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6. CONVERGENCE BETWEEN CERTIFICATION AND VERIFICATION IN THE DRIVE TO LEGALITY ASSURANCE: ASSESSING THE PROS AND CONS

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Summary

The verification of the legality of internationally-traded timber is an important dimension of the forest law enforcement and trade movement (FLEGT). Paradoxically, this has increased interest in the potential of private sector forest certification schemes as a mechanism not only to promote sustainable forest management but also - and more controversially - to verify legal timber. There is evidence of a convergence between the two streams of practice, with several producer governments said to be willing to consider certification as a surrogate for formal legality assurance. Whilst such a convergence does offer benefits in terms of reducing the costs and administrative load on producers, it is not without its risks. This paper considers the pros and cons of the convergence, and identifies some of the conditions that need to be met if the two instruments are to function in a mutually supportive way.

POLICY CONCLUSIONS

- The growing policy focus on the verification of legal timber is likely to expose the certification movement to increased scrutiny over its interpretations of legal compliance; this is a qualitatively new situation with implications for accreditation bodies and certifiers.
- FLEGT is also leading to a convergence between verification of legality and certification of sustainable management; this has both positive and negative aspects, and will need to be carefully managed.
- There is a risk of conflicts of interest developing in agencies seeking to provide both certification and verification services.
- Despite its limitations, certification may have much to teach the verification movement, particularly in the areas of systems governance and accreditation of suppliers.
- There is a case for treating the two movements as having different aims which should not be confounded. There are, however, good reasons to want to see both of them advance in a mutually supportive way, provided certain governance and equity conditions can be met.
- A critical requirement is that certification should not pre-empt the policy processes associated with the definition of legal timber - particularly the efforts that are underway by many producer states to refine the legality standards. It should seek instead to draw upon this new policy initiative so as to strengthen its own credibility.

Introduction

An important tension exists in natural resource policy between the international interest in the global public goods dimensions of forests and the fact that they are managed, almost exclusively, as sovereign resources of producer states. The latter have proven very protective of their sovereign rights over forests, as attested in all forest-relevant international conventions. One illustration is the lack of progress on a global forest convention at the Rio Earth Summit in 1992,

and in the IPF/IFF/UNFF process subsequently. The rise of forest certification as an industry-led initiative has reflected the impasse on global inter-governmental regulation. Since the early 1990s, actors such as WWF have sought to use certification as the primary means to promote sustainable forest management practices, and a number of certification schemes have risen to prominence as a result.



The Forest Stewardship Council (FSC) scheme established in 1993 was the early front runner and for a number of years was the sole international accreditation organisation. Its decision-making structures were innovative in the way they brought together divergent interests and, through its ten principles for forest stewardship, it helped define what sustainable forest management should look like. Other certification schemes followed, initially at the national level (the Canadian Standards Association scheme and the Sustainable Forestry Initiative in the United States). However, the main competition for the FSC has come from a regional initiative - the Pan-European Forest Certification scheme (PEFC) launched in 1999. The success of the PEFC in working with European industry interests and small forest owners led to its re-launch in 2003 as the Programme for the Endorsement of Forest Certification schemes, with global coverage. The largest area of certified forests worldwide is now made under the PEFC brand (Nussbaum and Simula, 2005).

Legality in Certification Schemes

There are many forest certification schemes, and all the major ones demand proof of legality as a precondition for receiving a certificate (see Table One).

Of particular interest in the present context is the freedom granted to certifiers to make their own judgements as to the level of compliance with national laws. Where the government in question has clarified the legal requirements, then the certifier will draw on this in making a decision on legal compliance. More problematic are those situations in which the law is contested by important interest groups. There is a danger that in such situations, certifiers will hesitate to explore any conflicting interpretations (for example, between the state view and those of civil society).

