

Why Is There No International Forestry Law?: An Examination of International Forestry Regulation, both Public and Private*

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ABSTRACT

This paper addresses the question posed in its title. The absence of a “third generation international environmental law” in the form of an interstate convention dealing with tropical and temperate deforestation, and mandating sustainable forestry practices, is not the result of a lack of effort. Rather, it is, I argue, inherent in the political economy and history of national forestry programs. These were originally devised to conserve timber through managed production, with little attention being paid to the other environmental services provided by forests. As a result, very strong domestic interests developed with great concern for continuing logging and little concern about the environment. It is this legacy, very different from that characterizing other “global commons” issues, that obstructs progress on a global forest convention.

In lieu of such an agreement, there are a growing number of groups, organizations and companies offering various forms of environmental certification to timber companies. These are meant to operate through the market for timber products, on the assumption that environmentally-concerned consumers will choose the “greener” product. Eventually, goes the argument, the profit motive will move timber producers to be green and to manage their forests in a sustainable fashion. For the time being, this must be considered a hope rather than an outcome.

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In 1992, representatives of 180 of the world's nations met in Rio de Janeiro to consider, among other things, the adoption of an Agreement on Forestry Principles, entitled a "Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests."¹ The statement was the result of several years of sustained, intensive negotiation and controversy, a product of growing concern during the 1980s and early 1990s about the future of the world's remaining tropical forests. That this meeting was taking place in Brazil was especially apposite for two reasons. First, the burning forests of Amazonia had, during the late 1980s, served to focus global attention on their survival as well as their role in the global environment. Second, the Brazilian government expressed strong opposition to any hint of internationalization of its sovereign resources and territory (for background, *see, e.g.*, Goodman & Hall, 1990; Schmink and Wood, 1992). Opposition to the statement was, however, much broader than support, and the Forestry Principles crashed and burned. During the intervening years, there have been continuing efforts to resurrect some version of the principles in the form of an International Forest Convention but, so far, these have been for naught. In this paper, I investigate the reasons for, and international responses to, this failure.

It is worth noting that the title of this paper is somewhat misleading. Instead of the question posed there, we should ask, "Why is there no global forestry convention of the type we find in several other environmental issue areas, such as ozone, toxics and biodiversity?" For the fact is that there do exist several forms of "international" forestry regulation, although they are, for the most part, deeply embedded within long-standing national legal and regulatory systems. If we examine national forest regimes, as I do briefly in this paper, we will discover that virtually all contemporary forest management systems have been derived from principles and practices developed originally in what would eventually become Germany, subsequently revised and adopted by France, Britain and the United States and later diffused throughout European colonial territories (Scott, 1998; *see also* Schama, 1995; Peluso, 1992). In all instances, these systems of practice were implemented as representing the "best available approach" to forest management at the time. Inasmuch

1. The text of the statement can be found at gopher://gopher.un.org:70/00/conf/unced/English/forestp.txt.

as these management techniques were intended by state authorities not for purposes of forest preservation, but rather, conservation and commodification, it is not surprising that a global forestry convention has proven so difficult to formulate. Institutions are sticky.

One result of this apparent international impasse has been the growing privatization of international forestry regulation. There is nothing new about private law, either domestic or international; private maritime law regimes and customary laws governing relations among traders of different nationalities were already in existence millennia ago (Green, 1996; Gold, ch. 1-2, 1981; Cutler, 1998). As well, there is a considerable body of "private international law" to which various countries adhere. These apply to relations among individuals or corporations based in different countries, and are overseen by non-governmental organizations such as the "Hague Conference on Private International Law" and the "International Institute for the Unification of Private Law."² But, whereas private law was, historically, constituted by contract among signatories, and is now legitimated and maintained through ratification and enforcement by states, the private regulation about which I write here rests on the viability and hope of a form of "social contract" between producers and consumers. Such a contract involves consumer brand loyalty in return for corporate production of goods that meet certain consumer demands. Such agreements may be weak reeds on which to base the Earth's environmental future.

My paper is organized as follows. I begin with a more detailed discussion of the questions posed above. As we shall see, one key obstacle to a global forestry convention lies not so much in conflict over principles as in the political economies of national forest management, which are historically-rooted institutions that are not easily addressed or changed through international law. I then turn to the matter of private international law, with a brief digression on its historical origins. In the third part of the paper, I discuss a number of initiatives to implement semi-public or private forestry regulation, and the ways in which market-based methods lie at their core. Finally, I assess what I see as the fundamental flaws in such an approach, and argue that the sovereign consumer, when faced with contradictory messages about her

2. See Hague Conference on Private International Law, <http://www.hcch.net>; International Institute for the Unification of Private Law, <http://www.unidroit.org/english/presentation/pres.htm#NR1>.

purchases in the market and, possibly, unmotivated by normative concerns, is not necessarily going to choose an environmentally-friendlier product.

I.

THE POLITICAL ECONOMY OF FORESTS

It is commonplace, in this era of almost-instantaneous communication, to argue that the diffusion of both knowledge and practice is more widespread than ever before (*see, e.g.*, Castells, 1996, 1997, 1998; Lipschutz, 1996a). Successful practices—if they are not proprietary—attract attention, and are replicated by others living in other places far removed. But as attested by the diffusion of agriculture throughout the world 10,000 years ago, there is nothing new about this (what *has* changed is the velocity with which communication takes place). Hence, it is not surprising that there are a limited number of templates for forestry management in place around the world. As I noted above, these are based primarily on practices first developed in Prussia and Saxony in the 18th century as a response by state authorities to a growing shortage of wood. Scientific forestry was based on the precise measurement of the distribution and volume of wood in a given parcel, the systematic felling of trees, and their replacement by standard, carefully-aligned rows of monocultural plantations that could be harvested at set times (Scott, 1998). As James Scott points out, this approach succeeded beyond expectations during the first cycle of 80 years or so, but began to fail during the second cycle as a result of unforeseen ecosystemic damage and destruction.³ No matter—by then, the model had been adopted around the world and become the law of many lands.

