

Chapter 2

Nonstate Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?

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When traditional forms of multilateral governance fail to materialise, is nonstate governance a viable alternative? This problem besets the forestry issue area, where repeated attempts to forge a binding international convention to manage the use and preservation of forests have failed (Wang 2001; Dimitrov 2003). Most relevant states now strongly oppose a global forest convention, including some that previously voiced support. Moreover, even prominent nongovernmental organizations (NGOs) have withdrawn their support, fearing a convention might do worse at promoting sustainable forest management than no treaty at all. In the wake of this failure, voluntary forest certification and eco-labelling schemes sponsored by environmental NGOs or forest company and landowner associations have arisen to fill this governance gap. Can such schemes gain acceptance as a viable alternative to a global forest convention?

The central argument of this chapter is that as a nonstate form of governance, transnational forest certification schemes require political authority beyond the state to succeed. In the abstract, power, legitimacy, and community constitute political authority (Bernstein 2003). In other words, authority exists when a community or audience authorises commands to which it feels bound, empowering those rules and, possibly, mechanisms to enforce them. But in the realm of global governance, especially in cases where hard law is absent, legitimacy takes on added importance because, by definition, nonstate governance schemes lack the traditional enforcement capacities associated with the sovereign state — the traditional site of authority in the international system where power, legitimacy, and authority appeared fused. Although one should always be sensitive to the importance of power for political authority, including where it resides and how it manifests, the decoupling of coercive force and legitimate rule is the most striking feature of new sites of authority found in contemporary global governance. According to James Rosenau, ‘the essence of [new sites of authority] is that they derive their legitimacy from the voluntary and conditional participation of individuals who can revoke their consent at any time’ (Rosenau 2003).² This chapter

focuses on legitimacy for this reason. Nonetheless, a sensitivity to its interaction with power in two regards: first, that underlying power configurations in the international system, as well as in domestic and international marketplaces, could interact with legitimacy dynamics to produce consequences that outside observers might not necessarily view as good or just; second, that schemes lacking in power resources risk being paper tigers, not really constituting governance in any meaningful way.

Legitimacy of any form of governance may rest theoretically on deeper notions of justice (Rawls 1971) or legitimate procedures — what Franck (1990) calls generically ‘right process’. But on a practical level, nonstate governance must ultimately be deemed acceptable or legitimate among its relevant audiences. Criteria of legitimacy in global governance are thus contingent on historical understandings of legitimacy at play and the shared norms of the particular community or communities granting authority, since a scheme’s viability depends upon those audiences recognising its legitimacy. In the case of forestry, relevant audiences include forest landowners and forest management companies, producers of forest products and purchasers of those products further down the supply chain (Cashore, Auld, and Newsom forthcoming; Sasser 2003). Governments also play an indirect role, as the source of authority for the web of existing rules and institutions that form the backdrop of any global governance scheme. While legitimacy does not guarantee a certification scheme’s effectiveness in promoting sustainable forest management (Cashore and Noah 2003), it is a necessary condition, especially in the absence of coercive state power.³

The legitimacy of transnational governance schemes must be achieved at two levels since, by definition, they occupy political space both internationally and domestically. Internationally, legitimacy requires that the basic institutional elements of the scheme — its norms and rules — fit with existing accepted norms and institutions of global environmental and economic governance. Overt conflict either with existing hard law or with less formal, but widely agreed or accepted, international norms or soft international law would militate against the legitimacy of any emerging governance scheme.⁴ The particular nature of forest certification as a market-based scheme raises the related question of whether acting in the marketplace can avoid conflicts that have militated against a binding global forest convention among states. This question is especially relevant for a central theme of this book: under what conditions can nonstate or voluntary forms of governance achieve desirable environmental, social and economic outcomes, if at all?

Domestic legitimacy is required because targeted firms also operate within domestic regulatory and competitive environments, with their own implicit and explicit norms of behaviour that set the boundaries of what relevant audiences would be willing to accept as appropriate. Two interrelated components of domestic legitimacy must be achieved: first, relevant audiences must accept the notion that a nonstate form of governance is an appropriate mechanism for addressing global environmental problems; second, domestic audiences evaluate which of the competing domestic

forest certification programmes, with very different conceptions of nonstate governance, are most legitimate (Cashore, Auld, and Newsom 2003, forthcoming).

The chapter proceeds in three parts. First, it discusses the most prominent transnational certification scheme, the Forest Stewardship Council (FSC). The FSC is identified as a nonstate, market-driven form of governance and placed in the context of more traditional forms of global governance. Second, the chapter addresses international legitimacy requirements. The FSC's relative success in meeting these requirements provides one piece of the puzzle of why forest certification has gained some acceptance as a viable form of governance whereas traditional forms of interstate governance have largely failed. The third section examines domestic legitimacy requirements and strategies employed to gain legitimacy for political schemes. The conclusion identifies limitations to this approach, and cautions against the view that transnational legitimacy automatically or easily translates into effective governance.

Forest Certification and Global Governance

Forms of Global Governance

Despite a great deal of talk about 'governance without government' in the international system, global governance usually brings to mind large and arguably powerful intergovernmental institutions such as the World Trade Organization (WTO), the International Monetary Fund (IMF), or even the United Nations and its affiliated agencies. These organisations, and the broader regimes or institutional arrangements in the areas they help manage, for the most part rest ultimately on the authority of their state members. They are organisations and institutions established by states and for states in order to solve collective action problems and manage interdependence.

As recent writing on global governance makes clear, however, nonstate actors — a term that refers to any actor other than governmental actors — increasingly participate in global governance if defined broadly as the method or means of realising shared values, interests, and goals that may or may not derive from a formal centralised political power or authority. Nonstate — or soft law — mechanisms, as defined in this volume, meet governance criteria if they purposely steer actors toward collective goals or values, and are recognised as authoritatively doing so (Rosenau 1995). In other words, they qualify as governance as long as what they do rests on the acceptance of shared rule.

The role of nonstate actors in global governance ranges from sources of information, influence, or monitoring of traditional intergovernmental institutions to governance schemes that manage in the absence of government control or even blessing. In between are various forms of hybrid governance where governments and nongovernmental groups — be they firms, nongovernmental political or activist groups, individuals, or groups of experts — jointly participate. Table 2-1 identifies ideal forms of global

governance depending on the level of governmental authority and control.⁵ The key difference relevant to this discussion is in the location of authority. What separates ‘non-state market-driven’ governance, as described by Cashore (2002), from both traditional international governance and hybrid governance is that authority is diffuse and located in the marketplace. Specifically, producers and consumers along the supply chain grant authority as products move through the market from (in the case of forests) extraction to end users. The institutions or governance schemes themselves are empowered ultimately by acceptance by these players, but also by drawing legitimacy from existing webs of authoritative international norms that define and regulate appropriate behaviour and practices in the issue area. Wider processes and audiences, including environmental groups and governments, may influence both supply chain dynamics as well as these broader norms.

International governance, in contrast, ultimately rests on the sovereign authority of states, either directly or because governments have delegated that authority to an institution or to private actors. A nonstate market-driven governance scheme does not rely on states and may explicitly exclude them, leaving them in a secondary role of

Table 2-1 Alternative Authorities in Global Governance

	Nonstate Market-Driven Governance	Shared Private/Public Governance	Traditional International Governance
Location of authority	Diffuse: producers and consumers along the supply chain (audience/market players); nonstate institution as location, interpreter, implementer of rules.	Some delegation possible (e.g., <i>de facto</i> granting authority to technical experts), but sovereign governments remain ultimate authority (explicit or implicit). Transfer of authority is rare.	Sovereign governments. Some delegation to institutions is possible, e.g., to interpret rules. Transfer of authority is rare.
Source of authority	Shifting international norms enabling markets, economic incentives, acceptance of programme by supply and demand side audiences.	State sovereignty and consent (deep structure of international system). Possibly legalisation or constitutionalisation.	State sovereignty and consent (deep structure of international system). Possibly legalisation or constitutionalisation.
Role of government	Interested player, potential facilitator or debilitator.	Shares policy-making authority.	Has policy-making authority.

Source: Adapted from Benjamin Cashore (2002), ‘Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule Making Authority’, *Governance* vol. 15, no. 4, pp. 503–529.

interested actor, albeit a powerful actor and one that may potentially challenge the scheme's legitimacy. While nonstate market-driven forms of governance in generic terms might occur within a single state's territory, the focus here on global governance specifically concerns schemes that transcend state borders.

