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GOOD COFFEE, BAD GOVERNANCE? THE LEGITIMACY OF FLO

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Abstract

One of the consequences of globalization is that some regulatory functions traditionally exercised by states are being carried out by non-state actors, such as transnational corporations or NGOs. Fairtrade Labelling Organizations International (FLO), the leading standard setting and certification organization for labelled Fairtrade, is one of these NGOs engaged in transnational regulation.

FLO is divided into two organizations, each of which participates in transnational regulation. While FLO e.V.'s mission is to develop and review Fairtrade standards, FLO-Cert ensures that producers and traders comply with the Fairtrade Standards and that producers invest the benefits received through Fairtrade in their development.

This paper aims at analyzing whether the decision-making and norm-setting power which FLO exercises through standard setting and certification is legitimate. For this purpose, legitimacy will be understood not only in the classical sense of democratic legitimacy, but also in the sense of international, procedural and substantive legitimacy.

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TABLE OF CONTENTS

I.	<u>Introduction</u>	p. 1
II.	<u>FLO as a transnational organization engaged in global governance</u>	p. 1
III.	<u>FLO's decision-making process and structures</u>	p. 5
IV.	<u>Definitions of legitimacy</u>	p. 6
V.	<u>How democratic is FLO's decision-making process?</u>	p. 7
VI.	<u>Stakeholders indirectly impacted by FLO's standards</u>	p. 8
VII.	<u>Does FLO achieve legitimacy in other ways?</u>	p. 9
	<i>a. <u>International legitimacy</u></i>	p. 9
	<i>b. <u>Procedural legitimacy</u></i>	p. 10
	<i>c. <u>Substantive legitimacy</u></i>	p. 12
VIII.	<u>Conclusion</u>	p. 13

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I. Introduction

This paper will analyze the legitimacy of the private governance regime put into place by Fairtrade Labelling Organizations International (hereinafter FLO). FLO will first be characterized as a transnational organization engaged in global governance. Subsequently, it will be argued that FLO exercises significant decision-making and norm-setting power through standard setting and certification. This is especially the case when governments delegate state authority to it, as will be demonstrated for Belgium.

After a description of FLO's decision-making process and structures, this paper will define the concept of (democratic) legitimacy and scrutinize how democratic FLO's decision-making process is. Stakeholders which are indirectly impacted by FLO's standards but do not participate in its decision-making process will then be identified. Consequently this paper will investigate whether FLO achieves legitimacy in other ways, namely whether it possesses international, procedural and substantive legitimacy. It will conclude by suggesting a number of improvements which could enhance FLO's legitimacy, for instance a better representation of Southern interests in its decision-making structure.

The sources consulted include academic literature, papers by Pi Environmental Consulting and FLO's website. The latter lacks information on certain aspects of FLO's functioning, such as sanctions and the Appeals Committee, which are therefore insufficiently dealt with. Where necessary, comparisons are made with Sustainable Agriculture Network (hereinafter SAN) Social Accountability International (hereinafter SAI) and SA8000. As regards the national contexts within which FLO operates, the scope of this paper is limited to Belgium.

II. FLO as a transnational organization engaged in global governance

As is apparent from its membership and organizational structure, FLO is a transnational organization. Not only is it an 'an umbrella organization of national Fairtrade initiatives currently in [20] consumer countries'¹, but its Board of Directors is composed of representatives from four continents². FLO, 'the leading Fairtrade standard setting and certification body'³, is engaged in global governance in that it 'develops and reviews standards'⁴.

As Gráinne de Búrca points out, since 'an increasing number of transnational entities and

¹ Nancy Vallejo and Pierre Hauselmann, 'Governance and Multi-stakeholder Processes Study Prepared for the UNCTAD – IISD initiative Sustainable Coffee Partnership', 2004, p. 18.

² *Ibid.*

³ <http://www.fairtrade.net/index.html>.

⁴ *Ibid.* See also <http://fairtrade.net/sites/aboutflo/tasks.html>: 'FLO gives credibility to the Fairtrade Labels by providing an independent, transparent and competent certification of social and economic development. The four main aspects for certification are:

- a) assessing the conformity of produces to the Fairtrade standards,
- b) assuring that Fairtrade benefits are used for social and economic development,
- c) auditing FLO-registered traders in order to make sure that the Fairtrade price reaches the producers and
- d) assuring that the Labels are only used on products coming from Fairtrade-certified producers.'

networks are carrying out the kinds of governing functions which have normally or previously been carried out by states, (...) questions of authority and legitimacy – the source of any obligation to obey – [arise]⁵. It seems that FLO exercises significant decision-making and norm-setting power through standard setting and certification, and that hence its legitimacy should be scrutinized. According to Jonathan Koppell, ‘legitimacy’s salience is a function of every organization’s “publicness” and “power”⁶. Hence, ‘the nearer a guide or standard is to allow public claims, the greater the need of stakeholder participation’⁷. FLO’s activities are public in so far as they deal with concerns, such as social and environmental standards, that ‘are shared, reflecting common welfare and matters that affect us collectively or our fundamentally shared rights’⁸. FLO is vested with a relatively important power since, as will be demonstrated below, its standards enjoy a certain degree of *de facto* authority. So is FLO-Cert, which can decide whether or not to certify a producer organization or register a trading company as compliant with the Fairtrade Producer or Trade Standards. Moreover, FLO can impose sanctions, such as fines, in the event of non-compliance⁹.