What is noteworthy about this “scientific” management system is that its goal was not preservation of forests, or even “sustainable development,” in the sense that we understand those practices today. Rather, as Scott has observed, the goal was entirely economic:

The early modern European state, even before the development of scientific forestry, viewed its forests primarily through the fiscal lens of revenue needs. To be sure, other concerns—such as timber for shipping, state construction, and fuel for the economic security of its subjects—were not entirely absent from official management. These concerns also had heavy implications for state revenue and

3. JAMES SCOTT, *SEEING LIKE A STATE* 19-20 (1998).

security. Exaggerating only slightly, one might say that the crown's interest in forests was resolved through its fiscal lens into a single number: the revenue yield of the timber that might be extracted annually.⁴

In each instance, management was overseen by the state, with the objective of maximizing production in the national "interest."

Actual practices differ from one country to the next (*compare* Hays, 1980; Peluso, 1992; Schama, 1995). For example, even though most forest land in the United States and Canada was, and is, privately-owned, a considerable amount is held by the state as a "public good" but systematically leased to private timber producers. In India, the Raj took ownership of virtually all forests, declaring them to be "wasteland" and, therefore, unowned (*see* Guha, 1990). In Indonesia, forests are legally state-owned but, in practice, treated as private property, while in Brazil, the lack of national government capacity literally renders forests open access commons. In all cases, however, public forests are viewed as a *national* resource, that is, the sovereign property of the state. In this role, the conservation of forests is tightly linked to the production of timber and other commodities that generate both capital and jobs, and the economies of large regions are almost wholly-dependent on natural resource production from those forests. Moreover, in the domestic scheme of things, timber producers can be politically-influential and often get their way (although this is changing; *see, e.g.*, Lipschutz & Mayer, 1993; Lipschutz, ch. 4, 1996a). In this respect, forest protection differs significantly from other parts of the Earth's environment, such as oceans and atmosphere that have been defined as involving a global commons, and have consequently, been made subject to regulation through international conventions.

If we look at these different issues more closely, *why* forests are different may become clearer. The point at which each portion of the natural environment becomes subject to international regulation is, for the most part, that one at which the balance-of-interests and costs tilts toward a public solution ("public" in the international sense). Moreover, a public solution is most easily negotiated when there is already in place a template or framework within which a new issue can be addressed. For example, although the Basel Convention and other agreements on the international movement of toxics are intended, in part, to en-

4. *Id.* at 11-12.

courage source reduction, their control mechanisms rely largely on the regulation of trade in toxic wastes; the same is true for the ozone agreements, the Convention on Trade in Endangered Species, and even the Biodiversity Convention. There already exists a well-developed framework for treating international trade as a heavily-regulated public good through the GATT and the WTO, NAFTA, the European Union and other such agreements and institutions. (It is one of the rhetorical paradoxes of “free trade” that it is regulated at the international level, which, from the national perspective, renders such law invisible and makes it appear as though no political intervention is taking place; *see* Mead, 1995, 1996; Attali, 1997). Hence, those bads whose substance or effects are transmitted through international commerce are also the ones for which global regulation seems to be most easily achieved (although I do not consider here whether such agreements achieve their stated goals; on the topic of effectiveness, *see* Bryner, 1997).

By contrast, those environmental bads whose substance or impacts are not amenable to management through a trade regime, such as climate change, are proving to be much more difficult to address at the international level. The production of greenhouse gases is intimately involved with everyday life, and there is little willingness on the part of political authorities or capital holders to limit trade in, or production of, the goods (fuel, food, fiber) that give rise to the bads. The political economy of greenhouse gas production is so much a part of modern industrial life that resistance to regulation is already intense, even as, in the face of accumulating evidence of global climate change, there are no effective restrictions in place at any level. The emerging solution to this impasse has been to address the climate change issue through markets in tradable emission permits, and to leave the difficult parts to the states themselves (I return to this point, below). While we might expect such a permit system to work smoothly once it is in place, whether national regulation to control emissions will be effective is anybody’s guess.⁵

Forests, I argue, fall into a similar category. Aside from the intrinsic value of the various species of trees themselves, forests serve a variety of ecological roles: providing habitat for other

5. More to the point, unless there is some binding agreement on the distribution of such permits, national governments will be hard put to prevent the kinds of corruption and black marketeering that have appeared in connection with other environmental protocols.

plant and animal species; environmental services such as water purification, soil retention, local climate moderation, and carbon sequestration (with the last being especially important for global climate); and serving as reservoirs of genetic diversity. While a number of these might arguably fall into the category of global commons, as suggested by the Biodiversity Convention (a point also contested within the text of the convention), none is as central to the political economy of many countries as timber production and land conversion. Moreover, while sovereignty considerations do impact access to genetic resources, and nominal access limits are addressed in the Biodiversity Convention, neither consideration of sovereignty nor global commons appears relevant to any of the other secondary benefits provided by forests. For the time being, these might be thought of as positive externalities for which no one pays but everyone benefits. In political terms, concentrated interests and the protection of national control far outweigh the diffuse and scattered interests that the world appears to have in these secondary benefits.

