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Multi-stakeholder Collaboration for a Sustainable Coffee Sector

Meeting the Challenge of U.S. Anti-trust Law

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1.0 Introduction

Over the course of past half century, commodities production and trade has increasingly been recognized as playing a pivotal role in determining the ability of many of the world's poorest regions and peoples to embark upon paths of long term social, economic and environmental development. High levels of dependency, combined with low barriers to entry and the direct nature of the relationship between production practices and social and environmental well being, give commodities production and trade a particularly influential role in determining the development prospects facing the rural poor around the world. The coffee sector, as one of the most valuable and dispersed commodities in international trade, is a case in point.[1] Poor economic conditions have visited the coffee producing community repeatedly over the course of the past century and have manifested themselves through a long term decline in real prices. The market response to uncertainty and overall price decline has often been one of short term survival tactics aimed at increasing revenues through available means, often at the expense of the environment and basic social infrastructure.

In response to the deteriorating social, economic and environmental situation facing the coffee sector, and in parallel to the development of the Agenda 21 process, there has been an impressive growth in voluntary initiatives which aim to promote the preservation and/or promotion of select conditions deemed to be essential to the long term sustainable development of the coffee sector.[2] Along with the growth in such initiatives, there has also been a corresponding growth in consumer and industry awareness of the many challenges to sustainable development facing the entire coffee supply chain. The generation of action and systemic change within the sector, however, has remained sluggish, with sustainable practices being integrated on a piecemeal basis distributed sparsely across the sector as a whole. Although there are many explanations for the difficulty facing the integration of sustainable practices within mainstream supply chains (whether it be in the coffee sector itself or otherwise), two major obstacles to the integration of such practices on a widespread basis stand out:

1. the inability and/or unwillingness of industry players and consumers to bear the additional costs associated with adopting such systems unilaterally in a competitive environment[3]
2. a lack of clear mechanisms for integrating broad sectoral concerns (specifically industry and producer concerns) within the development and implementation of such systems[4]

[1] Coffee is among the most important commodities in terms of value traded globally. Coffee is also grown in more than 70 developing countries around the world, many of which depend significantly on coffee as a source of foreign revenue.

[2] Over the past two decades a wide range of private initiatives for promoting sustainable production and trading practices within the coffee sector have been implemented. Most of these have focused on specific issues and/or specific supply chains and regions. A number of sustainability standards and labels, such as Fair Trade, Utz Kapeh, Rainforest Certified and Organic have improved the penetration of systemic approaches to sustainability but themselves represent a high degree of diversity and specificity.

[3] Sustainable production practices typically protect public goods which are not appropriately priced within the market as a whole. In the absence of a regulatory baseline, companies and consumers alike make personal and/or financial sacrifices through their support for such systems. In the case of companies such sacrifices can threaten the very competitiveness of the firm if undertaken individually. Consumers, on the other hand, sacrifice their spending power without any assurances of change in the absence of widespread consumer support. In either event, the conversion to sustainable practices through such voluntary systems are faced with traditional public goods problems.

[4] Most of the systems developed to date, have appealed to a specific range of stakeholders. As with similar voluntary sustainability systems implemented in other sectors, those in the coffee sector have been predominantly designed and implemented by stakeholders located in the developed economies with, at best, minimal participation of producers.

In short, the additional costs associated with standards implementation have operated as significant barriers to the adoption of existing systems and suggests the need for a reorientation of the development and implementation of voluntary systems from processes based on stakeholder specificity towards processes based on stakeholder multiplicity. On the one hand, if some level of agreement among a majority of stakeholders on the proper approach (and standards) for sustainable production and trade can be agreed upon, and the majority of stakeholders agree to commit themselves to the adoption of such practices, the threat of unilateral adoption can be largely avoided. On the other hand, by developing systems of including wider stakeholder participation in their development and implementation, the requisite flexibility for ensuring broad stakeholder uptake can be integrated within the foundation of such systems.

It is this broad context which provides an underlying rationale and motivation behind a growing trend towards the development of "multi-stakeholder approaches" to the integration of sustainable practices within commodity supply chains.[5] In the coffee sector, these factors have recently fueled interest and participation in the development of wide reaching guidelines for sustainability in the coffee sector through multi-stakeholder processes.[6] However, as stakeholders come together in the identification of communal strategies for promoting sustainability in the coffee sector, issues with respect to the effects of such activity on competition generally, and upon anti-trust law more specifically, also become increasingly important.

As stakeholders advance on the path towards enhanced cooperation for the promotion of sustainability in the coffee sector, a clear understanding of the competition policy issues will be critical to ensuring that any resulting strategies are as implementable and effective as possible given the policy context in the major consuming regions of the world.[7] It is the purpose of the following paper to provide such an analysis as background for current multi-stakeholder discussions within the coffee sector.

[5] A few of the more notable examples of fundamentally "multi-stakeholder" initiatives include the Forest Stewardship Council, the Ethical Trading Initiative and Social Accountability International's SA 8000.

[6] Common Code for the Coffee Community; Sustainable Coffee Partnership; CIRAD Sustainable Coffee Research Initiative. It should be mentioned that there are a plethora of other collaborative initiatives for promoting sustainability in the coffee sector, many of which address one or the other of the aforementioned barriers to widespread adoption of sustainable practices. For example, the Sustainable Agriculture Initiative Platform and the Eurepgap system (Utz Kapeh) have been developed to establish industry learning and practices through cooperation.

[7] Major roasting companies have expressed particular concern over the possibility of running into conflict with competition policies in their respective countries. The threat of possible conflict with competition policy can reduce the breadth of stakeholders willing to participate within a multi-stakeholder process or can reduce the depth of the issues dealt with over the course of such a process. The following analysis attempts to identify where the threats lie with a view to reducing their impact on the effectiveness of the multi-stakeholder processes themselves in promoting sustainability.

2.0 Multi-stakeholder Collaboration and Competition Policy

Although any form of multi-stakeholder collaboration has, in principle, the potential to reduce competition and violate national competition policies around the world, the development of sustainability guidelines, codes, standards and/or contracts for the coffee sector, represents a field of activity where the potential for coming into conflict competition law is particularly present. Three processes currently underway, standout for their potential vulnerability to competition policy challenges as a result of their interest in broaching discussions on the above themes: The Sustainable Agriculture Initiative Platform; The Common Code for the Coffee Community and the Sustainable Coffee Partnership.[8] Each of these initiatives involves competitors collaborating towards the development and implementation of shared strategies for promoting sustainability in the coffee sector based on the use/development of guidelines and related "measurable" supply chain approaches to implementing sustainable practices in the coffee sector.

