

The Administrative Law of Private/Public Global Forestry Regulation^{*}

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I. Introduction

Although few things would seem to be more local than trees, an extensive global system of forestry regulation is under construction. Its main architects are not governments or intergovernmental organizations, although they occasionally perform important tasks. The main architects have been transnational environmental organizations, in concert with a small but growing number of business, labor, social justice, landowner, and professional groups. These groups have formed alliances that cooperate and compete with each other in complex and shifting ways, and that regularly engage in reciprocal observation, communication, lobbying, and policy adjustment with governmental and intergovernmental agencies. The overall system of forestry regulation is thus a multi-centered private/public one which operates in a loosely coordinated and sometimes disjointed fashion. One could therefore also legitimately call it a governance system, since it articulates and adapts guiding norms through a system of shared authority,¹ or a regime, since it involves multiple institutions operating in terms of common principles, rules, procedures and programs.² In order to highlight the principles and rules governing these processes, however, this paper views the system as one of regulation, and indeed of regulatory law making. This perspective also seems to be appropriate as an empirical matter, since much of the system is concentrated on the development of general rules and their application to categories of enterprises by specialized officials relying on normative justifications and background threats of sanctions.³

For the past decade a major institutional focus of this emergent system has been forest certification, wherein trusted experts certify to a broader public that specific forestry operations meet applicable standards for proper forest management. Were it done by governments, forest certification would readily be seen by legal scholars as administrative licensing or permitting and the larger system of policy making and implementation as administrative regulation. Because forest certification is more fragmented and decentralized than most government regulation, however, understanding it requires forsaking simplistic source-of-law models for understanding administrative law.

Forest certification is also connected to parallel developments in other sectors, although it appears to be a leading edge in many ways. This

¹ Cutler, Haufler, and Porter 1999; Rosenau and Czempiel 1992

² Gulbrandsen, 2004; Levy, Young, and Zurn, 1995:274.

³ For a more detailed exposition of forest certification as a form of law making, see Errol Meidinger, *Forest Certification as Environmental Law Making by Global Civil Society*, in E. Meidinger, C. Elliott and G. Oesten, eds., *Social and Political Dimensions of Forest Certification* (2003).

<http://law.buffalo.edu/homepage/eemeid/scholarship/FCGCSLaw.pdf>

paper thus treats forest certification both as an indicator of broader trends in the administrative law of global governance,⁴ and as a place from which to trace connections to other regulatory domains. Focusing on the administrative law of forest certification is entirely apt not only from an external perspective, but also from an internal one, because much of the system is in fact defined and structured in terms of classical administrative law issues and practices. Later sections of this paper describe the rulemaking, adjudication and enforcement processes of forest certification and then seek to assess them in terms of the broader criteria of administrative law. The next two sections lay the groundwork by describing the broader historical context and the primary actors of forest certification.

A. Historical Context

The movement for forest certification grew out of the ‘tropical timber crisis’ of the mid-1980s, when environmental organizations portrayed the rapid deforestation of tropical countries as a grave and gathering disaster. Although the causes of tropical deforestation are multiple (including population growth, conversion of forests to farming and other uses, infrastructure expansion, and fire⁵) and vary from case to case, an important one in many cases is consumption of tropical timber in developed countries. The responsibility of Northern consumers combined with the importance of Northern currency to developing countries prompted calls by some environmental groups for a consumer boycott of tropical timber.⁶ This strategy was soon rejected as counterproductive, since it was seen as discriminatory by developing countries and since the loss of western revenues for developing country forest products could lead to accelerated forest conversion and destruction.⁷

Replacing the tropical timber boycott were calls for a system by which timber from sustainably managed forests could be certified and labeled as such, enabling consumers to identify it in the marketplace. By purchasing only wood certified through such a system, northern consumers could avoid contributing to destructive forestry and, better yet, reward good forestry. The original proposals called for a certification system operated, or at least developed, by the International Tropical Timber Organization,⁸ an intergovernmental organization of tropical timber producing and

⁴ See Stewart, *Global Administrative Law*

⁵ Katrina Brown, *Cut and Run? Evolving Institutions for Global Forest Governance*, 13 *J. Int. Dev.* 893-905 (2001)

⁶ Ans Kolk, *Forests in International Environmental Politics: International Organisations, NGOs and the Brazilian Amazon*. (1996)

⁷ *Id.*

⁸ Christopher Elliott, *Forest Certification: A Policy Perspective* (2000) p. 5.

consuming countries established in 1986 under the auspices of the United Nations.⁹ The ITTO resisted and eventually rejected those proposals.¹⁰ Other efforts to effectuate tropical forest protection also foundered, the most significant being the failure to achieve a binding forest convention at the 1992 UNCED meetings in Rio. The Rio Conference did, however, crystallize a discourse of “sustainable development,” which conceives economic development, environmental protection, and social justice as inextricably interlinked and mutually necessary. This conception has fed into the sector-specific discourse of ‘sustainable forest management’ to exert considerable institutional force on the emerging system of global forest regulation.

Meanwhile, a small group of environmental NGOs, timber producers and wood processors pursued the possibility of a non-governmental certification system. In 1990 the Rainforest Alliance, a US based environmental NGO, created a free standing forest certification program, Smart Wood, which proceeded to certify several timber operations as sustainably managed and to authorize their products to carry its logo. In the fall of 1993 a larger group led by the World Wildlife Fund, and including several other NGOs, small scale timber producers, high-end furniture makers, retailers (most notably the British do-it-yourself company, B&Q), and individual forestry professionals, founded the Forest Stewardship Council (FSC). The FSC was conceived from the outset as a global program for forest certification. Its primary functions would be to set standards for certification and to accredit certification organizations like Smart Wood.¹¹

The FSC was constituted as a multi-stakeholder policy-making body with the mission of promoting “environmentally responsible, socially beneficial and economically viable management of the world’s forests, by establishing a worldwide standard of recognized and respected Principles of Forest Management.”¹² Its founders drew on several important currents of thought. The most obvious was the sustainable development-sustainable forest management discussion, which was incorporated directly into the organization’s guiding principles as described below. A related current was the concept of multi-stakeholder decision making, as had recently been incorporated in the U.S. Negotiated Rulemaking Act of

⁹ [ITTO cite]

¹⁰ Elliott, *id at*

¹¹ For more detailed histories, see Elliott, *id.*, Errol Meidinger, Human Rights, ‘Private’ Environmental Regulation, Human Rights, and Community, 6 *Buff. Env. L. J.* 123, and Benjamin Cashore, Graeme Auld, and Deanna Newsom, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (2004)

¹² Forest Stewardship Council Principles and Criteria for Forest Management. [get current URL]

1990¹³ among many other administrative policies. The third was the more obscure lore of non-governmental standard setting. At the FSC's founding the International Organization for Standardization (ISO) had been in operation for almost four decades, and had developed a large body of knowledge on 'technical standard setting' – defining, e.g., the required attributes of a 6 mm screw or of the magnetic strip on a credit card.¹⁴ But the ISO had also recently ventured into setting standards for organizational management systems with its ISO 9000 series of standards.¹⁵ Following the Rio Conference it had also begun work on an Environmental Management Standard that would eventually become the ISO 14000 series.¹⁶ Finally, some of the FSC's founders had been involved with self-consciously progressive non-governmental standard setting efforts, most importantly in organic agriculture, where the International Federation of Organic Agriculture Movements (IFOAM) provided a fund of experience.¹⁷ These traditions were the source of the fundamental elements of the FSC forest certification system, and were also perforce the elements of the competitor certification programs that soon arose in response the FSC.

- Add international trade law
 - FC only makes sense in a well functioning international trading system
 - FC constantly shaped to accommodate international trade

B. Primary Actors

Forest Certification Programs

The FSC is the driving force in forest certification, having challenged the forestry establishment with an ambitious structure and agenda since its inception. The FSC's international governing body, the General Assembly, is constituted of three chambers – economic, social, and environmental – with equal voting power.¹⁸ These chambers are further divided into Northern (developed country) and Southern (developing country) sub-chambers, each also holding equal decisional power, thereby counterbalancing the comparative overrepresentation of members from Northern countries. The General Assembly holds authority to approve all forest certification standards and the accreditation of certifiers, and generally to make important FSC policy decisions.¹⁹ Membership in the FSC is open to all organizations and individuals who subscribe to the

¹³ NRA cite

¹⁴ See generally Meidinger, 1999 id, at to .