As might be expected, international efforts to regulate forestry practices and protect old-growth forests have come to rest largely on the tools of trade. For better or worse, however, both international trade law and the advocates of free trade stand in opposition to such international regulation. First, public international forestry law would mandate some degree of harmonization of forestry practices, yet free trade advocates generally argue that this amounts to a form of "cultural imperialism" and they therefore oppose the inclusion of environmental regulations in trade (Bhagwati, 1993). Second, in the absence of such harmonization, individual states are in a weak position to impose municipal standards on forestry imports in an effort to encourage more sustainable practices in the country of origin, inasmuch as they might then be found in violation of WTO rules that forbid process standards as non-tariff barriers to trade (*see, e.g.,* Mayer & Hoch, 1993). This is one reason why the agreement presented at Rio was characterized as "Forestry Principles," rather than as a binding convention; as principles, countries can choose to practice them or not. Most have chosen not. (Countries can, of course, impose their own domestic standards but these are likely to increase variable costs, and timber producers in high-cost countries, such as, Canada are demanding international harmonization for competitive reasons; *see, e.g.,* Barron, 1997.)

The resulting lacuna has generated a substantial effort to find other means of regulating forest practices at the global level. I noted above that "private regulation" has been offered as one approach to solving this problem. Although this term has not entered into common use (and is not the same as "private international law"), I use it to denote efforts to establish sets of rules and practices to be followed by producers in order to certify special characteristics or qualities of their products to consumers. The result, as we shall see below, is a growing reliance on market mechanisms other than trade to motivate sustainable forestry.

II.

PUBLIC AND PRIVATE INTERNATIONAL REGULATION

International regulation has not always been as public as it is today (and James Scott argues that, even today, much regulation is customary rather than public; *see* Scott, ch.1, 1998). Historically, customs, laws, and contracts among and between individuals and groups, often but not always with the approval or support of the state governed major social activities within society.⁶ For example, medieval guilds formulated strict rules governing membership and practice; this form of self-regulation has been carried over into the present in the medical and legal professions (which, nevertheless, are permitted to regulate only through the explicit authorization of state and national governments). Maritime law is an arena where there has long been, and continues to be, a considerable amount of private regulation (Cutler, 1999). A third example can be found in common pool resource systems, such as those described by Elinor Ostrom (1990) and others (Bromley, 1992). The tendency toward public regulation was, as documented by Craig Murphy (1994), a consequence of the growing marketization and industrialization of society as well as growth in long-distance trade. With bonds of social trust dissolved in the acids of economic exchange, *caveat emptor* was no longer a sufficient guide against fraud and dangerous practices. The welfare state represented the apotheosis of public regulation and, although there has been a strong rhetorical commitment in liberal democracies to deregulation since about 1980, it is not so clear that this has actually come about (Vogel, 1996).

6. Research on common pool resource arrangements suggests that approval or legitimization by the state is critical to their maintenance; otherwise, there is no legal basis for exclusion of non-members from the resource (Acheson, 1989).

In any event, after World War II, most such regulation remained national. There were certain sectors in which international public regulation was instituted, as in the control of the spread of nuclear weapons, the allocation of radio and television frequencies and geosynchronous satellite slots, and so on (Haas, 1992). In a few cases, national regulatory systems were "internationalized." For example, the safety rules of the U.S. FAA have been generally adopted by all national aviation authorities, although they are not always rigorously followed. Finally, the tradition of semi-private (e.g., International Red Cross) and private voluntary organizations (e.g., CARE) providing assistance internationally never disappeared completely, even during the height of World War II. Public regulation also had the effect of limiting entry into markets and professions (a story nicely told by Frank Norris in *MacTeague*).

In recent years, regulatory patterns have become much more complicated. As Steven Vogel (1996) has noted, there has been some decrease in certain forms of national regulation, but these have been replaced by others, some of them international. Walter Mead (1995/96) points out that the deregulation of the U.S. air industry has affected only a small part of the overall air transport system, that having to do with the setting of fares. In the financial sector, international regulations of various types of transactions have been put in place in order to ensure the overall stability of the global economy. But, these regulatory trends are limited in scope; there is no global welfare state to play the international role corresponding to that of national governments.

This does not mean that there is no transnational regulation. Numerous commentators and scholars have noted the rapid growth in the numbers and transnational activities of non-state actors (Princen & Finger, 1994; Lipschutz, 1996a; 1996b; Wapner, 1996; Mathews, 1997; Smith, Chatfield, & Pagnucco, 1997; Keck & Sikkink, 1998). Recent work has suggested that, especially in the environmental arena, there is considerably more activity than has been previously identified, especially in the area of what we might call "private" environmental regulatory systems (or regimes) that are altering environmental "regulatory space." As Earl Meidinger has observed:

Private organizations have recently established numerous programs aimed at improving the environmental performance of industry. Many of the new programs seek to define and enforce standards for environmental management, and to make it difficult

for producers not to participate in them. They claim, explicitly and implicitly, to promote the public interest. They take on functions generally performed by government regulatory programs, and may change or even displace such programs. Private environmental regulatory programs thus have the potential to significantly reshape domestic and international policy institutions by changing the locus, dynamics, and substance of policy making.⁷

The “fluidization” of regulatory space is a feature arising from globalization, the decline in the authority of the state (Lipschutz, 2000: ch. 2), and the growing tendency of individuals and organizations to act outside of traditional rules and frameworks (Rose-nau, 1997). In the future, regulatory authority is likely to be distributed among many foci of political action, organized to address specific issue-areas rather than to exercise a generalized rule over a specific territory (Lipschutz, ch.8, 1996a). Territorially-based political jurisdictions will continue to exist, but they will be complemented by others. Different “authorities” will deal with different, specific matters, which may or may not be spatially bounded. As Crook, Pakulski and Waters point out, the relationship between actor and jurisdiction might not necessarily follow logically from their apparent functions.⁸ Schools are as likely to engage in environmental restoration as environmental organizations are to become involved in education at the K-12 level

Why does this matter? It matters because changing or declining state authority will, in all likelihood, be supplemented or replaced by, or sublimated in, some kind of alternative political framework, which could be similar to a world state or very different. The late Richard Gordon’s (1995) research suggested that the relationship of production to politics, and the politics of production, are changing rather radically from what they once were. States are retreating from attempts to exercise a high degree of control over specific aspects of their national economies (Strange, 1996). Beyond this, the strategies of corporate actors and other holders of capital take less and less cognizance of the residual authority and power of individual states to regulate them. More and more, they engage in individual and collective attempts to self-regulate (as, for example, in the multifarious ac-

7. E.E. Meidinger, *Incorporating Environmental Certification Systems in North American Legal Systems*, presented to the CAVA Workshop in Brussels on Feb. 24-25, 2000 (paper on file with author).

