



The Administrative Law of Private/Public Global Forestry Regulation

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Introduction

- ◆ Emerging System of Global Forestry Regulation
- ◆ Major Form: Forest Certification
- ◆ Extra-governmental Actors and Institutions
 - ◆ Governments secondary
- ◆ Closely akin to Administrative Regulation
 - ◆ Rulemaking
 - ◆ Licensing
 - ◆ Enforcement
- ◆ My Goal: stimulate discussion and analysis



“Regulation”

- 1. development of general rules**
- 2. applied to categories of actors**
- 3. by specialized officials, based on**
- 4. normative justifications, with**
- 5. background threat of sanctions**



“Law”

(Institutionalist/legal pluralist perspective)

- 1. rules**
 - 2. organized in terms of rights and duties**
 - 3. with implementation mechanisms and**
 - 4. normative justifications**
- ★ Regulation thus a special form of law
 - ★ Policy making and implementation by expert agents
 - ★ Flexibility and adaptability



Paper Overview

1. Forest Certification
2. Primary Actors
3. Rule-Making
4. Adjudication and Enforcement
5. Preliminary Assessment
 - A. Effectiveness
 - B. Reliability
 - C. Accountability



Certification: Institutional Elements

- ★ **Standards for proper forest management [Rulemaking]**
- ★ **Certification of complying firms [Adjudication]**
 - ✦ **Accreditation of Certifiers (Inspectors)**
 - ✦ **Logo for Certified Products**
- ★ **Sanctions**
 - ✦ **Promotion of Certified Products (“buyers groups”)**
 - ✦ **Discouragement of Non-certified Products**





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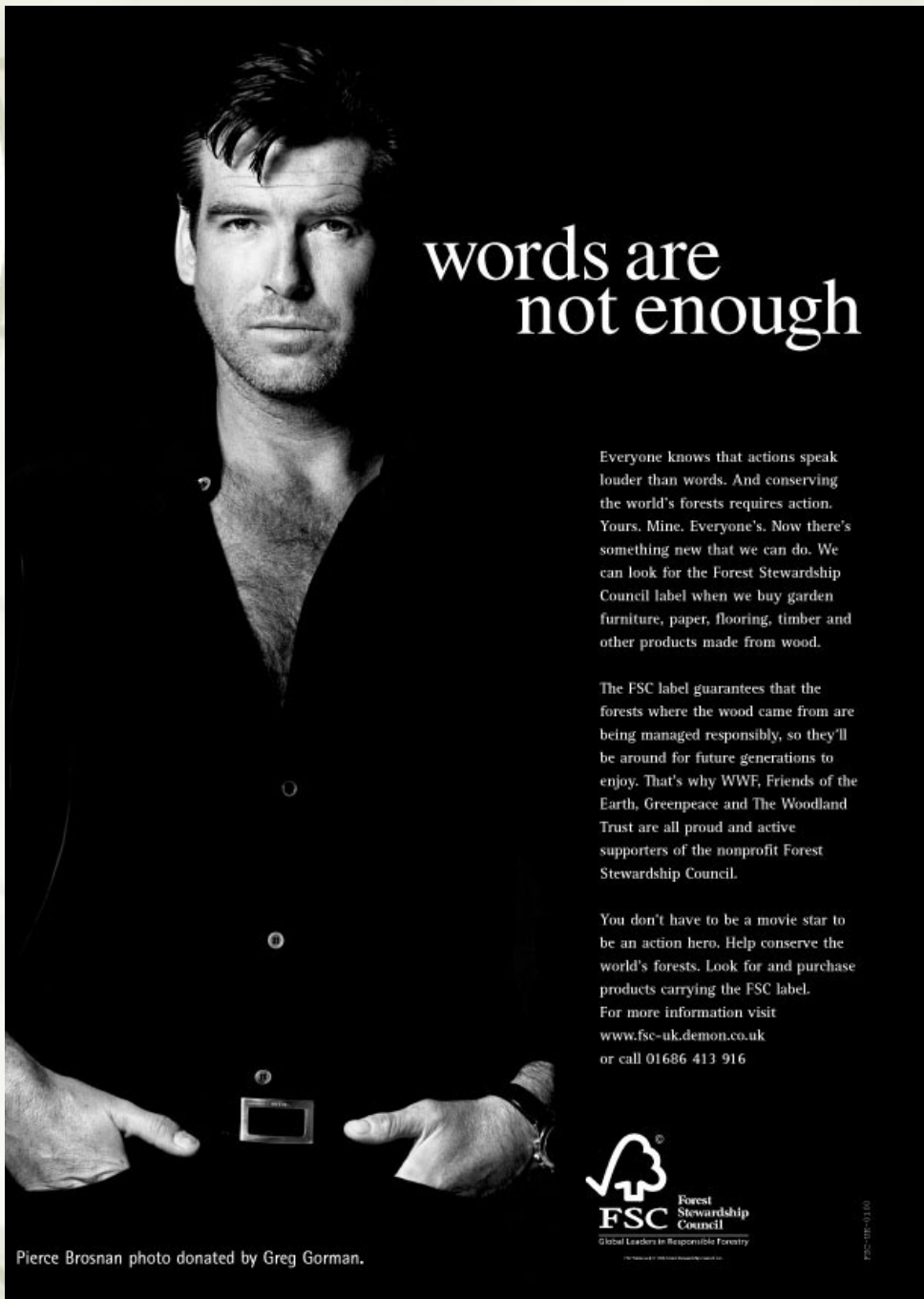
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words are not enough