The reasons for the emergence of these new forms of governance vary and are open to debate. Private governance among corporations may result from firms seeking to co-ordinate standards, form associations, provide services for their own benefit, or avoid state regulation. Similarly, states may enable or encourage private or hybrid governance for reasons ranging from the need to co-operate with firms when attempting transnational regulation to attempts to create regulatory environments consistent with their home firms' interest, to an inability or unwillingness to reach agreement at an intergovernmental level, whether owing to competing interests or structural impediments to co-operation among states. Furthermore, private or hybrid governance may form owing to an ideological or political desire to allow the market to operate with the least amount of political interference. From the perspective of nonstate actors, private or hybrid governance may stem from either an attempt to avoid state regulation or to create regulation or incentives for changes in behaviour when governments are unable or unwilling to act. While it is beyond the scope of this chapter to explore fully the reasons for the emergence of nonstate governance, some of the factors that led global forestry governance to move in this direction are nonetheless considered.

Forest Certification and the FSC

Forest certification and labelling programmes are designed to recognise officially those companies and landowners who voluntarily operate well-managed or sustainable forestlands according to predefined criteria. Forest company or landowner associations and environmental NGOs have established the schemes, setting up processes and procedures for developing and administering rules, and monitoring compliance. Governments may be involved indirectly if the scheme falls under larger regulatory or voluntary systems of standards where governments play a role, such as the International Organization for Standardization's (ISO) 14000 series of environmental standards. However, governments can also take on a new role as an interested — but entirely outside — actor, such as in the case of the NGO-led FSC, the main focus in this chapter. The FSC is a primary example of the new breed of governance schemes that falls closest to the ideal type of nonstate market-driven form of transnational governance. It also corresponds very well with the classification of soft law used in this volume, because it relies 'primarily on the participation and resources of nongovernmental actors in the construction, operation, and implementation of [its] governance arrangement' (see page 7). Moreover, participation is voluntary and consensus decision-making is encouraged, although voting procedures are available when consensus fails to develop. Like other soft law institutions, it shares some characteristics of law, and it may possibly form the basis of future binding law.

However, its source of authority separates it from more traditional state-centric understandings of international soft law, where authority stems from the stated intention or concern of states.

Forest certification operates according to a market-driven logic, based on the expectation that customers — whether manufacturers, retailers, or end users — prefer sustainably produced forest products and will demand them in the marketplace. Market incentives will then operate to produce forest products sustainably.⁶ This ordering of customers is not simply taken for granted. It occurs in the context of increasing environmental awareness and public advocacy on sustainable forestry. Groups involved in such schemes also actively manipulate the preferences of consumers and retailers by promotional activities including public campaigns and information, as well as the organization of buyer groups that serve to educate and socialise retailers as well as manipulate market incentives. For example, the World Wide Fund (WWF) has helped to organise buyers groups in the United Kingdom (1995+ Group), Holland (Hart Voor Hout), Belgium (Club 1997), Austria (Gruppe 98), the United States (the Certified Forest Products Council, renamed Metafore in 2001), and internationally with the creation of the Global Forest and Trade Network in 1997.

Forest certification schemes come in two basic varieties. In one, certification produces environmental rules and restructures influence among business, environmental, and social interests that raise standards (Elliott 1999). In the other, certification provides for continual improvement and, in many cases, approval of forestry practices already considered sustainable, as well as the maintenance of business influence in private policy-making processes. The focus on the FSC means this chapter is concerned primarily with the viability of the first type of scheme. Neither conception, however, is immune from a vigorous debate over the ecological and business implications of certification. On one side, some environmental critics fear that nongovernmental eco-labelling schemes such as certification risk sliding into weak forms of self-regulation if governments are unwilling or unable to take a more hands-on regulatory role. Notably, many of the domestic and regional schemes arose as industry-led competitors to the NGO-led FSC. Some of these competitors face criticisms from environmental groups and FSC supporters for being more concerned with industry control than with promoting sustainable forest management. Conversely, many industry and forest company officials argue that their programmes address forest sustainability in a more balanced manner, avoiding unnecessary details and regulations usually associated with public policy regulations.

Prominent FSC competitors include the American Forest and Paper Association's Sustainable Forestry Initiative (SFI) programme in the United States, the Canadian Standards Association (CSA) programme initiated with strong support from the Canadian Pulp and Paper Association (now the Forest Products Association of Canada), and the Pan European Forest Certification (PEFC) system, created by landowner associations that felt especially excluded from the FSC process. These programmes, along with newer schemes such as Brazil's Program for Forest Certification

(CERFLOR), created an umbrella organisation, initially under the auspices of the International Forest Industry Roundtable (IFIR) of the World Business Council on Sustainable Development (WBCSD), to establish an international presence to match the FSC's. Initial efforts by the IFIR to establish mutual recognition among all systems were later transformed by the WBCSD's (2003) CEO Action team into a proposed 'legitimacy threshold model'. Under this model, the FSC would be accepted as unique, and mutual recognition would depend on establishing process and standard threshold requirements for gaining market-based legitimacy.⁷ While the FSC remains hesitant to accept programmes originally designed to offer an alternative vision of governance, the market underpinnings of certification have at once moved the programmes closer together and made the FSC recognise that it, alone, will be unable to achieve global certification. As a result, the FSC is under pressure to find some accommodation with its competitors.

The FSC originated in discussions in 1990 as environmentalists drew the world's attention to threats to the world's tropical rainforests. Increased scrutiny of industry practices and activities that might contribute to deforestation resulted in a demand from timber retailers and distributors for fibre from well-managed forests (Meidinger 1997; Meidinger 2003). Adding impetus to the need for nonstate action, international negotiations to protect and manage the world's forests failed to produce a meaningful international forests treaty at the United Nations Conference on Environment and Development (UNCED, often referred to as the Earth Summit) in Rio de Janeiro in 1992. Environmental groups led by the WWF concluded that rather than expending significant effort to resurrect negotiations toward a forest convention, they could instead directly influence the private sector more quickly through the development of private eco-labelling programmes that would recognise those companies practicing sustainable forestry. They created the FSC in Toronto, Canada, in 1993. It became legally registered in Oaxaca, Mexico, in 1995 (Hansen 1998, 19) and recently moved its head office to Bonn, Germany.

The FSC originally created nine principles (later expanded to ten) and more detailed performance-based criteria, including tenure and use rights, community relations, workers' rights, environmental impact, management plans, and monitoring and preservation of old growth forests (Moffat 1998, 44; FSC 2000). To avoid a one-size-fits-all approach to forest management that would likely to foster local or regional resistance, the FSC programme requires the development of regional or national working groups to develop specific indicators and verifiers with which to apply the principles and criteria. Accredited certifiers then audit companies to see if they are in compliance with the regional standards.⁸ This institutional dynamic is crucial because it has directed many political struggles over certification to the territories designated as a national or regional working group.

In line with a nonstate market-driven identity, the institutionalised decision-making processes of the FSC limit business influence. Its three chambers — environmental, economic, and social — have equal voting weight. Each chamber also gives North

and South representation equal voting weight (Domask 2003). The FSC model also forbids government involvement in rule making, and allows wide-ranging policy initiatives. The limiting of business influence as well as the grouping together in the economic chamber of forest owners who must implement forest certification rules with businesses further down the supply chain are key reasons why FSC competitor programmes emerged. Many non-industrial private forest owners and industrial forest companies felt that their interests and concerns were not accommodated in the FSC model (Cashore, Auld, and Newsom forthcoming). As a result, most forest owners refused to participate in the FSC consensus process in regional standard-setting working groups in North America, and those who did were often at the losing end of key decisions on standards development (Lawson and Cashore 2001; Cashore and Lawson 2003; Cashore, Auld, and Newsom forthcoming, chs. 3, 4, 6). As of 2003, the FSC's competitor programmes had certified far more companies and forest land in North America and Europe than had the FSC, revealing the indirect influence of the FSC in promoting nonstate market-driven governance, even if it was not its own. The FSC has also certified companies in developing countries, including Brazil, Bolivia, and Indonesia, although the attraction to certification remains very weak in the South compared to the North.

Global Legitimacy

Traditional forms of international governance authority are state based and increasingly multilateral in form, in the sense of being embodied in institutions built by a number of states co-operating to achieve joint gains that recognise a set of reciprocal rules and obligations. As such, these institutions depend on major states support for their legitimacy. But what if governance arises precisely in response to the lack of legitimacy and effectiveness of intergovernmental, multilateral processes, as in the case of the FSC? What then is the source of legitimacy?