The fact that a diverse range of typically competitor institutions are at the same table discussing possible tools and modalities for collaboration, leaves the results of any such process subject to being considered a *de facto* "agreement" between stakeholders and thus vulnerable to competition policy challenges. A system of sustainability standards or guidelines has the potential to set the terms by which players enter and participate in the market. In so doing, standards, whether environmental, social or economic in character, have a clear potential to operate as restraints on trade and thus violate competition policy. In a similar fashion, a model sustainable contract, or other contractual instrument can influence the content of the contractual relationship between players and so operate as a restraint on trade. [9]

The principal threat presented by "competitor collaborations" as manifested by any form of multi-stakeholder process towards the development of the above instruments is the possibility that those involved in the collaboration will be able to increase their market power, through the collaborative process, to a point where the collaborators have the capacity to influence market outcomes to their own benefit at the expense of reduced welfare outcomes for others along the supply chain and society at large. Although competition policy can serve different objectives in different contexts, the principle objective of most competition policy is to help ensure that everyday free market activity roughly approximates that of a perfect market thereby producing near-optimal welfare outcomes.[10] In this respect, the goal of competition policy is very much in line with well established principles of

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[8] The Common Code for the Coffee Community project and the Sustainable Coffee Partnership are both multi-stakeholder initiatives. The Sustainable Agriculture Initiative Platform is a platform for shared learning among industry representatives. In all three initiatives, it is the fact that potential competitors are in a position to collaborate, which raises the issue of competition policy implications.

[9] The issue of a system of sustainable contracts can, in fact, be regarded as a sub-set of the questions related to the development of standards and guidelines, whereby contractual form is considered as a possible "practice" for adoption under a standard.

[10] Although competition policy in North America and Europe today is generally understood to be primarily or even solely concerned with the attainment of economic efficiency, early forms of competition policy were inspired by concerns about freedom of contract. Others have identified the preservation of the freedom of consumer choice and/or the right of small firms to be able to participate in the market as possible goods provided by competition policy. One of the reasons for preferring an efficiency-based system of competition law over one based on more general policies of equity and freedom, is the higher level of predictability, stability and transparency available through an efficiency analysis. See Ernst Petersmann. *The Role of Competition Policy in Providing a More Equitable Playing Field for Development in Globalizing Markets: A Challenge for Governments and Multilateral Organizations* in UNCTAD *The Role of Competition Policy for Development in Globalizing World Markets* UNCTAD Series on Issues in Competition Law and Policy accessed at http://www.unctad.org/en/subsites/cpolicy/english/cpissues.htm.

sustainable development which also include market efficiency as a major component of sustainable economies.[11]

However, while free markets provide the basic operational model for competition policy, sustainable development and welfare maximization simultaneously, it is also the case that free markets which exhibit significant market imperfections, typically fail to produce the predicted optimal welfare outcomes. Commodities markets are an obvious case in point, well known for their deep and pervasive market imperfections.[12] High levels of concentration, inequitable bargaining power, imperfect information, poor infrastructure and public goods problems all contribute to the imperfect operation of commodities markets. As a result of the market imperfections systemic to commodities markets, the long term sustainability of laissez faire free market activity has been frequently put to question. Sustainability standards and related voluntary initiatives applicable to such markets, typically target specific undesirable outcomes arising from the failure of free market activity and, as such, operate as a sort of restraint on free market activity. In this sense, sustainability standards can be viewed as providing a corrective force for free market activity. To the extent that this is in fact the case, collaborations under the auspices of a multi-stakeholder sustainability standards process can also be expected to come into conflict with the basic presuppositions of competition policy at one level or another. It is this possibility which demands further investigation into the relationship between standards development and competition policy.

[11]One of the six Winnipeg Principles for Sustainable Development pays specific tribute to the importance of an open and efficient market, "Efficiency and Cost Internalization: Environmentalists, development specialists and trade economists share a common interest in promoting efficiency. More efficient production reduces the drain on scarce resources such as raw materials and energy, and limits the demands placed on the regenerative capacity of the environment. Efficient use of land, labour and capital is also the heart of development efforts to combat poverty and satisfy human needs. Allowing the most efficient producers to provide the world's goods and services is the main rationale for an open trading system." Accessed at http://iisd.ca/trade/princip2.htm#efficiency. To the extent that competition policy is motivated by an interest in protecting smaller economic actors (see *supra* note 10) it can also play a role in supporting a needs based approach to sustainable development which places priority on the satisfaction of needs (interests) of the smaller less powerful segments of the economy. See also the Winnipeg Principle on Equity, http://iisd.ca/trade/princip2.htm#equity.

[12] Some of the more common sources of market imperfection in the case of commodities markets are imperfect information, inequitable market power and public goods problems.

3.0 U.S. Anti-trust Law

The United States is the single largest consumer of coffee in the world, home to several of the world's largest coffee roasting companies and widely recognized as having some of the most proactive anti-trust legislation in the world. This unique combination gives U.S. competition policy a special primacy in the context of multi-stakeholder processes for promoting sustainable development in the coffee sector. On the one hand, it is clear that the participation of industry stakeholders from the United States is crucial to the effective development and implementation of any multi-stakeholder process seeking significant market impacts. On the other hand, since U.S. competition policy has a particularly broad sweep, the range of activities which can be deemed to be anticompetitive under U.S. legislation is particularly vast and can therefore be viewed as a minimum threshold for collaboration among stakeholders in and around the world.

Although a number of U.S. laws contain anti-trust provisions, the two main legal instruments regulating anti-trust activity in the U.S. are the Sherman Act and the Clayton Act. The main distinction between the two acts is that the Sherman Act provides broad criminal and civil sanctions for anti-competitive behaviour while the Clayton Act deals only with civil liability and preventative measures.[13] The basic framework for any anti-trust investigation, whether through the Clayton Act or the Sherman Act, has been established through judicial rulings under Section 1 of the Sherman Act. Section 1 of the Act reads:

> 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[14]

Taken literally, the Sherman Act suggests an impossibly broad condemnation of "all" restraints on trade.[15] In *Standard Oil Co. v. United States* the Supreme Court, noting the need for restricting the scope of the Act, differentiated between reasonable and unreasonable restraints on trade, specifying that the Act only prohibits those restraints which are deemed unreasonable.[16]

Although the court's qualification of the scope of the Act arguably improved its coherence, it did little to improve its overall clarity. The main task of the courts, and those subject to the law for that matter, remains that of determining whether or not a particular set of trade restraining actions is, in fact, a reasonable restraint on trade or not.