Everyone knows that actions speak louder than words. And conserving the world's forests requires action. Yours. Mine. Everyone's. Now there's something new that we can do. We can look for the Forest Stewardship Council label when we buy garden furniture, paper, flooring, timber and other products made from wood.

The FSC label guarantees that the forests where the wood came from are being managed responsibly, so they'll be around for future generations to enjoy. That's why WWF, Friends of the Earth, Greenpeace and The Woodland Trust are all proud and active supporters of the nonprofit Forest Stewardship Council.

You don't have to be a movie star to be an action hero. Help conserve the world's forests. Look for and purchase products carrying the FSC label. For more information visit www.fsc-uk.demon.co.uk or call 01686 413 916



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FSC-COC-1100





FSC (1993)

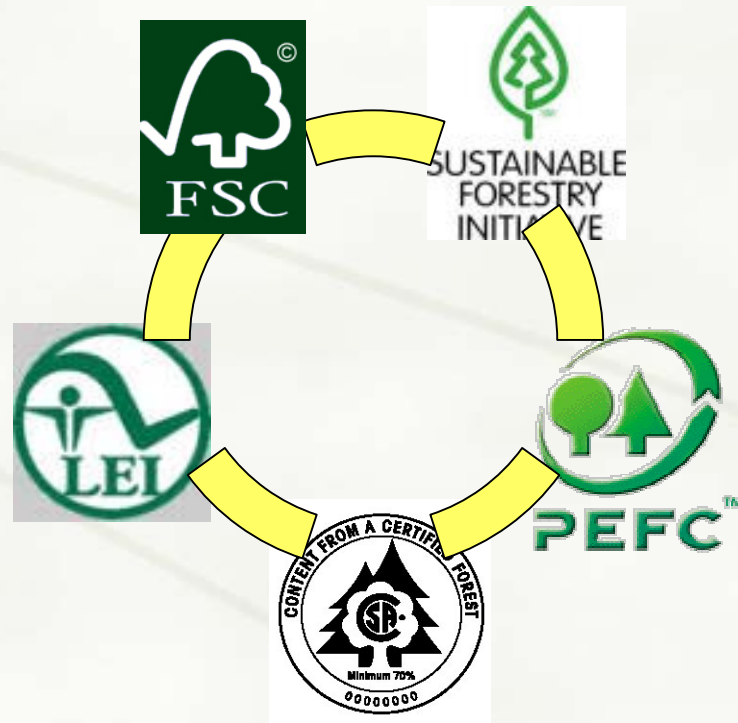
- ◆ Global “**General Assembly**”; three chambers
 - ◆ Economic
 - ◆ Environmental
 - ◆ Social
 - ◆ Each with Northern and Southern Subchambers
- ◆ Principles and Criteria → National and Regional Standards
- ◆ Third-Party Certifiers