FLO’s *de facto* authority takes several forms. First, a tendering authority wishing to tender for socially and environmentally responsible products, or a government wishing that its tendering authorities do the same¹⁰, could refer to FLO’s standards as a possible¹¹ or

⁵ Gráinne de Búrca, “Democratizing Transnational Governance: Lessons from the EU Experience”, 2005, http://www.law.columbia.edu/faculty/fac_resources/faculty_lunch/fall2005, p. 10-11.

⁶ Jonathan GS Koppell, “The Legitimacy-Accountability Connection and Transnational Global Governance”, 2005, <http://www.governance.qub.ac.uk/qub2005/KoppellPaperUpd.pdf>, p. 4.

⁷ Vallejo and Hauselmann, above n. 1, p. 24.

⁸ Koppell, above n. 6, p. 6.

⁹ Sasha Courville, “Social Accountability Audits: Challenging or Defending Democratic Governance?”, *Law and Policy* 2003, 25(3), p. 285.

¹⁰ Such behavior is encouraged by “Agenda 21”, a more concrete expression of the general principles formulated in the Rio Declaration. Agenda 21 was adopted by 178 governments during the United Nations Conference on Environment and Development (UNCED), which took place in Rio de Janeiro (Brazil) in July 1992. Although not binding, Agenda 21 offers an objective, internationally recognized and relevant frame for the tendering policy of national authorities. Chapter 4 of Agenda 21 concerning the change of consumption patterns, states in this sense:

‘D) Exercising leadership through government purchasing

4.23. Governments themselves also play a role in consumption, particularly in countries where the public sector plays a large role in the economy and can have a considerable influence on both corporate decisions and public perceptions. They should therefore review the purchasing policies of their agencies and departments so that they may improve, where possible, the environmental content of government procurement policies, without prejudice to international trade principles.’ (See <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter4.htm>)

¹¹ In Belgium, the online circular letter “*Guide for sustainable purchasing*” (<http://www.gidsvoorduurzameaankopen.be>) refers – *inter alia* – to FLO’s Max Havelaar label. The website explicitly mentions that the guide contains soft law “recommendations” “for purchasing sustainable products for offices”. The Circular letter P&O/DD/1 of January 27, 2005 implementing the policy of sustainable development in the framework of public contracts for delivery, initiated by federal public authorities putting into tender which belong to the traditional sectors (Moniteur belge / Belgisch Staatsblad February 4, 2005, p. 3689-91), however, obliges the federal authorities to apply the ecological and ethical prescriptions mentioned on the website <http://www.gidsvoorduurzameaankopen.be> to a great number of products. Hence, the Belgian federal public services are currently compelled to follow the directives of the Guide which refers – *inter alia* – to FLO’s Max Havelaar label.

minimum standard, or even require FLO certified products¹². In this case, FLO's *de facto* authority could be significant in the absence of a definition by the tendering authority or government itself of the criteria to be met in order for the products to qualify as "socially and environmentally responsible". Such a situation is likely to arise since, as Steven Bernstein and Benjamin Cashore point out, private or hybrid governance regimes are often developed 'when governments are unable or unwilling to act'¹³.

Secondly, besides numerous fair trade-logos, the very concept of "fair trade" was registered in 1994 as a Benelux Mark, which was renewed for ten years in 2004. Hence, any reference in the Benelux¹⁴ to the generic term "fair trade", which is purely descriptive and does not possess any distinguishing feature from the perspective of trademark law, is subject to the rights of the holder of the Benelux Mark¹⁵.

Thirdly, in Belgium, an implementing convention concerning the management of a guarantee mechanism for fair trade transactions was signed on 16 June 2003 between the Belgian State and the Belgian Technical Cooperation. This convention, which provides for the entry into force of a "Fair Trade transactions guarantee mechanism", stipulates which fair trade-transactions are covered by the guarantee mechanism, and under which conditions. Market players such as companies cannot appeal to this guarantee fund which

¹² The latter practice would conflict with the WTO rules contained in the GPA, which provides the following in its Article VI (Technical Specifications):

- '2. Technical specifications prescribed by procuring entities shall, where appropriate:
 - (a) be in terms of performance rather than design or descriptive characteristics; and
 - (b) be based on international standards, where such exist; otherwise, on national technical regulations, recognized national standards, or building codes.
- 3. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tender documentation.'