In determining whether or not a restraint on trade is unreasonable or not, U.S. courts have developed two different analytical tools for rendering decisions under the Sherman Act depending on the specific nature of the actions being considered. The court applies what is known as the "*per se* rule" whereby it is determined whether the act is so detrimental to competition by its very nature that it is *per se unreasonable*--without any detailed analysis of its actual effects on competition. The application

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[13] For example, in its preventative role, the Clayton Act proscribes procedures for mergers and acquisitions. 15 U.S.C. §§ 12.
[14] 15 U.S.CS § 1.
[15] As noted in *Standard Oil,* the definition itself refers to contracts which, by their very nature are restraints on trade rendering a literal interpretation logically untenable.
[16] 221 U.S. 1 (1911).

of the *per se* rule is designed to avoid prolonged economic analysis in cases dealing with certain kinds of activity, such as bid rigging, which are recognized as having virtually no competitive value. If the activity does not fit one of the specific ranges of activity deemed to be *per se* unreasonable, the court will then embark upon a "rule of reason" analysis based on a determination of the *actual* impacts of the specified agreement on competition.

In principle, any form of multi-stakeholder collaboration can be found to be in violation of Section 1 of the Sherman Act so long as the collaboration includes two or more potential competitors and is deemed unreasonable on the basis of one of the above tests. The fact that such a process also includes other "non-business" stakeholders does not save it from being susceptible to a competition policy challenge. Similarly, the fact that a particular collaborative endeavour is pursued entirely outside of the United States does not save such activity from the application of the Sherman Act which applies to any actions or agreements which have *impacts* on U.S. markets.[17]

This framework establishes the basic parameters against which any multi-stakeholder process must be measured within the context of their application to, and involvement of, stakeholders with activities in the U.S. Since the *per se* rule and the rule of reason form the heart of U.S. competition law as it would be expected to apply to multi-stakeholder collaboration in the area of sustainability standards development, we consider the application of these two rules in greater detail below.

The *Per Se* Rule

The *per se* rule sets a threshold of unacceptable activity based on judicial recognition that the specific activity is, "so likely to be harmful to competition and to have no significant benefits that they do not warrant the time and expense required for a particularized inquiry into their effects."[18] In *Northern Pacific Railroad Co. v. United States*, the Supreme Court describes *per se* illegal collaboration as, "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[19] The purpose of the *per se* rule is, of course, to save time, energy and resources of the court system by not dispensing extensive resources on competition determinations in cases of patently anti-competitive behaviour.

Although a wide range of "anti-competitive" agreements can be *per se* illegal, *per se* rules are generally established over-time through the court's experience with certain practices.[20] To date, the courts have limited application of the *per se* rule to five types of agreements:

- horizontal market division[21]
- tied selling[22]
- group boycotts[23]

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[17] "Any agreement in restraint of United States trade that is made outside of the United States . . . [is] subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States, and the agreement or conduct has some effect on that commerce." *United States v. Nippon Paper Industries* (1997) *109 F.3d 1,* at 7.

[18] Federal Trade Commission, U.S. Department of Justice. *Anti-trust Guidelines for Collaborations Among Competitors* (2000) at 7.

[19] 356 U.S. 1, 5 (1958).

[20] Phillip E. Areeda and Herbert Hovenkamp. Antitrust Law: An Analysis of Antitrust Principles and their Application, (Aspen Publishers, 2002) at para. 305. See also, *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) at 294-295.

[21] Palmer v. BRG of Ga., Inc., 498 U.S. 46, 111.

[22] Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2.

- reciprocal dealing arrangements[24]
- naked price fixing[25]

Under a strict application of the *per se* rule, once a precedent has been established with respect to a certain type of practice, and a party is found to have committed such a practice, the court will not embark on any further analysis of the "reasonability" of the activity.[26] The importance of this approach can not be underestimated with respect to the development of sustainability standards since it means that no sustainable development or other public policy objectives will be able to justify or save such collaborative activity if the collaboration is found to be in *per se* violation of the Act due to the content or practices associated with the collaborative action.[27]

The importance of this approach becomes particularly obvious in the case of explicit price considerations under a sustainability standard. The prominent relationship between price levels and the ability of coffee producers/producing regions to meet basic needs makes an improved pricing system a key "sustainability concern" for many stakeholders in the supply chain. The high profile of prices in sustainability discussions makes the "price issues" a prime contender for inclusion in the development of a sustainability standard or related multi-stakeholder collaboration for the coffee sector.[28] However, efforts to improve price stability or the actual level of returns to producers through the integration of pricing criteria or guidelines under a multi-stakeholder process involving competitors clearly raise the possibility of running into *per se* violation of the Sherman Act.

In *Socony*, a seminal U.S. anti-trust case, the court reiterated the well established principle that price fixing activities in the commodity sector are sufficiently damaging in character as to eliminate any need to consider possible justifications for such activity:

> A combination formed for the purpose of controlling the market price of a commodity and possessing the power to make its control effective raises such danger of evil consequences which the Sherman Act was intended to prevent, that it falls within the direct condemnation of the statute and can not be removed by collateral considerations urged in justification of the restraint. [29]

In that case, an effort to ensure minimal price stability for oil through a cooperative buying program resulted in a finding of a *per se* violation of the Sherman Act despite the fact that the agreement fixed retail prices at *below market level* prices.[30] What is particularly noteworthy about the decision in *Socony* is