Other Forest Certification Programs

- ★ Sustainable Forestry Initiative (SFI)
 - ★ Canadian Standards Association (CSA)
 - ★ Lumbago Ekolabel Indonesia (LEI)
 - ★ Pan-European Forest Certification Council
Now: Program for the Endorsement of Forest
Certification (PEFC)
- All more based in traditional forestry
interests -- essentially allies of each other

Tournament of Competing, Mutually Adjusting Programs





Other Certification Organizations

- ★ International Organization for Standardization (ISO)
- ★ International Accreditation Forum (IAF)
- ★ International Social and Environmental Accrediting and Labelling Alliance (ISEAL)
- ★ Much trans-sectoral communication and mimicry




Other Important Actors

- ★ Forest Campaigners
 - ✦ Publicity Campaigns
 - ✦ Covert Information Gathering
- ★ Global Networks
 - ✦ Product Chains
 - ✦ NGO Alliances
 - ✦ Intergovernmental Panels
- ★ Boundary Spanning Organizations (TFD)



Governments

- ★ Potential Regulators
- ★ Existing Requirements
- ★ Certify their own forests
- ★ Adopt Certification standards
- ★ Mandate Certification
- ★ Procurement Programs



Rulemaking -- Substance

Global Dialogue on Sustainable Forest Management

1. Sustained Yield
 2. Environmental Protection
 3. Social Protection
- ★ Close connection to Rio “sustainable development” dialogue

PRINCIPLE 3: INDIGENOUS PEOPLES' RIGHTS

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

PRINCIPLE 6: ENVIRONMENTAL IMPACT Forest management shall conserve biological diversity and its associated values, water resources, soils, and unique and fragile ecosystems and landscapes, and, by so doing, maintain the ecological functions and the integrity of the forest.



Sample Criteria for P3

- 3.3 Sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers.
- 3.4 Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.



Sample Criteria for FSC P6

- 6.2 Safeguards shall exist which protect rare, threatened and endangered species and their habitats (e.g., nesting and feeding areas). Conservation zones and protection areas shall be established, . . . Inappropriate hunting, fishing, trapping and collecting shall be controlled.
- 6.6 Management systems shall promote the development and adoption of environmentally friendly non-chemical methods of pest management and strive to avoid the use of chemical pesticides. World Health Organization Type 1A and 1B and chlorinated hydrocarbon pesticides; pesticides that are persistent, toxic or whose derivatives remain biologically active and accumulate in the food chain beyond their intended use; as well as any pesticides banned by international agreement, shall be prohibited. . . .



US Northeast Regional Std.

- 3.2.a. Forest owners or managers identify and contact American Indian groups that have current legal or customary-use rights to the management area, and invite their participation in jointly planning forestry operations that affect their resources.
- 3.2.b. Forest owners or managers incorporate safeguards in management planning to ensure that management actions do not adversely affect tribal resources, either directly or indirectly.