In the case of the FSC, compliance with the law is one of ten principles of sustainable forest management which must be complied with if a forest operation is to be certified. These principles are expressed as generic (global) FSC Criteria and Indicators (C&Is), which have

then to be adapted to the national context. This is usually done through the development of national certification standards involving a process of stakeholder consultation. This involves identifying those laws and regulations that are sufficiently critical to sustainable forest management to warrant inclusion in the national standard. In the absence of such guidance, certifiers have to interpret the generic C&Is themselves, putting together a checklist which is then available for public view. They may well draw on international advisory standards such as those proposed by the ITTO and (in the sub-regional context of central Africa) the African Timber Organisation¹. Using such guidelines, the individual certifier then makes a judgement as to whether there has been legal compliance. The short time available for most forest certification assessment missions means that this decision has often to be made quickly, based upon readily available evidence. In effect, the application of the law under certification is turned into an auditing event. This is not necessarily a very certain process, and certifiers are protected by the non-liability clause within the general introduction of the FSC C&Is. This states: 'FSC and FSC-accredited certification organizations will not insist on perfection in satisfying the P&C' (Para 4 of the Introduction). Clearly this is some way removed from a legal process in the sense implied in a court of law.

Certification has proven an effective instrument in certain types of forests, chiefly planted forests and others with a high degree of standardisation and secure access and ownership rights. This has been typically the case in the temperate regions of Western Europe and North America, and (to a varying extent) Central/South America. However, it has proven less applicable in other contexts, particularly the tropical regions of Africa and SE Asia where natural forests are more complex in their structure (and thus, less easily reconstituted after harvesting), and where, for a variety of reasons including the colonial inheritance, access and ownership rights are problematic (see Figures 1 and 2). These countries have also tended to be ones which are considered 'high risk' in the timber trade, because of their poor forest governance (itself usually a product of wider governance problems).

Table 1: Certification schemes and the requirements of legal and sustainable timber - the Five schemes accepted by the UK's Central Point of Expertise on Timber Procurement (CPET)

Certification Scheme	Acronym	Legal? (CPET assessment)	Sustainable? (CPET assessment)
Canadian Standards Association	CSA	✓	✓
Forest Stewardship Council	FSC	✓	✓
Malaysian Timber Certification Council	MTCC	✓	✗
Programme for the Endorsement of Forest Certification	PEFC	✓	✓
Sustainable Forestry Initiative	SFI	✓	✓ [provided CoC system is used]

Source: <http://www.proforest.net/cpet/cpet-s-assessment-of-evidence/assessment-of-certification-schemes-category-a/>

1. ITTO's C & Is are also now defined at the Central African regional level.

Figure 1: Area of certified forest (hectares)