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[23] FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411.
[24] Betaseed, Inc. v. U & I Inc, 681 F.2d 1203 (9th Cir. 1982).
[25] United States v. Socony Vacuum Oil Co., 310 U.S. 150 (hereinafter *Socony*).
[26] U.S. v. McKesson and Robbins (1956). It should be noted that in many cases the court takes a somewhat broader approach to the rule, looking as specific questions related to the practice which might speak to the effect of the action. In the case of group boycotts, some demonstration of market power is typically required in order to render an application of the *per se* rule. See Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985). In the case where foreign activity is challenged under the Sherman Act, a determination of the challenged activity's having *de minimus* effect on U.S. commerce is required to assert jurisdiction over the activity in question—regardless of whether or not the activity otherwise qualifies as a *per se* violation.
[27] *Northwest Wholesale Stationers*, *supra* note 20. *National Society of Professional Engineers v. United States* 435 U.S. 679 at 689.at pg 692.
[28] We do not here intend to condone a position one way or another on this subject. We merely take it for granted that prices generally, and the pricing mechanism in particular, are regarded by many to be an area where considerable work is necessary to forward the objectives of sustainable development within the sector.
[29] *Supra* at 25.
[30] *Ibid.,* at 223.

the court's insistence that *all forms* of price manipulation are prohibited under Article 1 of the Sherman Act.[31] As a result of the decision in *Socony*, it is not only outright price determinations which are prohibited but any other mechanisms or activities which attempt to adjust price, even if based on normal market activity:[32]

> An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices, whatever machinery for price fixing was used. ... Hence prices are fixed … …if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices.

And later,

> A combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se* under the Act.

On the basis of *Socony*, any attempt to establish a fixed range or premium for prices through cooperation or agreement among competitors, will be considered a *per se* violation of Section 1. Similarly, one can expect multi-stakeholder agreements on premiums or price bands, even if associated with standards compliance would, in principle, be found to be in violation of U.S. anti-trust law without further consideration of their actual impacts on competition or other merits.

The sensitivity of U.S. anti-trust law to price-related cooperative activity under the *per se* rule also extends beyond agreements with the primary objective of influencing prices. In *National Macaroni Manufacturers Association v. Federal Trade Commission*,[33] the National Macaroni Manufacturers Association (NMMA), an association representing 70 per cent of the U.S. macaroni industry, was found to have committed a *per se* violation of the Sherman Act when it passed a resolution recommending quality standards in the production of macaroni products. In that case the NMMA recommended that its members use 50 per cent durum wheat in the manufacture of macaroni, rather than 100 per cent durum wheat, as association members normally did, in order to allow the industry to cope with a seasonal shortfall in durum wheat production.

Although association members were not obliged to apply the recommendation, in actual practice virtually all members did so, resulting in a reduced demand for durum wheat products which significantly tempered the corresponding price increases associated with the shortage. Notably, the primary argument for making the recommendation provided by the National Macaroni Association was to ensure a maintenance of the quality of macaroni on the market on the reasoning that without some degree of "sharing" of the durum wheat on the market, price levels and/or scarcity would lead to a situation where durum wheat simply would not be used in the manufacture of most macaroni and that this would lead to reduced overall quality for consumers. The court, in no uncertain terms, bluntly rejected such action, however indirect, as a case of price fixing, and therefore *per se* illegal:

> price fixing is contrary to the policy of competition underlying the Sherman Act and … its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some

[31] *Ibid.,* at 223.
[32] *Ibid.,* at 223.
[33] *345 F.2d 421 at 427.*

> more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the [actual] effect of the agreement is to raise or decrease prices[34]

The *National Macaroni* case is of particular relevance to efforts towards the development of voluntary instruments such as sustainability standards for the coffee sector since it suggests that even "non-price" aspects of collaborative efforts *could* be considered to be *per se* illegal under the Sherman Act if they have an impact on price. To the extent that standards, whether based on quality specifications, environmental practices or labour practices, were to carry an additional objective of "artificially" affecting supply or demand on the market (and hence prices), then the activity might be regarded as *per se* illegal—particularly if this result was foreseen or expected by the actors over the course of the discussions (as it was in *National Macaroni*).[35]

National Macaroni is also important for its finding of *per se* violation despite the absence of any explicit obligation or formal agreement to act in concert. The NMMA in fact only agreed to make a "recommendation" as to the activities of its members, whereupon members were left to decide themselves whether or not to comply with the recommendation. The position of NMMA members with respect to the resolution on durum levels is thus arguably analogous to that of participants to a standards process which, following the development of the standard, are left with the option of either adopting or not adopting the standard as per their respective interests and needs. This suggests that having purely voluntary price determinations linked with a standard, whether as part of the standard or merely recommended as an accompaniment could also trigger a *per se* finding of anti-trust violation.

The *per se* rule may also apply to non-price related aspects of multi-stakeholder cooperation. For example, agreements between competitors not to deal with third parties along or across the supply chain can be subject to the *per se* rule as an example of a horizontal refusal to deal or "group boycott". While group boycotts can arise in a number of circumstances, the classic paradigm consists of an agreement between competitors not to deal with a third party unless the third party acquiesces with the demands of the agreeing parties (such a to not deal with a competitor).[36] Illegal group boycotts also may exist in the following circumstances:

> (1) when businesses refuse to deal in order to implement an agreement that is itself unlawful *per se*;[37]
>
> (2) when businesses at one level of distribution boycott a business at another level of distribution in order to benefit a competitor of the boycotted business;[38] and
>
> (3) in the context of trade associations (for example, when the association refuses to admit new members or excludes existing ones).

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[34] *Ibid., at 427*. Similarly, as noted by the Justice J. Stevens in *National Society of Professional Engineers* (full cite): "[United States v. Addyston Pipe and Steel Co], and subsequent decisions by this court, *unequivocally* foreclose an interpretation of the [*per se*] Rule as permitting an inquiry into the reasonableness of the prices set by private agreement." 435 U.S. 679 at 689.

[35] For example, some stakeholders under the auspices of the Common Code for the Coffee Community process have suggested that company commitments to an eventual code would generate a demand for conforming products and, as a result, generate a premium for such products. If a code were to attempt to generate or even influence such a premium by controlling demand accordingly (or any other means for that matter), the standard could be deemed to be a *per se* violation of the Sherman Act.

[36] FTC v. Indiana Federation of Dentists, 476 U.S. 447.

[37] FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411.

[38] Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S.

Although there is no necessary reason why a multi-stakeholder sustainability standard or code would trigger a *per se* finding of a "group boycott," it is nevertheless clear that the practices associated with the adoption of such a standard could quite easily lead to the exclusion of players who might otherwise serve certain markets and thus qualify as examples of group boycotts as per headings 2 and 3 above.[39] Moreover, in multi-stakeholder collaboration where the stakeholders have significant market shares, the court's may be more likely to find a *per se* violation of the Act.[40] Issues related to the impacts of the content of a standard on specific players along the chain, as well as the implementation of the standard, could, if not carefully designed, be classified as a form of refusal to deal.