For example:

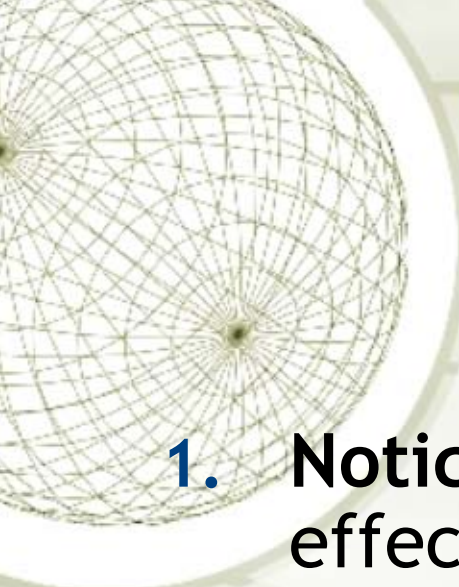
- *Forest operations protect spawning and rearing areas for migratory fish harvested by Native tribes and bands.*



Industry Based Programs

Originally

1. Much Weaker and Narrower
 2. Highly Discretionary
 3. Environmental Management System based (ISO) (focused on intra-firm policy-making and management)
- ★ **Increasing Convergence toward FSC**



Rulemaking Procedure

1. **Notice and Comment Procedures** effectively universal -- but still expanding
2. Growing Adoption of **Stakeholder Models of Participation**
 - ✦ Industry alliance still seeks to assert strong control
3. Pressure toward ISO Model: **Consensus and Openness**

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

★ **NOTE** - Consensus need not imply unanimity.



Structural Participation

- ✦ Stakeholder: “any person or group concerned with or directly affected by a standard” (ISO and ISEAL)
- ✦ “Standard setting organization shall ensure that participation reflects a balance of interests among interested parties in the subject matter and in the geographic scope to which the standard applies.” (ISEAL)
- ✦ “no group of interested parties can dominate nor be dominated in the decision-making process.” (ISEAL)



Adjudication (+)

- ★ Ground-level assessment of compliance
- ★ Interdisciplinary Team
- ★ Consultation with Local Stakeholders
- ★ Peer Review
- ★ Publication of Summary Information
 - ★ Website
 - ★ Local and Official Languages
 - ★ PEFC adopted due to UK procurement policy
- ★ Random Follow Up Audits



Adjudication (-)

- ★ Certifiers chosen and paid by applicants
- ★ Counter-measures
 - ✦ Random audits by FSC
 - ✦ Reliance on Expertise
 - ✦ Risk of external criticism
 - ✦ Availability of complaint mechanisms
- ★ Reasons for trust?
 - ✦ Historical role of foresters
 - ✦ Experience in other private standard setting



Enforcement

- ★ Formal: revocation of certificate
- ★ Informal:
 - ◆ Professional Credibility
 - ◆ Product Chains
 - ◆ Forest Campaigners
 - ◆ Path Dependency



Effectiveness

- ✦ Rapidly expanding and evolving regulatory system despite low consumer demand
- ✦ Indisputable effects on forest management, although full scope remains unclear
- ✦ Reasons:
 - ✦ Rhetorical power
 - ✦ Packaged in conventional institutional form
 - ✦ Leveraged existing power structures -- state, market, NGO



Reliability

Negative:

- ✦ Multiple programs, confusion about meaning
- ✦ Corruption incentives

Positive:

- ✦ Program competition
- ✦ Auditing and detection systems
- ✦ Public scrutiny

Sum: unclear



Accountability

- ★ Substitute for delegation models of legitimacy
- ★ Accountable to whom or what?
- ★ Risks of the underlying principle-agent model



Transparency

- ★ FSC relatively transparent from the outset
- ★ General tendency toward increasing transparency
- ★ But still heavily limited by business confidentiality concerns
- ★ Not necessarily much better in government inspectorates



Participation

Procedural

- ✦ Universal adoption of notice-and-comment
- ✦ Bolstering or rebuilding of local participatory institutions in certification

Structural

- ✦ Expansion to include environmental and social interests in forestry decision making
- ✦ FSC: new corporatism
- ✦ ISEAL goal: balanced, unimpeded participation



Accountability Redux

Problem -- no single structure or principal;
rather multiple ones

1. Competing programs, with states lurking in the background, other programs as well
 2. SFM Discourse: both open and more or less fixed elements
 3. Packaged in conventional, mutually reinforcing institutions
- ★ Overall Tendency: multi-stakeholder, participatory, open, transparent