That FLO's standards are not "international standards" in the sense of Article VI.2(b) GPA is evidenced by the existence of competing schemes such as the North-American *Fair Trade Federation*, *Utz Kapeh Code of Conduct*, *Rainforest Alliance*, *Basic IFOAM Organic Standard*, *NKG Sustainability Standards*, *Starbucks CAFE Practice Program* and *Common Code for the Coffee Community*. Moreover, besides FLO, six other organizations are members of *International Social and Environmental Accreditation and Labelling (ISEAL) Alliance* (see <http://www.isealalliance.org/membership/founding.htm>), 'an association of leading international standard-setting, certification and accreditation organizations that focus on social and environmental issues' (see <http://www.isealalliance.org/about/index.htm>). Lastly, FLO is not part of the *International Standardizing Bodies* mentioned by the *World Standards Services Network* (see http://wssn.net/WSSN/listings/links_international.html). FLO is thus only one of the numerous certification organizations in the area of fair trade. The criteria set by FLO are therefore not universal.

¹³ Steven Bernstein and Benjamin Cashore, "Nonstate Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?" in John Kirton and Michael Trebilcock (eds), *Hard Choices, Soft Law: Combining Trade, Environment, and Social Cohesion in global Governance* (London: Ashgate Press, 2004) p. 37.

¹⁴ The Benelux is composed of Belgium, the Netherlands and Luxemburg.

¹⁵ The holder of the "fair trade" Benelux Mark is neither FLO, nor any of its Benelux "National Initiatives", but the Foundation Fair Trade Organization, which is one of the three European fair-trade labeling bodies managing FLO (see Mick Blowfield, "Ethical trade: a review of developments and issues", *Third World Quarterly*, 1999, Vol 20, No 4, p. 763).

is exclusively reserved for Belgian NGOs¹⁶.

Fourthly, still in Belgium, the “Fair Trade Centre programme”, which is implemented by the Belgian Technical Cooperation, foresees a “fund for the promotion of fair trade products”, which enables the Belgian Technical Cooperation to support various activities which are financed to a maximum of 75%¹⁷.

Lastly, as Benjamin Quiñones indicates, Fairtrade organizations partly depend on grants and donations from governmental agencies¹⁸. Indeed, some governments view private systems as a way to pursue policy objectives without risking trade disputes¹⁹.

Hence, there is a wide range of ways by which governments can delegate state authority to private governance regimes such as FLO, which, as a consequence, can exercise *de facto* authority. Apart from the abovementioned examples in the field of public procurement, intellectual property, (in)direct financial support and promotion, one could also mention the following practices: endorsement as a standard, public media campaigns²⁰, publicly funded research²¹ and privileged access to decision-makers.

These delegations of authority are problematic for a number of reasons. First, ‘since soft law mechanisms such as certification depend to some degree on the success of active legitimacy achievement campaigns’²², the preferred certification organization(s) is (are) likely to be the most vocal and activist one(s), but not necessarily the most representative or inclusive of all the different tendencies existing within domestic society and/or the broader international community. As a result, sensitive yet important decisions such as the

¹⁶ According to Samuel Poos, coordinator of the Fair Trade Center ‘eventually, we have developed a weakened version of the initial proposition, which is exclusively reserved for Belgian NGOs. In the initial version any trader of the regular trade, who concluded a contract under fair commercial conditions, could appeal to this mechanism. Our hope was that traders would thus be encouraged more than had previously been the case, to pre-finance contracts (with the highest risk). This objective seems to be less obvious in the mechanism’s final version.’ (personal translation from the now unavailable website <http://www.koopfairtrade.be/content/main2/sub4/content.htm>, copy on file with author).

¹⁷ These activities include ‘market surveys, the creation of new products, improvements in the quality of existing products, the introduction of quality control systems, producer training (in management, marketing, etc.), participation at (sic) trade fairs and, finally, “company matching”, which puts producers and importers directly in contact with one another’ (<http://www.btcctb.org/showpage.asp?iPageID=1236>).

¹⁸ Benjamin R. Quiñones Jr., “The ECL Space Project. Learning from Social and Environmental Schemes for the ECL Space: FLO Case Study”, 2004, p. 33.

¹⁹ Steven Bernstein and Benjamin Cashore, “The Two-Level Logic of Non-State Market Driven Global Governance”, in Volker Rittberger and Martin Nettesheim (eds.), *Changing Patterns of Authority in a global Political Economy*, p. 30.

²⁰ In Belgium, the state-run “Fair Trade Centre programme” supports the “Fair Trade Week”, ‘a huge awareness campaign [where] all players in the sector (...) join forces to encourage as many consumers as possible to opt for fair-trade products. [It includes] special offers and campaigns in the various sales networks, a media campaign, events sponsored by famous people, the participation of businesses and institutions’ (<http://www.btcctb.org/showpage.asp?iPageID=1236>).

²¹ In Belgium, the “Fair Trade Centre programme” encompasses the Fair Trade Observatory, which ‘covers the management of surveys on the sector and its environment. The observatory will gather all useful information (Internet site, newsletter) and circulate it among businesses, institutional buyers and public associations’ (<http://www.btcctb.org/showpage.asp?iPageID=1236>).

²² Bernstein and Cashore, above n. 13, p. 51.

expediency of a minimum price (see below) are left to a small, often radical minority, which might pursue its own short run interest rather than the common interest, instead of being the subject to a broader debate within society, involving all stakeholders.