This section focusses on the requirements for international legitimacy. It argues that transnational authority faces many of the same difficulties in getting and sustaining legitimacy as public, multilateral authority in that both operate within an existing set of international norms that define appropriate behaviour and practices. In the forestry case, those conditions actually work in favour of legitimacy for nonstate market-driven governance compared to a multilateral global forest convention, owing to characteristics of the forestry issue area. However, there are also important differences between transnational and international authority, the main one being the relevant audiences where acceptance of a scheme must be achieved.

Scholars of international relations have long noted that international governance and cooperation requires domestic legitimacy in leading states (Ruggie 1982; Keohane and Nye 2001). However, if an institution is based, in the first instance, on markets and their supply chains rather than on territories, and if nongovernmental groups are

successful at creating transnational pressures that seem to operate independently of states or in another realm than the normal political realm of inter-state relations, then looking to democratic processes within states or the authority of states as a source of legitimacy is too limited, and perhaps even misleading.

The starting point, then, is a very broad concept of legitimacy rooted in organisational sociology and constructivist international relations scholarship rather than notions of political legitimacy rooted in democratic theory and practice that tend to dominate the political science literature. The conclusion considers the limitations of a strictly sociological approach, especially in regard to institutional design. It recognises that procedures and structures that ensure stakeholder access and accountability to those affected by decisions are likely important for achieving legitimate and effective outcomes, because norms of access and accountability reflect increasingly shared understandings of 'right process' transnationally. The design of the FSC clearly takes such concerns into account. Moreover, lack of access or resources to participate in the scheme can seriously undermine it, as the case study of Brazil in Chapter 3 demonstrates. Nonetheless, as a first cut, a more sociological notion of legitimacy moves directly to addressing the empirical and explanatory issue of the requirements for the acceptance of particular forms of governance, while bypassing thorny philosophical issues of what should nonstate governance ideally consist of, or whether it should be permitted at all.⁹ Put simply, in this view a rule or institution is legitimate if relevant audiences accept it as appropriate (Suchman 1995; Florini 1996). Given the nature and location of the audiences that must grant authority, as described above, legitimacy operates at two levels: global, which corresponds to the transnational marketplace and global normative structure, and national or regional, which corresponds to the immediate marketplace and regulatory regime in which firms compete.¹⁰ Each is addressed here in turn, and the interactions among them considered.

The Fit with the Global Normative Environment

At the global level, the legitimacy of nonstate governance depends on its fitness or competition with existing international sets of institutionalised norms already accepted as legitimate in the relevant issue areas, whether in the form of specific rules of multilateral hard law, soft law, or uncodified norms nonetheless understood to reflect shared beliefs about appropriate behaviour.¹¹ This focus stems from the recognition that rules and institutions compete for social fitness, so the focus turns to the conditions for success in that competition. For the normative environment, one must consider broadly accepted norms of global environmental governance and forest use and conservation norms, including emerging norms on sustainable forestry, as embodied in international environmental treaties and declarations, as well as action programmes, leaders' statements, and scholarly opinion. The relevant multilateral rules or hard law examined is primarily trade law, because rules on sustainable forestry remain largely in the realm of soft declaratory law.

In the case of sustainable forest management, Bernstein (2001) has labelled the relevant broader global normative environment 'liberal environmentalism', where international environmental protection is predicated on the promotion and maintenance of liberal economic order. Liberal environmentalism evolved out of a series of North–South compromises, but also an ideational shift in how the international community framed environmental issues and responses over the last 30 years. The main elements of this compromise include state sovereignty over resources within a particular state's borders on the political side, the promotion of global free trade and open markets on the economic side, and the polluter-pays principle (and its implicit support of market instruments over strict regulatory mechanisms), and the precautionary principle on the management side.¹² The polluter-pays principle refers to the idea that the polluting firm ought to shoulder the costs of pollution or environmental damage by including it into the price of a product. Ideally, price signals would reflect the real costs of pollution. This principle thus favours market mechanisms — including labelling and certification — because they operate by institutionalising schemes that incorporate environmental costs into prices. The precautionary principle is a norm concerning risk under uncertainty that essentially says that under conditions of risk of serious environmental harm, a precautionary stance is warranted under conditions of uncertainty.

These norms are embodied most notably in the Rio Declaration on the Environment and Development, the main statement of international consensus on how environment and development concerns ought to be addressed by the international community. States agreed to these norms at the 1992 Rio Earth Summit and subsequently reaffirmed them at the 1997 UN General Assembly Special Session to review the implementation of Agenda 21 (the detailed plan of action adopted in 1992 at Rio) and the World Summit on Sustainable Development in 2002. In addition to being reinforced in Agenda 21 and related action programmes, and in a wide range of declaratory and customary international law, these norms and the principles consistent with them are embodied in major multilateral environmental treaties such as the UN Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol to UNFCCC, and the Convention on Biodiversity, as well as programmes of multilateral institutions, including the World Bank, UN Conference on Trade and Development (UNCTAD), the United Nations Environment Programme (UNEP), and the Organisation for Economic Co-operation and Development (OECD) (Bernstein 2001, ch. 3).

Arguably, much of the difficulty in reaching an agreement on a global forest convention is precisely because states have been unable to formulate policies that do not conflict with many of these key norms.¹³ For example, certification is advantaged over multilateral diplomacy in the case of forestry because it is a market-driven mechanism consistent with environmental cost internalisation and the polluter-pays principle. The logic of certification is that firms internalise the costs of sustainable forest management through the requirements to gain a label, and the market operates to reward sustainable forest practices. Such a mechanism is consistent with liberal environmentalism, and avoids politically charged debates in which developing

countries in particular fear that the North will impose standards and unfair trade restrictions on developing countries (Lipschutz 2001; Humphreys 1996, 1999).

Although the debate over the effectiveness of economic instruments versus bans or other compliance and control mechanisms in environmental policy continues (Porter and van der Linde 1995; Esty and Geradin 1997, 1998; Gunningham, Graborsky, and Sinclair 1998; Gunningham and Sinclair 2002; Haufler 2001), a strong policy consensus has nonetheless emerged that favours market mechanisms, reinforced by the work of economists and internationally and domestic-sponsored policy research, including in influential international institutions such as the OECD, UNCTAD, the World Bank, and the United Nations Industrial Development Organization (UNIDO), and within the UN system more generally. While market mechanisms have been adopted for issues such as climate change, in the forestry area specific arguments in support of market-friendly or incentive-based mechanisms have also made headway. For example, major environmental NGOs such as the WWF subscribe to the argument put forward in the wider international forestry policy community that logging bans create perverse incentives such as increasing pressure to clear land for other uses or that they do not create incentives to improve practices because they eliminate markets for tropical timber (Hock 2001, 348).

This supportive normative environment is conducive to viewing certification and labelling schemes, and other market mechanisms, as legitimate means to addressing environmental problems, especially as compared to traditional forms of regulation of the command-and-compliance variety, such as bans or quotas. By granting legitimacy, these norms make it more difficult for market players or states opposed to the schemes owing to particularistic or short-term interests to make the case that others should not accept these schemes. Even with a normative context broadly conducive to the acceptance of such schemes, however, they must be designed to avoid running afoul of relevant international hard law, especially highly institutionalised bodies of rules embodied in multilateral institutions.

Consistency with Existing Multilateral Rules and Institutions

The multilateral institution of most relevance to transnational forestry governance is the WTO, specifically the Agreement on Technical Barriers to Trade (TBT). It covers labelling schemes, including eco-labelling, and is binding on WTO members. Other potentially relevant institutions include environmental agreements such as the statement of forest principles agreed to at Rio,¹⁴ the 1997 Kyoto Protocol, the Convention on Biodiversity, and the Convention on Trade in Endangered Species. However, it should be noted that rules in areas other than trade are still evolving, are often nonbinding, and are less institutionalized by most measures. In the case of climate change, for example, the political agreement ironed out in negotiations in Bonn and Marrakech in July and October-November 2001, which was meant to pave the way for ratification of the Kyoto Protocol, still left open the question of whether the use of carbon

sequestration in forests (or other land use, land-use change, or forestry activities permitted) must adhere to principles of sustainable forest management. In the only notable reference in a decision of the parties to the convention, they affirmed a set of principles to govern such activities, including ‘that the implementation of land use, land-use change and forestry activities contributes to the conservation of biodiversity and sustainable use of natural resources’ (UNFCCC 2001b, 56). Similarly, forest management activities under the protocol are defined as ‘those practices for stewardship and use of forest land aimed at fulfilling relevant ecological (including biological diversity), economic and social functions of the forest in a sustainable manner’ (UNFCCC2001a, 4). How these principles will be operationalised remains uncertain. Negotiators were much more focussed on reaching agreement on the conditions and extent to which carbon sequestration in forests (or other land-use changes) could count toward reaching emission targets.