8. S. CROOK, ET AL., *POSTMODERNIZATION—CHANGE IN ADVANCED SOCIETY* (1992).

tivities of the International Organization for Standardization—ISO)⁹ or to generate supra-national regulation (as in the World Trade Organization). This functional de-differentiation among formerly differentiated actors and institutions could generate a global system based on organizational functionalism rather than a world federalist state or regulatory system. The growing engagement of other actors—especially non-governmental ones—in supra-national regulatory efforts represents, in part, an attempt to extend various principles into the global realm as well as to modify and moderate corporate regulatory programs.

Elsewhere, I have argued that “global civil society” could represent a structure of actors and networks within which new regulatory authorities and arrangements emerge (Lipschutz, 1996a; 1996b; ch. 8, 2000). As conventionally understood, civil society includes those political, cultural and social organizations of modern societies that have not been established or mandated by the state or created as part of the institutionalized political system of the state (e.g., political parties), but are nevertheless engaged in a variety of political activities that are imbricated with institutionalized politics. Globalizing the concept extends this arrangement into the transnational arena, where it constitutes a proto-society composed of local, national and global institutions, corporations, and non-governmental organizations (Lipschutz, 1996b). Global civil society can be understood, therefore, as shorthand for both the actors and networks that constitute a “new spatial mosaic of global innovation”¹⁰ and the growth in neo-functional authority resulting from a “proliferation” of political actors beyond the state.

III.

INTERNATIONAL TRENDS IN THE REGULATION OF FOREST PRACTICES*

One issue area in which the diffusion of state-centered regulatory responsibility and authority can be observed clearly has to do with global efforts to institutionalize sustainable forestry. In

9. Although ISO is the acronym for the International Organization for Standardization, it is derived from the Greek for “equal.”

10. R. Gordon, *Globalization, New Production Systems and the Spatial Division of Labor*, in *THE DIVISION OF LABOR: EMERGING FORMS OF WORLD ORGANIZATION IN INTERNATIONAL PERSPECTIVE* 167, 196 (Wolfgang Litek & Tony Charles, eds., 1995).

* Portions of this section were written by Cathleen Fogel.

terms of forestry practices, regulation through conventional international laws and regimes has been limited, although several agreements, such as the UNCED Forestry Principles, remain on the agenda. Others, such as the Tropical Forest Action Plan, have proved less than successful despite concerted efforts to make them work. Finally, none of these public agreements dealt with temperate forests as a category, in large part due to the opposition of most Northern countries with large industries. More generally, we find four basic institutional approaches to global regulation of forestry practices:

1. PUBLIC AGREEMENTS AND CONVENTIONS, which are primarily interstate and intergovernmental regimes or organizations that seek harmonization of international standards, as have appeared in connection with the Kyoto Protocol to the UN Framework Convention on Climate Change, the International Tropical Timber Organization (<http://www.itto.or.jp/Index.html>), and the International Centre for Forestry Research (<http://www.cgiar.org/CIFOR/>). The resulting regulations are expected to be legislated domestically, where they will apply to both public and private actors.
2. QUASI NON-GOVERNMENTAL ORGANIZATIONS (QUANGOs) are organizations with public, semi-public and/or private memberships, charged with state-authorized functions, such as the International Organization for Standardization (<http://www.iso.ch/>). Members of international QUANGOs usually include representatives of both public authorities and private actors.
3. SEMI-PRIVATE INITIATIVES involve organizations that are either non-governmental organizations or coalitions (Rainforest Alliance; <http://www.rainforest-alliance.org/>) or include NGOs, social groups and corporate representatives (Forest Stewardship Council; <http://www.fscoax.org/principal.htm>). Regulations are voluntary and intended to apply to corporate activities, in either public or private realms, but are not subject to state vetting or rejection. At least one such group offers certification to private producers.
4. PRIVATE INITIATIVES involve organizations that are either corporate associations (IFW) or individual companies (Scientific Certification Systems; www.scs1.com/forests.html). Regulations are voluntary and meant to apply only to members (IFW) or to specific industrial sectors (as in forestry standards) or producers may hire auditor to provide certification.

Table 1 offers a listing of some of the international regulatory arrangements and initiatives underway with respect to sustainable forestry practices. Although this listing is not comprehensive, and some of the examples defy simple categorization, an examination of these different efforts suggests that there is significant

movement toward the privatization of forest regulation. There are two further elements of these regulatory schemes worthy of note: *motive* and *method*.

