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### Forest Certification as Environmental Law Making by Global Civil Society

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## FOREST CERTIFICATION AS ENVIRONMENTAL LAW MAKING BY GLOBAL CIVIL SOCIETY\*

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*"Law is that which is boldly asserted and resolutely maintained."*<sup>1</sup>

### INTRODUCTION

Forest certification programs are schemes methodically crafted by transnational networks of policy actors to define and implement the rules under which forest management enterprises are to operate. They undertake to verify not only that the standards under which certified enterprises operate are appropriate, but also that they are being met. Thus, certification programs take on policymaking and enforcement roles more typically performed by governments. A companion paper (Meidinger 2002) argues that forest certification programs may usefully be understood as an emerging form of governance by 'global civil society,' and seeks to describe key characteristics of global civil society and its governance structures. 'Governance,' however, is generally closely related to law; law making is a typical function of governance systems. Moreover, the methods used by certification programs closely resemble law, since they rely on the public promulgation of generalized rules and the definition of special organizational responsibilities for determining compliance. In this paper, therefore, I take the next step, and argue that forest certification programs may usefully be seen as a form of law making by global civil society. The primary advantage of this strategy is that it makes available to discussions of forest certification the experience and analytical methods of legal and socio-legal analysis. This should enrich forest certification, and help its

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<sup>1</sup> This aphorism was attributed to the late United States Supreme Court Justice, Louis Brandeis, by one of his former law clerks, Nathaniel L. Nathanson, as recounted to my Constitutional Law class at Northwestern University Law School in February of 1975.

proponents to scrutinize assumptions that heretofore have been taken for granted but have the capacity over time to seriously undermine their programs.

The paper proceeds as follows. The next two subsections offer brief descriptions of my methodology and perspective. The following section provides a general overview of the historical relationship between law and civil society. It argues that civil society has long been an important source of law, and that our tendency to equate law with the state is not only a very recent prejudice, but also one that significantly misconstrues the genesis of state law in the present era. The next section lays the foundation for understanding how forest certification may articulate with the existing environmental law system by providing brief historical overviews of national and international environmental law. These are based largely on Anglo-American law, but are sufficiently general to be suggestive for other western legal systems as well. The final section of the paper brings some of the experience of legal scholarship to bear on forest certification. It argues among other things that it would behoove certification programs to become more sophisticated about the challenges of enforcing rules effectively, the need to learn and adapt based on experience, the difficulties of achieving consistency across highly varied situations, and the general challenges of attaining legitimacy. Although this paper touches briefly on what is perhaps the greatest normative problem for forest certification, its relationship to democracy, that problem is left largely for a later paper.

## **PERSPECTIVE**

Most people who become involved with emerging, politically contentious fields such as forest certification have an agenda. Mine is largely that of an academic researcher. I have long been interested in two fundamental questions of institutional sociology:

1. How are social rules and standards made?
2. How are they institutionalized in social behavior?

I find the field of forest certification movement to be a fascinating and potentially important arena for studying these questions because it may be one of the leading edges of emerging institutions for making and enforcing rules on a global scale.

At the same time, my interest as a researcher is not merely academic. One of my goals is to help understand how to build social institutions that promote environmental stewardship and social justice. This paper and its companion attempt to do so by clarifying some of the relationships between forest certification and global civil society, and by bringing some of the experience with governmental regulatory and legal institutions into the forest certification debate, which thus far has tended to be limited to foresters and environmentalists who think all they are doing is trying to promote sustainable forest management.

## **METHOD**

Like its companion, this paper is best seen as an exercise in imaginative social theory. It takes two general, contested, and 'under construction' concepts - global civil society and environmental law and - and seeks to situate forest certification in terms of them. It subjects the hypothesis that forest certification is an emergent form of environmental law (initially developed in Meidinger 1999 and 2001a), to a mutual-illumination strategy, using environmental and other legal scholarship to examine forest certification and also using forest certification scholarship to reflect back on law. The overall goal is to paint a picture in which we can view forest certification in the context of larger institutional developments, both indicating where environmental law may be headed and how forest certification may have to adapt to meet the challenges of global environmental law.

This methodological strategy is subject to important limitations. Most importantly, it entails a significant degree of arbitrariness. Another scholar following a similar method could focus on different factors within the field of study and perhaps reach quite different conclusions. This limitation is mitigated considerably, however, by the fact that this paper will be part of a larger discussion of forest certification, global governance, and environmental law. It is likely to be complemented and challenged by other works, and its arguments will be grist for their mill.

## **LAW AND CIVIL SOCIETY**

### **DOMESTIC**

The relationship of law to civil society has usually been either ambiguous or contested. The Greeks and Romans took the rule of law to be essential to civil society, but had a multitude of theories about the source of law. During the feudal period, the guilds and other urban corporate bodies that gave rise to civil society played a large role in making and enforcing rules. As the nation states solidified their authority and created separate forums for authoritative law making, they generally endorsed and adopted guild and community made rules, but also gradually revised them to provide interregional consistency, pursue their own goals, and accommodate new conditions (Poggi 1978:78-79). Concurrently, the nation states asserted a monopoly on the authority to make binding laws. Legal theorists assisted that effort by developing a supporting rationale, systematizing law at the level of the nation state (particularly in civil law countries) and establishing elite 'national' law schools.

Since the late 18<sup>th</sup> century, the assumption that law necessarily emanates from a sovereign state has become deeply embedded in both Civil and Anglo-American legal thought. Accordingly, it is not surprising that modern commentators often take as given that the law of civil society is made by nation states, and that nation states must be urged by civil society actors - petitioned by them - to make laws supporting civil society in the first place and to implement civil society agendas in the second (e.g., Mertus 1999:1338-1339; Etzioni 2000:356-357).

In practice, however, the situation has always been more complex. Continental legal scholars, such as Ehrlich (1913) and Heller (1996, orig. 1933), pointed out that law must take on meaning from the context in which it is implemented; people give meaning to legal terms by the inevitably variable ways in which they live and organize themselves to implement them. Heller explained this difficult argument as follows: “The very same general court structure proclaimed by Josef II would lead in Austria to a written and mediated court procedure, but in the Netherlands to an oral and immediate one” (1996:1191). Thus, civil society necessarily has a role in ‘making’ law, even when the official source of law is the state. Weber (1922) took the argument a major step further by arguing that law means little unless it is accorded legitimacy by society, and that it must therefore be made with the goal of legitimacy in mind. Thus again, actors outside the state necessarily shape the law given to them by the state because the state must tailor it to gain their acquiescence.

Although Anglo American systems never adopted the positivist view as completely as the civil law systems, their courts, legislatures and administrative agencies came over time to be seen as the exclusive sources of law. The American legal realists of the 1920s-1950s, however, countered by arguing that much law was in fact made outside government bodies. For example, a contract between employer and employee was legally binding and enforceable by government agencies without significant government input as to its terms. The parties therefore could be seen as defining the substantive content of law, and hence as exercising delegated state power. Not only that, but the terms of the contract would very likely reflect pre-existing social or economic relationships in society (Hale 1920). Thus in reality, the authors of the law would not be the individual contractors so much as the system of social relationships in which they operated - in effect civil society in many cases.

Karl Llewellyn and others extended this insight by arguing that judges and legislators should adjudicate and legislate based on empirical information on the social practices to which the law applies. A commercial code, for example, should be based on the practice and context of real-world commercial transactions, rather than on abstract principles. The same would be true of laws governing non profit organizations such as unions, religious organizations, and so on - thus allowing civil society to “author” general rules of law. In addition, particular legal documents should be interpreted in terms of the “usage in trade” providing the context for the transaction to which they apply, which the parties could be presumed to have presupposed in their bargaining (Llewellyn 1960). In sum, continental and Anglo-American legal scholars laid strong conceptual foundations for a revitalized understanding of civil society’s role of in law making during the first half of the 20<sup>th</sup> century.

One might expect that the rapid growth of the empirical social sciences in the second half of the 20<sup>th</sup> century would stimulate much further progress in clarifying the relationship between civil society and law. That does not seem to have been the case, however. Although the reasons go well beyond the scope of this paper, two are relevant to this analysis. First, most members of what came to be called the “law and society movement” have been unwilling to focus on defining which social phenomena count as law and which do not. This posture seems to reflect a sense that pursuing such a question is likely to lead into an infinite regress of formalist jurisprudential arguments that simply recapitulate their premises. Moreover, many law and society scholars seem to have assumed that what counts as law is

an empirical question, although this assumption is conceptually problematic and accepted methods for addressing it have never been developed.

Second, law and society researchers have typically drawn upon established social science disciplines and sought to explain legal phenomena in terms of variables central to those disciplines. To a great extent this has meant viewing the work of courts, administrative agencies, and legislatures as products of economic interests, political power, social class, cognitive assumptions, and the like. Efforts to bring these variables together in a “legal system” conception might well have included a component with civil society as a law-maker, but by and large they have not (e.g., Friedman 1978, Chaps. 1, 6). Law and society scholars nudged toward that possibility by developing the concepts of formal and informal legal systems (e.g., Schwartz, 1954) and law-in-the-books versus law-in-action (e.g., Abel 1973). But they pulled back from the potential implications of these ideas with regard to modern societies. On one hand, informal law making was seen largely as a phenomenon of “traditional” rather than “modern” societies, and often as a matter of “normative,” rather than truly legal ordering. Thus it is not surprising that today a separate “law and norms” movement has emerged, which blithely assumes that norms are distinct from law, and then expresses collective amazement at the importance of norms in ordering social life (e.g., Posner 2000).