¹⁵ ISO 9000 cites [Describe program]

¹⁶ ISO 14000 cite

¹⁷ IFOAM cite; Sasha Courville, [cite] [Confidential Interviews]

¹⁸ FSC website. Give early history of the chambers. Members for the most part choose the chambers of which they are members.

¹⁹ FSC website; elaborate

FSC's principles and whose applications are supported by two existing FSC members, but not to governments or government agencies.²⁰ At present the FSC has approximately 600 members, two-thirds organizations and one-third individuals.²¹

The FSC champions a demanding set of standards for certification. Formally denominated 'principles' and described in more detail below, they require conformance to applicable laws and treaties, possession of clear property rights, as well as protection of indigenous rights, workers, local communities, biological diversity, and areas of high conservation value, among other things.²² These requirements are further defined by a set of more specific globally applicable criteria and indicators.²³ All of these are in turn are put into practice through more detailed national and regional standards, developed by local working groups with the goal of tailoring the general principles and criteria to specific environments.²⁴

The founding of the FSC was met with considerable skepticism and hostility by most traditional forestry interests. Yet in North America, large forestry companies soon took steps to establish their own certification programs. This was not as difficult as one might expect, because many large corporations were familiar with the ISO programs and were casting about for ways to improve their generally poor public images.²⁵ Thus, the highly export-dependent Canadian forest industry collaborated with the Canadian ISO affiliate, the Canadian Standards Association, to develop a forestry-specific, ISO-based standard (CSA).²⁶ In the U.S., the American Forest and Paper Association, comprising approximately 200 of the largest companies in the industry, began to develop its own free-standing standard. The resulting Sustainable Forestry Initiative (SFI) started out as a vague corporate code of conduct created by staffers using focus groups to determine the minimum commitments necessary to allay public distrust.²⁷ But it has since gone through multiple iterations, gradually getting stronger and more detailed, and eventually being placed under the control of a nominally independent multi-stakeholder board.²⁸

²⁰ Government exclusion; note by-law provisions on independence from governments; note policy on national working groups.

²¹ http://www.fsc.org/keepout/en/content_areas/77/82/files/5_2_2_FSC_Membership_List_2005_03_16.pdf

[describe differential voting power of individuals and orgs]

²² FSC Principles

²³ FSC C&I

²⁴ FN on National and Regional Standards

²⁵ Public opinion cites.

²⁶ CSA cite

²⁷ See Meidinger 1999 at ___ to ___, for an early history.

²⁸ SFI website

Several tropical countries have also developed their own certification programs. Indonesia, for example, has the Lumbago Ekolabel Indonesia (LEI) program.²⁹ It is the result of a complex negotiation among traditional forestry powers (primarily the powerful government ministries responsible for allocating timber concessions on state owned forests and large timber producing corporate concessionaires) and emerging Indonesian and established transnational NGOs. In part to counter ongoing enforcement and credibility problems, LEI has forged a tenuous but continuing alliance with the FSC. Currently, products certified under either program must meet the requirements of both.³⁰

Finally, in the late 1990s traditional European forestry interests entered the tournament of certification programs. A few European forestry companies, particularly in Scandinavia, engaged in the FSC system from the outset, but most remained outside it. Many European forestry interests initially supported the idea of certifying tropical timber, because they felt unfairly disadvantaged by its lower environmental and labor standards. When it became clear that requiring certification only of tropical timber would violate international trade rules,³¹ however, and when environmental groups began agitating for certification of European timber, they reacted angrily. This was due to both the traditional high regard in which the European industry held itself and the small size of many European forest owners, making it difficult for them to find the economies of scale to readily achieve and finance FSC certification.³²

After initially resisting certification, European forestry groups gradually came to accept it as inevitable and then decided to establish their own program. The resultant Pan-European Forest Certification Council was formed in 1998 and 1999. It drew upon the by-then substantial lore of certification and sustainable forest management to form a system with many similarities to, but also important differences from the FSC. The first difference was that the PEFC portrayed itself not as promulgating a single overall standard to be adapted to variable local conditions, but rather as providing a common framework for the mutual recognition of nationally based certification programs that had adopted their own legitimate rules of sustainable forestry, as well as an appropriate set of certification institutions to implement them. Second, although formed as a multi-stakeholder structure nominally independent of governments, the PEFC is controlled largely by traditional forestry interests, primarily landowners and European forest products corporations. These interests also have long

²⁹ See generally Meidinger, Elliott and Oesten, *The Fundamentals of Forest Certification*, at 15–17.

³⁰ MOU

³¹ Austria passed and then repealed such a statute [cite]

³² Meidinger, Oesten and Elliott at 17 and 18. [Explain]

standing relationships with and influence on European government forestry ministries. The PEFC grew quickly and now has approximately 18 national members with another dozen in process.³³ In late 2003 the PEFC rechristened itself the Programme for the Endorsement of Forest Certification, thereby opening membership to non-European programs and laying claim to global reach.³⁴

Overall, although the actual number of forest certification programs and their relationships to each other remain subject to a surprising amount of uncertainty, it is clear that they are organized in two basic alliances. The first is the FSC system, which is most closely identified with transnational environmental NGOs but also has substantial numbers of business and social justice members. The second is the PEFC alliance, which is most closely identified with landowners and industry, but has increasingly sought to bring in other interests.

Other Certification Organizations

Both the FSC and the PEFC alliances maintain relationships with other certification organizations of various kinds. The FSC is part of the International Social and Environmental Accrediting and Labelling Alliance (ISEAL), a recently founded association of eight progressive labor and environmental certification organizations.³⁵ ISEAL's purposes include improving the standard-setting processes of its members and strengthening the governance and legitimacy of their programs.³⁶ ISEAL's strategy has been to accommodate and apply ISO processes, rather than to challenge them. The FSC also increasingly refers to and seeks to comply with ISO standard setting and certification protocols.³⁷ A important sister organization to the ISO, the International Accreditation Forum (IAF), is an international association of nationally based accreditation bodies among whose goals is to create a single international program of conformity assessment for its members. Although ISEAL and some of its organizations were earlier denied membership in the IAF (reportedly on grounds that they are international, rather than national organizations), the PEFC recently gained admission. This may turn out to be particularly

³³ http://www.pefc.org/internet/html/members_schemes/4_1120_59.htm [possibly list]

³⁴ Non-European members currently include programs in Australia, Canada (the CSA program) Chile, and Gabon. Countries with programs likely to receive future endorsement include Brazil, Gabon, Malaysia, and Russia. Id.

³⁵ Current members include includes the Fairtrade Labelling Organizations, the Forest Stewardship Council, the International Federation of Organic Agriculture Movements, the International Organic Accreditation Service, the Marine Aquarium Council, the Marine Stewardship Council, the Rainforest Alliance, and Social Accountability International.

<http://www.isealalliance.org/membership/founding.htm>

³⁶ <http://www.isealalliance.org/about/index.htm>

³⁷ [List and cite]

important because the European Union requires accreditation organizations to have IAF membership to be considered competent in the EU.³⁸

Related Interest Groups

Depictions of institutionalized forest certification programs sometimes lose sight of the fact that their existence is closely tied to the efforts of parties who may not play official roles in the certification process. The rise of certification was partly driven by a number of social movement activities. Already mentioned was the tropical timber boycott. In addition, many large forest products corporations have been subject to various demonstrations, lawsuits, shareholder resolutions, media campaigns, national regulatory initiatives, and the like, which they typically see as posing risks that should be controlled.