TABLE 1: SOME INTERNATIONAL INITIATIVES IN REGULATION OF SUSTAINABLE FORESTRY

NAME	TYPE	MEMBERSHIP	OBJECTIVE
Kyoto Protocol	Public	Signatory countries	establish terms and conditions to meet provisions of Kyoto Protocol regarding management of forests & their role as carbon sinks
Inter-governmental Working Group on Global Forests (IWGF)	Public	nine countries	develop a scientifically-based framework of criteria and indicators for the conservation, management and sustainable development of boreal and temperate forests
INTERNATIONAL TROPICAL TIMBER ORGANIZATION	Public	producer & consumer countries (timber trade, IOs, NGOs present as observers)	provide international reference document upon which more detailed national standards could be developed to guide sustainable management of natural tropical forests
CENTER FOR INT'L FORESTRY RESEARCH (CIFOR)	QUANGO	countries, but also NGOs, universities, etc.	improve the scientific basis for ensuring the balanced management of forests and forest lands; develop policies and technologies for sustainable use and management of forest goods and services.
ISO-14001	QUANGO	national standards bodies	ISO series 14000 template proposed for development of sustainable forestry standard; rejected but under study
RAINFOREST ACTION NETWORK	Semi-private (NGO)	Individual members and allied NGOs in other countries	protect the Earth's rainforests and support the rights of their inhabitants through education, grassroots organizing, and non-violent direct action.
SMART WOOD (RAINFOREST ALLIANCE)	Semi-private (Civil Society groups)	no membership; NGO certifies timber producers	Operations certified as Smart Wood sources according to extent to which they adhere to RA's Generic Guidelines for Assessing Natural Forest Management
FOREST STEWARDSHIP COUNCIL (FSC)	Semi-private (Civil Society groups)	ENGOs and NGOs, wood products buyers, and certifiers in three assemblies	establish internationally-recognized principles and criteria of forest management as a basis for accrediting regional certifiers
SCIENTIFIC CERTIFICATION SYSTEMS	Private firm in Oakland, CA	no membership; producers are certified	"Forest Conservation Program" means to evaluate forest management against objective and regionally appropriate principles of sustainable forestry

NAME	TYPE	MEMBERSHIP	OBJECTIVE
SGS FORESTRY	Private firm in Oxford, UK	no membership; producers are certified	"Carbon Offset Verification Service" assesses, surveys, monitors & certifies project development & management
INITIATIVE ZUR FÖDERUNG NACHHALTIGER WALDBEWIRTSCHAFTUNG (IFW)	Private group	German timber trade unions, importers, and processors	dual process of certification whereby nationally-accredited bodies within timber exporting nations would certify that producers have met high standards of forest management. for European label

SOURCE: Bryan Evans, "Technical and Scientific Elements of Forest Management Certification Programs," Paper prepared for the conference on Economic, Social and Political Issues in Certification of Forest Management, University of Pertanian, Malaysia, May 12-16, 1996, at: www.forestry.ubc.ca/concert/evans.html; CIFOR web site, at www.cgiar.org/CIFOR/general/about.html; SGS Forestry Brochure SGS2118/0597.

Each is motivated by one or more of three somewhat different incentives, which I label *normative*, *functional*, and *instrumental* (for lack of a better term). *Normative* incentives have to do with notions about justice, equity, indigenous rights, biocentrism, and so on. *Functional* incentives have to do with development and implementation of protection and conservation programs. And *instrumental* incentives have to do with the profits and "good works" resulting from certification or approval. Thus, the Rainforest Action Network appears to be motivated primarily by normative incentives; the Forest Stewardship Council by functional incentives; Scientific Certification Systems by instrumental ones.

In terms of regulatory *method*, the recent trend in sustainable forestry regulation moves away from command-and-control, per se, toward certification of both national and private practices through what is called "eco-labeling."¹¹ An eco-label is a claim placed on a product, having to do with its production or performance, that is intended to enhance the item's social or market value by conveying its environmentally advantageous elements. Such a label is intended to make the product more attractive to the environmentally-conscious consumer (Markandya, 1997). Three categories of eco-labels are widely recognized: *first*, *second*, and *third party* (Caldwell, 1998).

11. See *Environmental Labeling Toolbox*, International Institute for Sustainable Development, <http://iisd1.iisd.ca/business/envirolabeling.htm>; and *Guarding the Green Choice: Environmental Labeling and the Rights of Green Consumers*, National Wildlife Federation, <http://www.nwf.org/international/trade/ggc.html>.

First party labeling, the most common and simplistic approach, entails producer claims about a product, such as “recyclable,” “ozone-friendly,” “non-toxic” or “biodegradable.” In the absence of a mechanism for verifying these claims, the only guarantee that the product performs accordingly is the producer’s reputation.

Second party labeling is conducted by industry-related entities, such as trade associations, which establish guidelines or criteria for making such environmental claims. Once the standards are met or the guidelines followed, an industry-approved label is placed on the product stating or verifying the product’s environmentally friendly qualities. In this instance, corporate members of the certifying organization will seek to ensure the label’s value, and to mandate its use, so that no single producer will have an advantage over any other.

Third party, or independent, labeling is performed by either a governmental agency, a non-profit group, a for-profit company or an organization representing some combination of these three. As with second party type, third party eco-labeling programs set guidelines that products must meet in order to use their label. They may also conduct audits in order to ensure compliance with the guidelines. As the name implies, third party organizations are not affiliated with the products they label. The Forest Stewardship Council is engaged in third party independent labeling and auditing, whereas the International Organization for Standardization provides second party labeling based on a company’s program for compliance with its own environmental standards. Below, I provide more details about these two organizations and their programs.

a. *The Forest Stewardship Council*

During the 1980s, a number of European and U.S. environmental groups started to push the idea of sustainable forestry in developing countries. In 1985, the World Wide Fund for Nature (WWF) convinced the developing country government members of the International Tropical Timber Organization (ITTO) to pledge that, by 2000, they would trade only in forest products originating from sustainably-managed forests. Country-level guidelines on sustainable forest management were developed soon thereafter, but they were rarely put into practice. In 1988, an influential ITTO study (Poore, 1988) concluded that less than one-eighth of one-percent of all tropical forests were under sus-

tainable management regimes, but the intergovernmental body and its member governments failed to respond. The following year, the ITTO rejected a WWF proposal to initiate an independent certification scheme to help realize the Year 2000 pledge, and WWF decided to start its own program. The result was the Forest Stewardship Council (FSC).