In terms of binding rules, the agreement on TBT stands out as potentially most significant since any labelling of a traded product formally falls within its ambit. States supported the agreement, in its current form, in the Uruguay Round of trade negotiations that created the WTO. Disputes covered by the agreement are subject to the WTO panel process and appellate body rulings. Consistent with the norms that underpin the trade regime, the TBT agreement aims primarily to ensure that technical regulations and standards do not ‘create unnecessary obstacles to international trade’ (WTO 1994, preamble, art. 2.2). It permits national programmes and standards, including for environmental purposes, as long as they do not discriminate on the basis of national origin, are necessary for the stated objective, and are the least trade restrictive to achieve that objective (art. 2). In addition, the agreement states that recognised international standards (such as an ISO standard), or relevant parts of them shall be used ‘as a basis for their technical regulations’ except when they would be inappropriate or ineffective for the ‘legitimate’ objectives covered by the agreement.¹⁵

The implications of these provisions for nonstate market-driven governance are uncertain. The agreement on TBT does cover nongovernmental schemes (WTO 1994, preamble, art. 3). However, whether such a scheme would be recognised as an international standard is less certain, because the agreement only refers specifically to national standards. Nor is it clear what a transnational scheme’s status would be if not recognised by states. Halina Ward (1997, 143), for example, argues that ‘purely voluntary, non-governmental labelling schemes administered through organizations that do not fall within the scope of the term “standardizing bodies” for the purposes of the TBT Agreement ... do not fall within the scope of the TBT at all’. In addition, ISO standards by virtue of the WTO’s status and procedures, might be recognised automatically, even if they conflict with voluntary standards of a nongovernmental scheme with otherwise widespread support. However, working against their legitimacy, it should also be noted that procedures for determining the ISO 14000 series of standards in particular have been criticised because ISO decision making occurs through working groups of representatives from national standard-setting organisations,

which are dominated by government and industry experts. Some non-industry NGOs and developing countries complain this configuration leads to biases and unequal representation (for example, Clapp 1998; Deutsche Gesellschaft für technische Zusammenarbeit GmbH Forest Certification Project 2000, 18). So far, only two WTO disputes have been launched under the labelling provisions of TBT agreement, and both involved countries that argued for proprietorship of names of traded products — scallops and sardines — not labels that denoted standards regarding health or environment, or that involved nongovernmental labelling schemes. Thus, the interpretation of relevant conditions under the agreement remains untested.

The picture is further complicated by what kind of criteria for a label the TBT agreement deems acceptable. A major bone of contention is whether the criteria cover production and processing methods (PPMs), especially nonproduct-related production and processing methods (as in life-cycle analysis that takes into account values or effects not directly related to production of products for export or import). The Uruguay Round incorporated PPMs into the TBT agreement, so arguably even voluntary schemes that incorporate them are covered, although their status both before and after the Uruguay Round is still disputed (Chang 1997, 140–147). Nonproduct-related PPMs are not mentioned, thus do not fall under TBT by almost any interpretation. This creates the ironic situation where certification and labelling schemes that are potentially more expansive in scope, by covering broader inputs and values in the life cycle of a product, are generally considered outside the scope of the WTO as long as governments remain uninvolved. Once governments become involved, such schemes may fall under other rules of the General Agreement on Tariffs and Trade (GATT) or other WTO agreements (Chang 1997).

How trade law treats measures related to PPMs is still evolving. In theory, at least, such standards or measures can operate in a way consistent with free trade norms and the GATT since, if applied fairly, such a standard or measure to protect the environment could simply internalise the cost of pollution. However, from a trade perspective, especially when viewed from the South, such measures face resistance owing to a perception that they potentially violate sovereignty (especially in the case of nonproduct-related PPMs) because they involve guidelines on practices within an exporting state, not just the nature of a product. Moreover, different countries may argue they have different optimal levels of pollution and should not be subject to the same standard.

It should also be noted that outside of the TBT, WTO and earlier GATT rulings generally have set the bar high in justifying environmental measures, such as under GATT articles XX(b) and (g) on exceptions (for example, for health and safety and including animal and plant life and health, or to protect exhaustible natural resources), especially when it appears that standards are being applied extraterritorially.¹⁶ However, post-1994 Appellate Body rulings, relying on a more literal reading of Article XX exceptions, suggest some easing of the tests for acceptable environmental measures, in effect suggesting that earlier rulings applied requirements that had no basis in the

treaty text (Wofford 2000). In addition, rulings in cases such as beef hormones (1998) — a dispute launched by the United States over a European ban on hormone-modified beef — indicate some very limited openness to interpretations of science and risk more favourable to considering environmental concerns, such as those consistent with the precautionary principle, although it is still far too early to judge what such rulings portend in the longer run.¹⁷

These issues and related concerns remain ongoing subjects of controversy within the WTO Committee on Trade and Environment. Committee discussions suggest openness to eco-labelling in principle because it does not deny market access, but developing countries continue to express concern that it could restrict sales. This north-south divide shows little sign of easing.¹⁸

Where does all this leave forest certification programmes in their nonstate market-driven form? As private transnational voluntary schemes operating in the marketplace, they are largely immune from WTO discipline, unless adopted by a government. While some pressure continues to build for a harmonisation of criteria for sustainable forest management and certification schemes, a scheme such as the FSC arguably would not run afoul of basic WTO principles even if the agreement on TBT were extended to include nonproduct-related PPMs and transnational voluntary schemes. In the case of the FSC, its criteria are consistent with equivalency of environmental measures in importing countries (that is, different environmental goals apply to different countries), mutual recognition (that is, if it qualifies in the exporting country, it should qualify in the importing country), as well as general WTO goals such as transparency. For example, Hock (2001, 363–365) argues that the FSC process is transparent, nondiscriminatory (because it applies to all forests and ecosystems as opposed to being aimed mainly or solely at tropical forests), and does not restrict trade because it aims to inform the consumer rather than ban trade.

Under these conditions, the FSC or similar nonstate certification schemes seem well placed to gain international legitimacy, or at least not to provoke legitimacy conflicts with existing institutions. Where the FSC and some of its competitor nonstate programmes find conditions favourable to gaining legitimacy, a proposed global forest convention did not. A brief discussion of that failure further highlights the comparative advantage of nonstate market-driven governance in this case.

Failed Negotiations Toward a Global Forest Convention

International attempts to forge a forests treaty have their roots in the efforts of northern countries and environmentalists in the 1980s to press for action to protect tropical forests. These efforts originally focussed on securing the inclusion of a mandate to conserve tropical forests and their genetic resources in the International Tropical Timber Agreement (ITTA) of 1983. Even from this early date, forest negotiations were seen largely in the context of international trade and economic development, not primarily environmental protection or conservation. The primary mandate of the International

Tropical Timber Organization, the decision-making body of the ITTA, remains the regulation of trade in tropical timber (Humphreys 1996). As it became clear that tropical deforestation was not being addressed adequately within the structure of the International Tropical Timber Organization or other existing initiatives, pressure mounted, especially in the run-up to the 1992 Rio Earth Summit, to develop a more wide-ranging and environmentally focussed treaty on tropical forestry.¹⁹ It quickly became apparent, however, that any international agreement would have to include all forests, not focus only on tropical forestry, and would include the full range of forest values. Moreover, the compatibility of any action on forests with other multilateral institutions was a requirement for success. Following from arguments made earlier, the compatibility requirements can be broadly conceived as consistency with norms of liberal environmentalism that were emerging during this period, and especially with norms of free trade as embodied in the GATT.

It should come as little surprise that a consensus emerged in forest negotiations that trade and environmental policies can be mutually supportive, and this became a central element in the nascent discourse around sustainable forest management. This idea eventually became explicit in Principle 12 of the Rio Declaration and Principle 13 of the statement on forest principles (both agreed to in Rio). The former says that states should 'promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries' (UNCED 1992), while the latter applies the same sentiment to forestry, stating that 'open and free international trade in forest products should be facilitated' and that 'removal of tariff barriers and impediments to the provision of better market access ... should be encouraged to enable producer countries to better conserve and manage their renewable forest resources' (UN 1992). Also consistent with the norms mentioned earlier, Article 13(c) encourages states to incorporate 'environmental costs and benefits into market forces and mechanisms, in order to achieve forest conservation and sustainable development'.