Among the most important but little known actors in this arena have been the “forest campaigners” who pressure large forest products organizations to embrace certification. In one mode they have carried out large public media campaigns. Perhaps the most important of these were the efforts of the Rainforest Action Network (RAN -- not to be confused with the Rainforest Alliance) to persuade Home Depot Corporation, which reportedly accounts for 14% of the retail forest products trade,³⁹ to embrace FSC certification. RAN held a series of well dramatized and publicized demonstrations at Home Depot stores seeking to associate the company’s brand with environmental destruction. After eight years and approximately 600 such actions,⁴⁰ Home Depot agreed to promote FSC certification and to buy all of the FSC certified products it can find.⁴¹ Legend has it that when RAN turned its attention to the second largest US retailer, Lowe’s, only two phone calls and one meeting were necessary to achieve a similar result.⁴²

Forest campaigners also carry out covert operations. These typically involve visiting sites of tropical forest destruction and tracking the illegally logged timber to retailers in developed countries. Once the forest campaigners have documented the trail from devastated forest to Northern retailer (typically with photos and video cameras, and sometimes with invoices obtained through dumpster diving) they visit the retailer’s

³⁸ [get cite]

³⁹ Cite [WSJ article?]

⁴⁰ RAN cite

⁴¹ HD policy cite

⁴² This has been mentioned as a fact by several interviewees, although documentation has not been found.

corporate offices and threaten to publicize its complicity in the destructive practices. Reportedly, such visits have led a number of corporations to embrace certified products.⁴³

Global Networks

Although global networks are ordinarily viewed as vehicles rather than sources of action, they play a more affirmative role in forest certification. The actors described above depend heavily on preexisting global networks – most importantly transnational business networks and product chains.⁴⁴ These networks can be understood as actors because they have built-in directions and expectations. The commitments of trade networks to profits and economic protection of their members are dynamic directions that can activate them in favor of certification. And once a major network actor such as Home Depot is committed to certification, it can push other network members in the same direction. Similarly, global NGO networks established for a variety purposes work as allies for promoting certification because their purposes can be tied to those of certification. Both types of networks draw on far flung allies. Certification connects them so that the common NGO invocation – “the whole world is watching” – becomes a plausible contention.

Governments

Governments are often portrayed as non-actors in forest certification, and indeed their frequent inability to act in concert may have been a precondition to the rise of certification. In fact, however, governments are involved in certification in a variety of ways. First, the threat of increased regulation in the absence of effective non-governmental regulation has often been a background factor in the acceptance of certification. Second, certification programs have generally sought to garner a certain amount of government and public support by promoting conformance to existing laws. Third, many of the non-FSC processes draw directly on government resources, such as criteria and indicators produced by intergovernmental organizations, and sometimes involve fairly direct interactions with governments. Thus, the PEFC, CSA, and LEI involved much government influence, albeit limited roles for government officials in actual certification processes. Even in the FSC system, some national working groups involve government participants.⁴⁵

⁴³ Confidential interviews.

⁴⁴ Erika Sasser, *Gaining Leverage: NGO Influence on Certification Institutions in the Forest Products Sector.* In L. Teeter, B. Cashore, and D. Zhang, Eds., *Forest Policy for Private Forestry*, Oxon, UK: CABI Press 2002. [get published pages]

⁴⁵ Cites, e.g., Cameroun.

Recently, however, governments have become more directly involved in certification. Most strikingly, some governments have chosen to obtain certification of state owned and managed forests, perhaps implying that their own credibility or legitimacy might be enhanced by certification.⁴⁶ Second, a number of governments, particularly in Europe, have adopted certified forest products procurement programs, thus helping to create markets for certified products and lending further legitimacy to certification requirements.⁴⁷ Finally, a number of governments either make certification a requirement for producing commercial timber in their jurisdictions or treat certification as de facto compliance with applicable laws.⁴⁸ Certification standard setting processes also appear to have had considerable influence on the legal requirements of some governments.⁴⁹

Boundary Spanners

The many actors involved in certification programs communicate in many ways, often bilaterally or simply by observing each other. Recently they have also begun to meet in broad multi-program, multi-stakeholder *fora*. An important one of these is The Forest Dialogue (TFD). Headquartered and staffed at Yale University, and convened by respected environmentalist and industry figures, TFD holds periodic discussions of important issues in forestry.⁵⁰ Two have been held about forest certification in the past two years. The first involved about thirty [check] individuals from a broad array of perspectives, and the second about twice as many people. The effect of these meetings as well as TFD in general is difficult to gauge, but it seems likely to be important at least in creating personal relationships and working toward shared understandings among engaged individuals.

Summary

Forest certification in particular and forestry regulation in general is worked out through complex interactions among a multitude of governmental and extra-governmental actors and in multiple fora. It can

⁴⁶ Cites for Poland, Latvia, Bolivia, NY Adirondack Park, US Forest Service pilot project, etc.

⁴⁷ Cites, e.g., UK and German programs.

⁴⁸ Cites to Bolivia, Latvia, Poland, etc.

⁴⁹ Cites: Simula and Nussbaum, among others

⁵⁰ <http://research.yale.edu/gisf/tfd/index.html> According to the website, "The Forests Dialogue (TFD) is a group of individuals from diverse interests and regions that are committed to the conservation and sustainable use of forests. Through a shared understanding of forest issues from their own dialogues, members of The Forests Dialogue work together in a spirit of teamwork, trust, and commitment. They believe that their actions and relationships can help catalyze a broader consensus on forest issues and encourage constructive, collaborative action by individual leaders that will improve the condition and value of forests."

therefore be understood neither as a form of industry “self-regulation,” nor as a form of governmental regulation, but rather as a negotiated hybrid. Important negotiations take place with regard to several types of issues. The next section describes the primary institutional arrangements adopted by certification programs, some of which are coming to be taken for granted and others of which remain very much contested.

C. Institutional Building Blocks

Each of the forest certification programs outlined above draws upon and necessarily interacts with a received body of certification experience. Nongovernmental standard setting systems have evolved four common institutional components, two of which will seem obvious to legal scholars, and the other two quite logical. Most obviously, a certification system needs procedures for setting the standards to which enterprises are certified, and then for certifying that specific firms meet those standards. These are analogous to rule-making and licensing procedures in administrative law.⁵¹ In addition, most systems have developed methods for accrediting certifiers. These are often quite important, since a certification process must be accepted as credible if a certification program is to be effective, and that credibility may depend heavily on the credibility of the person carrying out the review. Finally and more recently, a number of certification programs have developed requirements for labeling specific products as deriving from certified operations. These are particularly important where there is a considerable distance between the production process and consumption. The following sections first discuss forest certification in terms of their rule-making, adjudication and enforcement mechanisms, and then characterize them in terms of some of the broader criteria of administrative law, including stakeholder participation, deliberation, transparency, expertise, and accountability.

II. Rule-Making

Administrative rulemaking is ordinarily structured by both substantive and procedural requirements, as well as by customary practices and modalities of various kinds. The same is true of forest certification.

A. Substance

Substantive requirements in traditional administrative systems are typically portrayed as deriving largely from statutes. But the statutes of state legal

⁵¹ Licensing is a kind of adjudication in American administrative law. Administrative adjudication apparently is often called simply administrative decision making in other systems, evidently to avoid confusion with procedures conducted by individuals denominated as judges. [follow up cites]

systems can provide only limited guidance for global certification systems, since they vary by country and are perhaps implied to be inadequate by the very existence of certification programs. Yet there exists a transnational discourse on sustainable forest management (SFM) which provides much of the substantive framework for certification programs. When the FSC was founded the concept of sustainable management had long been the guiding credo and primary legitimating ideal of forestry. As a focal concept, it had undergone a long term development, much of which had been incorporated in the norms and sometimes the laws of forestry. In essence that development had gradually expanded the criteria which forest managers must take into account from (1) ensuring a steady flow of timber to (2) protecting the range of ecological functions, components, and services to (3) protecting the many societal interests tied to the forest (though not always in this order). These criteria are often in some conflict with each other, since preserving ecological functions may not be the best way to maximize timber yields, and since preserving societal interests may also be at odds with timber production or ecological preservation.⁵²

The FSC took an aggressive, socially and environmentally protective stance in promulgating its guiding Principles and Criteria. As noted above, they include requirements for the protection of indigenous peoples, workers, communities, and the environment. The FSC can thus be understood as seeking to impose standards which incorporate concerns well beyond the common purview of profit maximizing corporations. While this is similar to many state-based regulatory programs, which seek to curb selected negative externalities of economic activity, the FSC program is unusually ambitious in that it seeks to combine economic, environmental, and social regulation. These concerns would typically be divided among several state agencies, if indeed they were addressed at all.