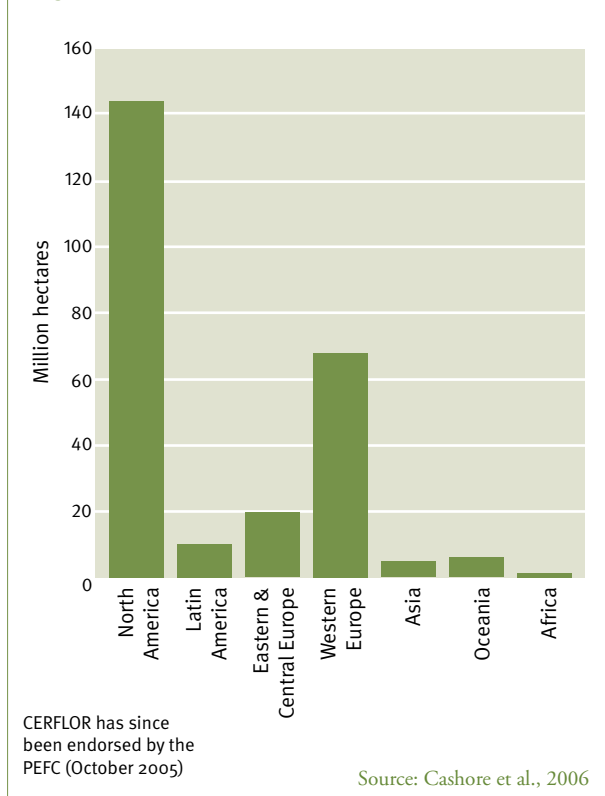
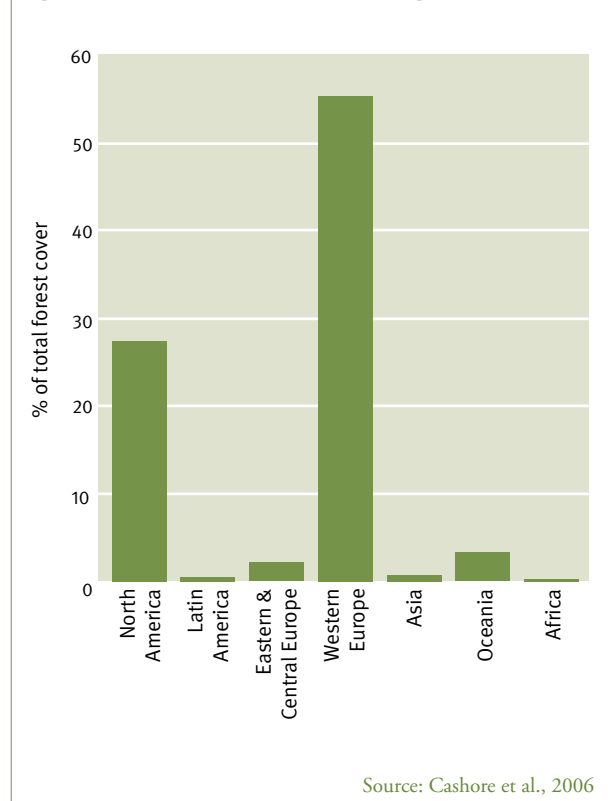


Figure 2: Area certified as a % of total regional forest cover



Verification as a new policy initiative

It was partly in recognition of the limited success of certification in regions such as Africa and SE Asia that, in the early 2000s, attention turned to the verification of legality as a vehicle to progress international forest policy. This was seen to offer a more feasible way of improving the quality of forest management, without recourse to complex notions of ‘sustainability’. ‘Legality’ was seen as a much simpler concept, and one that would be easier for states to deliver. It was thus viewed as a more attractive option in the shorter term, as well as a stepping stone to sustainable production in the longer term.

As the drive to legality assurance has advanced under the impetus of initiatives such as the EU’s FLEGT programme, there has been evidence of a growing convergence between certification and verification. Paradoxically (given its more complex associations), certification has been increasingly viewed as a potential surrogate for legality assurance. Several producer governments are reported to be considering treating some private sector certification schemes as equivalent to verification of legality. This will provide something of a bye for certified concessions in relation to the administrative demands of legality assurance. This convergence is quite separate from industry-led initiatives to ‘verify’ timber in terms of legal origin and legal compliance (for example, the FSC’s ‘Controlled Wood’ standard and the SGS ‘validation of legal timber programme’).

How should this convergence between certification and verification be assessed, not just in relation to the quality of forest management, but also the broader issues of social justice and equity for forest-dependent peoples? It is with this question that the rest of this paper is concerned.

FLEGT and Legality Assurance

Legality assurance is a much narrower concept than sustainability, focusing only on the compliance of the logging and transformation activities with international, national and local laws rather than more demanding issues relating to sustainable exploitation in its various ecological, social and economic dimensions. That said, it still represents a major challenge, particularly in the developing world. In some cases, the challenges pertain primarily to the complexity of legislation, and to the fact that this is often overlapping and inconsistent, even internally contradictory. An extreme case is that of Indonesia, where there are about 900 relevant laws, regulations and decrees. In such a situation, ensuring conformity with all national and local laws may be factually impossible. However, deciding which of the laws are central to legality assurance in the timber industry may not be an easy task. The forest industry is likely to press for the narrowest interpretation, limited only to forest sector standards and restricting the scope to the core features of forest law. Campaigning NGOs are likely to press for much broader interpretations, bringing in issues of tenurial rights and the interests of indigenous groups, and focusing on all forest-relevant laws. An impasse may well result, with the government unwilling or unable to arbitrate between the two.