Law-in-action studies, on the other hand, have concentrated almost entirely on the way law is made and applied by governmental bodies. Thus, law and society scholars have focused on the outputs of national and local governments, judges and legislators. Whether the research is on disputing, the legal profession, legal agencies, or even legal theory, most research seen as central to the field (see, for example, the studies cited in Munger 1997) has as its endpoint and taken-for-granted analytical filter government legal institutions, thus neglecting the potential law making operations of civil society institutions.

Still, there exist several strands of socio-legal research that have focused to some extent on civil society relationships. Perhaps the best known is research on how people understand and incorporate (or ignore) law in their everyday lives (e.g., Greenhouse, et al. 1994, Sarat and Kearns 1993). For the most part, however, work in this tradition has not critiqued the assumption that law is made up of the rules and acts of the governmental agencies. Rather, it has focused on the distance between government and civil society, and the nature of interactions between them.

A second school of thought has explicitly rejected the assumption that law is necessarily associated with government agencies, and sought instead to bring into the ambit of law the full set of social institutions that define and enforce social rights and duties. In his study of industrial relations, for example, Philip Selznick (1969), built on the post-realist work of Lon Fuller (1964) and H.L.A. Hart (1964) to describe important law making processes in non-governmental organizations such as arbitration associations and universities. While widely admired, however, this and related work (e.g., Galanter 1981) seems to have had little effective impact on the state-centric understanding of law held by

most empirical researchers, legal scholars and practitioners.<sup>2</sup> The same seems to be true of “legal system” approaches developed in the past few decades by German theorists such as Luhmann (1985) and Teubner (1997a and b). Although they have sought to locate the essence of law in the capacity of social institutions to declare certain types of acts acceptable or unacceptable, their impacts on scholarship and practice to date appear to be very limited.<sup>3</sup> It is possible, however, that the currently marginal schools of thought represented by Selznick and Luhmann will receive a strong push toward the center of legal scholarship by the recent and rapid development of global law making institutions that are not reducible to government agencies.

## GLOBAL

With the 1648 Treaty of Westphalia, the global legal arena officially became the “inter-national” legal arena - meaning that it was constituted solely by, for, and of nation states. Enacting a vision worked out by Hugo Grotius (1625) and others in the preceding decades, the nation states constituted themselves as independent, equal, and exclusive legal actors in the international arena. Each was free to make laws governing its citizens, lands, and other assets. Any law applicable across or beyond the jurisdictions of nation states had to be made by the nation states affected, either by treaty or by some other mutually recognized process. Any law imposing an obligation on a state had to rest on a formal expression of consent by that state (Falk 1997:337).

The Westphalian legal system has long been under pressure for reasons too numerous to discuss here. The factors driving globalization described in the companion paper (Meidigner 2002) are among the most important. International trade in particular has created huge challenges for state-based conceptions of law. The drive to simplify and promote trade has been an important factor in the rise of the European community and its establishment of institutions that are not explicable merely as agreements among states (e.g., Joerges 2001).

International trade also has driven the growth of legal institutions more self-consciously distinct from states. Since an interstate transaction crosses jurisdictions, it could conceivably be governed by the law of either jurisdiction, and international traders have gone to enormous lengths to attempt to choose the law applicable to their transactions. In general, each trader is likely to have an aversion to submitting to the legal system of the other trader. It did not take traders long to realize that there might be advantages in being governed by law from still other jurisdictions, or even in making their own law and using arbitrators to enforce it, and they took steps to do both. Gradually a distinctive set of rules and institutions for dealing with transnational commercial transactions has arisen - *lex mercatoria*, the “law merchant.”

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<sup>2</sup> Ironically, one of the major studies of non-governmental regulation, Cheit 1990, originally done as a Berkeley doctoral dissertation, does not explicitly build on Selznick’s insights.

<sup>3</sup> For an early effort to apply the perspective of Luhmann and Teubner to forest certification, see Lawson and Cashore (n.d.) For a particularly clear and careful exposition of Luhmannian legal theory, see Ziegert (forthcoming).

Although a tremendous amount of ink has been spilled debating the status and content of *lex mercatoria*, the present discussion can be limited to two basic points. First, a large number of problems regarding international commercial transactions are in fact settled through the *lex mercatoria* system (e.g., Dezalay and Garth 1996). Second, the system is not reducible to the law of states or to laws made by combinations of states. This is so even though many state legal systems are committed by treaty to enforce the judgments of non-state *lex mercatoria* arbitration panels.<sup>4</sup> The obvious next question is whether *lex mercatoria* should be treated as law or as something else. This is a question which I may yet write about in detail, but not here. For now it suffices to say that the benefits of holding off with thinking about phenomena such as *lex mercatoria* as law until all of the traditional elements (e.g., a widely recognized coercive mechanism) are clearly present are far outweighed by the costs. To hold back, or to argue about definitions, is to forego the opportunity to carry out research and analysis on non-governmental law making while it is happening, a high cost indeed. Moreover, it is to deprive civil society institution building processes such as forest certification of the full experience and scrutiny of legal and socio-legal research, a problem regardless of whether one is a supporter or a critic (Spiro 1996). For now, therefore, I think it appropriate to treat Teubner's bold statement as probably accurate and work from that basis.

[G]lobalization of law creates a multitude of decentered law-making processes in various sectors of civil society, independently of nation-states. Technical standardization, professional rule production, human rights, intra-organizational regulation in multinational enterprises, contracting, arbitration and other institutions of *lex mercatoria* are forms of rule making by 'private governments' which have appeared on a massive global scale. They claim worldwide validity independently of the law of nation-states and in relative distance to the rules of international public law. They have come into existence not by formal acts of nation-states but by strange paradoxical acts of self-validation (1997b:xii).

## BASIC CONCEPTUAL PERSPECTIVES

Before proceeding, it is appropriate to note that there seem to be two basic approaches to the decision to treat *lex mercatoria* and other forms of non-governmental regulation as law, which can be characterized loosely as internal and external. Internal perspectives focus on the nature of the system that produces the phenomenon at issue. There are several main variants. One focuses on the institutions involved in the system. The traditional legal positivist perspective, for example, generally requires that for law to exist an agency of a nation state must formulate an order that it is prepared to enforce with coercion (Austin 1832). The focus on the nation state is limited to a particular historical period, however, and

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<sup>4</sup> Under the New York Convention of 1958 over 120 countries have committed to enforce arbitral awards where such awards are based on written contracts to subject commercial disputes to arbitration and to abide by the decisions (McConaughay 2001:611).



there is no good reason to presume that law did not exist prior to the nation state. Thus, there is no inherent reason the list of relevant institutional sources cannot be enlarged. One could conceivably include some or many of the “civil society” organizations described above in the legal system.

A second variant of the internalist perspective focuses on characteristic functioning and products of the system. This is the strategy of Luhmann (1985; Ziegert forthcoming) and Teubner (1997b:14), which focuses on social communication processes that produce “binary coding” - e.g, legal/illegal. Since the judgment could as well be sustainable/unsustainable, it seems plausible to treat forest certification as a form of law making. The only limitation in principle is the occasional timidity of the certification systems in holding back from using strong and definite labels.

The externalist approach to defining law looks at how it is received and used in the larger society. This is the approach suggested by Weber’s concept of legitimacy. Falk and Strauss build upon it by emphasizing a public expectation that people will conform to a rule, and the “pull toward compliance” exerted by the rule (2000:207, following Franck 1990). It is the force of public justice referred to by Professors Mohawk and Lyons in the mid-1980s discussion described in the companion paper. Legitimacy is a difficult criterion to apply in practice, since different people could disagree on whether such an expectation of and pull toward compliance exist in a particular cases, but it refers to a very important aspect of law which it would be hard to justify ignoring, as is discussed further in the concluding section of this paper.

A second externalist strategy is to look at how society uses organizations in a given social field to make and enforce rules. This is the method used by Dezalay and Garth (1995 and 1996) in their study of the growth of an arbitration system for resolving transnational commercial disputes.<sup>5</sup> Their distinctive contribution is to describe in detail how transnational enterprises use dispute resolution services and how potential arbitrators and arbitration alliances build institutions to compete for business in the field. In the course of that competition they shape the overall transnational commercial arbitration system in ways that suit their interests and those of the commercial transactions system. It seems likely that a similar approach could be used to describe the field of forest certification, wherein programs compete for influence and legitimacy, and in the course of that competition shape the overall law and policy of forest certification.<sup>6</sup>

In sum, if one takes the criteria discussed above - institutional rule-making and adjudication mechanisms, public legitimacy, and social usage - there is a good, although not incontrovertible case for treating forest certification as a form of law making, specifically of environmental law making. The next question is what this choice gains us. Before addressing it a brief overview of environmental law will be helpful.

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<sup>5</sup> Examples of other scholars following this general approach include Braithwaite and Drahos (2000), Spiro (1996), Wapner (1996).