The rigorous requirements of the FSC program played an important role in provoking the industry response that ultimately led to the PEFC alliance of programs. First out of the box was the American Forest & Paper Association, which produced a rather weak standard, but made it a requirement of continued membership in the Association. The SFI principles simply required member firms to commit to practicing and promoting sustainable forestry, improving long term forest health and productivity, managing lands 'of special significance' in appropriate ways, and continuously improving their practices of forest management.⁵³ Those

⁵² Heiner Schanz, *Sustainable Forest Management, Ecological Forestry*, 2004 [get full cite]; Jeffrey Romm, *Sustainable Forestry: An Adaptive Social Process*, in G.H. Aplet, N Johnson, JT Olson and VA Sample, eds, *Defining Sustainable Forestry*, at 280-293. Washington: Covelo.

⁵³ Meidinger 1999 at 206-207

principles were given somewhat more detail in a series of objectives and performance measures, but were still extremely loose and subject to interpretation. The original SFI standard contained no requirements regarding workers, indigenous peoples, or local communities.⁵⁴

The Canadian Standards Association also produced a standard in the same time period, arguably somewhat more demanding than the AF&PA's, but also considerably more friendly to the industry than was the FSC standard. The PEFC and its member programs also produced more industry friendly standards, but accepted the legitimacy of including labor and human rights concerns by adopting a definition of SFM originally developed by the intergovernmental Helsinki Ministerial Conference on the Protection of Forests in Europe in 1993:

“the stewardship and use of forest lands in a way and at a rate, that maintains their biodiversity, productivity, regeneration capacity, vitality and their potential to fulfill now and in the future, relevant ecological, economic, and social functions, at local, national, and global levels, and that does not cause damage to other ecosystems.”⁵⁵

Of course the above definition, while affirming environmental, economic, and social responsibilities of forest managers, leaves much room for debate about their content. And indeed very intensive debate has occurred both within and among certification programs. The major issues have included the following:

- limits on clear felling
- duties to protect old growth forests
- duties to protect endangered species and habitats
- the relationship between natural forests and plantations
- limits on use of chemicals and genetically modified organisms
- duties to workers
- duties to local communities
- duties to indigenous peoples

It is neither possible nor important to detail the evolution of the debate and standards in this paper. It suffices to note that, while there are still considerable differences between the industry-oriented programs and the FSC, there has been a significant convergence, largely in the direction of

⁵⁴ The SFI's explanation at the time was that these were matters of other policies and of state and federal law.

⁵⁵ PEFC: http://www.pefc.org/internet/resources/5_1177_286_file.1038.pdf; MCPFE Helsinki cite

the FSC standards.⁵⁶ Forest certification rulemaking processes have thus been a central domain for both contesting and defining the meaning of sustainable forest management. At a relatively high level of abstraction the term now seems to embody several key principles, some explicit and others implicit. First, forestry enterprises have duties to protect both environmental functions and dependent social groups, such as indigenous peoples, local communities, and workers. As will become more apparent below, these are defined in terms of both substantive and procedural elements. One important emerging tendency is that forestry firms seeking certification are beginning to take responsibility for fostering local civic and democratic institutions in developing and transitioning societies.⁵⁷ Second, a defining, if often unstated and unchallengeable, purpose of forestry and forest certification is to support effective and functional global markets. Such markets require local institutions capable of stabilizing forestry and protecting property rights. Forest certification programs therefore must mesh with and promote effective local and national social control institutions. One of the best indicators of this proposition is the complete agreement among certification programs and governments that a critical agenda is to combat ‘illegal’ logging.

The governing substantive principles of forest certification thus include local environmental and social responsibility combined with protected property rights, stable local institutions, and effective markets. One can legitimately read these in either a ‘weak’ or a ‘strong’ way. The weak reading would suggest that the shared substantive norms are so vague and general as to provide little meaningful guidance, and so toothless as to provide few effective checks on the relentless pressures for corporate profits. The ‘strong’ reading would suggest that the principles reflect a significant movement toward a shared global understanding of proper forest management, and that this understanding could significantly affect practices if implemented through effective institutions. Not surprisingly, much of the debate on these matters has in fact taken the form of a debate about institutional arrangements. Indeed the governing substantive principles are almost always packaged with a set of preferred institutions. The underlying assumptions are not merely that the chosen institutions will implement the principles, but that they will play a role in determining the future contents of the principles.

⁵⁶ Cites: Cashore; Meridian Institute, Humphries, etc.

⁵⁷ Tysicachniouk and Meidinger (2005); Cashore, Gale, Meidinger, and Newsom, *Confronting Sustainability* (2005)

B. Form

The FSC's certification standards are relatively prescriptive and moderately specific. The indigenous rights and environmental protection Principles, for example, provide as follows:

Principle #3: Indigenous peoples' rights

The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.

...

Principle #6: Environmental impact

Forest management shall conserve biological diversity and its associated values, water resources, soils, and unique and fragile ecosystems and landscapes, and, by so doing, maintain the ecological functions and the integrity of the forest.⁵⁸

These principles are further specified in through 'criteria' such as the following:

...

3.3 Sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers.

3.4 Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.

...

6.2 Safeguards shall exist which protect rare, threatened and endangered species and their habitats (e.g., nesting and feeding areas). Conservation zones and protection areas shall be established, appropriate to the scale and intensity of forest management and the uniqueness of the affected resources. Inappropriate hunting, fishing, trapping and collecting shall be controlled.

...

⁵⁸http://www.fsc.org/keepout/en/content_areas/77/71/files/FSC_STD_01_001_FSC_Principles_and_Criteria_for_Forest_Stewardship_2004_04.PDF

6.6 Management systems shall promote the development and adoption of environmentally friendly non-chemical methods of pest management and strive to avoid the use of chemical pesticides. World Health Organization Type 1A and 1B and chlorinated hydrocarbon pesticides; pesticides that are persistent, toxic or whose derivatives remain biologically active and accumulate in the food chain beyond their intended use; as well as any pesticides banned by international agreement, shall be prohibited. If chemicals are used, proper equipment and training shall be provided to minimize health and environmental risks.

...

The FSC principles and criteria are further detailed in area-specific national and regional standards, of which there are dozens.⁵⁹ The Northeast Regional standard, for example, further defines criterion 3.2 as follows:

3.2.a. Forest owners or managers identify and contact American Indian groups that have current legal or customary-use rights to the management area, and invite their participation in jointly planning forestry operations that affect their resources.

3.2.b. Forest owners or managers incorporate safeguards in management planning to ensure that management actions do not adversely affect tribal resources, either directly or indirectly.

For example:

- Forest operations protect spawning and rearing areas for migratory fish harvested by Native tribes and bands.*
- Forest operations maintain populations of culturally important species, such as moose, that are harvested on nearby tribal lands.*
- Forest operations protect other resources identified through consultations described in 3.2a.*

Although the full sets of standards are much more extensive, the above examples provide enough material for the administrative lawyer to discern several things. First, these provisions could easily be the product of a government administrative agency – if one had ever been given such far-

⁵⁹ National standards are prepared for countries in which forestry conditions are comparable across areas, and regional standards for larger countries with significant variations among regions. See for example, the US regional standards at <http://www.fscus.org/documents/index.php>. There is an ongoing discussion in the FSC about how to define geographic areas appropriate for individual standards.

reaching jurisdiction. Second, although they are prescriptive, the standards leave much room for discretion. The certifier, like the government inspector, must work out their meaning on the ground. This is all the more the case because there are tensions among and within the standards. The Northeast Regional standard regarding customary community use rights makes one of them quite explicit:

2.2.a. The forest owner or manager allows customary tenure and use rights of the forest to the extent that they are consistent with the conservation of the forest resource and the objectives as stated in the management plan Use rights that are not legally recognized or enforceable are subject to implied or expressed consent of the landowner.