Secondly, while it is true that private global governance regimes are a means of taking into account the preferences and interests of affected foreigners²³, this broadening of the geographical scope of the interests taken into account could be accompanied by a reduction of the types of societal interests taken into account. Indeed, whereas governmental decision-making at the national level has developed mechanisms to involve and accommodate the demands of a wide array of interests²⁴, private global governance regimes could, at least initially, only be supported by a particular group within society such as socially and environmentally conscious consumers.

Thirdly, contrary to governments, certification organizations, as NGOs, are not legitimated by ties to a defined public and lack formal accountability mechanisms, except towards their donors²⁵.

III. FLO's decision-making process and structures

FLO's standards are set and reviewed as follows²⁶: 'When a stakeholder signals the need for development of a standard or revision of an existing Fairtrade Standard, the Standards Unit or the FLO Standards Committee initiates a research phase in which relevant producer organizations, traders and other stakeholders are asked to give their input. Based on their contributions a set of standards and/or a Fairtrade Minimum Price proposal are drafted. For major standards issues the FLO Standards Committee meets to discuss the proposal. It is published for formal consultation in line with the ISEAL Code of Practice on Standards Setting. The final draft of proposals for major issues goes to the Standards Committee for decision taking, otherwise the Standards Unit will decide.'

The Standards Committee consists of between 5 and 11 members (uneven number) appointed by the FLO Board of Directors. Its composition, with voice and voting rights, is balanced between suppliers (producers, FLO liaison, labour unions/workers) and users (national labeling initiatives, traders) of the Fairtrade certification system.²⁷

The Board of Directors, 'which holds the supreme power over the organization', is composed of 5 representatives from the Labelling Initiatives, 4 representatives from Fairtrade-certified producer organizations (2 from Latin America, one from Africa, one from Asia), 2 representatives from Fairtrade-registered traders and 2 independent Board

²³ A. von Bogdandy, "Globalization and Europe: How to Square Democracy, Globalization, and International Law", 15 *E.J.I.L.*, 885 (2004) at p. 18, fn 81.

²⁴ Bernstein and Cashore, above n. 13, p. 9.

²⁵ R. Grant and R. Keohane, Accountability and Abuses of Power in World Politics, (2005) 99, 1 *American Political Science Review* p. 29 at p. 10.

²⁶ See FLO's procedure for standard setting: http://www.fairtrade.net/standard_setting.html.

²⁷ www.fairtrade.net/uploads/media/Fairtrade_Module_1_What_is_Fairtrade_Version_Aug_06.pdf.

Members²⁸. The Meeting of Members elects the Labelling Initiatives' representatives, while traders and producers elect their own representatives, all for three-year terms²⁹.

The Certification Committee, which certifies producers who meet the Fairtrade criteria, – as well as the Appeals Committee³⁰ – is comprised of representatives of producers, traders, national labeling organizations and external experts³¹. Its decisions can be appealed before the Appeals Committee. The members of both committees are appointed by the Board of Directors³². As required by ISO Guide 65 for certification bodies, both committees are part of FLO Cert. Ltd., a limited company distinct from FLO³³.

IV. Definitions of legitimacy

In order to ascertain whether FLO's decision-making and norm-setting power is legitimate, the meaning of "legitimacy" must first be clarified. Legitimacy can be defined as 'the aspect of governance that validates institutional decisions as emanating from right process'³⁴. In secularized, democratic societies, the primary source of legitimacy lies in the involvement of those impacted by a decision in the decision-making process leading to it. As indicated by Fritz Scharpf, 'in the modern period, the concept of democracy has become the major foundation of such legitimating arguments'³⁵.

Lincoln described such democratic legitimacy as 'government of the people, by the people, and for of the people'³⁶. "Government of the people" embodies the idea of a political community and refers to the fact that a majority decision is only accepted by a minority if both belong to the same people³⁷. Since until now there is no "global people", the generalization of majority decision at the global level – if feasible – cannot be used for global governance purposes. "Government by the people" refers to "input-legitimacy", and implies that 'collectively binding decisions should originate from the authentic expression of the preferences of the constituency'³⁸. "Government for the people" concerns "output-legitimacy", and implies that 'collectively binding decisions should serve the common interests of the constituency'³⁹.

There is no guarantee that private governance organizations such as FLO satisfy the demands of input-legitimacy since, as said above, they are not expected to be representative or inclusive of all the different tendencies existing within domestic society

²⁸ <http://www.fairtrade.net/structure.html>.

²⁹ *Ibid.*

³⁰ Vallejo and Hauselmann, above n. 1, p. 19.

³¹ <http://www.fairtrade.net/introduction.html>.

³² Vallejo and Hauselmann, above n. 1, p. 18.

³³ Courville, above n. 9, p. 279.

³⁴ T. M. Franck, *Democracy, Legitimacy and the Rule of Law: Linkages*, NYU Law School, Public Law and Legal Theory Working Paper Series, Working Paper 2, 1999, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=201054, p. 1.

³⁵ F. W. Scharpf, "Legitimacy in the Multi-actor Polity", in: M. Egeberg & P. Laegreid, *Organizing Political Institutions. Essays for Johan P. Olsen*, Oslo: Scandinavian University Press, 1999, p. 267.