This consensus, however, masks deep political conflicts that prevented the creation of a binding treaty in 1992. The debate at Rio pitted northern states such as the United States and Canada, which argued for a 'global responsibility' approach, against southern states such as Malaysia and India, which argued for 'sovereign discretion'. The latter feared that northern states would dictate how forests within the jurisdiction of southern states should be managed (Porter and Brown 1996, 115–129). As a result, negotiations were mired in north-south debates, where the G77/China bloc of developing countries remained suspicious of northern intentions on several fronts and at the Earth Summit refused even to consider a binding agreement with few economic incentives (Humphreys 1996; Porter and Brown 1996, 115–129; Williams 1993, 7–29). Despite various attempts since 1992 to reinvigorate movement toward a convention, all have failed.²⁰

The failure to create a binding treaty at Rio (the statement of forest principles is declaratory) and to make substantial progress toward a forest convention since 1992 is in large part owing to the inability to work out how this compatibility of free trade,

development, and protection of forests can work in practice. This poor fit is partly explained by the nature of forest resources themselves, which some perceive as a global commons problem, but which fall under the sovereign jurisdiction of individual states (although many forests cross borders). Thus, proposals to address forestry issues have difficulty gaining legitimacy because they can be easily perceived as violating norms of sovereignty over resources and free trade, especially since developing countries worry that any mandatory rules on sustainable forest management, even if not explicitly trade related, would disproportionately affect developing country exports. Aid or assistance to institute sustainable forest managements is the other major stumbling block.

While some have argued (such as Steiner 2001, 98–99) that various soft law principles, including those found in the forest principles, along with Agenda 21's Chapter 11 on deforestation, as well as various government-supported programmes such as criteria and indicator processes, might provide the basis for future action, even in these areas results have been limited at best. Moreover, apart from references to forestry issues in other treaties, interested states have made little progress toward creating binding forestry rules. The forest principles are symptomatic of an issue area where states have tried to include every value in international negotiations and refused to make trade-offs to give direction on how ambiguities would be addressed in practice. The UN Forum on Forests (UNFF) provides a more secure institutional setting to implement concrete proposals, but the political divides remain as strong as ever.

The sense among environmental NGOs that a convention with concrete commitments on sustainable forest management is unlikely in the short or medium term, and could even entrench watered-down rules if a weak regime prevailed, accounts in part for the push toward certification. Such schemes can be kept relatively independent from multilateral processes bogged down in north-south conflict. The inability of forest negotiators to formulate rules that fit with the broader normative context of what would be perceived as acceptable by states, and the ability of nongovernmental schemes to take advantage of opportunities that same normative environment provides, offered an opportunity to promote sustainable forest management where intergovernmental negotiations remained deadlocked.

Implications of Norms and Institutions for the Legitimacy of Certification

The discussion above suggests that the viability and acceptability of certification as a legitimate form of governance largely depends on how it is viewed in the context of a wider debate on the compatibility of trade and environmental policies. For most states, caution prevails. Fears persist that government supported sustainable management schemes could lead to unjustifiable restrictions on trade and obstacles to market access. Thus while certification has gained increasing attention in international forest negotiations, so far states can only agree to endorse more research to gain experience. Hence, the UNFF and related intergovernmental work will continue to encourage

research with the aim of enhancing comparability of various schemes, transparency, and nondiscrimination in operation of programmes, but certification is unlikely to be included in any inter-state agreement on forests in the short or medium term.

Furthermore, developing countries, in particular, would prefer the WTO to take the lead on certification rather than leaving it in the hands of forest negotiators who may be less sensitive to these concerns. They especially resist efforts to move certification discussions into environmental forums such as UNEP. But given the slow pace of resolving these conflicts in forums such as the Committee on Trade and Environment, supportive state leaders may simply view schemes such as the FSC or competitor programmes as the most viable way to incorporate abstract principles they have agreed upon, while avoiding the political stumbling blocks that have plagued forest negotiations.

Domestic Legitimacy

The domestic arena constitutes the second level of legitimacy. Its importance arises because land owners and forest companies — the very entities whose behaviour certification programmes seek to modify — make choices at this level over whether to pursue forest certification and, if so, which programme to support. Just why forest companies and forest landowners would agree to a set of rules not required by their own governments is an important question that requires an examination of the evaluations forest companies and landowners make of such programmes.

In order to address this question, Benjamin Cashore (2002) has drawn on Mark Suchman's seminal work on organisational legitimacy. Suchman (1995) identifies three types of legitimacy that external audiences may grant an organisation: pragmatic legitimacy based on short-term material self interest, moral legitimacy based on a belief that supporting the actions of the organisation in question is 'the right thing to do', and cognitive legitimacy, where external audiences grant legitimacy because to do otherwise is unthinkable or because it is taken for granted. The common element that makes each a type of legitimacy follows from the earlier definition, that legitimacy at its most basic means acceptance as appropriate by relevant audiences. 'Pragmatic', 'moral', and 'cognitive' reflect the reasons for that acceptance; for example 'I view an organisation as appropriate because it benefits me',²¹ 'I view it as appropriate because it is the right thing to do', or 'I view it as appropriate because it seems natural to follow its rules because I have internalised them and I would not think to act otherwise'. These distinctions permit a more nuanced understanding of how domestic-level legitimacy works, and the nature of support for the FSC by companies all along the supply chain, as well as by those domestic environmental groups seeking to alter and influence company evaluations.

Comparative research based on survey research and extensive interviews of forest company officials and landowners reveals that support by forest companies and

landowners at the domestic level for forest certification operates, for the most part, at the level of pragmatic legitimacy (Cashore, Auld, and Newsom forthcoming, 2003; Auld 2001; Cashore and Lawson 2003; Auld, Cashore, and Newsom 2002; Lawson and Cashore 2001; Newsom et al. 2002). Firms and companies support FSC-style nonstate governance because of short-term material incentives — they either see the benefits of gaining access to a certified market or they support certification in order to avoid costs of boycott campaigns. Similarly, many companies and landowners reluctantly support industry or landowner association nonstate certification programmes because they wish to grant these programmes legitimacy over what they view as the more costly prescriptive FSC-style certification programmes. Thus domestic legitimacy of FSC-style nonstate governance is currently weak, and often rests on environmental groups maintaining negative economic pressure (boycotts, targeting of companies). Forest companies and landowners grant even FSC competitor programmes a relatively weak form of legitimacy, since support here is often a defensive tactic.

Recognition of the relatively weak, pragmatic form of legitimacy at the domestic level raises important questions about whether and how domestic legitimacy for nonstate governance systems might move toward more durable moral or cognitive forms. Suchman (1995) argues that cognitive legitimacy can be attained by routinisation, but just how long companies would have to grant pragmatic legitimacy before it becomes routinised, or whether routinisation is more or less automatic or depends on particular conditions, is uncertain. Depending on these factors, nonstate governance systems could easily wither away before cognitive legitimacy was granted.

One promising direction of research in investigating this transition is to focus on 'legitimacy achievement strategies' (Suchman 1995) at the domestic level. FSC and competitor programme supporters are actively engaged in high-stakes efforts to win the legitimacy contest among firms along the supply chain. Here efforts and results diverge dramatically among different cases. In Canada's British Columbia (BC), the FSC has made significant inroads through active legitimacy achievement strategies, reversing initial forest company rejections. By 2002, seven of the ten largest companies in the province indicated some support for the FSC (Cashore, Auld, and Newsom 2003). But by the summer of 2002, much of this support was dissipating as the FSC working group produced standards in BC that companies felt were too stringent and would hurt them economically if adopted (Bourgeois 2002; Cashore, Auld, and Newsom forthcoming, ch. 3). In the United States, with few exceptions, large forest companies continue to reject the FSC. Instead, they strongly support the American Forest and Paper Association's SFI programme. In the United Kingdom, state forest owners have reluctantly supported the FSC, while in Germany, most forest landowners support the PEFC system, although the FSC has earned the support of state forest landowners whose political masters support an environmental agenda (Cashore, Auld, and Newsom forthcoming, chs. 4, 6; Auld 2001; Newsom 2001). In Sweden, large industrial forest companies support the FSC, while small landowners reject this approach.

A focus on domestic legitimacy is required to answer the question of why support for global nonstate governance would vary across countries, or why some firms would opt for the more prescriptive FSC scheme while others would steadfastly support the industry alternatives. Research by Benjamin Cashore, Graeme Auld, Deanna Newsom, and James Lawson reveals the importance in understanding how variations in the features of domestic forest sectors mediate domestic legitimacy dynamics. Since soft law mechanisms such as certification depend to some degree on the success of active legitimacy achievement campaigns, it is important to have a thorough understanding of the process through which domestic legitimacy is achieved, and the ability of actors supporting the FSC and other certification programmes to alter preferences.