In general, the requirements of industry-based programs tend to be both more limited and more discretionary. The SFI standard most comparable to FSC Principle 6, for example, provides as follows:

4.1.4 Objective 4. Manage the quality and distribution of wildlife *habitats* and contribute to the *conservation of biological diversity* by developing and implementing *stand- and landscape* level measures that promote *habitat* diversity and the *conservation* of forest plants and animals including *aquatic fauna*.

4.1.4.1 Performance Measures

4.1.4.1.1 *Program participants* shall have *policies* to promote habitat diversity at *stand* and *landscape* levels.

Core SFI Indicators:

1. Written *policy* to promote wildlife *habitat* diversity, forest types, ecological or natural community types and the *conservation of biological diversity*.
2. Programs to protect federally listed threatened and endangered species.
3. Plans to locate and protect known sites associated with viable occurrences of *critically imperiled* and *imperiled species* and communities. Plans for *protection* may be developed independently or collaboratively, and may include *Program Participant* management, cooperation with other stakeholders, or use of easements, conservation land sales, exchanges or other conservation strategies.

4. Training or education for appropriate personnel in endangered species identification and *protection*, and *critically imperiled* and *imperiled species* and communities.
5. *Policy* or plan that sets criteria for *stand* level wildlife *habitat* elements to be retained (e.g., snags, mast trees, down woody debris, den trees, nest trees, etc.).
6. System to achieve continual compliance with applicable regulatory requirements.
7. *Available regulatory action information* demonstrates a commitment to legal compliance.⁶⁰

Core indicators have the following status:

Core indicators are those indicators that are integral to conformance with the SFI S[standard]. All *Program Participants* must address *core indicators* either by demonstrating conformance with the indicator or, with the concurrence of the verifier, substituting another indicator that more appropriately provides evidence of conformance with the *performance measure*.

The SFI system is more encompassing than this provision alone may indicate, since it is one of several.⁶¹ Moreover, the SFI standards have gradually become more prescriptive through successive revisions. Indicators have gradually been converted from advisory to compulsory, as the passage above suggests. However, the SFI standard still reflects a longstanding division about the appropriate institutional structure of certification programs. On the one side have been proponents of FSC-style ‘performance standards’ and on the other those of ‘management system’ standards. Performance standards require the achievement of concrete conditions in the forest or in human organizations related to the forest. Management system standards focus on defining management responsibilities and processes within forest management organizations.

The font of management system standards is the ISO, and most directly the ISO 14001 environmental management system (EMS) standard mentioned above. The basic idea is to require the forest management organization to define and implement a specific set of responsibilities and processes for dealing with environmental and related issues. EMSs typically include arrangements for (1) ascertaining the organization’s environmental effects, (2) planning how to increase the positive ones

⁶⁰ SFI website

⁶¹ See [list others]

and/or decrease the negative ones, (3) achieving ‘continuous improvement’ and (4) monitoring and reporting on performance. The underlying argument for EMSs is that harnessing the planning and control capacities of the forest management organization to the goal of improving environmental performance may achieve better results in a dynamic and uncertain environment than would reliance on fixed performance standards.⁶²

Although the mix varies, today’s forest certification programs contain elements of both types of standards. There is some obvious intelligence in using environmental management systems, because they harness the regulated firm’s internal procedures to the purposes of the regulatory program. And this harnessing includes not only carrying out predetermined objectives, but thinking about what the objectives should be and how best to achieve them. The difficulty is that it also allows for considerable dispute about the appropriate locus of policy making authority. In a pure EMS system, the maximum possible amount of policy making authority is retained in the firm. In a pure performance standard system, policy discretion by firms is minimized. Although the issue is still vigorously debated, it seems clear that over the past several years both alliances have accepted the need for a mixed system, where deliberation and policy making occur at both levels.

C. Federalism

The discussion of performance versus environmental management system rules is one indicator of the difficulty of determining the appropriate level of centralization for making various kinds of policy decisions. The second indicator is the relationship between global, national, and sub-national standards in the various certification programs. The FSC is relatively centralized, starting with a global principles and criteria and then scaling down to national and sub-national locales. The industry-based programs are formally structured at the national level and federated into international arrangements, although the PEFC is probably better understood as having been an international European arrangement from the outset. In practice the differences between the programs seem to be declining, as the FSC becomes increasingly attuned to dealing with local variation⁶³ and the PEFC becomes increasingly committed to producing coherent, globally plausible standards.

Both alliances face considerable challenges of “harmonization,” first of standards for relatively similar environments such as the northeast US and

⁶² See e.g., Coglianese and Nash 2001

⁶³ Cite new structure and review procedures.

the maritime provinces of Canada, and then of standards for places that vary enormously. Thus, for the FSC some of the most obvious challenges involve persuading Northern consumers that timber produced by workers in developing countries, who may be using unshielded tools and wearing no protective clothing, is really the equivalent of timber produced by European workers using sophisticated machines designed for safety and wearing protective gear. Ultimately, the standard setting processes in each program must deal with such problems and create plausible normative understandings of what comparability means.

D. Procedure

The certification universe has seen considerable elaboration and convergence of rule making procedures in recent years. All certification programs claim to be participatory and transparent. The FSC started out with relatively elaborate structures and procedures for rulemaking. Not only does it have the tripartite ostensibly representative legislature of the General Assembly, but it also generally subjects new rules and policies to public notice and comment procedures analogous to those of administrative agencies in most modern governments.

The programs in the PEFC alliance have gradually followed suit. While the SFI standards originated as products of staff members working with member companies and consumer focus groups, they now go through a web-based notice-and-comment procedure with ultimate promulgation by a multi-stakeholder governing board made up of five AF&PA members and ten outsiders chosen from academia, state and local agencies, professional associations, and environmental groups.⁶⁴

Formal rulemaking in the PEFC is done at the national level, although national programs are expected to fall within the general criteria of sustainability developed by the Pan-European Ministerial Conferences. The standard procedure for each country is roughly as follows: (1) an existing forest owners' organization invites other national organizations representing 'relevant and interested parties' to constitute a 'national governing body for the program;' (2) the national governing body constitutes a forum, again inviting all relevant parties (e.g., forest owners, trade unions, NGOs), and then develops a certification program appropriate to that country; (3) the resulting program is submitted to the PEFC, which appoints external consultants to prepare a report assessing the proposed program under PEFC criteria; (4) the consultant reviews the

⁶⁴ Cite. List members and appointment process.

program and invites comments from ‘all interested parties,’⁶⁵ and then makes a recommendation to the PEFC, which (5) ultimately decides whether to endorse the program.

In sum, all of the programs now employ notice and comment procedures, and provide for at least some stakeholder involvement. The PEFC processes are still ultimately controlled by landholder and industry groups, who choose the additional stakeholders who are included in the decisional process. The FSC at least requires a tripartite structure, but it should be noted that the FSC still exerts some control on who can join in that an applicant must be supported by at least two existing members.

The effort to define appropriate rulemaking processes for extra-governmental standard setting is still very much in process. The ISEAL Alliance recently developed a ‘code of good practice’ for social and environmental standard setting which it presumably believes will contribute to the legitimacy of certification program standards.⁶⁶ Many of the guidelines sound as if they were products of government agencies – and indeed, the guidelines are written to be equally applicable to governmental and non-governmental processes. Standard setting processes should follow documented procedures, consider comments on the need for and objectives of the standard, allow two rounds of public comment on proposed standards, keep a record of the standard setting process, and produce a written, publicly available synopsis of how each material issue raised in the comments was addressed in the standard.⁶⁷ Except for the multiple comment period requirements, the guidelines could have been taken directly from the US Administrative Procedure Act.

Many government agencies, however, operate under delegated authority from representative democracies. Extra-governmental rulemaking processes generally do not. Seeking to draw upon and extend directions drawn from ISO and WTO guidelines,⁶⁸ the ISEAL code addresses this

⁶⁵ Solicitations for comments on proposed Brazilian, Slovak, and Estonian endorsements are posted on the PEFC website at this writing. <http://www.pefc.org/internet/html/>

⁶⁶ ISEAL Code of Good Practice for Setting Social and Environmental Standards. P004 – Version 3 – January 2004.

⁶⁷ ISEAL Code of Good Practice, section 5.