³⁶ *Ibid.*, p. 267-268.

³⁷ *Ibid.*, p. 276-277.

³⁸ *Ibid.*, p. 268.

³⁹ *Ibid.*, p. 268.

and/or the broader international community. Potential discrepancies arising out of this situation are referred to as “agency costs”⁴⁰. The output-legitimacy of private governance organizations is not guaranteed either since, as explained above, they are not bound by any accountability obligation. Moreover, some private governance organizations have the tendency of being exclusive networks that exclude the broader domestic society and/or the international community, and hence public opinion.

V. How democratic is FLO’s decision-making process?

At first sight, FLO’s standard setting procedure seems to be democratically legitimate since both the Board of Directors and the Standards Committee are composed of representatives of certified producers, registered traders and national labeling organizations. This assertion, however, needs to be nuanced on the following grounds.

First, FLO standards have been set by the – exclusively northern – national labeling initiatives when they established FLO⁴¹, and hence without the participation of representatives of the southern producers they are designed to assist and/or of traders. According to the path dependency theory, the preferences expressed in these standards by the northern national labeling initiatives are likely to guide any new or revised standards – if they are ever to be revised. Moreover, not only do the twenty national labeling initiatives constitute the biggest group in the Board of Directors, but only one of these initiatives originates from a developing country⁴². These infringements of what Steven Bernstein and Benjamin Cashore characterize as the “norm of popular sovereignty”⁴³ undermine FLO’s legitimacy.

Secondly, as Benjamin Quiñones puts it, ‘only certified Fairtrade stakeholders can participate in the governance system and trading business of FLO’⁴⁴. Indeed, ‘a key difference [between FLO and SAI] is the internal focus on key stakeholders within FLO while SAI has a greater outward focus to external actors’⁴⁵. Consumers, for instance, have no say in FLO’s standard-setting mechanism. While one could argue that consumers ‘have one very effective option: exit, [which] provides a very powerful and relatively low-cost option for stakeholders’⁴⁶, this option is unsatisfactory. Indeed, this “all or nothing” approach only allows for a negative disapproval of existing standards, but does not enable consumers to make any meaningful, constructive and positive contribution to the formulation of standards.

Thirdly, although the Fairtrade business model does not try to eliminate middlemen⁴⁷, it seems that they are less well represented than producers and national labeling initiatives.

⁴⁰ R. Howse, “Transatlantic Regulatory Cooperation and the Problem of Democracy” in G. Bermann et al. (eds.), *Transatlantic Regulatory Cooperation* (2000), p. 471 and 477.

⁴¹ Quiñones, above n. 18, p. 20.

⁴² I.e. Comercio Justo Mexico, which is only an associate member (see http://www.fairtrade.net/labelling_initiatives.html).

⁴³ Bernstein and Cashore, above n. 19, p. 29.

⁴⁴ Quiñones, above n. 18, p. 1.

⁴⁵ Courville, above n. 9, p. 287.

⁴⁶ *Ibid.*, p. 290.

⁴⁷ Quiñones, above n. 18, p. 16.

Thus, whereas national labelling initiatives and producers have five and four votes, respectively, on the Board of Directors, traders, a concept which includes processors, exporters, importers and manufacturers⁴⁸, only have two. Moreover, neither subcontractors and agents, nor licensees are included among FLO's stakeholders⁴⁹. Hence, like consumers, their only – limited – means of making their voice heard, is the exit option.

Lastly, the capacity building aimed at by FLO's Producer Support Network, which was created in 1999 to help strengthen the governance of producer organizations, is more oriented towards standards conformity than towards their participation in standards setting⁵⁰.

VI. Stakeholders indirectly impacted by FLO's standards

Apart from the stakeholders who are directly impacted by FLO's decisions through their participation in "Fair trade", and whose involvement in FLO's decision-making process is discussed here above, there are also stakeholders who are indirectly affected by FLO's standards and who do not participate at all in FLO's decision-making process.

Thus, the requirement of paying a minimum price to producers, taking into account wage costs and environmental costs, threatens to stimulate farmers to massively rush on the production of a certain product and hence generate oversupply of low quality products⁵¹. In a report of 2001 on Financing for Development, a "High-level Panel" of the United Nations argued, after having reminded that the decrease in commodity prices on the world market made it more and more difficult for producers to obtain a reasonable income, that:

It is difficult to imagine how the problem could be resolved by direct intervention to support prices. International commodity agreements have occasionally managed to hold up prices for a few years. But such success has invariably attracted additional producers and dampened demand until the agreement finally collapsed, leading to adjustments even sharper and more painful than would have been experienced in a free market. At the root of the problem is that, under current circumstances, any rise in commodity prices spurs a rush of new entrants hoping to scratch out a living by supplying the world market, even if at a starvation wage. The problem will be overcome only when development has proceeded far enough to make such desperate behaviour unnecessary.⁵²

Hence, while trying to ensure a decent living for a small number of producers through the voluntary payment of an artificially high price, FLO might in fact encourage new producers to enter the market. Their additional production will, paradoxically, lead to even lower world prices, affecting all producers. The latter, who might see their income decrease as a result of FLO's standards, are not involved in FLO's decision-making process.