<sup>6</sup> The key here is that the competition is not limited to a competition for business, but is also a competition to establish a legal order that will support that business. At the same time, contrary to the way many economists and some institutionalists conceive law, the legal order is not really fixed, but rather dynamic and subject to constant competition (Dezalay and Garth 1996:16).

## ENVIRONMENTAL LAW AND CIVIL SOCIETY

### DOMESTIC

If forest certification is a kind of law making, it is probably a kind of environmental law making. To see how it fits and potentially changes the structure of environmental law, it is necessary to have a working overview of the field. Although I cannot possibly survey environmental law around the globe, this section begins by providing an overview of environmental law development in the Anglo-American system.

Environmental law can be generally defined as the law governing the relationships of humans to the biophysical environment.<sup>7</sup> As with law in general, environmental law can be helpfully conceptualized in terms of three basic forms or phases. At the same time, it is important to understand that the phases are not completely distinct, and that elements of each phase can be found in the others (e.g., Westbrook 1994).

#### Phase 1

Before the 19<sup>th</sup> century, most environmental law appears to have been made in civil society. It typically took the form of either generally accepted customs or rules developed by assemblies of appropriate estate holders or other interested members of society. There is little published research on this phase of environmental law, most likely because many scholars uncritically think of environmental law as a product of the 19<sup>th</sup> century, when the control of industrial discharges came to be widely seen as necessary. My exploratory review of early English legal history, however, has found a great deal of environmental regulation in the medieval period. Typical laws covered how many sheep and cattle could be grazed, where and when, how water runoff must be managed, how land fertility was to be preserved, and so on.

The details of these regulations and how they were worked out are well beyond the scope of this paper, but it is helpful to describe a few typical institutional practices. First, although environmental laws usually were not voted upon nor based upon a principle of political equality, they were generally discussed quite thoroughly in village, town, or manorial assemblies. Most interested farmers and villagers probably had a 'voice' and would be heard in those assemblies. At the same time, the views of certain 'men of substance' (not necessarily free holders) generally counted most, and the resulting bylaws tended to reflect the interests of the better off community members (Ault 1965:42). It is also apparent that in most cases regulations were not simply dictated or imposed by officials. Whether or not the lord of the manor could in principle set the rules under which the manor and village operated, it is clear that he did not do so for most natural resource and environmental

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<sup>7</sup> There are risks to such a broad definition, primarily of taking in such a huge and unwieldy area that it resists meaningful conceptualization. The recent histories of the subfields, however, indicate a need to deal with interconnections among them. Protecting an endangered arctic species, for example, may require controlling land

regulations. These were more typically worked out by concerned groups of citizens and then sometimes ratified by the lord. Depending on the village of origin environmental laws might be described as ordained “by the whole homage and by the freemen” “by the whole township”, “by the community of the town”, “by the lord and the community of the town”, “by the whole homage of the town”, “by the lord and his tenants”, “by all the tenants, free and customary”, or “by the assent of all the homage” (Ault 1965:41).

Over time, the rules and policies thus worked out in customary social institutions were gradually incorporated into definitions of property rights, primarily through real property, servitude,<sup>8</sup> and nuisance doctrines. This was done first by local courts and eventually by the royal courts and other agents of the crown, thus mirroring the general processes for incorporating guild-made rules into governmental law discussed above. As the origins of the property based environmental regulations receded into history, they may have begun to appear as if they had been created and imposed by the state in the first place. At the same time, however, the conflicts created by rapid urbanization and industrialization in the late 18<sup>th</sup> and throughout the 19<sup>th</sup> century created new conflicts that were difficult to handle in terms of received property rights. In trying to resolve them courts increasingly asked whether contested land uses were ‘nuisances’. Traditional nuisance doctrine typically asked whether a specific resource use fit or was appropriate in a given place, thus again implicitly ratifying received civil society arrangements. But the static and yet somewhat unpredictable implications of such an approach brought increasing pressures on the courts to rationalize and universalize their decisions. Thus courts came to define the central question as whether a land use was “unreasonable” under the circumstances. This question invited judges to determine the proper use of land in a changing society, and perhaps even to balance the relative costs and benefits of alternative land uses. At the same time, such questions were being taken up by legislative bodies, and sometimes by newly established administrative agencies as well, thus inaugurating institutional structures characteristic of Phase 2.

## Phase 2

Although the “modern” era of environmental law often is portrayed as starting in the late 1960s or early 1970s, its institutional roots go back a hundred years earlier. By the end of the 19<sup>th</sup> century, legislatures and administrative agencies were beginning to address environmental issues, promulgating a miscellany of laws directed at air and water pollution, as well as wildlife and forest destruction, and typically assigning their enforcement to administrative agencies attributed with expertise in handling such problems.<sup>9</sup> In some countries this was done primarily at the local or provincial level, in others at the national

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use in North America as well as the use of organic pesticides in the tropics. Accordingly, it seems unlikely that a narrower definition of the field would be fruitful in either the near or the long term.

<sup>8</sup> The term “servitude” is used here to include uses and constraints on property use that often are separately categorized as easements, covenants, and equitable servitudes in Anglo-American law.

<sup>9</sup> There were striking and important precedents, of course. In England, for example, a 1388 Parliamentary statute forbade the deposit of “Dung and Filth of the Garbage and Intraills as well as of Beasts killed, as of other Corruptions ... in Ditches, Rivers, and other Waters”, and required anyone who had made such deposits to remove them or be fined. It also provided for citizen enforcement of the law. Statute of 12 Rich. II. Ch.13 (1388).

level.<sup>10</sup> On the whole, these laws appear to have been relatively ineffectual for a half century or more, due primarily to weak scientific foundations, relentless industrialization, and lackadaisical enforcement reflecting preferences in most jurisdictions for economic growth over environmental protection (e.g., Laitos 1980). After World War II the situation slowly began to change, as the impacts of industrial pollution became more widespread and better understood (e.g., Ashby and Anderson 1981).

By the 1970s and 1980s most industrialized countries had established extensive statutory and administrative systems to protect air, water, land, and biodiversity. The systems are so extensive, and grow so steadily, that they are extremely difficult to understand or conceptualize. They range across an enormous array of subjects, running from nuclear power to endangered species, from historic preservation to genetically modified organisms, and on and on (e.g., Plater 1999). They typically involve great technological and scientific complexity, and face enormous uncertainty. They almost always encounter unanticipated interconnections and problems. Finally, they often involve difficult normative choices that can trigger or exacerbate social conflict. In sum, they require combining sophisticated political processes with sophisticated scientific ones. Not surprisingly, the challenges of making and revising environmental law can be staggering.

The complex of institutional methods primarily relied upon by government legal systems to meet these challenges in Phase 2 is often derisively and somewhat unfairly called “command-and-control” regulation. Because this form of environmental law has been so exhaustively studied and described as to be generally familiar to most readers, I will only note its most basic institutional characteristics here. Phase 2 regulation places enormous reliance in administrative agencies directed to focus their attention on particular types of problems - e.g., air or pollution. The agencies are legitimated primarily by their claims to technical expertise, but over time have also increasingly deployed consultative methods for developing and implementing policies. The core regulatory mechanism of Phase 2 environmental law is the requirement that categories of polluters and other natural resource users keep their environmental impacts at levels which would result from application of the strictest feasible technological methods to their production processes. Thus, although they usually do not require the actual use of a specific technology, these requirements are typically referred to by names such as “best available control technology” and “best management practices”. The standards are generally defined by administrative agencies for specific industries through rulemaking and adjudication processes. They often are set with little regard to collateral environmental issues, such as waste production or consumption of scarce resources. Pre-existing plants and activities generally are treated more leniently than proposed ones. Actual implementation of standards varies considerably among jurisdictions, both within and among countries. The costs and levels of protection thus also vary among both firms and sectors. Like any important institutional synthesis, Phase 2 has given rise to a set of institutional antitheses in Phase 3.

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<sup>10</sup> Formally, the level made little difference because local and provincial governments by this time were defined as creatures of the state. (Dillon 1911)

### Phase 3

Phase 3 consists of a number of loosely related reform initiatives, including market mechanisms, information disclosure requirements, flexible permitting programs, regulatory negotiation, ecosystem management, place-based collaborative management initiatives, voluntary agreements, good neighbor agreements, and environmental certification programs. Many grow out of critiques of Phase 2 regulation, although some go back farther. Overlaid on Phase 2 regulation, the overall picture constituted by these initiatives suggests that environmental law is in considerable flux, and may be quite hospitable to the emergence of civil society regulatory initiatives such as forest certification.

Market Mechanisms effectively attach prices to environmentally damaging activities and allow firms to reduce the damage if doing so is cost-effective, or to pay others or pay taxes if the costs of reduction are higher than the payments or taxes. Market mechanisms are a response to the most influential critique of traditional regulation, which holds that it is needlessly inefficient, costing more than necessary to achieve a given level of social benefits. This is because control technology standards are based on feasibility for general categories of polluters, rather than on individually tailored cost-benefit criteria. Thus, one firm or sector can be required to incur significantly higher costs than another to obtain any given level social benefits.<sup>11</sup> Market mechanisms seek to obtain environmental benefits where they are least costly, and thus to minimize the total costs to society of environmental protection.