⁶⁸ ISO/IEC Guide 2:1996. Standardization and related activities - General vocabulary.

ISO/IEC Guide 59:1994. Code of good practice for standardization.

ISO/IEC Guide 14024:1999. Environmental labels and declarations - Type 1 environmental labelling - Principles and procedures.

WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)

WTO Agreement on Technical Barriers to Trade (TBT) Annex 3: Code of good practice for the preparation, adoption and application of standards.

WTO Agreement on Technical Barriers to Trade (TBT) Second Triennial Review Annex 4:

Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the Agreement.

problem by mandating that standard setting “strive for consensus among a balance of interested parties.” Consensus is defined by the ISO formulation:

3.1 **Consensus:** General agreement, characterized by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process seeking to take into account the views of interested parties, particularly those directly affected, and to reconcile any conflicting arguments.

NOTE - Consensus need not imply unanimity.⁶⁹

Interested party is defined liberally by ISEAL as “any person or group concerned with or directly affected by a standard.”⁷⁰ Furthermore, the ISEAL standard provides that “[s]tandard setting organization shall ensure that participation reflects a balance of interests among interested parties in the subject matter and in the geographic scope to which the standard applies”⁷¹ and that “no group of interested parties can dominate nor be dominated in the decision-making process.” Thus, in this vision a rule is legitimated by the participation in a consensus decision process of all who are affected or concerned. This is not yet the practice of all forest certification programs, but it may reflect the underlying conceptual pull of the concept of participation with which they are contending. The idea is that a standard will be good, and presumably legitimate, if it “reflects the priorities of interested parties.” While there are significant theoretical problems with this concept of the public interest, it is difficult to argue that interested parties should not be heard, and it is also difficult to argue that a standard which receives the assent of all affected and concerned parties is bad. Finally, of course this vision has had a significant influence on concepts of governmental decision making as well, perhaps because delegations of authority from elected bodies combined with expertise is not always enough to produce well accepted standards.

III. Adjudication and Enforcement

The significance of forest management requirements is largely a function of the degree to which they are put into practice on the ground. Given the incentives of firms to minimize costs, certification programs must have methods for judging and enforcing compliance. These are conventionally broken down into three functions: certification, accreditation, and labeling.

⁶⁹ ISO/IEC Guide 2: 1996 [get full cite]

⁷⁰ ISEAL Code Section 3.2. This is a relatively broad definition. Some standard setting organizations limit the term to those who are directly affected by standards. ISO 14004 opted for the broader definition, however. [cites]

⁷¹ ISEAL Code Section 7.1

A. Certification

Certification is the central adjudicatory process of forest certification. Certifying good forest management is the main reason certification programs exist. Certification programs must persuade observers that they reliably distinguish good forest management from bad. There has been much debate among and within programs about the institutional arrangements necessary to make this process work. Some of the issues focus on procedures, others on the qualifications of certifiers. The typical procedure as instituted by the FSC involves the following steps:

- (1) preliminary discussions between the potential applicant and one or more certifiers, including indications of what changes the applicant likely would have to make to achieve certification;
- (2) submission of an application to a certifier, including documentation of the applicant's operation;
- (3) negotiation of a budget and other contractual terms of the assessment, possibly including a 'scoping' process;
- (4) an on-the-ground field assessment, including:
 - (a) review by an interdisciplinary team that would typically be made up of three individuals, including forestry, biology, and social science experts.
 - (b) consultations with local stakeholders;⁷²
- (5) preparation of a draft assessment report by the certifier;
- (6) peer review of the report by two or three independent specialists;
- (7) discussion of possible terms and conditions of certification with the applicant;
- (8) a final certification decision (see below);
- (9) issuance of a certificate, processing of final payments, further certification contracts, press releases, etc; and
- (10) random annual follow-up audits.

Certifiers have several options in reaching a final decision on certification: (1) approve the application unconditionally; (2) grant provisional approval on condition that specified "corrective actions" are taken within a certain time; (3) indicate that approval will be granted after certain "preconditions" are met; or (4) deny the application. Certificates ordinarily last for five years, after which time a thoroughgoing reassessment takes place prior to renewal. The bulk of FSC certification proceedings seem to result in the second option: provisional approval with corrective action requirements.⁷³

⁷² Most stakeholder consultation processes to date have been developed by certification organizations. The FSC is working to systematize information on and approaches to local consultation.

⁷³ [Cite; check]

Several things about the FSC process deserve note. On the positive side, it requires an on-the-ground inspection as well as consultation with local stakeholders. It thus combines the often separate permitting, hearing, and inspection processes that might typify, for example, the granting of a discharge permit under the US Clean Water Act. It also involves probably more public participation than the typical comment process in a discharge permit, since the certifier is expected to seek out public comment, rather than simply accept it. Although the FSC procedure was initially the only one to require local stakeholder consultations, the PEFC has very recently changed its policy to require local consultations as well, although what this will mean in practice remains to be seen.⁷⁴

On the other hand, although required by the FSC to be a ‘third party’⁷⁵ – i.e., neither an employee of the firm, nor one of its customers or suppliers – the certifier is selected and paid by the organization seeking certification. This poses a problem which can be seen either as a vague tendency to favor the applicant where standards are indeterminate or as a structural risk of corruption, depending on one’s perspective. The FSC attempts to deal with this problem by reviewing selected accreditation decisions of certifiers, with the option of suspending or revoking their status as certifiers if problems occur. Although there are no formal procedures for accepting complaints about certifiers [verify], it seems apparent that the FSC Secretariat would respond to serious allegations of problems. There are real questions, however, whether this process is adequate to handle the pervasive benefit-of-the-doubt dynamics that are likely to arise. The SFI and PEFC also face this problem, but try to distance themselves from it in different ways. For the PEFC, it is up to the national certification program to decide how to handle it, and they do so in a variety of ways, although none very rigorously based on information gathered to date. The SFI does not address it directly, but does provide a system through which loggers can report “inconsistent practices” to the Sustainable Forestry Board in a confidential manner.⁷⁶

The tendency of certification programs to repose so much trust in certifiers is somewhat difficult to explain. Some of it probably has to do with a general technocratic confidence in expertise, together with the particular history of the forestry profession in gathering a high level of trust to itself

⁷⁴ PEFC press release, April 12, 2005.

http://www.pefc.org/internet/html/news/4_1154_65/5_1105_1174.htm

⁷⁵ Although the FSC has required third party verification from the beginning, the other programs made it optional to various degrees. There has been a long evolution among them encouraging and gradually urging or requiring third party verification, but this has been largely tied to labeling requirement, discussed below.

⁷⁶ <http://www.sampsongroup.com/sfi/inconsis.htm>

over many generations. Such reliance seems likely to prove more fragile in forest certification than in some other types of private certification programs, however, in that buyers of certified products are less likely to discover poor certification results than would be the case where the certified product in fact performs poorly in the use to which it is put.

Additionally, the work products of the certification process belong to the applicant after the certification decision is completed. The typical public product of the certification is simply a yes/no answer: the enterprise is either certified or not. Thus, the “administrative record” of the process available to the public is little more than the outcome.⁷⁷ Even here it is difficult to ascertain which companies may have been denied certificates, although this is reportedly a rare occurrence due to the pre-assessment review process. There are movements toward reform in this area. The PEFC recently announced that it has changed its policy to require that a summary of each certification audit be made available to the public.⁷⁸ Both this change and the PEFC’s decision to require local stakeholder consultations were driven by the UK government’s purchasing policy criteria,⁷⁹ which requires such policies for eligibility for government purchasing. [Add note on limited public availability of government licensing proceeding records]

Accreditation

Given their heavy reliance on certifier expertise and credibility, much debate among forest certification programs has focused on what qualifications certifiers should have and how they should be accredited. The FSC conducts its own relatively intensive accreditation processes, and currently lists 15 accredited certification organizations.⁸⁰ As noted above, it also reviews the work of certifiers; on several occasions it has suspended the accreditation status of certifiers.⁸¹ The FSC recently reviewed its overall accreditation program to bring it in line with ISO protocols.⁸² Most other forest certification programs rely directly on general ISO affiliated programs. The SFI, for example, requires that the leader of any third-party verification team be certified as an ‘environmental management systems lead auditor’ under the appropriate ISO affiliated