⁴⁸ <http://fairtrade.net/pdf/FLO%20Trader%20Application%20Evaluation%20Policy.pdf>, p. 4.

⁴⁹ *Ibid.*

⁵⁰ Quiñones, above n. 18, p. 18.

⁵¹ Courville, above n. 9, p. 281.

⁵² A/55/1000 of 26 June 2001, p. 43, <http://www.un.org/esa/ffd/a55-1000.pdf>.

One solution for the affected producers would be to become Fairtrade certified. However, as Benjamin Quiñones points out, ‘the Fairtrade movement operates in a niche market which it has carved out for itself’ and ‘the Fairtrade market is still small although it is growing robustly. Producer organizations from developing countries may, therefore, end up with surplus production if their Fairtrade markets could not absorb their production volumes’⁵³. As a result, Fairtrade certification is not open to each and every producer.

Moreover, FLO’s certification criteria require that the coffee be produced by organized “small producers”⁵⁴ or organized “wage workers”⁵⁵. This excludes a wide range of producers from Fairtrade certification (unorganized small producers such as self-employed stand-alone farmers, unorganized wage workers and big producers).

VII. Does FLO achieve legitimacy in other ways?

As explained above, there is a wide range of ways through which governments can delegate state authority to private governance regimes such as FLO, which, as a consequence, can exercise *de facto* authority. As indicated earlier, there are stakeholders who are impacted by FLO’s decisions but do not participate in its decision-making process, such as regular producers, most of who, even if they would want to, could not become Fairtrade certified. This raises the question whether, in the absence of a democratic involvement of these actors, compensatory⁵⁶ mechanisms can legitimate FLO’s action.

a. International legitimacy

According to Steven Bernstein and Benjamin Cashore, ‘the legitimacy of transnational governance schemes must be achieved at two levels (...) internationally and domestically. Internationally, legitimacy requires that the basic institutional elements of the scheme – its norms and rules – fit with existing accepted norms and institutions of global environmental and economic governance’⁵⁷. These norms certainly include ILO Convention 87 on freedom of association⁵⁸, to which FLO refers in its generic certification standards⁵⁹.

⁵³ Quiñones, above n. 18, p. 35 and 36.

⁵⁴ With “small producers” is meant: ‘those that are not structurally dependent on permanent hired labour, managing their farm mainly with their own and their family’s labour-force’. “Small producers” can only participate in Fairtrade ‘if they have formed organisations (in co-operatives, associations, or other organisational forms)’. See p. 4 and 2 of the Generic Fairtrade Standard for small farmers’ organisations (version 12/05), available on <http://fairtrade.net/sites/standards/sp.html>.

⁵⁵ “Wage workers” can only participate in Fairtrade ‘if they are organized (normally into unions) and if the company that they work for is prepared to promote its workers’ development and to share with them the additional revenues generated by Fairtrade’. See p. 2 of the Generic standards for hired labour situations (version 12/05), available on <http://fairtrade.net/sites/standards/hl.html>.

⁵⁶ This terminology refers to Gráinne de Búrca’s “compensatory” approach ‘to the question of the “democracy deficit” of transnational governance (...) (the idea of democracy cannot be transposed directly to the transnational level, so that other more partial – although often related – ways of strengthening its legitimacy must be found)’. See de Búrca, above n. 5, p. 12.

⁵⁷ Bernstein and Cashore, above n. 13, p. 34.

⁵⁸ Bernstein and Cashore, above n. 19, p. 28.

⁵⁹ See point 4.2, p. 21 of the Generic Fairtrade Standard for small farmers’ organisations (version 12/05), available on <http://fairtrade.net/sites/standards/sp.html> and point 1.4, p. 12 of the Generic

However, as seen above, FLO's certification criteria require that the coffee be produced by organized "small producers" or organized "wage workers". In this respect, one could recall that freedom of association as embodied in ILO Convention 87 does not only contain the right to establish or to participate in an association, but also implies the right not to have to become a member of an association. Hence, FLO's certification criteria indirectly violate ILO Convention 87 – and thus damage FLO's legitimacy – by excluding self-employed stand-alone farmers and non-organized wage workers.

Moreover, FLO's approach is far from being universally accepted. It is apparent from a comparative study of the five major standards and one set of corporate codes for sustainable coffee production⁶⁰ that FLO is the only certification organization excluding unorganized producers or workers. Rainforest Alliance, for instance, mentions the following on its website:

The Rainforest Alliance and SAN engage with all types of farms -- from small cooperatives and family farms to large plantations owned by multinational corporations -- as a means of promoting change at many levels and of ensuring that all agricultural workers are well-treated.⁶¹ (emphasis added)

b. Procedural legitimacy

This section will examine whether FLO's action is legitimate in the abovementioned sense of 'emanating from right process'. This issue is especially salient in the context of auditing, where sanctions, such as fines, can be imposed in the event of non-compliance⁶².

As said above, FLO-Cert decides which producer organizations to certify and which trading companies to register. It outsources to independent inspectors the task of assessing conformity of producers and traders with FLO standards, while remaining accountable for the integrity, competence and transparency of any sub-contracted components of the certification system⁶³. Thus, auditor and decision-maker roles are separate⁶⁴.