Since such a finding is based on the manner in which certain market players are excluded from the market, the potential of a *per se* finding on the basis of such action can arguably be reduced by maximizing inclusiveness and transparency in the development and implementation of any given multi-stakeholder collaboration. This, combined with the fact that the court has adopted a "loose" version of the *per se* rule in the case of group boycotts (often applying the rule of reason), [41] suggests that the process leading to the development of a standard or related instrument could play an important role in determining whether the resulting instrument or agreement operates as a refusal to deal. By having as wide a group as possible participate in the multi-stakeholder process, the content of the resulting standard or instrument can be expected to be less exclusionary.[42]

Rule of Reason

Socony and *National Macaroni Northwest Wholesale Stationers* suggest different ways in which a multi-stakeholder sustainability standards system for the coffee sector could trigger the *per se* rule under current U.S. anti-trust law. Indeed, the notion of voluntary "industry self regulation" through codes of ethics and other similar instruments was treated as a virtual *per se* violation until fairly recently. For example, in the 1935 case of *Federal Trade Comm'n v. Wallace*[43] the court condemned self-regulation in the coal industry which was designed to prevent misrepresentation in coal sales, noting that such practices were unacceptable in principle. In that case the court emphasized that, "it is not the prerogative of private parties to act as self constituted censors of business ethics, to install themselves as judges and guardians of the public welfare, and to enforce by drastic measures their conceptions thus informed."[44]

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[39] For example, if major traders or roasters were to decide that they would only purchase coffee from a particular region according to determined sustainability practices, it is conceivable that the standard implementation activity could effectively prohibit some players from being able to serve the market. Such impacts could generate a finding of per violation.

[40] "Unless the [group] possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted." *See Northwest Wholesale Stationers Inc. v. Pacific Stationery and Printing Co* (1985) at 296. Given the high levels of market concentration within the mainstream coffee sector, agreement among as little as two major players over the course of standards implementation could render such agreements as *per se* illegal.

[41] In *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma* 468 U.S. 85. The court noted that not all group boycotts produced anti-competitive effects. In that case, the court noted that a group restraint on the marketing of televised college football was required in order, "to make the product available at all."

[42] It should be noted, however, that an open process provides no guarantee that this will be the case. Stakeholders need to pay explicit attention to the potential exclusionary character of any standards or related system.

[43] 75 F.2d 733 (8th Cir. 1935).

[44] *Ibid.,* at 737.

Since the 1978 case of *National Society of Professional Engineers v. United States*[45] the court has, as general rule, adopted the rule of reason approach for dealing with voluntary self-regulatory initiatives. In that case, an analysis of the legality of Society's code of ethics was treated using the rule of reason analysis:

> Ethical norms for learned professions may serve to regulate and promote competition for professional services, and—for purposes of analysis under Section 1 of the Sherman Act which prohibits contracts, combinations, or conspiracies in restraint of trade or commerce—thus be valid under the "rule of reason" standard where the inquiry is whether a challenged agreement is one that promotes or suppresses competition.

The rule of reason, in contrast with the *per se* analysis, applies a detailed analysis of the reasonableness of any particular restraint but only based on the impacts of the agreement on competitiveness alone.[46] The analysis of the reasonability of any particular given series of events of trade restraining activities will be based on either or both of two different sets of facts:

> (1) on the nature or character of the contracts, or
> (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices.[47]

Under either branch of the test, the inquiry is confined to a consideration of impact on *competitive conditions*. This fundamental characteristic of a rule of reason analysis means that no other broader public policy goals will be considered in such an analysis.[48]

> In either event [*per se* or rule of reason analysis], the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by Congress.[49]

Thus, in *National Society of Professional Engineers*, the Supreme Court refused to consider the potential beneficial impacts on public health and safety of certain restrictions on bidding practices of professional engineers specified in the association's code of ethics because these were identified as addressing larger public policy issues irrelevant to the specific question of competition within the marketplace.

In looking at the competition effects of any particular action due to the nature of the agreement, the court will focus on the structural impacts of the agreement on the market such as any impacts it may have on, *"financial interests in production, key assets or decisions on price, output or other competitively sensitive variables…"*[50] In order to undertake such an analysis, the court typically must undertake a preliminary analysis in order to determine the market power of the collaborating players and the market definition of the products affected by their collaboration since these are the boundary variables for

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[45] 435 U.S. 679.

[46] "The rule of reason has been used to give the Sherman Act both flexibility and definition, and its central principle of anti-trust analysis has remained constant. Contrary to its name, the rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."
Ibid.

[47] *Ibid.*

[48] *Ibid.*

[49] *Ibid.,* at 692.

[50] DOJ Federal Anti-trust Guidelines for Competitor Collaborations at 12.

determining actual economic impact. The court's investigation into the competition effects of an agreement may therefore consider a number of variables beyond the mere content of the agreement including the nature of the parties to the agreement and the general conditions of the market. It will not, however, consider the larger policy justifications for such an agreement.

The rejection of any consideration of the policy implications of collaborative activity under the rule of reason *a priori*, clearly has important implications in the context of standards development and implementation since these mechanisms typically secure much of their legitimacy on the basis of the larger public goods objectives they seek to preserve. The legitimacy of any restraints on trade with respect to U.S. anti-trust law, whether they are in the form of exclusive dealings through a standards system or through the specific content of standards, can only be determined in light of their potentially pro-competitive impacts.

In fact, many aspects related to the design and formulation of standards can be expected to have positive impacts on the competitivity within the sector—particularly at the producer level. For example, standards can improve the ability of the market to communicate information and with it, the ability of individual players to compete on the basis of free market fundamentals rather than information advantage or market placement. Similarly, it might be argued that such standards could help preserve the diversity of producers currently serving the coffee market by improving stability and productivity through improved management practices. Alternatively, the implementation of multi-stakeholder standards or contracts could help in promoting more equitable relations among various players in the market-place by providing a forum outside of the market through which basic terms and relations are established. Enhanced information communication, diversity and equity can all be conducive to enhanced competition and as such *could* conceivably provide arguments in favour of the pro-competitive benefits of a standards system.

Although it is difficult to assess the expected impacts of any standards activity on competition without a clear indication of the nature and content of such standards, the importance of competitive effects does suggest that a standards process which harbours the widest representation possible is least likely to run into competitive challenges insofar as the potential negative impacts or any particular trade restraining effects are more likely to be discovered and prevented over the course of the standards development process itself.