In other situations, the challenges may be more straightforward – at one extreme, complicity by state actors with dishonest industry operators; at the other, worthy technical demands which prove difficult to translate into practice, thus compromising the efforts of even the most legitimate operators to ‘act legally’.

Table 2: Some key differences between certification and verification

Certification	Verification
Voluntary private sector initiative	Statutory government initiative
Global in scope and practice, but most advanced in the north	Global in scope, but in practice focuses on 'high risk' countries
Aims to achieve the broad concept of sustainable forest management	Aims to achieve the narrow concept of legal compliance
Involves both process and performance standards	As yet unresolved, though the EU position is to favour performance standards.

The convergence: pros and cons

The convergence between legality assurance and certification is a new development in a number of senses, and likely to have implications for both certification bodies and certifiers, as well as the movement to assure legality. In operational terms such a convergence has much to recommend it. However, certification and verification are contrasting types of instruments, and their intentions are rather different (See Table Two). This section first examines the arguments in favour of the convergence, and then the arguments against.

Arguments for

First, the fact that all the major certification schemes demand adherence to national and local laws as a precondition for certification implies that there is an essential overlap between the two. If a forest area is certified then the wood production from that forest should be in compliance with all relevant laws. It therefore makes sound financial and administrative sense, both for producer companies and governments, to accept certification as a surrogate for legality assurance in that it avoids duplication of bureaucratic requirements and associated costs.

Second, because certification relies in the last analysis on an independent assessment of adherence to legality by an accredited certifier (usually a commercial firm), legality assurance under certification avoids the threat to national sovereignty that might be perceived when outsiders are drawn into debate with producer governments on the interpretation of national laws.

Third, the new demand-side schemes, such as the various European procurement schemes that have recently been put in place are generally felt to be working well and these may provide models of wider validity for both producer and consumer states. The case of public procurement is particularly interesting in this context. Several of the northern European governments now require that only timber from verified legal and sustainable sources is used by their contractors, and these schemes aim to provide detailed information and advice on how public sector buyers and their suppliers can meet these requirements. Such schemes appear to address a real need among timber buyers and retailers who wish to operate on a legal basis, but who have hitherto found it difficult to assess their suppliers.

For example, the UK's Central Point for Expertise on Timber (CPET) identifies four key dimensions of legality:

use rights, compliance with relevant laws, payment of government taxes and fulfilment of CITES obligations. Use rights are usually the most problematic. For example, the Malaysian Timber Certification Council (MTCC), has been opposed by rights NGOs who question whether native customary rights are eroded by the formalisation of forest tenure (Nussbaum and Simula, 2005). The interplay between statute and customary law presents a particular challenge to the definition of legality in many countries.

In purely practical terms, it is beyond the capacity of procurement schemes to assess individual suppliers. They rely on certification standards to act as proxies in this regard. Producer governments seem to be looking to certification schemes for largely the same reasons. Proponents would argue that, though such schemes may not be ideal with regard to legality assurance, they are good enough for the purpose, and solve a real dilemma for, as well as reassure, the industry.

Experience outside the forest sector would also support this positive assessment. For example, meat standards authorities in Europe recognise the value of private sector certification schemes, and reward enterprises that have taken the trouble to comply by lowering the regulatory requirements on them. This would seem both logical and sensible in managerial terms.

Arguments against

Not all commentators are so favourably disposed to the convergence. Criticisms of the use of certification as a surrogate for legality relate to issues both of principle and of practice.