While accreditation structures are on the whole preferred by international verification initiatives because of their separation of standard-setting and certification functions, FLO decided not to adopt such a structure because of its 'unique minimum and process requirements', its 'producer-support element' and 'its unique client base', which is

standards for hired labour situations (version 12/05), available on <http://fairtrade.net/sites/standards/hl.html>: '**Freedom of Association & Collective Bargaining**

FLO follows ILO Conventions 87 and 98 on freedom of association and collective bargaining. Workers and employers shall have the right to establish and to join organisations of their own choosing, and to draw up their constitutions and rules, to elect their representatives and to formulate their programmes. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their Employment.'

⁶⁰ Rebecca Cague, Amelia Hube and Dave Gibson, *Beyond the Bean: "Redefining Coffee. Quality Quick Reference Guide to Standards for Sustainable Production Systems."*, <http://marketstandards.chemonics.net/resources/PDF%20Files/Beyond%20the%20Bean.pdf>

⁶¹ See <http://www.rainforest-alliance.org/programs/agriculture/certification/faq.html>, under 'How Does Rainforest Alliance Certification Compare to "Fairtrade"?'.

⁶² Courville, above n. 9, p. 285.

⁶³ Quiñones, above n. 18, p. 22.

⁶⁴ Courville, above n. 9, p. 284.

‘disadvantaged in the marketplace’ and requires ‘support to access markets and develop trading relationships’⁶⁵.

Certified Fairtrade producers and registered traders have no right to choose or recommend inspectors, which, once employed by FLO, must comply with FLO’s conformity assessment methodology, i.e. assessing conformity against the requirements of FLO Standards⁶⁶. Auditors are prohibited from giving technical advice, although guidance on complying with FLO’s criteria is allowed⁶⁷. In an effort to increase confidence of producer groups, by reducing the likelihood that language and cultural differences may cause misunderstandings and tensions, monitoring visits of producer groups are now contracted to local consultants⁶⁸. However, this gain in proximity should be evaluated against the fact that auditing remains of dubious quality in developing countries⁶⁹.

As regards audit costs, both the producer⁷⁰ and the final processing and packaging company pay a license fee, which partly covers the producer’s auditing costs⁷¹. On the one hand, this fee might deter producers with limited resources from participating in Fairtrade. On the other hand, it creates some fiscal accountability⁷² for FLO towards producers, who thus gain more leverage to assert their claims. As in every social auditing system, FLO copes with a tension between accessibility through low costs and qualitatively better audits thanks to higher fees⁷³. Another, deeper tension is that between the need to maintain label credibility, which calls for complete financial independence, and the need to generate income by charging the companies using the labels⁷⁴.

As said above, decisions of the Certification Committee can be appealed before the Appeals Committee, which also deals with producer complaints about auditors⁷⁵. Since there is no accreditation for FLO’s certification system, no external complaints can be made concerning FLO auditing operations and procedures⁷⁶. Therefore, a consumer complaint about the authenticity or compliance with “Fairtrade” criteria of a FLO labeled product would be presented at the Certification Committee for investigation but, unlike in the SA8000 system, there is no formal widely publicized mechanism for such consumer action⁷⁷.

⁶⁵ *Ibid.*, p. 283 and 279.

⁶⁶ Quiñones, above n. 18, p. 22.

⁶⁷ Courville, above n. 9, p. 284.

⁶⁸ *Ibid.*, p. 283-284,

⁶⁹ Mick Blowfield, “Ethical trade: a review of developments and issues”, *Third World Quarterly*, 1999, Vol 20, No 4, p. 762.

⁷⁰ Quiñones, above n. 18, p. 18.

⁷¹ Courville, above n. 9, p. 291.

⁷² For a definition of this term, see R. Grant and R. Keohane, *Accountability and Abuses of Power in World Politics*, (2005) 99, 1 *American Political Science Review* p. 29 at p. 8.

⁷³ Courville, above n. 9, p. 291.

⁷⁴ Blowfield, above n. 69, p. 762.

⁷⁵ Courville, above n. 9, p. 286.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

c. Substantive legitimacy

As legitimacy not only stems from democratic decision-making, conformity with international norms and procedural guarantees, but also from fairness, it has to be examined whether FLO's rules and procedures are just and equitable.

A first possible unfair result of complying with FLO's standards is 'the allocation of Fairtrade premiums to the capacity building of producer organizations, at the expense of the individual producer's welfare'⁷⁸. Secondly, the aforementioned exclusion of unorganized small producers and wage workers from Fairtrade certification might be considered as an unjustifiable discrimination on the basis of whether or not these producers and workers chose to exercise their freedom of association.