WWF's work paralleled the efforts of several other environmental organizations. In response to the 1988 ITTO study, the Rainforest Action Network (RAN) initiated successful U.S. consumer campaigns to boycott the import and use of all tropical timber except that produced from sustainably managed forests. At the same time, the Rogue Institute in Ashland, Oregon began a verification program to promote environmentally-sensitive timber production as an alternative to clear-cut logging in the southern part of the state. Other groups concerned with sustainable forestry included the Sierra Club, Friends of the Earth, Greenpeace, the National Wildlife Federation, and the Woodworkers Alliance for Rainforest Protection (WARP), the last representing concerned wood users, as well as several smaller grassroots forests groups, indigenous peoples, social organizations, timber producers and timber retailers from several countries. The FSC was launched in 1992 by a loose alliance of these groups at a meeting in Washington, DC. An interim board was elected, a mission statement adopted, and draft Principles and Criteria for Forest Management formulated soon thereafter. By 1997, the Forest Stewardship Council had become an internationally-recognized organization with nearly 200 members in 50 countries.¹²

The FSC is a membership organization comprised of three equally weighted chambers: environmental, social and economic; membership within each chamber is also equally weighted between North and South. Each chamber represents 33% of the vote at Annual Meetings, and the Board of Directors has rotating members reflecting these interests. The FSC is based in Oaxaca, Mexico, and is operated by a small staff. With international governmental processes in apparent stalemate, the FSC is seen by many as the "magic bullet," a "market driven mechanism" able to fill a critical niche towards achieving sustainable forest management where governments cannot.

12. The Forest Stewardship Council United States, <http://www.fscus.org/>; the Forest Stewardship Council global organization <http://www.fscoax.org/principal.htm>.

From the start, the FSC was funded, and to some degree controlled, by the WWF. WWF desperately needed a source of “sustainable” wood: in 1995 it had launched a “Buyers Group” in the United Kingdom (since 1992, such Buyers Groups have been created in 25 countries, including the United States). Wood retailers in this group committed to purchasing only verifiably “sustainably produced” timber in their UK stores as soon as it was available. In 1997, these companies sold \$2.4 billion in wood products annually, and \$97 million of these sales now originate from independently certified sources (still less than 5% of the total). This demand is creating immense pressure for the rapid development of Principles, Criteria and Standards, such that consensus-based principles of decision-making may be shortchanged in the rush.

The FSC has also developed and adopted global Principles and Criteria for Forest Management and it accredits certifying organizations that agree to abide by these Principles, Criteria and Standards. Purportedly, the FSC also monitors the operations and portfolios of such certifying groups on an annual basis. Regional or national processes to elaborate more detailed criteria and standards for these principles are underway in 14 countries, including nine separate processes in the United States alone. The actual ecological and social outcomes triggered by the FSC system are not yet clear, however, and have not yet been well studied. Some indications are that in some locations, the system is not leading to ecological or social outcomes that exceed those already required by existing governmental policies. In other instances, FSC standards may not actually be implemented by producers, a result that may be due to the weak institutional base of the FSC. Funding and personnel to monitor implementation are scarce, and penalties for failing to observe the rules are few. Moreover, the large financial stakes involved have led forest products companies to become actively involved in standard setting and implementation activities in several countries such as Sweden and British Columbia, Canada. This appears to be leading to a “consensus” rather than “science-based” approach to standard setting in order to make the standards achievable, and thus to ensure that the large and growing market demand will indeed be met.

An additional limitation of the FSC may be the broader trend toward green labeling that it has inspired. Its forest product certification program has triggered numerous corporate and government responses, and considerable alarm. Certification schemes

which emerged following the FSC include those proposed by the governments of Indonesia and Malaysia; the African Timber Council; the American Forest Products Association, and the Canadian Pulp and Paper Association, in conjunction with the International Organization for Standardization. This last process may also reflect an attempt to expropriate forest product certification processes, principles and discourse from the FSC and other environmental organizations (Hauselmann, 1997).

b. *The International Organization for Standardization (ISO) and ISO-14000*

The ISO, based in Geneva, is a quasi-governmental body with member organizations in 119 countries, and is the official standard-setting and labeling body recognized by the World Trade Organization and other international agencies. Founded in 1946, "ISO's mission is to promote standardization and related activities in the world with a view to facilitating the international exchange of goods and services and to developing cooperation in the spheres of intellectual, scientific, technological and economic activity' by developing worldwide technical agreements which are published as international standards."¹³ With an annual operating budget of \$125 million, provided by governments and corporate members, the ISO hosts as many as ten standards setting meetings each day, around the world (Hauselmann, 1997:3).

The organization only provides the context within which standards can be negotiated and promulgated; it does not engage in policing corporate behavior, enforcing standards, or penalizing violators. In fact, individual corporations generally devise their own internal performance programs, which are vetted and certified by an authorized company or organization. In other words, a producer whose program receives second-party certification from an ISO-approved auditor is, for the most part, self-regulating and responsible for seeing that it meets the terms of its programs.

Historically, the ISO has neither worked on, nor developed competency in, environmental or forestry issues. Until the early 1980s, it limited itself to purely technical standards, such as the size of nuts and bolts (Hauselmann, 1997). The demand for environmental standards grew out of a concern that these might be

13. Pierre Hauselmann, *ISO Inside Out: ISO and Environmental Management* 3 (Surrey, UK; WWF, International Discussion Paper, 1997) on file with author.

imposed “from above” as a result of interstate agreements and conventions, and because of growing public agitation over the absence of any environmental considerations in the GATT.¹⁴ In 1993, the ISO initiated a process of developing a new “ISO 14000 Series” of Environmental Management Systems standards. This was intended to build on the success of the ISO 9000 Quality Management Systems, which are *de facto* requirements for companies engaging in most sectors of international trade (Cascio, Woodside & Mitchell, 1996), driven by the market and based entirely on self-regulation.¹⁵ Unlike the Forest Stewardship Council, the ISO is frequently the recipient of praise and support by governments and most of the forest products industry.