⁷⁷ The FSC list of certificates, for example, contains contact information for the company, date of issuance, amount of land covered, tree species involved, whether ownership is public or private, and whether the land is managed in a ‘natural’ or ‘plantation’ form. <http://www.fsc-info.org/>

⁷⁸ Press Release, April 12, 2005, supra note

⁷⁹ [Get cite]

⁸⁰ FSC website

⁸¹ Cites

⁸² FSC Accreditation Process for Applicant Certification Bodies, 18 January 2004.

http://www.fsc.org/keepout/en/content_areas/77/35/files/ABU_GUI_10_111_final.pdf

national accreditation body,⁸³ that a professional forester serve on each team, and that the team include expertise in wildlife ecology, silviculture, forest hydrology and operations (not necessarily in separate individuals).⁸⁴ [Detail evolving PEFC policy]

Labeling

Because forest certification programs are centered on the idea of certifying the propriety of wood products to downstream market participants, their policies for labeling those products have become increasingly important. There are two basic dimensions to these policies. The first involves the need to distinguish certified from uncertified wood through what are often very complex production chains. These have led to various ‘chain of custody’ policies⁸⁵ which need not be detailed here. The second has to do with the claims that are made on the products. These are dealt with through increasingly detailed and stringent controls on the use of program-based labels, and are structured and enforced largely through intellectual property law. Each forest certification program has developed a logo or set of logos to signify the status of the product within its program,⁸⁶ as well as detailed policies with regard to its use. The FSC’s logo evidently set the framework for the rest. Recently, logos have become increasingly complex, with the PEFC, for example, having several different versions depending on the claim being made.⁸⁷ Like many other elements of the programs, these logo policies seem to be gradually converging, perhaps in part because they operate in the same world of trademark law.

B. Enforcement

Because certification programs are self-defined as voluntary, one would not be surprised to find that they have few enforcement mechanisms, and on the surface this seems to be the case. In fact, however, this is a case where there is more to enforcement than initially meets the eye. The

⁸³ Examples include the American National Standards Institute/Registrar Accreditation Board and the Canadian Environmental Auditing Association. This requirement only becomes effective one year after the relevant national accreditation body accepts SFI audit experience as appropriate for meeting its experience requirements. [cite; check for currency]

⁸⁴ The SFB does have a ‘verifiers accreditation subcommittee,’ however, and it is possible that more requirements will be introduced. [cite]

⁸⁵ Describe and cite the various positions.



⁸⁶

⁸⁷ PEFC logo rules

formal enforcement mechanisms of most forest certification programs are limited to revoking the certification itself (or, in the case of the Sustainable Forestry Initiative, revoking the membership of the company in the American Forest & Paper Association as well). In fact, however, the enforcement system is more extensive. First, as described above, certified forestry companies are engaged in extensive and increasingly well controlled product chains. If their customers are committed to buying certified products, loss of a certificate is likely to be accompanied by loss of business. This has occurred in several cases. Not only have major retailers committed to certified carrying certified products, they are under steady pressure to do so. The Forest Campaigners described above regularly scan the forest products trading system for vulnerable targets – and the targets know this, much as they may resent it. Finally, the multiple institutionalization of forest certification seems to be developing its own momentum. The further the forestry industry goes down the road of certification, and the more institutionalized its direction becomes in the various ways described above, the less likely it is to reverse course.

IV. Preliminary Assessment

The system of global forestry regulation described in preceding sections has been built with very little direct involvement by state or interstate administrative agencies. Yet it operates a sophisticated, evolving, and rapidly expanding set of administrative regulatory institutions. So similar are they to their better known state-based cousins that they virtually cry out for assessment according to the received criteria of administrative law. This analysis involved is not likely to be one way process, however. Although it is important to apply the received criteria of administrative law to these emergent institutions, it is equally important to glean lessons from them that can be taken back to the analysis of traditional administrative institutions. This section is a preliminary attempt at such an analysis.

Many criteria are regularly used to assess administrative institutions. Traditional ones in American legal scholarship include accuracy, fairness, effectiveness, efficiency, public acceptability, and fidelity to law, as well as somewhat more conceptually intricate ones such as accountability, responsiveness, democracy, and legitimacy. Most of these criteria are intertwined to some extent, seeming separable only at very abstract levels, and can therefore be mixed and matched in various ways as applied to empirical phenomena. The major questions about extra-governmental regulatory institutions to date seem to revolve around three basic issues: their effectiveness, their accuracy or reliability, and their legitimacy, and the discussion below is organized in terms of them. For

reasons of theoretical flexibility, however, the discussion of legitimacy is framed in terms of the criterion of accountability.

A. Effectiveness

Much scholarly discussion of forest certification to date has concentrated on the question of effectiveness. Boiled down to its essentials, the conventional scholarly wisdom has been that forest certification is unlikely to work or to persist. The simplest version of this thesis has focused on the fact that there is notably little demand among retail consumers for certified forest products (although it is slowly growing). What demand there is becomes miniscule when willingness to pay is considered. And yet, forest certification is spreading rapidly, and engaging and structuring a growing share of the world's forestry industry. Moreover, it is not just spreading without affecting practices. Most informed researchers seem to agree that forest certification is having significant effects both on the normative frameworks of the forestry world and on the actual practices of forestry operations – not all of them, certainly, but a growing proportion of them. Its regulatory effectiveness has a long way to go, but achievements thus far are becoming undeniable.

This is not the place to expound on why consumer based economic models of regulatory institutions seem to come up so short in the case of forest certification. Indeed, it is not the place to develop a thoroughgoing explanation of the rise of forest certification *per se*. But, in order to assess the implications of forest certification it is necessary to offer at least a basic theory of why it has been so effective thus far. The most obvious way to do this is simply to make explicit the theory that is implicit in the argument thus far. Essentially, it is a legal institutional theory, but one of a particular kind. Unlike many functionalist institutional theories, the argument here accords a moving role to normative vision. The rise of forest certification was driven by social movement actors with a vision of, to put it in a slightly hyperbolic way, “the just forest.” This is a forest in which basic ecological functions are protected, in which workers and forest dependent communities are sustained, and which can sustain itself in economic transactions with the world economy. It is the expansive vision of sustainable forest management discussed above. This vision has been successful for two basic reasons. First, its proponents have packaged it in conventional, widely acceptable standard setting institutions. Second, they have used existing power structures, particularly global trading networks, to leverage those institutions into place. It is important to stress, however, that they have been very careful in choosing their enemies, and have tried to make peace with the global economy wherever possible. Functional variables therefore also play a powerful role in explaining institutional adoption.

The continued effectiveness of the forest certification system will depend heavily on its ability to learn and adapt to changing conditions and values. Its basis in a particular normative vision may make it vulnerable on this count. On the other hand, the intense competition and jockeying among certification programs and governments seems likely to promote adaptation for some time to come. The rapid flows of information and broad multi-stakeholder dialogue may also be valuable mechanisms of adaptation. At the firm level, finally, the EMS commitment to continuous improvement may also lend dynamism.

B. Reliability

To say that a regulatory system is effective in shaping the objectives and behavior of economic actors is not necessarily to say that it is a form of good regulatory administration. Modern administrative systems are expected to make reliable decisions – meaning impartial, accurate, and consistent ones. Because these criteria are virtually impossible to assess on their own terms in most real world situations, administrative scholars generally rely on institutional proxies to address them. Traditionally, these have included the use of independent experts, the maintenance of official neutrality, and the availability of review and appeals mechanisms. By these standards the forest certification system as it exists today can be seen in either a positive or a negative light.