Although the practical role of market mechanisms remains limited, it has been expanding for over two decades. At the formal level, agencies have developed a number of programs, such as the “offsetting”, “bubbling” and acid rain trading programs in United States air pollution regulation. At the informal level, too, regulatory officials appear to allow a certain amount of “bubbling” in individual pollution permits, even when statutes and rules do not provide for it. Market mechanisms are regularly extended into new regulatory territory. The State of California, for example, recently established an “endangered species mitigation bank”, whereby landowners can earn “conservation credits” by taking steps to permanently protect endangered species on one site and can then sell their credits to developers seeking to carry out projects that might harm those species on other sites (Bean and Dwyer 2000).

Information Disclosure Requirements also appear to be expanding steadily in environmental law. The basic strategy is to require firms that handle dangerous substances or engage in other potentially harmful activities to publicly disclose those activities. The

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<sup>11</sup> On the benefit side, the argument was also made that uniform standards among jurisdictions are undesirable, because the benefits will vary greatly depending on population density, concentration of pollution sources, natural conditions, and so on. (Krier and Ursin 1978)

Two other important initiatives also respond in large part to this critique. The first is to document means-ends, or cause-effect relationships between regulatory strategies and environmental goals. This of course requires a significant expansion in the quality of scientific information and models. A second and related initiative is to undertake comparative risk assessment of environmental regulation, so that resources and costs will be focused on the most risky activities. This is a very difficult undertaking making huge demands on science. The available scientific information and models are flexible enough that huge disagreements persist about the comparative risks of various activities.

paradigmatic example is the United States “Community Right to Know” law, which requires that anyone who stores or discharges more than set amounts of any of a list of approximately 600 toxic chemicals to the air, land, or water must publicly disclose the types and amounts of chemicals involved. This must be done regardless of whether the activities are legal or illegal, regulated or unregulated. Since its passage in 1987, the law appears to have had a large effect on the discharge of hazardous chemicals, possibly reducing them by over one-third (e.g., Karkkainen 2001; TRI 2001).<sup>12</sup> This kind of “transparency” strategy is not cost-free, but is significantly less costly than traditional regulatory standard setting. Some scholars view the emergence of information disclosure requirements as a major step toward “reflexive” environmental law designed to make actors reflect upon the consequences of their acts and adjust to make them socially acceptable (e.g., Orts 1995). Others find them to constitute a major expansion in the ability of wider communities to monitor and set benchmarks for the performance of corporations (e.g., Karkkainen 2001).<sup>13</sup> State imposed disclosure requirements can thus be seen as valuable resources for civil society regulatory institutions.

Flexible Permitting Programs allow firms to avoid specific regulatory requirements in return for showing that they can provide equal or greater environmental benefits by other, presumably less costly means. Flexible permitting programs respond to some of the same critiques of command-and-control regulation as market mechanisms, but give the regulatory agency a more direct role in the decisional processes. Examples include “Project XL” in the United States and the Eco-Management and Auditing Scheme (“EMAS”)<sup>14</sup> in the European Union. Rather than simply creating legally protected interests that can be traded, the government agency creates a framework in which firm are invited to be innovative to the benefit of the public, subject to some sort of check and ratification by the administrative agency.

The record of flexible permitting processes is unclear at this stage. In the U.S., flexible permitting seems to have fallen short of expectations, creating just about as many procedural hurdles and business costs as it eliminated (EPA 2001) and stimulating relatively little environmental improvement. Recently, however, the EPA has established a new, ostensibly improved program called Performance Track, which relies more heavily on environmental management systems and non-governmental environmental certification programs such as ISO 14001 (EPA 2001). EMAS, which also includes a substantial EMS component,<sup>15</sup> seems

<sup>12</sup> Mazurek (1999) suggests, however, that some of these effects may be artifacts of tendencies by transnational companies to relocate polluting activities to jurisdictions lacking comparable disclosure laws or to outsource them to small companies that fall beneath threshold reporting requirements.

<sup>13</sup> At the same time, it is important to note that modern environmental systems still face severe and possibly increasing information disparities. Thus while it is true that the amount of public information seems to be growing absolutely in most industrial societies, the amount of private information, much of it given proprietary protection, may be growing even more quickly.

<sup>14</sup> EEC Council Regulation 1836/93 (authorizing voluntary participation by industrial firms in a community eco-management and audit scheme) 1993 O. J. (L 168) 1. The primary benefits of EMAS participation for companies appear to be extended time frames for regulatory compliance and reduced penalties for non-compliance.

<sup>15</sup> Each company participating in the EMAS program prepares an environmental management system incorporating several principles, including pollution prevention and source reduction. The environmental management system

to be viewed as more of a success in Europe, although it too has fallen short of expectations. Nonetheless, these programs persist and seem to be growing, as agencies work to improve them in successive iterations.

Regulatory Negotiation (“reg-neg”) is a rulemaking process in which a government regulatory agency organizes a stakeholder group and commissions it to draft a proposed rule addressing a specific problem. The stakeholder group is supposed to represent all important affected groups, to be willing to bargain in good faith, and to seek consensus. Agencies are advised to use this method for problems that are not likely to be highly contentious, nor require participants to compromise their fundamental commitments (ACUS 1990:38). When the regulatory negotiation process is complete the agency subjects the proposed rule to a slightly streamlined version of its traditional rule making processes, but remains responsible for the ultimate content of the rule.

Reg-Neg processes have been used in a large number of U.S. environmental rulemakings since the mid-1980s, although impressionistic evidence suggests that their popularity in the United States may have leveled off recently. Evaluations of the process are contentious. Some commentators argue that reg-neg has provided for a forum in which regulatory problems are effectively redefined, innovative solutions found, and new institutions developed (Freeman 1997). Others assert that they have not reduced regulatory costs, conflict, or litigation (Coglianese 1997), and have dangerously transferred regulatory power to private interests, a form of “capture” (Funk 1997).

Ecosystem Management seeks to integrate the many environmental and social interconnections implicated in all significant environmental management decisions. Its goal is to correct for the shortcomings of single-purpose and single-technique environmental actors, both private and public. Ecosystem management attempts to do this by locating all significant actors and their activities in a broad scale ecological framework and addressing the complex ecological and social interactions among them. Often it also seeks to link “environmental” issues to social and economic ones such as community maintenance and job creation, thus partaking in the post-Rio ‘sustainable development’ framework. In doing so, most ecosystem management initiatives attempt to combine a comprehensive analytical methodology with broad stakeholder collaboration. An important driver of ecosystem management is the recognition that the fragmentation of jurisdiction over the natural environment among many governments and property holders leaves none of them in a position to achieve integrated management on its own. Integrated, ongoing stakeholder collaboration is necessary to make, assess, and revise environmental policy (Meidinger 1997).

Ecosystem management has been a “top-down” strategy on the whole, conceived primarily by ecologists and centralized government agencies and NGOs. At the same time,

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must include: (a) specific definitions of management responsibilities in the company for environment matters; (b) a register summarizing the effects that the company’s operations on the environment; (c) environmental record keeping and reporting procedures; (d) a public environmental statement listing significant environmental issues and emissions; and (e) periodic audits of the company’s management system, with verification of the audits by an external auditor. Participating companies have the right to register with their national governments and to be included in a list of EMAS companies published in the Official Journal of the European Union. The companies are also permitted to advertise publicly their participation in the program (*id.*).

governments and government agencies are often only one or two members of the broader group of stakeholders, although they sometimes play a controlling role. To date, the legal framework for ecosystem management appears to consist primarily of memoranda of understanding among units of government and contractual agreements among government agencies and landholders. Ecosystem management proponents in the United States have generally not sought amendments or new authority in statutes (Interagency Task Force 1995), evidently out of a fear of “opening up” environmental statutes to the risk of weakening amendments.

Place-Based Collaborative Management Initiatives are closely related to ecosystem management ones, but have typically been more bottom-up, self-organized processes. They are often established on a “watershed” basis, on the underlying theory that actors in a watershed are mutually dependent upon each other, and would be well advised to work out mutually acceptable understandings of proper environmental management. The watershed frame also provides a basis for deciding who the participants should be. The specific foci of place-based groups vary with the environmental management issues relevant to the particular place. They often involve water quality, fisheries, and forest management, although the scope of issues can expand beyond traditional environmental ones to include social and economic ones. The United States EPA estimates that there are currently over 3000 local watershed management groups in the United States (Lewicki 2001).

Some place-based groups have evolved very definite structures of rights and responsibilities, enforceable through legal or informal sanctions (e.g., Pinkerton and Weinstein 1995) whereas others have much looser, more fluid arrangements in which members come and go (Nickelsberg 1998). Again, government bodies sometimes participate in place-based management initiatives, but more as stakeholders than as sovereigns. In recent years governments seem increasingly inclined to take steps to facilitate place based management processes, thus giving them some “top-down” impetus as well. In the US, for example, the EPA has encouraged states to set up watershed management groups to set and allocate “total maximum daily loads” of pollution for particular watersheds under the Clean Water Act (Houck 1999).

Voluntary Agreements typically are “one-shot” deals negotiated between government agencies and firms in which the firms commit to improving their environmental performance beyond what is required under existing law. They differ from flexible permits in that there is no pre-defined framework in which they are worked out, and they are therefore difficult to incorporate systematically in environmental law (Murswiek 2001). Voluntary agreements are extremely common in Japan, and quite common in some European countries (Carraro and Leveque 1999). They can be negotiated at the national, regional, or local level. Although local governments seem particularly vulnerable to informational and negotiating inequalities in relation to firms, there are good arguments that voluntary agreements allow governments to achieve higher levels of environmental protection than they otherwise would (Rehbinder 1994; Carraro and Leveque 1999).