The ISO adheres to the “Environmental Management System” approach. This approach differs from the FSC’s Principles, Criteria and Standards for forest management in that Environmental Management Systems only prescribe *internal* management systems for companies that wish to continuously improve upon an environmental performance level which they themselves define. Adherence to externally agreed standards (ostensibly set by all interested stakeholders) is not required (as it is in the FSC). Furthermore, the ISO has no adequate mechanism to either ensure corporations’ compliance with, or the effectiveness of, their individual action plans, or to control the use (or misuse) of logos and certification marks. As a result, there is, according to one critic, a:

potential for confusion. . . this situation is worse in the case of forest management certification, where some economic interests are seeking to use the ISO framework to develop a forestry-specific application of the Environmental Management System (EMS) approach in order to counter an existing and operational environmental labeling scheme— that of the Forest Stewardship Council.¹⁶

Nevertheless, forest industry members and supporters of the ISO 14000 series are using the discourse developed by the FSC and environmental groups to describe their systems approach in terms uncannily similar to those adopted by the FSC. For example, in a 1997 press release issued by the Canadian Sustainable

14. Amy Pesapane Lally, *ISO 14000 and Environmental Cost Accounting: The Gateway to the Global Market*, 29 *LAW & POL’Y INT’L BUS.* 501, 504 (1998).

15. *Id.* at 503.

16. Pierre Hauselmann, *ISO Inside Out: ISO and Environmental Management* (Surrey, UK; WWF, International Discussion Paper, 1997) (on file with author).

Forestry Certification Coalition (an industry group), promoting ISO forest certification, claims that:

we have identified the background information that forestry organizations will find useful as they implement and progressively improve upon their environmental management system. This major step forward in relating the key elements of the ISO standard in the context of a range of international forest management measures will further the UN Agenda 21 goal of promoting sustainable development.¹⁷

Although the ISO has well-developed procedures on consensus and participation, these have not been well followed in creating the "ISO 14000 Series"—civil society groups of all kinds, including environmental groups, have not been allowed to attend at standards-setting meetings (Hauselmann, 1997), apparently in order to avoid "politics." Instead, corporate forest product industry efforts seem to be aimed at imbuing the ISO with an aura of scientific, technical and *social* legitimacy, all the while maintaining a near perfect level of control. Some ISO members continue as well to actively push forward the development of international ISO forest management system standards. Some are also active at the WTO Environment Committee to limit the definition and mutual recognition of eco-labels by GATT country signatories. Consequently, although timber products may carry an ISO certifying label, what lies behind it is none too clear.

IV.

CAN THE MARKET MAKE A DIFFERENCE?

As suggested by these two examples, the process of international privatization of regulation of forestry practices through certification is being achieved through a growing reliance on markets and market-based strategies as mechanisms to foster compliance. As progress in the formulation of conventions and protocols has slowed, especially in the environmental issue area, there appears to be a general trend toward such approaches. (Although the recent out-of-court settlement over working conditions in Saipan between a number of apparel manufacturers and the Union of Needletrades, Industrial and Textile Employees, Global Exchange, the Asian Law Caucus of San Francisco, and

17. *ISO Forestry Working Group Completes Technical Report*, (Sept. 9, 1999) <http://www.sims.com/rece71.htm>.

Sweatshop Watch of Oakland illustrate that this trend is appearing in other social welfare and justice issue areas, as well).

Historically, the regulation of economic practices has been treated separately from environmental practices. In using the term “economic practices” I refer specifically to transactions that take place in a regulated market setting, in which rules are meant to ensure the observance of contracts, the probity of sellers, and the quality of goods and services. By use of the term “environmental practices” I refer to those activities involved with the production and consumption of material goods, including air and water pollution, toxics production, health impacts, and which have been regulated by rules meant to reduce such insults. While there has always been a major economic element in regulation of environmental damages as defined here, until the 1980s, rules were motivated more strongly by ecological and health concerns. During the 1970s, a growing debate over the costs of regulation led to the growing use of cost-benefit analysis, a practice formally institutionalized during the 1980s. Figure 1 illustrates in a very simple fashion the relationship between economic practices and environmental externalities.

Over the past decade or so, for both ideological and efficiency reasons, this pattern has begun to change, as shown in Figure 2. Market-based mechanisms, such as tradeable pollution permits and independent certification, are replacing or supplementing command and control methods in an effort to manage environmental impacts.¹⁸ The market-based approach has the supposed virtue of increasing the efficiency with which financial resources are used, but it is also driven by the ability of the rich to purchase rights to pollute from the poor, which could result in a transfer of financial resources from the former to the latter, thereby allowing the poor to pay the costs of environmental improvement. But there might be undesirable consequences from this, too, because if market-based auctions and sales operate as suggested by neo-classical economics, they may have the effect of pricing poor countries completely out of the market to pollute and leave them

18. Note that a permit system does not eliminate entirely command and control rules. Some cap must be set on pollution, either as a total for each individual consumer of permits or as a total for the system as a whole, in which individuals consumers can then buy and sell permits.