Moreover, the courts have explicitly recognized the importance of the historical context leading to a particular collaboration or agreement in assessing the expected impact of the agreement on competition under the second branch of the rule of reason analysis. Mr. Justice Brandeis' in *Chicago Bd. Of Trade v. United States, 246 U.S. 231, 238 (1918)* notes the purpose and role of such a contextual analysis accordingly:

> The true test of legality [under the rule of reason] is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. *The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.*[51]

[51] Chicago Bd. Of Trade v. United States, 246 U.S. 231, 238 (1918) emphasis added.

The contextual history does not therefore provide a direct measure of the competitive effects but may be recognized as a tool for determining the expected impacts of a given activity. In *Allied Tube & Conduit Corp v. Indian Head Inc.*,[52] the court took this approach a step further with respect to the analysis of the competitive effects of standards systems in particular. In that case the court considered a complaint that standards established by the National Fire Protection Association had resulted in an "anti-competitive" outcome by setting the standard for electrical conduits so as to exclude a competitor's product. Pursuant to allegations of the mis-use of the standard setting process to serve anti-competitive ends, the court explicitly acknowledged the importance of having an expert and neutral process for standards establishment in order to eliminate the potential for bias in the formation of the standard.

> Typically, private standard-setting associations include members having horizontal and vertical business relations. Undoubtedly members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of anti-trust scrutiny. *When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant pro-competitive advantages.*[53]

Although the court in *Allied Tube* does not depart from the analysis based on effects on competition of a specific standard, the case specifically identifies guarantees on the neutrality and legitimacy of the process as a critical element in ensuring that the standards development process does not serve anti-competitive ends. The decision in *Allied Tube* suggests that the existence of rigorous safeguards for transparency, accountability, inclusiveness and fairness in a standard setting forum combined with evidence of compliance with such safeguards might provide a defense to a competition challenge based on a multi-stakeholder standards system.

[52] 486 U.S. 492.
[53] Allied Tube & Conduit Corp v. Indian Head Inc. 486 U.S. 492 at 500. Emphasis added.

4.0 Implications for Standards Development through Multi-stakeholder Collaboration in the Coffee Sector

The legal context of competition policy in the U.S. has important implications for the development of effective and meaningful multi-stakeholder standards for sustainability in the coffee sector. Clearly, insofar as one of the principal purposes of the adoption of a multi-stakeholder process is to ensure widespread adoption of recognized sustainable practices, the significant market importance of U.S. industry and consumers makes buy-in, adoption and participation by U.S. stakeholders of great importance to the overall success of any eventual standard or other forms of collaboration designed to promote sustainability. Meanwhile, the fact that the measure for the applicability of U.S. competition policy extends to all market players having a potential impact on U.S. markets expands the relevance of U.S. competition policy beyond players merely located within the U.S.. The relative importance of the U.S. market, combined with the proactive enforcement of anti-trust law in the American context, makes U.S. anti-trust law a particularly important factor in deliberations towards the establishment of sustainability standards and other multi-stakeholder sustainability instruments for the coffee sector developed through a multi-stakeholder process.

On the basis of the above analysis of the U.S. anti-trust law, we can draw several conclusions:

1. that prices cannot be intentionally influenced, whether directly or indirectly, through collaborative action among stakeholders where the stakeholder group includes potential competitors
2. that U.S. competition policy permits multi-stakeholder cooperation for self regulation and standards development—even despite corresponding trade restraints, as long as the competitive advantages outweigh the disadvantages
3. that having a clear, structured, representative and transparent process for the development and implementation of a standard etc. can be a key component to ensuring its ability to promote competitiveness and the willingness of the court to recognize such impact.

We consider these conclusions and their implications for further action in the standards development process below.

Price Considerations

As noted above, the concept of sustainable development is closely related to the concept of an efficient market. To the extent that competition policy promotes the objective of more efficient markets, such policy can be expected to simultaneously forward the objectives of sustainable development. However, the focus of competition policy on one specific component of a functioning market (namely, competition) to the exclusion of all other considerations makes it an imperfect tool for generating market efficiency across the board. Where public goods and information problems are pervasive, for example, full competition alone may not secure the welfare outcomes promised by a perfect market. In commodities markets, as in other markets displaying market failure, the price mechanism provides the first and most evident signals of market inefficiency. Similarly, efforts to promote sustainable markets (aka. perfect markets), whether through voluntary measures or regulatory measures, may come into conflict with the purely competitive pricing mechanism exhibited by imperfect markets.

Furthermore, although price adjustment is traditionally an area where the American courts see no positive role for competitor collaboration, it is actually conceivable that such collaboration could yield pro-competitive effects. For example, if a standard is able to introduce greater predictability or security for producers through some form of customized pricing mechanism, this could improve

overall market efficiency by reducing the transaction costs associated with uncertainty.[54] A standard with pricing components might also help ensure that market signals are more effectively based on long-term market trends and forces rather than speculative interests or other external shocks. Although the courts will not recognize such arguments, they may nevertheless provide a rationale for the inclusion of a price element within sustainability discussions.

The above considerations suggest that there may be a sustainability based rationale for including discussions related to price formation within discussions towards the establishment of a sustainable coffee sector.[55] On the basis of our brief overview of the U.S. anti-trust law, however, it is also clear that any consideration of pricing issues within a collaborative stakeholder process is very likely to be susceptible to challenge under U.S. anti-trust law. Moreover, the fact that agreements related to price formation are typically treated as *per se* violations of the Sherman Act suggests that such a challenge could not be avoided through a mere showing of the positive impacts on the public good, sustainability or *even* overall competition within the sector. Competitor cooperation on price formation is simply prohibited outright by U.S. anti-trust legislation.

An obvious challenge facing any effort to draw on multi-stakeholder collaboration towards the promotion of sustainable development within the coffee sector, therefore, rests in assessing the possible modalities for overcoming the potential impasse between price-related sustainability considerations and straight-forward competition policy issues.