“Good Neighbor Agreements” are somewhat like traditional voluntary agreements, but are negotiated between firms and community groups or other civil society organizations, rather than between firms and governments (Olsen 1991). It is impossible to say how many



exist, but they seem to be multiplying rapidly, facilitated to some extent by the public information, participation, and review requirements of government regulatory programs. Good neighbor agreements often are very sophisticated arrangements, approximating or exceeding the detail and coverage of permit documents prepared by regulatory agencies (e.g., Stillwater Mine 2000). They generally seek to achieve environmental performance superior to that government agencies are able to require, and largely cut government out of the deal, leaving it only as a background player. Contract law and private land use agreements often are used to help assure compliance.

Environmental Certification Programs provide frameworks in which firms can be certified as practicing good environmental management. Some, such as the chemical industry's "Responsible Care" program (Gunningham 1995) and the United States forest product industry's Sustainable Forestry Initiative, are run by industry trade associations. Others, such as the ISO 14001 program, are run by inter-sectoral industry-based groups, some of which are government sanctioned. Still others, such as the Forest Stewardship Council, are established by NGO-based groups. Depending on the program, firms are entitled to signal their certification status by displaying labels on their literature, facilities, or products. ISO-type programs focus on the implementation of sophisticated environmental management systems ("EMS"s) by firms (Coglianese and Nash 2001), while FSC-type programs focus on performance requirements. The performance requirements almost always include traditional pollution and biodiversity concerns, but some are now extending to include economic, community, and labor ones as well.

Summary. Taken together, the above-described initiatives indicate great churning in the field of environmental law. Most of them expand the role of civil society organizations in domestic environmental law. For the most part, civil society institutions do not seem to displace government ones, but rather enter open ended cooperative and partnership relationships with them (cf, Freeman 2000; Meidinger 2001a; Wood, forthcoming).<sup>16</sup> Government agencies generally remain dominant, but rely heavily on extra-governmental processes and relationships, and often operate in horizontal rather than vertical relationships with them. Although it is difficult to generalize about such a diverse set of initiatives, it seems safe to predict that they will lead to increased incorporation of civil society norms and institutions into governmental regulation, making it all the more important to monitor civil society institutions. It also seems possible that the new initiatives portend fundamentally more complex and contentious legal processes, as the roles and responsibilities of various governmental and nongovernmental actors overlap and blur. These problems seem especially likely if the tendency to integrate traditionally separate economic and social concerns expands, concomitantly expanding both the number of interested actors and the inherent conceptual and informational challenges.

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<sup>16</sup> I use the term "organization" to refer to specific organized groups of actors, whereas "institution" refers to larger patterns of relationships into which specific organizations come and go.

## GLOBAL

Global environmental law has a history broadly similar to its domestic counterpart, but much briefer and less accomplished. Before World War II there was very little international environmental law, the primary exceptions being treaties to protect migratory birds and a few international water bodies. Since World War II the pace has accelerated considerably, with a raft of treaties and cases seeking to protect transnational environmental resources (Kiss and Shelton 2000). Important examples include the Montreal Protocol on Substances that Deplete the Ozone Layer (“Montreal Protocol”) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), as well as the soon-to-be-ratified Stockholm Convention on Persistent Organic Pollutants (“POPs Convention”).

On the whole, however, progress through the Westphalian system of nation-state negotiations has been painfully slow, while the growth of serious transnational environmental problems has been remarkably rapid. Problems such as global climate change, biodiversity loss, ocean degradation, desertification, drinking water degradation, and hazardous and nuclear waste mismanagement have not been credibly addressed by the Westphalian system. Even where treaties exist, their enforceability and adaptability to change often are subject to serious doubt. Finally, the growing promotion of international trade, and the distrust of regulations that could conceivably constitute non-tariff trade barriers, create international obstacles to improved domestic environmental regulation.

Given the limited capacity and achievements of Westphalian institutions, it is not surprising that global civil society organizations would attempt to fill the gap. As noted in the companion paper, it was the failure of international institutions to protect tropical forests that spurred the growth of forest certification in the first place. For this reason and because of the law-like nature and structure of forest certification, it is in the ironic position of being faced with the same questions confronting traditional legal systems.

## FOREST CERTIFICATION AS ENVIRONMENTAL LAW

This section treats forest certification as a form of environmental law and starts to ask some of the questions regarding certification that are asked of environmental law. Of the many possible criteria that could be deployed and their variants, this paper focuses on four general areas: efficacy, coherence, adaptability, and legitimacy. Its goal is more to clarify and frame important questions than to answer them at this stage, although some working hypotheses are offered.

### EFFICACY

In modern times, the criterion most frequently invoked to evaluate legal systems is that of efficacy (e.g., Jones 1969). Its core question is whether the legal system effectively governs how people interact in a given field. In the case of environmental law, the question is whether the legal system effectively governs human relationships to the biophysical environment. Ironically, there has been very little research on the overall efficacy of Phase 1

and Phase 2 environmental law systems. This is in part because of the enormous difficulty, if not impossibility, of attributing cause and effect relationships to such large phenomena.

There is also an important and contested preliminary problem: efficacy toward what end? Neither the traditional environmental law system nor forest certification have come up with a clearly defined end. Indeed, as suggested above, part of the operation of any legal system focuses on defining the goals of the system. Environmental law and forest certification are caught up in larger societal dialogues on environmental policy. In the past two decades societal conceptions of environmental regulation have begun to shift from relatively narrow, negative conceptions of controlling pollution and other destructive practices toward broader, more affirmative conceptions of achieving sustainability and sustainable development. These affirmative conceptions include important social and economic goals, such as economic vitality and community stability. For this reason alone they are harder than negative goals to operationalize, and their achievement is accordingly harder to “certify.” In fact, the difficulty of documenting sustainability prompted the Forest Stewardship Council to redefine what its program certifies, from “sustainably” to “well” managed forests.

Nonetheless, there has been considerable discussion about the efficacy of forest certification, mostly focusing on how well it protects the environment.<sup>17</sup> The first level has debated the comparative advantages of programs based on substantive standards versus those based on environmental management systems (e.g., Hauselmann 1997; Krut and Gleckman 1998). The second level has debated the comparative effects of different standards-based systems (e.g., CEPI 2000, Meridian Institute 2001). Although some of this debate is based on limited empirical research, most of it is hypothetical-deductive in form. In other words, it assumes that standards will be fully implemented and then compares the assumed effects of the standards. Similarly, standards systems and environmental management systems are compared based on analysts’ assumptions about how they will work in practice. These assumptions often are based on a queasy mix of real-world experience and commitment to different management philosophies and even theories of social control.

Many of the analyses that have been done are useful in that they clarify the terms and structures of certification programs. And despite my critical posture, it is my impression that forest certification programs are leading to some improvements in forest management (see generally Meidinger 1999:164, 199, 217). Still, we know very little about why or where or under what conditions. And debates regarding the relative merits of different approaches probably cannot be sorted out at this point because we lack anything remotely approximating evaluation research.

The absence of rigorous evaluation research on forest certification is somewhat ironic, since the efficacy of certification systems is in principle easier to research than the efficacy of

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<sup>17</sup> This is not surprising, since there is broad agreement across legal systems that protection of environmental resources, particularly those that are valuable to humans, is a core goal of environmental law (e.g., Lundmark, 1998:9). It does, however, fall short of addressing the post-Rio environment-society-economy goals of sustainable development.

more multi-faceted legal systems. If proper evaluation research were to be done, comparable firms would be randomly assigned either to be certified or not. The certification group would also be randomly assigned to different certification programs so that the programs could be compared (see generally, Campbell and Stanley 1963). The performance of the firms would be measured before and after certification, ideally at regular intervals. Typical performance of certified and non-certified firms could then be compared by program.

Systematic evaluation research is quite unlikely to be done, however, for two basic reasons. First, because certification programs are self-defined as voluntary there is a significant problem with 'selection effects.' Firms choose whether or not to participate in certification programs based on their individual assessments of what is in their best interest. It is therefore likely that significant prior differences exist between firms that enter certification programs and those that do not, and between firms that enter different certification programs or enter them at different times. Accordingly, differences in their performance over time are as likely to be correlated with underlying differences among firms, as with differences in the programs *per se*.<sup>18</sup>

Second, certification programs are not designed to produce detailed, comparative data on the performance of forest enterprises. Rather, the whole point of certification is to make a binary classification: certified or not-certified. Firms within the certified category are portrayed as if they were homogenous in performance. The primary site-specific information provided by certification programs is the label itself. The label can be matched up with the standards and criteria on which it is based, but the standards and criteria are general, and do not provide any further information on the particular enterprise. If such information is to be provided, it must come from voluntary action of the firm or compulsory mandates of other regulators, usually governments. This situation exposes a second level of irony: some of the attraction of certification to firms may derive from its potential to stave off mandatory regulatory disclosure of more detailed information on their operations.