The competition between the FSC and its competitors is especially important because even if the FSC loses, it may have succeeded in creating pragmatic and possibly cognitive legitimacy for the general concept of nonstate market-driven governance in forestry, even if its preferred rules and procedures do not fully prevail. Indeed, this may very well be the direction of forest certification in the United States, where the entry of the FSC led to little direct support, but widespread support of its competitor, the SFI. There is emerging evidence that support for the SFI is reaching a cognitive phase among industrial forest owners, becoming an everyday business practice. However, if domestic legitimacy struggles result in the emergence of a nonstate market-driven certification system that lacks broad-based support from environmental groups, and faces criticism by them for what they believe are inappropriate standards for promoting sustainable forestry, then the question arises as to whether this form of governance will address the problems for which environmental groups originally created the FSC.

Understanding domestic legitimacy first requires an analysis of the way pressures along the supply chain may reach or affect forest company and forest landowner legitimacy evaluations. Support for various schemes is uneven along the supply chain. Initially, the FSC was more successful than its competitors in gaining support from retailers such as Home Depot, B&Q, Sainsbury, Centex, and German publishing companies, which then urged or required their suppliers to provide them with FSC-certified wood or wood products. Supporters of the FSC have also been successful in creating buyers groups (see examples above) in different countries with the purpose of establishing economic incentives for forest companies by creating a clear demand for certified forest products. One unanticipated consequence, however, is that many forest companies have used this pressure to create their own programmes in an attempt to meet retailers' demands without having to adhere to more onerous FSC rules. Consequently, many of the above-mentioned retailers, as well as others, now have inclusive procurement policies that implicitly or explicitly accept FSC competitors.

While still in its infancy, recent research on the influence of supply chain dynamics in the struggle for domestic legitimacy shows the centrality of different monopoly interests of the FSC and competitor programmes at different parts of the supply chain (Cashore, Auld, and Newsom forthcoming). At the level of the forest landowner and

forest company, FSC competitor programmes have a monopoly interest in gaining support. If a landowner or forest company accepts the rules of the FSC, the competitor programme has lost the legitimacy struggle because it was created expressly to limit the impact of the FSC. However, the FSC does not have a monopoly interest in support at this level — it does not matter to the FSC if a forest landowner or forest company follows another programme's rules as long as it supports and follows FSC rules as well. The reason is that the FSC was created as the most prescriptive and wide-ranging programme, which means it can encompass the rules of competitor schemes.

The situation is reversed, however, further down the supply chain. Take, for example, the case of the retailer Home Depot. The FSC requires that Home Depot only support and grant legitimacy to the FSC in order to create pressure along the supply chain. If Home Depot also supports — that is, grants legitimacy — to a competitor programme, it effectively removes the economic incentive for landowners and forest companies to support FSC, taking away all of its market leverage required for pragmatic legitimacy. Conversely, based on the same logic, FSC competitor programmes have no monopoly interest at the retailer level at all — all they care about is that their programmes, in addition to the FSC, are deemed to be legitimate. It is for these reasons that at the retailer level FSC competitor programmes formed an umbrella organisation — the IFIR — whose members called for mutual recognition not just of their own programmes, but also of the FSC (Cashore, Auld, and Newsom forthcoming, ch. 8).

Further complicating this process, the supply chain is often not limited to a single national market. Transnational supply chains can produce different legitimacy achievement dynamics because different players along the chain operate in different national contexts. Acting across borders presents both opportunities and constraints for influencing the support for particular schemes. Cashore and his colleagues found, for example, that commitments from retailers and purchasers of forest products were easier to obtain, and had more direct market impact, when those retailers and purchasers were outside of the domestic unit. For example, German publishers fairly quickly and easily committed, following environmental NGO pressure, to demanding that their BC forest company suppliers commit to the FSC. The same German publishers paid much less attention to requiring that their domestic supply be FSC certified (Newsom 2001). To do so would have meant becoming embroiled in domestic debates about the supremacy of German forestry, and being accused of pandering to foreign demands. As a result, German publishers have more impact on influencing domestic legitimisation struggles in BC than in their own country. A similar dynamic occurred in the case of Scott Paper. Its UK branch quickly demanded that its BC suppliers become FSC certified while Scott Paper Canada took the opposite stance, publicly announcing it would not succumb to unfair environmental group demands that would hurt the Canadian economy (Auld 2001). Furthermore, it should not be surprising given this pattern that the U.S. Home Depot's announcement to favour the FSC had more impact in altering forest company support for the FSC in British Columbia, Canada, than it did in the United States. There, a well-organised industry effort has

resulted in a stalemate of sorts: as long as the U.S. companies refuse to commit to the FSC, Home Depot will be unable to meet its commitments to the FSC, which puts pressure on Home Depot to eventually support the industry competitor programme as legitimate. Such a move would do much to grant nonstate market-driven governance legitimacy in the United States, but at the same time could undermine the FSC conception of forest certification.

Domestic Legitimacy and Durability

While much of the effort to achieve legitimacy is centred on gaining pragmatic legitimacy, early research suggests two important limits to Suchman's arguments. First, contrary to Suchman, Cashore's team found that caution is warranted in assuming that pragmatic legitimacy is always the least durable. They found that for profit-maximising companies, it appears that pragmatic legitimacy is a prerequisite for nonstate market-driven governance, making its status more important, at least initially, than that of moral legitimacy. Pragmatic evaluations will trump moral ones, and are thus potentially more durable, since companies need to stay in business. But such support is double edged. While it may mean that companies will support certification when it offers a clear market advantage, the reverse is also true — companies granting only pragmatic legitimacy will walk away if they view certification as a liability. Indeed, understanding the conditions that produce both moral and pragmatic legitimacy appears to be the key to durability.

Moreover, survey findings and interviews of non-industrial landowners in the United States, Germany, the UK, Canada, and Sweden suggest their notions of private property rights and fierce feelings of independence militate against the FSC and industry-created FSC competitor programmes obtaining moral legitimacy since outside rules are deemed largely inappropriate (Auld, Cashore, and Newsom 2002; Newsom et al. 2002). Many landowners even view forest landowner association certification programmes with suspicion (Newsom et al. 2002), unless landowners were specifically involved in the creation of rules and they deemed their participation as purely voluntary. Here, the importance of institutional design, specifically regarding participatory norms and accountability, creeps back in. The issue of non-industrial private forests raises the need to understand how such audiences might grant pragmatic legitimacy, and if and when this support for any programme might eventually be converted to cognitive support.

Second, a focus on domestic legitimacy achievement strategies forces consideration of whether such strategies take conforming or converting approaches (Cashore, Auld, and Newsom forthcoming).²² Under converting strategies, the certification programmes and their supporters actively work to change the evaluations of those from whom they seek support by changing the outside audience in some way. The usual strategy is to create economic pressure along the supply chain. But if this economic pressure falls short, certification programmes may undertake legitimacy achievement conforming

strategies where they change their own rules or programmes in order to gain support. For example, the FSC has relaxed its rules governing harvesting of ancient forests in order to gain support in British Columbia, and relaxed its rules governing forest plantations in order to get support from companies operating in the tropics and other fast-growing climates. The strategy chosen is important because the extent to which the FSC and its competitor programmes must conform to different audiences in their efforts to achieve legitimacy will affect their ability to remain true to their original goals. In this regard, Cashore and his colleagues found that certification schemes appear to have core audiences who grant moral legitimacy that must be maintained. This finding suggests that the conforming strategies to anchor moral legitimacy in core audiences may be required to gain legitimacy from non-core audiences.

Future Research

Domestic legitimacy contests are far from predetermined. Analysis of how strategic choices interplay with key features of different domestic forest sectors is required to make a clearer case whether or not nonstate market-driven governance can gain legitimacy where a forest convention has failed.

One especially important line of inquiry is to investigate the role of traditional domestic state authority in this process, since, as noted above, it still provides the general rules of the game under which these struggles occur. In so far as the state is a landowner or purchaser of wood products, its actions and policies, or the broader regulatory or legal environment it creates, might add to or reduce the ability of nonstate market-driven governance to gain legitimacy.