The "FLO Trader Application Evaluation Policy" requires the applicant 'to show that their registration will open up significant new markets for FLO Fairtrade Products and therefore will result in an increase in volumes of FLO Fairtrade Products sold to consumers and not merely a reallocation of existing Fairtrade markets or supply chains.'⁷⁹ This "New Markets" requirement might be considered as unjust insofar as it unduly favors traders already registered with FLO to the detriment of traders wishing to register. The "FLO Trader Application Evaluation Policy" also stipulates that 'where an applicant trader has a commercial interest in a specific FLO Certified Producer that might result in serious disadvantage to other FLO Certified Producers, then the application may be denied.'⁸⁰ This provision might be considered as discriminating unduly against companies wishing to integrate vertically. However, it should be noted that FLO's decisions on these issues can be brought before the FLO Appeals Committee⁸¹.

FLO's privacy policy appears to be satisfactory. Indeed, 'FLO guarantees full confidentiality with respect to all confidential business information'⁸² and an unsuccessful application for certification will not be made public⁸³.

FLO seems to have a sound corporate governance system since it 'has managed to maintain a power equilibrium among the various interest groups by: (1) segregating the developmental function (i.e. capacity building of farmer groups), from the commercial function of certification and the licensing; (2) separating the powers and authorities that regulate and supervise these functions: the developmental function of capacity building of farmer groups is done by relevant FLO departments; certification by FLO Cert Ltd., and licensing by the national initiatives; and (3) devolving the function of Fairtrade standards conformity assessment to independent inspectors. The result is a symmetrical balance of

⁷⁸ Quiñones, above n. 18, p. 2 and 37, according to which 'there are numerous cases of cooperatives that got rich while their members remain poor'.

⁷⁹ See <http://fairtrade.net/pdf/FLO%20Trader%20Application%20Evaluation%20Policy.pdf>, at p. 9, under 6.1.1 New Markets.

⁸⁰ See <http://fairtrade.net/pdf/FLO%20Trader%20Application%20Evaluation%20Policy.pdf>, at p. 10, under 6.2.4 Conflict of Interest between Trader and FLO Producers.

⁸¹ Quiñones, above n. 18, p. 25.

⁸² See <http://fairtrade.net/pdf/FLO%20Trader%20Application%20Evaluation%20Policy.pdf>, at p. 9, under 6. EVALUATION OF FLO TRADER APPLICATION.

⁸³ Courville, above n. 9, p. 290.

power in a four-sided relationship.’⁸⁴

As regards sanctions, FLO seems to respect the principles of legal certainty and proportionality. Thus, the minimum penalty for an irregularity (a contravention of one of the FLO rules which is done openly and declared to the inspector without any attempt to deceive) is the correction of the noncompliance, but where noncompliance is repeated more severe sanctions must be imposed⁸⁵. In order to guarantee transparency, sanctions, defined as a maximum fine charge for a breach of contract, and the levels of escalation should be covered in the contract⁸⁶.

Lastly, FLO standards, where they take the shape of non-product related PPMs (production and processing methods), might also violate state sovereignty since they involve guidelines on practices within an exporting state, not just on the nature of the product⁸⁷.

VIII. Conclusion

While FLO’s decision-making process and rules display certain characteristics contributing to their legitimacy, they also present certain flaws, which this paper has tried to describe. The most important of these flaws appears to be the under-representation of Southern interests in FLO’s decision-making structure. As Mick Blowfield points out, ‘there is a need for greater stakeholder participation. It is ironic, given that ethical trade is primarily described in terms of its benefits for developing country people, that the participatory approaches common in international development have not been widely used in designing, implementing or evaluating ethical trade. (...) Without greater participation from developing countries, and particularly a shift in decision-making from the North to the South, ethical trade will at best be paternalistic and at worst harmful to those it is intended to benefit.’⁸⁸

FLO’s legitimacy could be enhanced through a number of improvements. First and foremost, the exclusion of unorganized small producers and wage workers from Fairtrade certification should be abolished. Secondly, Southern interests should be better represented in FLO’s decision-making structure. To this end, FLO might, like the Forest Stewardship Council, create regional or national working groups to develop specific indicators and verifiers with which to apply the principles and criteria⁸⁹. These regional standards would avoid a one-size-fits-all-approach and permit their interpretation in local contexts⁹⁰.

Thirdly, FLO should introduce an external complaints system enabling a consumer to formally complain about the authenticity or compliance with “Fairtrade” criteria of a FLO labeled product. Fourthly, consumers and “middlemen” should be given more say in

⁸⁴ Quiñones, above n. 18, p. 2.

⁸⁵ Courville, above n. 9, p. 285.

⁸⁶ *Ibid.*

⁸⁷ Bernstein and Cashore, above n. 13, p. 45.

⁸⁸ Blowfield, above n. 69, p. 767.

⁸⁹ Bernstein and Cashore, above n. 13, p. 39.

⁹⁰ Courville, above n. 9, p. 288.

FLO's decision-making structure. As Nancy Vallejo and Pierre Hauselmann suggest, 'the input by stakeholder could be brought in the initiative in a slightly informal way through the establishment of concentric spheres of stakeholders, where direct members would be at the centre and those with a distant interest be provided the opportunity to access general information documents and comment on them'⁹¹. Lastly, the two criticized requirements of the "FLO Trader Application Evaluation Policy" should be dropped.

⁹¹ Vallejo and Hauselmann, above n. 1, p. 26.

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