In sum, we do not have and are not likely to get anything approximating scientifically persuasive information on the efficacy of forest certification programs. This does not mean, however, that we are incapable of making efficacy assessments and recommendations. Research on other areas of regulation suggests several areas of concern that will have to be dealt with over time as certification systems assess their efficacy and seek to reconfigure themselves. I raise them here in an attempt to spur discussion as early as possible. Given that forest certification is only one forest regulatory system among several, it is useful to consider efficacy from both an internal and external standpoint.

### Internal

Viewed internally, regulatory systems can be understood primarily as seeking to control the behavior of their direct "targets" - typically regulated firms. We have a great deal of experience with command and control regulation which might be useful to forest certification. In this section I will touch on only a few issues that seem most immediate.

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<sup>18</sup> This is a more general version of the argument that firms seeking certification are likely to be good performers regardless of whether they undertake certification. (E.g., Thornber *et al*, 1999:15).

*Accountability.*<sup>19</sup> At present certification systems are built on a three part accountability structure: policy maker/accreditor→certifier→forest management organization. This is a rough approximation of the agency→inspector→regulated firm structure typical of governmental regulation, but there are several important differences. First, many certification systems seek to improve the compliance of organizations by institutionalizing controls within the firm in the form of environmental management systems. Many government agencies are also pursuing such strategies, but there is little information to date on how well they work. As I have suggested above and elsewhere (Meidinger 1999:199-203), it is hard to believe that environmental management systems will have no effect on firm behavior. On the whole, they seem likely to lead to improvements, simply because they give specific actors in management organizations specific responsibilities for specific issues - whereas before these elements were often highly diffuse or absent in the management organizations. We just do not know how much improvement there is or under what circumstances.

The second important difference is that certifiers are not employees of the certification programs. Rather, they are hired and paid by firms seeking to be certified. Experience with other regulatory programs suggests that this situation has the potential to lead to at least two major types of problems: limited enforcement resources and risks of corruption.

*Limited Enforcement Resources.* The resources available to certifiers to monitor compliance come from the firms being monitored, and are fundamentally limited by the total magnitude of certification revenues. This means it will be difficult for certifiers to concentrate resources on monitoring firms in the way an administrative agency might, for example, focus its resources on particular companies thought likely to present special problems. Certifiers will generally be hard pressed to set their fees for any particular firm higher than the costs of certifying that firm in order to pay for surveillance of other firms. It may be possible for certification firms to call for help with extra resources from environmental NGOs or foundations in particularly difficult circumstances, but it does not seem likely that they will be able to do so on a regular or continuing basis.

*Risk of Corruption.* Second, there is a serious risk of what as well be labeled corruption, despite the term's powerful overtones. By corruption I simply mean allowing one's official judgments to be influenced by self-interest in a way that is inconsistent with one's official duties. Because of their need for continuing revenues, certifiers are highly dependent on firms seeking certification and are under pressure to satisfy them. This is particularly true of the ISO 14001 and AF&PA Sustainable Forestry Initiative programs, but also applies to the FSC program. Certifiers have strong interests in pleasing their employers, and are likely to be selected in part because they are expected to sympathize with the viewpoints of their employers.<sup>20</sup> At the same time, of course, the reason certifiers are employed is to provide assurance to the public that the firms employing them in fact are performing as advertised. Certifiers are thus placed in an inherently difficult position, since they are in effect public

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<sup>19</sup> This paper focuses on internal program accountability and control. The bigger question of democratic accountability to the public (e.g., Spiro 1996) is left for a later paper.

<sup>20</sup> For a critical analysis of PriceWaterhouseCoopers auditing of clothing manufacturers, see O'Rourke 2000. For an argument that auditors suffer from an inherent "self-serving bias" see Prentice 2000.

fiduciaries employed by the very private actors whose activities they are supposed to assess and monitor. To date, in my estimation, the public discussion and analysis of this problem in the forest certification arena has been quite limited and exceedingly naïve. This is probably due in part to the fact that the primary basis of reliability attributed to certifiers is professionalism, and the discussion has taken place primarily among forestry professionals. We know from the history of other fiduciary professions, however, including accounting and law, that other safeguards are important and perhaps essential.

*Institutional Safeguards.* At present there are very few structural safeguards against corruption in forest certification. The primary one in the case of the FSC is periodic auditing of certifiers' decisions by FSC staff. Although this process recently led to the suspension of one certifier's privileges,<sup>21</sup> the oversight resources of the FSC are very limited, and are likely to remain so for the foreseeable future. The AF&PA system evidently provides for no auditing of certifiers at all, and indeed makes them even more dependent on firms than the FSC system. The AF&PA has provided, however, for a rudimentary external complaint system wherein people who believe they have information indicating that a member company is not conforming to SFI guidelines can submit that information to someone who will keep their identities confidential. This is a start toward creating a more adequate accountability structure, but a very limited and probably quite inadequate one, because there are likely to be few cases in which people have the necessary combination of information and interest to file complaints.

Research on regulatory institutions has produced a broad consensus that triangulation of social accountability structures is important to regulatory efficacy. The key idea is to empower third parties to monitor the performance of both regulators and regulatees (Ayres and Braithwaite 1992). The third parties may be organized groups, or they may be more diffuse actors such as citizens. Many institutional mechanisms exist for achieving triangulation. Perhaps the most important in environmental regulation are "citizen suit" and various "transparency" and public information devices. A citizen suit mechanism empowers parties aggrieved by non-compliance with a rule to bring legal enforcement actions directly against the violator, with or without action by the government regulator (Boyer and Meidinger 1985). Transparency mechanisms give aggrieved parties information with which to publicize the misbehavior of the regulated party to the public at large and possibly to take or provoke legal action. The "community-right-to-know" laws discussed above are one of the most powerful examples in modern law, but there are others (Karkkainen 2001).

It is important to note that triangulation mechanisms place increased compliance pressures not only on regulatees, but also on regulators, whose performance can also be assessed. This creates some structural "balance" in a situation where regulators are responsible for protecting public interests, and is likely to improve the efficacy of the regulators in performing their functions. Another important factor is that the outsiders must

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<sup>21</sup> The certification organization involved was SKAL, based in the Netherlands, which was temporarily deprived of its authority to issue new certificates. (FSC headquarters circular to National Initiatives, April 9, 2001) (on file with author). It was reinstated about a month later, after undergoing intensive discussions and a training session. (Memo from Karen Tam, Operations Officer to FSC Members, May 11, 2001.) (on file with author).

have some leverage to challenge the effectiveness of the system in order to enhance its effectiveness. Typically, this means the capacity to inflict some kind of “bad” on poorly performing parties. Third, of course, this process is likely to make forest certification more of a public phenomenon, and less a narrowly “professional” one.

Many different triangulation structures are possible for forest certification, and it is not feasible to propose or justify a specific one here. Rather, the key point is that to achieve reliable efficacy (and thereby adaptability and legitimacy) forest certification programs will likely need to empower third parties to monitor and challenge the performance of firms and programs.<sup>22</sup> The third parties should be involved not only in the policy formation process, but also in the implementation process. Who they should be could vary among from one cultural and institutional context to another, but it seems clear that the issue will need to be worked out for certification to become a dependably effective process.

“*Creative Compliance.*” Another dimension of forest certification that has received much thought by lawyers and some study by socio-legal scholars, but relatively little public discussion by forest certification experts is the problem of “creative compliance.” If pressed, many lawyers would probably acknowledge that one of their most important roles is to help clients “work around” rules. Working around rules does not mean violating them, but rather finding ways to conform to them while sometimes attaining ends that the rules were probably intended to prevent. McBarnet and Whelan (1997, 1999) provide a number of informative case studies of how corporate lawyers have figured out ways to get around financial regulations, often with the tacit cooperation of accountants who enjoy institutionalized trust very similar to that accorded forest certifiers.<sup>23</sup>

Creative compliance seems to be an endemic tendency of rule-based systems, and there is no reason to think that forest certification systems will be free of the problem. I suspect that the main reason it has not received much thought to date is that the designers of

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<sup>22</sup> In principle, it is possible that governmental agencies could play the triangulation role in some contexts. It seems unlikely, however, that those contexts will be ones where agencies are already heavily involved in certification, such as in Europe, since their interests are rather closely aligned with some certification programs (e.g., the PEFC) and opposed to others (e.g., the FSC).

<sup>23</sup> The collapse of the energy trading corporation, Enron, in late 2001, evidently due in part to creative compliance with accounting rules approved by major accounting firm Arthur Anderson, might be taken as an exclamation point to this warning, which was written months before the collapse. However, the exact bearing of the Enron case on forest certification remains to be worked out. One of the commonly cited problems, the provision of both accounting and consulting services by Arthur Anderson, with the consulting as lucrative as the accounting work, may have given Anderson an added incentive to facilitate creative compliance. No evidence has come to my attention that there is a comparable problem in the forest certification context, although it is difficult to say with certainty. Most certification programs appear to have bans on certifiers providing consultancy services to firms they certify, but it is not out of the question that some of the experts retained by certification firms may have interests of some kind in the professional advice relied upon by certified forest enterprises. On the other hand, there is a type of accountability pressure present in the financial accounting world that is absent from or much weaker in the forest certification world, and that is the fact that stockholders who might be injured by accountant ratified overestimates of a stock’s value will place considerable pressures on accountants to avoid such situations (Morgenson 2002). If an accounting firm got a reputation for approving questionable practices, its audits would lose value in the financial markets and its business would therefore be expected to decline. There are not likely to be comparable pressures from consumers of certified wood, although competitors might have incentives to police one another to some extent.

certification systems are strongly inclined either to believe their rules will work, or at least not to question them too closely. Moreover, they may be somewhat naïve about the workings of traditional governmental regulatory programs. Eventually they will have to confront the problem, however. They will have to engage in the same kind of process that financial regulators are involved in, which is trying to adjust their rules to close off the loop holes that creative compliers have found and then watching for reports of new forms of creative compliance. At present, however, as is further discussed in the “adaptation” section below, forest certification systems seem poorly equipped to deal with this challenge. They are not organized to systematically collect information on creative compliance. No one in the system has that function.