Moreover, a key question is whether nonstate market-driven governance institutions might actually replace traditional domestic public policy arenas as the places where forest conflicts are resolved. If an array of actors along the supply chain accepts an FSC — or even a hybrid — conception of governance as legitimate, environmental governance power relations could conceivably be altered in two ways. On the one hand, the FSC grants more decision-making authority to nonbusiness interests than many traditional process for public policy making. On the other hand, it is much more difficult for environmental NGOs to target a firm that abides by FSC rules, and is certified as doing so, as being environmentally unfriendly since it possess the legitimacy granted to it by NGO-supported governance system.

Conclusion

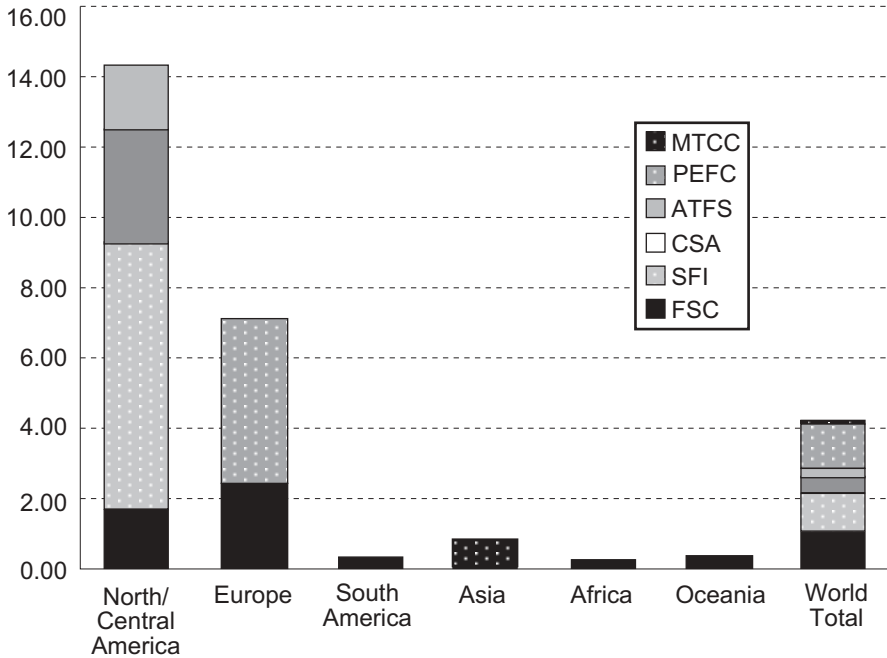
The domestic-transnational nexus associated with nonstate market-driven governance is unique because the very location of authority under it occurs along a supply chain that can transcend borders. Nonetheless, traditional domestic borders are important for two reasons. In the case of the FSC, they are important because the FSC grants

national or regional bodies the right to develop domestically appropriate rules through consultation processes. Such domestic-centred processes are important for how rules are developed and how corresponding legitimacy is granted or not granted by different domestic audiences. Furthermore, the FSC has resulted in the emergence of domestically focussed competitor programmes, which means legitimacy contests are largely domestic in nature.

At the same time, schemes that operate transnationally must gain legitimacy at the international level as well, since they come into contact with existing norms, rules, and institutions that define and regulate appropriate behaviour in relevant issue areas. Our main goal has been simply to show that a scheme must be granted legitimacy at both levels to be successful, and to offer some preliminary explanations as to how and why legitimacy is or is not likely to be granted at those two levels. A sociological approach to the problem of legitimacy is useful in this regard.

One limitation of a sociological approach, however, especially when focussed on the legitimacy of the norms and rules of a scheme, is the tendency to bracket democratic or other procedural aspects of legitimacy that link decision making and outcomes of a regime to the communities that authorise it, and over which it is granted authority. The importance of institutional design and the right process in gaining legitimacy from relevant communities have been noted here, although not explicitly addressed. Indeed, it may be that insights from the democratic and normative literature on legitimacy cannot easily be separated from the focus here on the fitness of norms and rules and legitimacy achievement strategies. The link may come in the form of investigating the shared norms of stakeholders on legitimacy requirements. This poses a particular challenge for nonstate market-driven governance since, owing to differences in relevant audiences in terms of identities (producers, consumers, environmentalists), geographic location, or interests, consensus may be lacking on what constitutes either procedural or substantive legitimacy. Thus there may be little agreement on how to design a nonstate market-driven institution that could generate authoritative commands. More research is required on these links, particularly if demands for greater democracy and accountability in global governance institutions continue to increase.

The focus on legitimacy should also not obscure the underlying sustainability goals in this case. Thus, this chapter concludes on a cautionary note. Success in gaining legitimacy does not necessarily mean that a scheme is effective at producing sustainable forest management or is desirable from the perspective of all actors. Two examples highlight this danger. First, in the context of north-south debates over global forest protection and use, it is notable that the focus of certification campaigns very quickly shifted from the South to the North (Europe, the United States, and Canada) because of the strength and coherence of environmental groups in the North and because these locations offer the most likelihood of institutionalising nonstate market-driven governance (see figures 2-1 and 2-2). Once institutionalised domestically or regionally in the North, such governance will arguably provide leverage, both materially and

Figure 2-1 Percentage of Forest Cover under Leading Certification Programmes

Notes:

1. The percentages of forest cover in this table downplay the influence of forest certification programs. Data from the Food and Agriculture Organization include all lands with '10 percent forest cover', and include lands generally ineligible for forest certification, such as commercially unviable forest land, forestland used for non-forestry activity, and land in formal protected area status. For this table, certified land by programme is recorded, so the data 'double count' the small amount of forest land certified under more than one programme.
2. FSC: Forest Stewardship Council; SFI: Sustainable Forestry Initiative; CSA: Canadian Standards Association; ATFS: American Tree Farm System; PEFC: Pan-European Forest Certification; MTCC: Malaysian Timber Certification Council

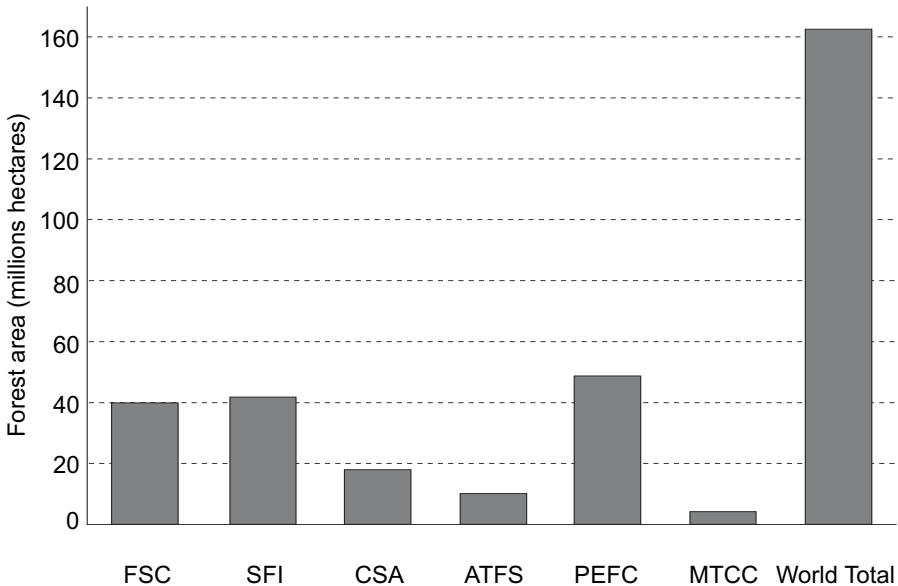
Sources: Data reported as of 1 December 2003. See websites of the Forest Stewardship Council <www.fscoax.org>; Sustainable Forestry Initiative <www.afandpa.org>, Canadian Standards Association <www.sfms.com>, James O'Connor (joconnr@forestfoundation.org) of the American Tree Farm System; Pan-European forest Certification <www.pefc.cz>, and the Malaysian Timber Certification Council <www.mtcc.com.my>. Forest cover is reported by the Food and Agriculture Organization, 2000, and identifies land with 10 percent forest canopy.

morally, to force developing countries and emerging markets to accept. While such a dynamic might bypass the thorny political divisions that militate against an international convention, it necessarily risks being perceived as a form of eco-imperialism. It thus appears crucial that the FSC (and other programmes) decision-making structures strive to be truly representative, and its principles and processes remain sensitive to local conditions and needs.

Second, as hinted at above, there is always a risk that a scheme that gains legitimacy among major players, if not driven by a political process that pushes standards higher than some interested actors may desire, may institutionalise lowest common denominator standards, industry preferences, and lax monitoring. This risk is mitigated to the degree that nongovernmental groups manage to entrench themselves as core audiences or continue to apply material pressure. Nonetheless, it may be that a nonstate market-driven certification system must first become institutionalised with base-line standards to which most companies eventually adhere, at which point across the board increases could occur without putting those who support forest certification at a competitive disadvantage.