Principle

To sceptics, the fundamental issue is the legitimacy of voluntary governance schemes as a surrogate for national governance. They contend that certification is a tool of the commercial sector, and an instrument that was neither designed for nor intended to serve the public interest or the regulatory requirements of states. Such schemes may provide a credible market-based solution for forest operators who wish to demonstrate to consumers of wood products their high standards of forest management. However, certification should not be allowed to displace the legitimate role of government to regulate national economic activity. International accreditation agencies, such as the FSC or PEFC, are not answerable in the same way as national democratic governments to their electorates. If they are answerable at all, then this tends

to be across national boundaries rather than within them. Indeed, it could be argued that certification schemes have the potential to undermine the development of states by paralleling essential responsibilities that need to emanate from national institutions as defined under the constitution. This may be particularly pertinent to the case of post-conflict states where there is an attempt to rehabilitate fragile institutions. On this view legal compliance is not an area where the private sector has legitimacy to operate on its own. Also, being market-based entities, the competitive nature of certification systems leads a temptation to lower standards as increased market share is sought.

A second criticism is that certification schemes were not designed expressly for the purpose of ensuring legal compliance. Rather, forest certification was established with the aim of helping legitimate forest users demonstrate responsible forest management (Colchester, 2006). Such schemes were thus designed with a very broad goal in mind - that of sustainable forest management - rather than the more limited objective of legal compliance. A particular user group was involved who wished to demonstrate high levels of forest stewardship. In contrast, legal verification needs to apply to all operators in the forest sector. In order to have any effect verification must be able to identify those who operate beyond the law and, through enforcement activities, bring such actions to an end.

As Figures 1 and 2 show, certification is largely undeveloped in those countries where illegal wood production is common. It is most advanced in countries where legal compliance is not considered to be a major problem for policy development and is largely restricted to the developed North (although there is certification of forest plantation schemes in the South). The reasons why certification has not moved forward more quickly in tropical natural forests reflect the significant constraints that forest management faces in terms of economic, ecological and social goals in these environments. None of these constraints can be easily or quickly addressed. One assumption that can probably be made in this situation is that the lack of certification is not the result of lack of commitment or effort. A corollary of this, sceptics would argue, is that any rapid increase in the number of certified forests in hitherto uncertifiable regions is likely to be the result of a compromise on standards, rather than a sudden change in the levels of compliance with them.

Practice

Environmental rights NGOs have alleged that there are instances where certification standards have been accepted as proof of legality when there is clear evidence of illegal production. Even where such claims are justified, they do not totally undermine the enterprise; it is inevitable that some mistakes will be made. However, they may reinforce the suspicion that because commercial interests are driving the process, this is leading to compromises on standards of performance – in a downward direction.

Other areas of concern

There are two other main areas of concern:

- i. Conflicts of interest between service providers
- ii. Anti-small producer and anti-poor biases

Conflicts of interest

An issue that warrants attention is the power of accreditation bodies to prevent conflicts of interest arising with individual certifiers. The arrival of legality verification as a major new international policy initiative has led to a rapid response by the certification industry in order to capture new business. As a result, companies could find themselves verifying legal compliance under public sector timber legality assurance schemes whilst also certifying legal compliance under private sector certification schemes. There is a potential conflict of interest here, which could lead to allegations that commercial interests are influencing compliance decisions. This is over and above concerns that certification personnel may sometimes cross the line in their relationship with those operators they certify. Despite accreditation organisations having rules to limit this abuse it remains a grey area. The problem is accentuated by the practice of some certifiers to contract certification missions to freelance consultants who could find themselves ‘working for both sides’.