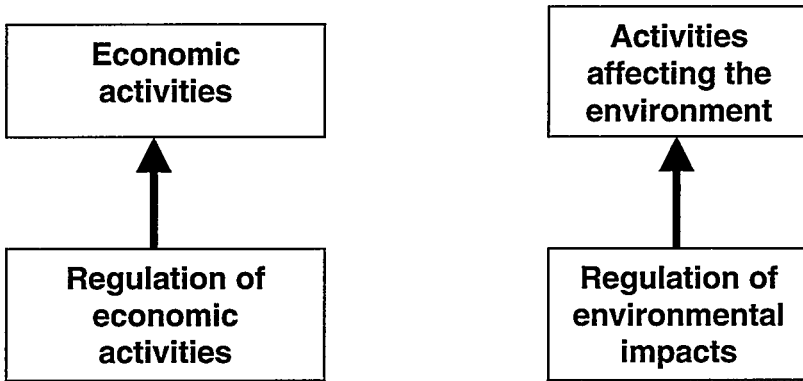


FIGURE 1: THE CONVENTIONAL RELATIONSHIP BETWEEN FUNCTION AND REGULATION

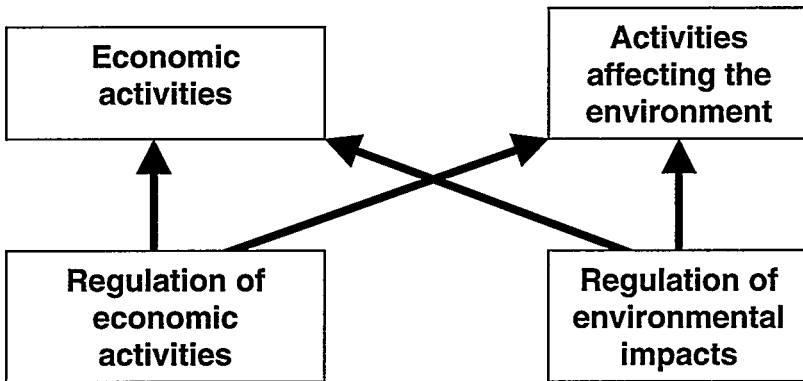


FIGURE 2: THE CHANGING RELATIONSHIP BETWEEN FUNCTION AND REGULATION

with insufficient funds to purchase newer environmentally-friendly technologies and goods.¹⁹

What is interesting, in any event, is that, parallel to the growing trend of using economic techniques to regulate environmental practices, there has also developed a trend toward utilizing environmental controls to regulate economic activities (as in the inclusion of environmental concerns in trade agreements). As we have seen above, producers absorb the costs (or pass them on

19. The long-term prospects of the UN Framework Convention on Climate Change may rest on this point. If and when developing countries do make commitments to control emissions, and if they need to purchase emission credits, they may very well discover that the rich countries have bid permit prices to levels they cannot afford to pay.

to consumers) of internalizing environmental externalities by adhering or subscribing to a set of regulated behaviors and practices that, when vetted by the appropriate authority, certify them as environmentally friendly. These regulations are expected to appeal to consumers who, looking for the appropriate certifying mark, will prefer environmentally-friendly goods to unfriendly ones. While the change in behavior is motivated by economic concerns, the form of the regulations is not, in itself, market-based; rather, these rules are somewhat akin to a moral code that fosters an environmental "civic virtue," hoping that a shift in consumer demand for such goods will lead to a commensurate shift in supply, thereby fostering "green markets."

There appears to be a growing demand for such regulation (although the size of the market remains small and its future uncertain), a demand that is driven in no small part by globalization and the consumerism that it fosters (Lipschutz, 2000). At the same time, however, corporations engaged in the production of material goods have no inherent interest in environmental protection, with two exceptions. First, a failure to reduce externalities may increase variable costs from fines and lost business, which requires the kind of policing that ISO-14000 does not address and that many corporations are loathe to accept. Second, having a "green" reputation could increase corporate profits. Purchasing rights to pollute, as opposed to reducing pollution, may be efficient in aggregate but, in an open-bid market setting, there is no theoretical ceiling to the cost of such permits, and there is little favorable publicity to be gained from admitting that one continues to pollute. A producer who voluntarily controls externalities, and engages in virtuous behavior, can advertise such practices and, with luck, grab a little extra market share. It might even be possible to charge a premium for green certification, for which high-income consumers will gladly pay. So, there is available here both a moral and a market opportunity. Corporations can do well by doing good, while certifiers can do good by doing well.

The ultimate question nevertheless remains unanswered: Can action through the market provide the incentives for the maintenance and enforcement of the kind of private, self-regulation described here? Producers will only be attracted to such approaches if environmentally-conscious consumers choose their environmentally-friendly certified products. But setting the premium for such products at the "correct" level is no easy task.

Moreover, it is one thing to tack a 10% green surcharge on a piece of furniture that may cost between \$100 and \$1,000; it is quite another to charge an extra 10% on a \$20,000 remodeling job or a \$300,000 house. Over the past 50 years, industrial societies have been built on the premise that lower prices enhance purchasing power, which maximizes individual satisfaction; it will not be so easy to convince people that they will be better off if they exercise environmental virtue in the marketplace. In any event, at the end of the day the trend toward privatization and market mechanisms appears to be gathering steam. If negotiations do begin, a global forestry agreement will take years to conclude even as non-public modes of regulation develop and grow. Meanwhile, the cutting and burning proceed without much letup, and the scale and impacts of concomitant environmental damage continue apace.

V.

WHAT KIND OF INTERNATIONAL FORESTRY LAW IS THERE? SOME CONCLUDING THOUGHTS

The case presented here (albeit in a rather abbreviated fashion) suggests that international forestry law does, indeed, exist. It does not, however, come in the form generally expected, as international convention and protocol. Rather, regulation is taking place through and in the market, fostered by a growing number of private and semi-public organizations and entities. The extent to which this trend is taking place (or might in the future) in other environmental issue areas, and represents a long-term shift, is less clear. The reasons for privatization of regulation are complex and beyond the scope of this paper (*see* Cutler, Haufler & Porter, 1999; Lipschutz, 2000), but the implications for international environmental law are significant.

In particular, where both international and municipal law presume a fairly homogenous regulatory environment, the reality is that both production and consumption are highly contextual and contingent. It might be argued that such differences could be handled nationally and locally, but experience does not bear this out (Scott, 1999). Addressing this very point is likely to be the great environmental challenge of the coming century.

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