One potential tool for dealing with pricing issues, might be through the use of the existing differential systems present in LIFFE and NYBOT exchanges as instruments for bringing greater predictability and transparency to the pricing of coffee produced and traded according to sustainable practices. On the basis of this approach, it is conceivable that a transparent and formalized differential could be offered for such coffees on the basis of their additional "quality" characteristics. This option for incorporating the price component of sustainability within the larger sustainability discussion is appealing for its reliance on the existing pricing infrastructure for the coffee sector and for its use of a combination of market-based indicators and "committee" consultations for determining appropriate differentials on the market.[56] It is unclear, however, how such a process would avoid competition policy concerns since any presumed form of "agreement" among competitors to pay a specific differential through the exchange differential system would arguably face the same anti-trust problems as a differential directly incorporated within a standard itself. On the other hand, if the process were merely left to itself, with individual market players determining the appropriate differential through purely competitive forces of supply and demand, there will be no

[54] Enhanced market stability might be expected to produce greater overall market efficiency by reducing the social costs associated with uncertain resources for social programs and subsistence living and the economic costs associated with planning for multiple strategies simultaneously and regular shifting behaviour on the basis of ever changing market conditions. Ultimately, the test of whether or not efficiency is favoured by one approach or another will depend upon a comparison of the costs associated with managing predictability versus the costs associated with managing uncertainty.

[55] The rationale for using multi-stakeholder processes for dealing with imperfections in the pricing mechanism rests in the fact that: 1. cooperative action is typically required to address such issues and 2. Cooperative action can help neutralize the influence of specific interest groups over (and thus market distortions arising from) the process. It is important to note however that multi-stakeholder processes are neither the only, nor necessarily the most effective, tools for adjusting the pricing mechanism in face of market failure. Regulatory and market-based fiscal measures may perform a similar task more efficiently where the political will and infrastructure exists.

[56] Personal communication, Ted Davis, NYBOT, March 12, 2004.

guarantee that the market clearing price reflects the actual costs of sustainable production—thus potentially putting the sustainability of any related cooperative standard/process itself into question.[57]

Of course, the coffee sector is not the only area of market activity subject to market imperfections and sub-optimal welfare outcomes. In other areas where market failure exists, the government has frequently intervened with corrective policy measures which are excepted from competition law in the national context. The U.S. government clearly has the prerogative to make exceptions to competition policy requirements where deemed appropriate for other policy reasons.[58] Although the U.S. Congress and Senate have both recently passed resolutions emphasizing a commitment to finding global solutions to the coffee crisis,[59] it is doubtful whether such political support could be channeled towards the granting of an exception to competition policy with respect to an eventual sustainability standard on the issue of the pricing mechanism. At any rate, such a process raises a problem of circularity since stakeholder involvement in such discussions would depend upon such an exemption while government approval for exemption would likely depend on the actual outcome of multi-stakeholder discussions on such an issue.

An alternative, and perhaps more plausible, forum for advancing multi-stakeholder discussions on pricing issues related to standards or other collaborative mechanisms is the International Coffee Organization. As an intergovernmental body, the ICO has the capacity and mandate to take decisions related to market and pricing issues within the coffee sector at large. The ICO could conceivably adopt, and thus validate from a competition policy perspective, measures related to price (and other areas where anti-trust law comes into potential conflict with sustainability objectives) in any of several different ways:

- ICO establishes an intergovernmental process for determining pricing issues with respect to and for application within a multi-stakeholder sustainability standard
    - Advantages: this approach would necessitate active involvement of governmental interests in the development and implementation of a sustainability standard which could be expected to have positive spin-off effects in the actual implementation of such a standard.
    - Disadvantages: this approach would probably require considerable organization, be cost-intensive and could be subject to considerable setbacks through the politicization of the discussion process.

- ICO administers a multi-stakeholder process for determining pricing issues with respect to sustainability standards cooperation
    - Advantages: this approach would enable active government participation in the standards development process while maintaining the flexibility associated with a multi-stakeholder process.
    - Disadvantages: it may be unclear how ICO multi-stakeholder discussions link up to existing multi-stakeholder discussions revolving around standards development and implementation. By having the ICO administer such a process, there is a

[57] Note that a reliance on supply and demand alone for determining prices associated with sustainable activity will not necessarily lead to a system of imperfect or unsustainable pricing. On the other hand, any pricing system which is not at least partly linked to supply and demand considerations can be expected to produce highly inefficient and unsustainable results. The point here is merely that the reliance on supply and demand alone to determine prices where important public goods remain un-priced in the market, renders the supply/demand model vulnerable to producing unsustainable price outcomes.
[58] See, for example, *National Society of Professional Engineers, supra* note 45.
[59] Both the U.S. House and Senate passed Resolution 604 IH in support of promoting global solutions to the coffee crisis in November of 2002.

possibility for a disjoint between existing multi-stakeholder processes and an ICO process.

- ICO adopts the outcome of multi-stakeholder negotiations on price related issues with respect to sustainability standards cooperation
    - Advantages: This approach has the potential of taking full advantage of existing multi-stakeholder processes using them to inform eventual price determinations under ICO based standards activity. It also minimizes the potential of politicization at the level of the ICO from hindering the advancement of multi-stakeholder discussions on the development of pricing determinations
    - Disadvantages: It may be difficult to conjure government support within the ICO towards a process which governments and their representatives have little direct control over themselves.

As long as the ICO were to play a certain management role over the process, the actual actions of stakeholders with respect to such standards could, in principle, be protected from anti-trust considerations.[60] Although the precise modalities and respective advantages and disadvantages of having the ICO take up the task of addressing pricing issues within the context of multi-stakeholder collaboration, it is nevertheless clear that the ICO holds a special role to play in such a process and that discussions on the appropriate nature of that role may be necessary before the full spectrum of sustainability issues can be dealt with through a multi-stakeholder process.

Process Considerations

On the basis of our review, it is clear that the process behind multi-stakeholder collaborations can play a critical role determining the legality of such actions from a U.S. competition policy perspective. Although the application of the *per se* rule, typically does not consider process questions in the assessment of the reasonability of the restraint, the application of the *per se* rule in the case of group boycotts suggests that the development of a full and open process may help in reducing the potential of a *per se* challenge over the course of implementing and eventual agreeing upon a multi-stakeholder strategy since process considerations can avoid or reduce the exclusionary impact of such a strategy. Insofar as the products of multi-stakeholder collaboration can be expected to be subject to a rule of reason analysis (as in the case of most issues related to standards development and implementation), then the courts will take into consideration the history and context of the collaboration as a means to assessing competitive effects of the collaboration. Finally, the courts have explicitly recognized the role of formal procedural guarantees the objectivity and neutrality of the development context as key in providing the assurance that self regulatory action favours competition rather than the contrary. On the basis of this context the following recommendations on process can be made.