Anti-small producer and anti-poor biases

Many legally-compliant (and particularly small-scale) operators see no incentive to invest in voluntary certification schemes, on purely financial grounds. They may be put at a disadvantage should certification be used as an early proxy for legal compliance. With certification having already been taken up by the more capital intensive forest operators worldwide, there is a danger that small-scale operators will be squeezed by these larger concerns. Early market capture would be won by existing certified operators through their advantage of being able to demonstrate legality in a credible way, particularly in the higher-value export markets.

Ways forward – certification as a complement to verification?

Controversies surrounding the issue of forest certification are not new in the media, and have become part of the territory for all of the major agencies. What may be new, however, is the effect on certification of the heightened interest in the issue of legality. This is a product of the new policy focus on FLEGT, particularly the implementation of the EU Action Plan. The rise of this theme in forest policy could well have a profound influence on public perceptions of, and interest in, the issue of legality standards. This is particularly the case in consumer markets and most obviously at the high risk end of the spectrum. Both accreditation bodies and certifiers will need to take note of these developments and increase their vigilance over the application of standards. In countries in which voluntary partnership agreements with the EU are presently under development, legality definitions are likely to be very strongly in the public eye. Certifiers may have to revise the criteria by which they assess legal compliance with national standards in such situations, again with increased rigour and transparency in mind.

A rather different issue is how the convergence of certification with verification should be assessed in broader governance terms, not just as regards the

interpretation of legal compliance. There are surely good prime facie grounds to welcome any measures that promote the likelihood of sustainable management and of the public consultation mechanisms needed to achieve it. Likewise, it makes sense to give preferential treatment to those operators who are already trying to act legally, and to absolve them from unnecessary additional costs.

However, to use certification as a proxy for legality is arguably to put the cart before the horse. To be effective, verification of legality requires the authority of the state and clear lines of responsibility not linked to financial interest. Transferring this authority too far towards the market place risks undermining legality in the interests of commerce, even before the FLEGT movement has got seriously off the ground.

Thus, there are some strong arguments to maintain not only a conceptual but also an institutional separation between certification and legality assurance. This separation would give priority to state definitions of legality standards, and would encourage a rigorous and single-minded assessment of them.

If this interpretation is accepted, two sets of conditions would be imposed on certifiers:

- Certifiers may have to be much more rigorous and transparent in making their judgements of conformity with the law, if their interpretations are to be accepted without question by NGOs and other activists, and ultimately by the public at large.
- Accreditation agencies would need to take steps to ensure that their aims are not compromised by commercial goals, in relation both to:
 - » Assessments of compliance with the standards, particularly over the passage of time; close tracking will be required to ensure that there is no downward trend in the standards applied.
 - » The individuals and organisations on which they draw to assess compliance will need to avoid any conflicts of interest. There is likely to be the need for clear codes of conduct to govern both streams of work, and maintain their separation. Some sort of licensing scheme for verifiers of legality might well be called for.

Conclusion

This paper has highlighted the ambiguities inherent in the present functioning of the major systems of certification with regards the verification of legal compliance. It is likely that these ambiguities will be magnified and underlined by the new movement to verify legality.

An important message is that both streams of regulation, voluntary and statutory, need to develop simultaneously - but not forgetting the issue that brought them both into being. This was the need to improve the generally poor governance of the forest sector. The State clearly has a

critical role to play, being answerable to its citizens in a way that private sector institutions are not.

These findings are not necessarily relevant only to the certification movement. The context for legality assurance would also seem to be changing, so the effects could be two-way. Particularly in the area of institutions, forest authorities may have much to gain from looking to the experience of certification over the last decade, and seeking to build upon its strengths. These strengths lie in the areas of systems governance and the accreditation of service providers – both areas where legality assurance is presently under-conceptualised, but on which its credibility will depend. Thus, while the convergence of certification and legality assurance may present a particular challenge to the more established movement (certification), this movement may yet have something to offer to the new policy initiative.

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See also the website of the VERIFOR Project (ODI and international partners – CATIE, CIFOR-Central Africa Office and RECOFTC): www.verifor.org

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