### External

The fact that certification programs operate in a larger regulatory arena, often competing and cooperating with one another and with governments, means that they can also achieve efficacy by influencing other programs. First, and most obviously, there is reason to believe that more rigorous certification programs, such as the FSC, have spurred significant improvements in less rigorous ones, such as the SFI (Meidinger 1999); a moderately optimistic analysis holds that this dynamic is likely to occur to certification programs generally (Fung, et al. 2001). Less obviously, certification programs may also have broader external effects by stimulating improvements in governmental environmental regulation and promoting increased consistency among jurisdictions.

*Improved Governmental Regulation.* Forest certification programs have the attention of governmental forestry agencies in most of the world. Some government management agencies have chosen to seek certification of the lands they manage under one program or another. Others, particularly in Europe and Asia, have formed alliances with specific certification programs. Even where governments are officially detached they are likely to be influenced in various ways by certification programs. First, as noted above, certification programs are likely to bring public attention to how well government agencies are doing their work, and may possibly spur them to improve. Second, the larger discussion of forestry standards and practices stimulated by certification processes is likely to infuse governmental legal requirements in various ways, including changes in formal rules and informal implementation practices, as well as standards imposed by courts and other agencies (see generally Meidinger 2001a). In Bolivia the FSC-oriented standard setting process undertaken by a non-profit civil society organization led not only to the creation FSC national standards, but also to revisions of government requirements, which ended up being effectively the same. The government regulations also recognize FSC certified forestry operations as complying with forest laws (Cordero 2001).

Third, government agencies could simply require certification as a condition of conducting forestry in their jurisdictions, as some have done already (Meidinger 2001a), thus significantly expanding their total implementation capacity. There are intermediate options as well. For example, when Guatemala makes a land concession to a community forestry group in the Biosphere Reserve it requires the group to obtain FSC certification within three years



(Finger-Stich 2001), apparently as a condition of retaining the concession. Even if they do not formally require certification, government agencies could concentrate their enforcement on uncertified firms, treating certified ones as likely to be in compliance. Again, this would effectively expand total enforcement resources and presumably lead to improved overall compliance.<sup>24</sup> Governments could even seek to leverage their overall resources by attempting to 'steer' certification programs, as they are doing to a limited degree already (Webb 1999). This strategy might be one of the ways in which states gradually redefine their regulatory roles, increasingly incorporating civil society regulatory programs where they can, and focusing their own efforts on areas where certification programs are less helpful. It should be noted, however, that any obvious increased government involvement in or reliance on certification programs is likely to trigger back-pressure by industry on certification programs. Thus, there might be increased pressure for lower standards and less expensive, weaker inspection practices, as evidently has been the case with the PEFC.

*Interjurisdictional Consistency.* As a global movement, forest certification automatically creates new channels of communication and comparison across national boundaries. If in fact it has the influence on governmental regulatory standards and practices posited above, certification has the potential to promote increased regulatory consistency and convergence among jurisdictions, both governmental and non-governmental. Although this possibility is subject to the logical challenges of coherence discussed below, it is a goal high on the agenda of both environmental organizations and many transnational businesses, who see advantages to consistent rules across jurisdictions. At present, there remains enormous variability among national systems and different certification systems, but the possibility exists that together they will serve as conduits for convergence over time.

## ADAPTABILITY

Ultimately, forest certification will be efficacious only to the extent that it promotes sustainable forest management. Promoting sustainability will not be a simple matter of implementing existing rules and standards. First, there is inevitably much we do not know about how to achieve sustainability. Second, those subject to certification programs will often practice "creative compliance". And third, rule systems generally have unanticipated consequences as great or greater than the intended ones (Jones 1969). Therefore, they need to be adaptable.

In essence the challenge of adaptability is a challenge of learning - learning to solve emergent problems (Lee 1993). Forest certification programs face major challenges regarding how to institutionalize learning. Perhaps because they have conceptualized themselves so much as rule systems, and because there has been so much contention about the content of

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<sup>24</sup> Interestingly, the degree to which this has occurred to date is unclear. The U.S.E.P.A. evidently has increased the resources it expends on defining and managing the "Performance Track" program, for example, but there is little evidence that it has shifted enforcement resources to monitoring firms that are not in the program (Coglianese and Nash 2001:231-232)

the rules, they do not seem to have taken seriously the problem of gathering and analyzing information about their own performance and how they can improve it.

The primary need is to create feedback loops from ground-level experience to system-level policies. The major repositories of ground level information, certifiers, do not seem to have incentives or resources to share information on implementation experiences or to gather systematic information. Indeed, since they compete with each other, certifiers may have disincentives to share anything beyond the trivial or obvious. Management organizations are also in competition with each other, and would seem to have equally few incentives to share information, particularly when it might cost them money. As forest certification is presently constituted, no other interests have the capacity to gather detailed information on ground level experience.

This situation could change if some of the suggestions for transparency and triangulation made above were to be adopted. It probably must change if forest certification is to become sufficiently adaptive to remain viable over the long term. The fact that the problem has not been more carefully addressed to date seems particularly unfortunate given the potential envisioned by some observers for transnational NGOs to become agents of global social learning (e.g. Finger 1994:65). If this potential is realized, it is likely to be a major development in the capacity of global civil society to circumvent some of the severe limitations of the Westphalian governance system.

## COHERENCE

From the perspective of legal theory, forest certification, particularly as exemplified by the FSC, is a stunningly ambitious undertaking. It seeks to create a set of rules and institutions for forest certification that (1) integrate environmental, social, and economic goals and (2) apply them consistently across boreal, temperate and tropical forests (3) in developed and developing regions with vastly different institutional arrangements and cultural traditions. One may pause simply to wonder whether any rational actor would undertake such a profoundly difficult task. Of course a skeptic might quickly observe that perhaps the ambitions of forest certification are not as great as they seem. Actually, what forest certification needs to achieve is an acceptable image of globally consistent rules rather than the “reality” (Balkin 1993). This is also what most global traders would want - a system in which the fundamental qualities of products are not subject to question.

Regardless of whether the ambitions of forest certification are truly staggering, or merely unprecedented, they are worth following closely. The Westphalian system has been utterly incapable of fulfilling either vision. All legal systems should therefore pay close attention to how forest certification fares. If forest certification makes significant progress there is much to be learned from it, both about how to make rules and about the emergent role of global civil society. In this section my goal is primarily to clarify some of the challenges of coherence posed by such a grand set of goals, and secondarily to offer a few observations about what is being done to meet them.

## Integration

As noted above, the core goal of integration involves incorporating environmental, social, and economic goals in the same set of standards. This general approach is supported by the increasingly commonplace view, promoted for about two decades now, that one cannot have a healthy environment without a healthy economy and society, and vice versa. Of course, these concerns have largely been kept separate in traditional legal and regulatory systems. The FSC forest certification program thus attempts to break new ground. Initially, it seeks to do so by addressing the various concerns in individual principles. In practice, however, the principles must be accommodated with each other not only in regional standard setting processes, but also, and probably more importantly, in the course of each certification decision. How much responsibility for protecting the environment, for example, can firms be required to carry when they are also enjoined to remain economically viable in a market where not all firms are certified? Similarly, what provisions are sufficient to protect indigenous rights, given that clear adjudications could take a long time in many places, and possibly negate the economic viability of certain enterprises?

These questions have been handled largely in individual certification processes to date, occasionally with considerable public conflict, but mostly below the radar screen. The ideal of the FSC (and derivatively of the PEFC), however, has been that regionally-based stakeholder standard-setting processes will provide contextually appropriate answers, reflecting regional culture and values. Making the tradeoffs in this way implies a culturally based coherence supported by the reasoning developed in decision process. This is fairly similar to traditional democratic justifications for law as well as to Habermas' dialogic model (1989), but it faces several problems. First, of course, it is possible that the tradeoffs would have been quite different if different people had participated in the standard setting process, as has been asserted for example in the FSC Canadian Maritime standard setting case. There the timber industry claimed that the standards were inappropriate because they were developed without sufficient industry input, and was partially sustained by an investigating commission (FSC Commission of Enquiry 2000). While this can be described as a problem of stakeholder theory, it also affects the ideal of coherence, since it may be that regional values simply do not and are not likely to fit together in many situations. Legal theorist Joseph Raz suggests that this is a problem with all efforts to privilege conceptual coherence in law (1992:310).