This case also raises broader questions concerning whether nonstate governance poses a viable alternative to state or multilateral governance. While the legitimacy dynamics of the FSC and its competitor schemes are instructive, much work remains to

Figure 2-2 World Area under Major Forest Certification Programme



be done on how legitimacy dynamics at various levels interact, and whether legitimacy is enough without the coercive power of the state to back it up. In the face of the limited progress toward sustainability goals by traditional multilateral governance, an investigation of the viability of these new forms is all the more imperative, as well as an assessment of how serious a challenge to state authority they pose.

Notes

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2. Rosenau acknowledges, as do the authors of this chapter, that such new islands of authority are still the exception and exist in oceans of disorder or the more classic order of the sovereign state system.
3. Hard law enforcement mechanisms available to governments under the authority of international law may not be the only means of coercion, but they are the primary source of coercive power and authority in the international system. This source of authority is usually unavailable to nonstate schemes unless delegated by states. One of the few alternative sources of direct coercion (as opposed to indirect market pressures or voluntary codes or rules) available in nonstate governance resides in the marketplace, where actors' decisions to purchase or not (including a decision to boycott certain products) can put pressure on the targets of governance, whether states or firms, to comply. These marketplace decisions or activities may be legitimated under nonstate governance arrangements. Thus nonstate governance is not necessarily without coercive elements, an observation that fits with the argument that authority links power and legitimacy over a community. See Bernstein and Cashore (2000) on the use of transnational market pressure to affect policy change.
4. In the strict context of this 'fitness' argument, a traditional understanding of soft international law as largely declaratory or nonbinding is applied, but that has wide acceptance or agreement among states and frequently serves as a basis for future hard law (Chinkin 1989; Dupuy 1991). The modifier of 'international' is used here to differentiate it from the broader, nonstate focus of soft law in this volume.
5. This table is adapted from Cashore's (2002) categorisation of domestic governance.
6. Owing to competing schemes and the complex science behind sustainable forestry, no consensus definition of sustainable forestry exists. This lack of a universally accepted definition makes an examination of rule development within the FSC and competitor programmes important to understand how they may define sustainability.
7. The legitimacy threshold model was developed and promoted by the IFIR following the Forest Dialogue meeting on forest certification in Geneva, Switzerland, 17 October 2002.
8. Because many regional or national working groups are still developing standards, many companies and landowners are audited according to provisional rules developed by certifiers and accepted by Oaxaca.
9. See Bernstein (2003) for a detailed discussion of these broader issues.

10. Although the term 'global' is used here to differentiate this level from a strictly state-centric (international) focus, it must be said that marketplaces may not be truly global and global norms may not be universally accepted.
11. For a related discussion of specific requirements for forest certification schemes consistent with parts of the argument here concerning the importance of fitness with international rules and norms, see Deutsche Gesellschaft für technische Zusammenarbeit GmbH Forest Certification Project (2000).
12. A detailed discussion of why this set of institutionalised norms is believed to prevail can be found in Bernstein (2001). State sovereignty over resources is widely considered the foundational norm of international environmental law, existing in various forms in legal decisions and documents such as the UN charter, but stated explicitly beginning with the UN General Assembly Resolution 1803/62 (1962) on Permanent Sovereignty over Natural Resources, and later in Principle 21 of the Stockholm Declaration on the Human Environment and Principle 2 of the Rio Declaration. The latter expanded it to include a sovereign right to exploit resources pursuant to a state's own environment and development policies. See, for example, Sands (1994, 7).
13. Given space limitations and the limited focus of this chapter, the argument that this is the reason for failure cannot be defended here. If anything, failure to reach an agreement on a binding treaty is overdetermined since the issue area is characterised by structural conflicts of interest, lack of scientific consensus on the transnational effects of deforestation, conflicts that arise from differences in national forest economies, and so on. See Lipschutz (2001) and Dimitrov (2003) for an exploration of some of these alternative explanations. The argument here is more modest, namely that these norms would be enabling of any agreement that could be framed to be consistent with them, in effect redefining interests and making it more difficult for those opposed to successfully argue their case.
14. The full title of the Rio agreement is the 'Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of All Types of Forest'.
15. 'Legitimate' objectives explicitly mentioned include national security, prevention of deceptive standards, and the protection of human health and safety, animal or plant life and health, and the environment.
16. Trade-environment disputes that touch on the issue include tuna-dolphin dispute and the shrimp-turtle dispute. See, for example, Wynter (1999) for an argument that the WTO Appellate Body's decision on the shrimp-turtle dispute between the United States and India, Malaysia, Pakistan, and Thailand, over the danger to protected sea turtles by shrimp trawling, left the door open for the use of PPM-based trade measures, if properly applied, under GATT article XX, even though it ruled against a U.S. restriction on imports of shrimp caught with nets not equipped with 'turtle excluder devices'. The ruling found the U.S. acted in an unjustifiably discriminatory manner, not that PPMs were impermissible.
17. For a succinct summary of the Panel and Appellate Body rulings, see Nordström and Vaughan (1999, Annex 1, paras. 140–147). On possible implications, see Winham (2003).
18. At meetings of the Committee on Trade and Environment during 2000 (WTO 2000), many delegates asked that the committee work on clarifying coverage of eco-labels under the TBT agreement, and some expressed concern they could become an unnecessary barrier to trade. At the same time, delegates supported their use as an effective tool to promote environmental policies. One member state argued that eco-labels that included nonproduct-related production and processing methods were not consistent with WTO rules. There is general agreement within the committee that eco-labelling schemes (whether mandatory or voluntary) should be developed in a transparent, nondiscriminatory (e.g., consistent with rules of national treatment), and least trade restrictive manner to achieve the policy objective. Pressure may build to only allow mandatory schemes, such as those agreed to

under multilateral environmental agreements, since voluntary schemes run a greater risk of being considered barriers to trade under WTO rules if there is any government involvement and TBT encourages harmonisation. However, agreement on mandatory schemes is obviously much more difficult and the lack of progress in the committee suggests continued opening for purely private market-driven schemes.

19. After prolonged negotiations on a successor agreement (the ITTA 1994, which came into force in 1997), consumer countries pledged to manage their own forests sustainably by 2000, but outside the context of the International Tropical Timber Organization. They reasoned that a pledge within the organisation would undermine the prospects for a global forest convention, which they wanted to be much broader than the trade-focussed ITTA. Negotiations originally concentrated on tropical forestry (pre-Rio), now on the North and South, producers and consumers, and full range of forestry issues. A new round of negotiations is underway for a further successor agreement following the ITTA 1994, which will expire in December 2006.
20. A variety of narrower or regional initiatives have taken shape since 1992 in its place. Examples include the Montreal Process on creating criteria and indicators for the conservation and sustainable development of temperate and boreal forests, the Helsinki Process on protecting forests in Europe (which includes a criteria and indicators process), and negotiations toward successors to the ITTA. The only process to focus serious attention on a global convention was the Intergovernmental Panel on Forests in 1995, sponsored by the UN Commission on Sustainable Development. After two years of discussions that failed to reach consensus on a number of key issues, the Intergovernmental Forum on Forests (IFF) succeeded the Intergovernmental Panel on Forests, but obstacles concerning trade, sovereignty, and aid continued to plague those discussions ('Report of the First Session of the CSD Intergovernmental Panel of Forests' 1995; 'Summary of IPF-2 Geneva' 1998). The IFF process eventually evolved in October 2000 into the permanent United Nations Forum on Forests (UNFF), a subsidiary body of the UN Economic and Social Council with the mandate to carry on work to implement existing agreements and initiatives from the IFF and its predecessor. In addition, it would consider within five years the possibility of a mandate for negotiating a binding convention.
21. Pragmatic legitimacy is therefore not simply the same as material self-interest, because of its emphasis on acceptance of a rule or institution as appropriate. If a company acts simply out of coercion — that is, it does not accept the scheme but denounces it even while it feels compelled to go along to avoid costs — then pragmatic legitimacy has not been achieved. However, given that pragmatic legitimacy still largely rests on short-term cost benefit calculations — the same consequentialist logic as an interest-based argument that does not necessarily imply legitimacy — pragmatic legitimacy is seen as a relatively weak form.
22. The categories are modified from Suchman (1995), with 'converting' replacing his 'manipulation' category.

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