On the negative side, there are of course competing systems with inconsistent and contested standards. Thus, one certification mark is not the equivalent of another and one certified forest product may have quite a different environmental and social pedigree than another. This is not a devastating problem, since the marks are different and information is readily available on their meaning. Moreover, a general understanding of the relative status of the marks could develop over time. Even within certification systems, however, there are reasons for concern. While all of the programs rely on experts, and there is no reason to think that the experts are less intelligent or well educated than they would be if they worked for state agencies, they are chosen and employed by the firms seeking certification, rather than by a state agency. This has the advantage of removing the costs from the public treasury, but involves real risks of certifier bias and inconsistency. The seriousness of this problem is difficult to gauge at present. Certification programs seem confident that it will not undermine their credibility. But the basis of their confidence is unclear. To the degree that they are simply mimicking the practices of traditional technical standard setting programs, they may be misguided. In most technical certification processes problems of functionality are likely to emerge if substandard products are certified. The poor work will be thus

be discovered and the party needing certification is likely to find a different certifier. This is not the case for forest certification; a wood product is likely to serve its function equally well whether it was produced through sustainable forest management or not.

On the other hand, the larger competitive and political dynamics of the forest certification world may serve to reduce the risks of certifier bias somewhat. Many actors have interests in pointing out substandard certifications, and indeed have done so quite loudly in a number of cases.⁸⁸ The programs also have some internal review processes that will catch at least some problems, such as the FSC's auditing program and the SFI 'inconsistent practices' reporting system. There are also other dispute resolution possibilities, but on the whole they are relatively limited and difficult to pursue. [elaborate] The availability of these procedures seems likely to remain quite limited given the pressures on certification programs to keep down costs.

C. Accountability

Accountability has emerged as a central term in discussions of non-conventional regulatory institutions. There may not be a simple explanation for this development, but I suspect it has to do in part with a growing discomfort with the term legitimacy. Legitimacy was once a genealogical term for most legal scholars: administrative policy and decisions were legitimate if they could be attributed to a legitimate state.⁸⁹ Scholars could then concentrate on the practical business of how close the linkage of administration to state policy should be and how it could be maintained. Legal scholars have been open-minded enough to acknowledge that administrative regulation without clear ties to state legitimacy might conceivably still be legitimate somehow, but have not been prepared to carry the heavy normative load involved in making that assessment. Hence the attractiveness of accountability. Accountability seems to be a relatively open minded word. An administrative system could possibly be accountable to many different sources of authority, but at least it would be accountable.

And yet, the term accountability poses the same conundrums as legitimacy in the end. One must answer the question, accountable to what? And one must still make a judgment about the validity of source of authority. Indeed, the underlying principal-agent connotations of the term

⁸⁸ E.g., *Trading in Credibility; Certifying the Uncertifiable*; Finnish book, etc.

⁸⁹ Most were never completely comfortable with the Weberian version of the concept – the ability of a legal system to elicit compliance without using coercion even from those who disagreed with the rule involved. Weber, cite

may cause further problems by allowing the analyst too easily to consider and critique one or another source of accountability in isolation. This problem can be put off to some extent by focusing on institutional proxies for accountability, the main two of which are transparency and participation mechanisms, which can be considered before returning to the larger question of accountability in forest certification.

Transparency

- transparency as a traditional accountability mechanism; [Aristotle on the Athens budget]

All of the forest certification programs embrace the value of transparency and claim to be transparent. But their transparency is carefully controlled. On the whole, it focuses on rule-making rather than adjudication and other forms of administrative decision making. This may in part reflect the relative emptiness – “transparency” – of the term. But in any event, the transparency of forest certification programs remains a work in progress. Certification proceedings are decidedly non-transparent, mainly on the grounds of protecting confidential business information. One can suspect that this policy may also reflect a tacit deal between certification programs and firms in which the programs implicitly provide cover for the firms. Rather than having the public or nosy government inspectors intruding into their operations, the firms hire certifiers to perform inspections and then stand between the firms and the public with a simple yes/no summary of findings. As noted in Section III, that deal is giving way to a limited extent, with public synopses of findings, but seems likely to persist on the whole. On the other hand, one can wonder whether the situation would be much different with a government inspectorate. Absent statutory directives, most inspectorates seem to treat information from inspections as privileged in one way or other, and are loath to release it.⁹⁰

Participation

As section II showed, the forest certification programs are gradually expanding their provisions for public participation. On the procedural side, they have all adopted at least minimal notice-and-comment procedures. Yet it is worth noting that, as in government agencies, a great deal of decision making can take place before the notice process begins. Moreover, the comments may play a small role in determining the ultimate content of the rules.

It is also important to note that forest certification programs seem to be increasing the net amount of participatory activity in many societies. The requirement that FSC certifiers conduct stakeholder consultations seems

⁹⁰ Follow up cites; note on FOIA trade secrets exemption

to have stimulated the revitalization of community civic participation institutions in a number of developing and transitioning societies.⁹¹ If the new PEFC requirement is implemented in an equally serious way, it is likely to have a similar effect. Moreover, there is considerable anecdotal evidence that the very process of creating certification programs and regional or national standard setting processes has stimulated greatly increased public policy discussions in many countries. Finally, the establishment of a constellation of forest certification programs can be said to have created a larger participatory arena involving discussion and debate not only within programs, but between them. In sum, thus far the record of forest certification in facilitating both formal and informal public participatory processes in forestry policy making appears to be fairly strong.

The rise of forest certification has also aided a structural expansion in who participates in forest policy making. The traditional world of forest policy was a relatively closed system. In most countries forestry agencies worked in close, comfortable relationships with foresters and the forest industry. Forest policy generally reflected what the industry wanted. The environmental movement brought interlopers into the field. Their efforts to change state policies were typically resisted, and their successes often limited to lawsuits setting aside legally indefensible forest policies. It was not possible to bring such law suits in most countries. The FSC system ultimately broke open that closed structure by creating a parallel regulatory system and threatening the brands of companies who depended on global product chains. The effort was aided, however, by the ISO policies promoting broad stakeholder involvement in private standard setting.

Whether the industry based programs will ever evolve to the kind of full “balanced” participation of all stakeholders that the ISEAL guidelines envision is impossible to say at this time. But they have accepted in principle the need for broad stakeholder participation and begun to put it into practice, albeit it in a carefully controlled way. Still, it will not be easy for them to turn back.

A Sustainable Forest Management Social Imaginary?

Now it is possible to return to the question of to whom or what the global forestry regulation system as manifested by forest certification is accountable. There is no single accountability structure in this system.

⁹¹ Maria Tysiachniouk and Errol Meidinger, Using Forest Certification to Strengthen Rural Communities: Cases from Northwest Russia (forthcoming); Cashore, Gale, Meidinger and Newsom, Confronting Sustainability: Forest Certification in Developing and Transitioning Countries (2005).

Rather, there appear to be multiple, mutually reinforcing ones. First there are the competing programs, each seeking to demonstrate the capacity to certify proper forest management. Second there is the overarching discourse of sustainable forest management to which they all profess allegiance. Although this discourse has a number of fixed elements, such as sustained yield, it also has considerable room for debate about other values. And the various actors are engaged in that debate. One of the ways they engage in that debate, third, is by defining and implementing the institutions described in sections II and III. Like the discourse of sustainable forest management, these institutions seem to have some fixed and relatively irreversible elements, while at the same time being open to revisions of various kinds.

If the above is indeed a plausible outline of the accountability structure of forest certification, the challenge is how to conceptualize it in a way that allows further analysis and assessment. Its conceptual form is more synthetic and additive than theoretical and deductive, and its behavioral structure is both regular and creative. This pattern resembles the concept of the ‘social imaginary’ as recently articulated by Charles Taylor⁹² drawing on the work of Cornelius Castoriadis⁹³ and Benedict Arnold,⁹⁴ although all three authors tend to be interested in larger social formations. The next question is how administrative law should go about evaluating such an accountability structure. An evaluation is unlikely to be very fruitful at this stage if conducted directly from a theoretical perspective, given the need to incorporate for multiple accountability structures with multiple theoretical bases. It is likely to be more productive if based on at least some empirical understanding of, first, how the actors involved in forest certification see the accountability structures in which they operate and, second, what accountability processes can be inferred from their behavior. The next version of this section will draw on some recent empirical work to suggest some directions for this assessment.

⁹² Charles Taylor, *Modern Social Imaginaries* (2004)

⁹³ Cornelius Castoriadis, *The Imaginary Institution of Society* (1987)

⁹⁴ Benedict Arnold, *Imagined Communities*