Inclusivity

Broad, equitable representation both across the supply chain and across different geographic regions in any given multi-stakeholder process will help the results of collaboration reflect the diverse interests of different economic actors. A process which guarantees wide inclusion of stakeholders is both less susceptible to generating an anti-trust challenge as well as more likely to withstand any eventual challenge by preventing any specific parties within the process from exercising undue influence or reaping specific gains as a result of decisions or actions taken therein. Drawing from a wide base of stakeholders in the design phase allows a more comprehensive vetting process prior to actual implementation thus providing something of a preventative check on the proposed measures

[60] Although one can expect some degree of "protection" from antitrust legislation where the ICO adopts a specific system even without U.S. membership in the ICO through the application of the principle of comity, it is clear that stronger protection is provided under the context where the U.S. is an actual member of the ICO and corresponding actions have the force of law within the U.S.

in terms of broad acceptability and restraining effects with respect to specific stakeholder conditions. Wide representation thus helps a multi-stakeholder process avoid the development of a system which imposes major trade restraints for specific segments of the supply chain. Stringent guarantees on representation also help ensure the neutrality of the overall outcome and by *Allied Tube* can be important in determining the acceptability of the collaborative process.

Flexibility

In addition to regional representation, a certain degree of regional flexibility can be expected to help reduce the trade restraining characteristics of any eventual collaborative instruments. Such flexibility can help promote the objectives of sustainability in ways which enable different geographic regions to take advantage of their respective competitive advantages. Although there are different models available depending on the nature of the collaboration, the Forest Stewardship Council offers a useful model in the context of standards development.[61]

Predictability

Uncertainty is a core source of market inefficiency in commodities markets. A multi-stakeholder collaborative process can establish more predictable terms for production and trade and by so doing, help build competition based on market essentials rather than on the ability of specific players to deal with such uncertainty. Predictability can be fostered both by formalizing the terms of trade and production in the content of an agreement,[62] standard or other form of collaboration, as well as by establishing a stable administrative structure and dispute resolution process for the development and administration of such a process over the long term.

Equity

Market influence by a select group of market players is one of the primary "evils" which competition policy attempts to prevent. A multi-stakeholder process can promote greater equity by reducing the influence specific players may have over the free market by integrating a "mutual" decision making process into the market mechanism. It is similarly clear however, that equity in a process cannot be assumed on the mere basis of representation. Clear and transparent safeguards for ensuring that market influence does not dominate multi-stakeholder processes are critical to ensuring the equity is preserved within such a process and that its corresponding activities in fact promote such equity in ways which ultimately promote competition.

Transparency

Transparency too plays the double role of reducing the potential for discontent in an eventual system (and thus the delivery of an anti-trust challenge) while simultaneously promoting a fundamental characteristic of a free and efficient market. Transparency at the development stages, are necessary to provide the process with widespread buy in and a solid foundation for cooperation. Transparency at the level of implementation of multi-stakeholder collaboration through monitoring, verification and other information-generating devices, has the potential to help improve the communication of information significantly within and across the supply chain thereby producing pro-competitive results. In commodities markets such as the coffee sector, improved information exchange represents a major asset which multi-stakeholder processes and instruments can bring to the commodity chain

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[61] The Forest Stewardship Council consists of a system of basic principles which are then formulated in terms of geographically specific standards. The system thus enables global consistency while providing regional flexibility.

[62] Commitments under a particular multi-stakeholder process can also be linked to other more direct "stabilizing instruments" such as specific risk management tools and other financial services. Banks, for example, have shown a greater willingness to provide financial services to cooperatives involved in certification and related sustainability schemes.

and market. The development of accessible monitoring and verification systems clearly plays an additional role in matching claims with actual action in a manner which free markets may not.

5.0 Conclusion

On the basis of the foregoing analysis, it is clear that competition policy presents significant challenges to the development and implementation of multi-stakeholder processes which have as one of their main objectives the correction of market imperfections prevalent in the free market such as sustainability codes, guidelines, standards and contracts. On the basis of our analysis, the critical areas for concern (and action) are those in respect of discussions related to price as well as to the formal structure of the collaborative process itself.

With respect to the former, it is clear that a purely "stakeholder" led discussion and implementation process which deals with pricing issues, all other things being equal, has a high probability of being vulnerable to a U.S. anti-trust challenge. Where price is an element of a stakeholder agreement, the fact that the agreement promotes larger public policy objectives, depends upon voluntary implementation or only influences price in an indirect manner, will not save the process from U.S. anti-trust law. Although there are different ways for dealing with this challenge, it would appear that some degree of involvement of the ICO, and perhaps even eventual adoption by the ICO, of approaches based on multi-stakeholder cooperation—at least with respect to issues related to price formation—could effectively meet this challenge.

With respect to the latter, the establishment of an inclusive, transparent, predictable, flexible and equitable structure for the development and implementation of multi-stakeholder collaboration, can play a key role in avoiding competition policy challenges in one of several ways. First, an open and inclusive process can help prevent an eventual standard from being exclusionary in character and thus deflect potential challenges as a form of group boycott. Second, the use of a transparent and open process can help ensure that the content of an eventual standard does not favour any particular party at the expense of potentially pro-competitive impacts. Third, the courts have noted the importance of the history and context of an agreement, as indicators of intent, in assessing the competitive effects of agreement. Finally, at the margin, incorporating governmental or third party decision makers can alleviate the competition policy threat presented by multi-stakeholder collaborations by altering the "agency" behind such collaboration.

In order to enable maximum participation from U.S. stakeholders in such a process, and thus maximum inertia towards a more sustainable system, developers, facilitators and stakeholders will want to pay special attention to these two prospects for advancing discussions and actions for promoting sustainability in the coffee sector through multi-stakeholder cooperation. These considerations should not, however, be regarded as replacements for overall due diligence in the formulation of the content of any cooperative mechanisms which, short of securing an exception to basic competition policy requirements (via, for example, government involvement), will be the ultimate determinant of the legality of multi-stakeholder collaborative activity in the coffee sector. While a degree of flexibility in discussions prior to actual implementation of any eventual agreement can be permitted, national competition authorities should be consulted directly upon the finalization of a formal standard or other multi-stakeholder initiative for implementing sustainability across the sector.