This problem becomes much more serious when the global scope of the system is considered. The promise of forest certification is that a piece of certified wood from Malaysia is the environmental and social equivalent of a piece of certified wood from Sweden. For this to be the case one of two conditions must be met. Either "equivalent" must mean merely that a regional standard has been set in each case and that each piece of wood meets the applicable regional standard (avoiding for the moment the problem of setting a standard for what constitutes a legitimate standard setting process). Or, there must be some logical relationship between the standards making them comparable within a larger framework. Most forest certification programs are strongly committed to the second principle, although they vacillate on how to meet it. The environmental NGO FERN, for

example, argues that one reason performance based systems are necessary for certification is that only they can achieve coherence. Environmental management system standards, by contrast are fundamentally incapable of achieving coherence (FERN 2001:17).

The commitment of forest certification programs to coherence reflects an underlying assumption that there is globally common standard for proper forest management, and that it is possible for forest certification programs to certify it. The assumption of a common moral standard seems to apply equally to the global civil society movement. Thus forest certification in particular and global civil society in general are faced with the need to create coherence in order to advance their causes. I will not predict whether or how they will do it - only that they will and must try. One route is for certification programs to promote master metaphors, such as “ecosystem health” and “sustainable forestry” (e.g., Shannon, Meidinger and Clark 1996) and position themselves to be the ones who progressively fill those metaphors with concrete meaning. It will be interesting to compare the process with developments in international commercial arbitration (Dezalay and Garth 1996) and computer operating systems (Lessig 1999), where competitive informal definitional processes seem to have been key, with forest certification, which seems to lean toward more formal arrangements.

It will also be interesting to observe to what extent variations in specific standards can be reconciled with the requirement of coherence. Can the FSC, for example, effectively persuade people that requiring elaborate protective equipment for adult workers in Swedish certified forests is equivalent to allowing barefoot twelve-year-olds to work in third world certified forests, where if they do not do so their families they may starve? How will this be done? The current debate within the forest certification world will eventually have to find a social reception outside it. In doing so it may have to develop a persuasive account of how facially different regional standards should be seen as effectively consistent.

## Federalism

The FSC is organized to address the problem of regional challenges to coherence primarily with a system of closely coordinated federalism. The primary processes involved are central review of regionally developed standards for conformance with the international principles and criteria, and inter-regional “harmonization” processes. A number of examples of each are now complete, and will undoubtedly be subjected to intensive review. From a legal scholarship standpoint, the harmonization processes are fascinating. While there are some guidelines for how they are to be carried out, they seem to vary greatly from one region to the next. This is not to say that they will not work well, only that a theory of why they work well will have to be developed after the fact.<sup>25</sup>

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<sup>25</sup> To date, the PEFC has devoted considerably less resources than the FSC to the problem of inter-regional harmonization, and indeed seems to start from the assumption that all European standards are fundamentally comparable. As Reh binder (2002) points out, the FSC is not free of the problem, in that many of the regional standard setting bodies are organized according to national boundaries, thus suggesting a potential “renationalization” of standards. Nor is his critique vitiated by the fact that the larger nations include multiple regional standard setting bodies.

Moreover, if one compares these harmonization processes to traditional Westphalian ones, they could come out looking fairly good. It is quite possible that NGOs and certification programs link levels and regions much more successfully than governments. They also benefit from a narrower set of concerns. The Maritime region's view of the Great Lakes region's herbicide policy, for example, is not dependent on the Great Lakes region's position on software sales to the Maritime region. Global Civil Society programs also benefit from rapid communications technologies, less cumbersome decision procedures, and (perhaps) less turf wars. Moreover, it is not inherently obvious that they are less "democratic" than Westphalian decision systems (Finger 1994:58), given the all of the well known shortcomings of governmental decision making. All in all, then, if coherence can be achieved, there is some reason to think that civil society organizations are in a plausible position to do so.

The main shortcomings of global civil society regulatory programs are their incapacity to raise taxes and conduct wars - not minor defects, but perhaps not as important as they were in the rise of state regulatory institutions. Though poorly funded and under staffed, these small programs made up of relatively well informed participants who communicate regularly may have better prospects of achieving closure in the harmonization process than so non-expert legislatures with much broader issue portfolios. Finally, it is worth noting that the nitty-gritty details in the harmonization and central review processes are being worked out for the most part by foresters and environmentalists, rather than lawyers. While they are not trained for the job, neither are most lawyers, and it will interesting in any case to learn from their experience.

### **(In)Determinacy**

Indeterminacy refers to a condition in which rules, even quite elaborate ones, fail to generate determinate outcomes in particular cases. Thus, one can take a given factual situation, apply the rules to it, and reach more than one logically justified conclusion. In the certification situation, this would mean that the same forest enterprise could be seen as either certifiable or not certifiable depending on how the rules are applied. Some, but not all, legal scholars see indeterminacy as a flaw in coherence and an inherent limitation of all rule-based systems. One common maxim is that the more factors a legal agent is allowed or required to consider, the less determinate her decision will be. In practice the situation is probably more complicated, depending on the nature and magnitude of the factors at issue. But it is worth bearing in mind in the certification context.

I mention the issue for two reasons. First, anecdotal experience suggests that despite the elaborate systems of rules that have been developed in many regions (perhaps particularly in the U.S.), certifiers still seem to feel they must exercise a great deal of "professional judgment" going beyond the rules in making individual certification determinations. Second, these conditions seem to apply even in much more rule intensive (or "juridified") arenas such as administrative regulation. Hence, the tendency of certification programs to promulgate growing numbers of rules, criteria, and indicators is not likely to resolve the problem of indeterminacy. Accordingly, the programs should probably consider

whether they would be better off simply publicizing and attempting to explain the role of professional judgment in their operations.

## LEGITIMACY

No legal system can endure for long, or be broadly effective, relying solely on coercion. Rather, it must enjoy voluntary compliance by the great majority of persons subject to it. In attempting to understand why and when legal systems are successful, much sociolegal research has focused on how they build social authority so as to elicit voluntary compliance. Given that certification systems have very little coercive capacity, this research is particularly relevant to them. Perhaps the most widely relied upon concept in explaining legal authority has been that of legitimacy. Max Weber argued that a legal system has legitimacy when it can, without using coercion, elicit compliance with its rules or decisions even from people who disagree with the substance of those rules or decisions (1978:31). This is the “pull toward compliance” referred to above.<sup>26</sup> The degree of legitimacy enjoyed by forest certification today is unclear, and in fact is deeply contested (Cashore, et al. 2001). Some observers, echoing my long-ago conversation with Professors Lyons and Mohawk, think it inevitable and only a matter of time until the obvious rightness of certification wins the day. Others view certification as a fundamentally coercive phenomenon. One industry representative told me bluntly that “proper forest management is what the FSC says it is . . . nothing more, nothing less”. His point was that the reason his company would maintain FSC certification was simple economic self-preservation. It could not afford to get a bad name in its markets, and the FSC and its allies were capable of giving it a bad name. Other company representatives have of course said the opposite, and talked about the basic correctness of the FSC or other certification standards.

For now, it appears that the legitimacy of forest certification programs is largely derivative, and reflects the credibility of the groups affiliated with them. Thus the FSC program relies primarily on the public legitimacy of environmental (and to a lesser extent labor and human rights) NGOs, while other programs rely more on the somewhat uncertain legitimacy of the forestry profession, industry, and state agencies. Over time, however, the dynamics of legitimacy are likely to become more general, and certification systems will have to develop their own legitimacy. Whether that is happening and how is currently an open question subject to ongoing research (Cashore et al. 2002). By their nature, however, certification systems face two especially intriguing problems of legitimacy, with which I close this paper.

The first problem has to do with certification programs’ reliance on market relationships and consumer preferences to organize governance institutions. This strategy

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<sup>26</sup> Whether and when legal systems actually function in this way is a difficult question about which I make no assumptions here. As Alan Hyde (1983) has pointed out, it may be a mistake to assume that legal systems generally enjoy legitimacy. It is quite possible that behavior described as being based on legitimacy is actually based on self-interest or other functional considerations. On the other hand, as Franck’s (1990) scholarship makes clear, it is difficult to understand many developments in international law without the concept of legitimacy.

may give up one of the traditional legitimacy advantages enjoyed by civil society organizations, which Ann Phillips describes as having a much greater capacity to “capture people’s hearts and minds” (1999:58) than do governments. Assuming that her assessment is accurate, it is worth pondering the implications of the use of marketing techniques to organize civil society relationships. Might this strategy inherently reduce the depth and durability of commitment to civil society norms? Might it reframe the background in which civil society actors are seen so that their views have the same ontological status as all other individual consumer tastes? If so, the use of market methods could create considerably greater difficulties than are currently apparent for holding certification institutions in place over the middle and long term.

The second legitimacy challenge has to do with the global reach of forest certification programs. To date, the primary focus of certification systems has been on retailers and consumers in wealthy countries. In a global civil society, however, they will have to legitimate themselves simultaneously with poor, third world woods workers and villagers and with relatively well off northern workers. This is a major challenge - one that no governmental or intergovernmental body has come close to meeting. If certification programs in fact achieve anything approximating north-south, inter-class, inter-cultural legitimacy, they will have pulled off an organizational feat unprecedented in human law and governance. Ultimately, however, even if they are successful in establishing global legitimacy, we will not know for some time whether they thereby function to challenge and supplant governmental legal systems, or in fact to extend and amplify them.

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