
TRACK F: CREATING A CULTURE OF COMPLIANCE

‘DRINKING IN THE LAST CHANCE SALOON? NON-GOVERNMENTAL ORGANIZATION ROLES IN VERIFYING LEGALITY IN THE TROPICAL TIMBER TRADE’

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SUMMARY

This paper examines some of the transnational dimensions and arising issues of rule-making and enforcement in the forest sector. The main interest is in the role of non-governmental organisations in verifying the legality of tropical timber production. The experience of advocacy and rights-oriented non-governmental organisations in countries like Cambodia, Cameroon, Ecuador, Indonesia and The Philippines provides case material to explore these themes. The paper draws on the findings of the *VERIFOR* project, an international collaboration exploring options for the verification of legality in the international timber trade.

The impact of non-governmental organisations working as environmental rights monitors is examined, focusing on both the early innovators which opened up the tropical forest sector to external scrutiny, and the subsequent and ongoing consolidation phase, where attempts are made to routine forest monitoring. The paper seeks to account for the likely disjuncture between the high impacts of such non-governmental organisation monitors in the former case, and their less certain roles in the latter. A number of practical measures are suggested which might improve timber verification practice.

It should be emphasised that this is very much a ‘work in progress’ in that the processes in question are generally still under development, and innovative institutions (such as the EU voluntary partnership agreements) are not yet in place.

1 TROPICAL FOREST GOVERNANCE

Tropical forest policy is well-known to be a problem area for international policy. While tropical forests have important global public goods dimensions, they are managed almost universally as sovereign resources of the state. The major

producer countries are very mindful of their sovereignty and defend it assiduously. Attempts to bring forested areas under an international convention have failed to make any ground, and look most unlikely to do so in the foreseeable future. Thus, to the extent that international organisations wish to defend the global public goods dimensions of forests, they are unable to require compliance with their interests, still less to enforce them, and have instead to rely on soft norms and influencing mechanisms. In such situations, information gathering takes on a heightened role, and non-governmental organisations have been particularly prominent. Encouraging environmental rights non-governmental organisations to 'name and shame' has grown in favour as a means to encourage compliance, particularly when targeted on countries that are highly dependent on external markets, and protective of their commercial image.

The forest sector is also problematic from the perspective of public governance, and by and large the problem is greatest in tropical environments. This is partly due to the practicalities of tropical production, but such problems are massively inflated by the ways in which high windfall profits from timber production impact upon the political economy of the encompassing societies. As Ross has noted¹, while conventional wisdom would suggest that involvement in the international economy should be beneficial to states, this is not necessarily the case with the forest sector. Governments attract foreign investment in manufacturing when they maintain sound economic policies, but extractive industries operate rather differently. In such cases, super-rents are generated in boom periods, far in excess of the actual costs of production. These economic rents are there to be captured regardless of the overall state of the economy – indeed it could be argued that they are highest where disorder is greatest. High windfall rents lead to the twin evils of *rent seeking and rent seizing* – the former implying attempts of private actors to 'capture economic rents in a manner that is socially unproductive', the latter implying rent seeking within the state, in which 'public officials seek the right to allocate the rents held by ... government'.² Rent seizing is a much more pernicious problem than rent seeking in that it fundamentally alters the institutions in which it occurs.³ Forest administrations and regulatory bodies are likely to be largely ineffective during times of economic boom (assuming that they were ever functional), a reflection of their subordination to the political order. This has implications for legality verification, both in terms of the effectiveness of institutions and their likely impacts, as will be later discussed.

The exceptional growth of resource rents in the tropical forest sub-sector in the 1980s and 1990s increased the temptations for rent seeking and seizing and led to a widespread perception that the sector was in disarray. The decline of some producer states into anarchy, part-fuelled by timber revenues (Liberia, Cambodia, Democratic Republic of Congo) only increased the international concern. Various attempts to improved management were initiated by the development assistance community, with varying levels of success. These included aid conditionality to leverage reform of the industry and the forest administration (more rigorous planning requirements, enhancing revenue capture, etc.); encouragement to

private sector initiatives in the areas of standard setting and certification; and funding to a range of non-governmental organisations to 'kick-start' governance reform through information generation at the state/industry interface.

It is with the third of these that this paper is concerned. As its title suggests, recourse to non-governmental actors as the spearhead of forest reform was often a last ditch effort of donor agencies to justify continued interest and investment in a sector with an unattractive image and poor social record. The strategies employed were in many ways the reverse of those that were coming into fashion elsewhere in aid circles.

2 NON-STATE ACTORS AND ATTEMPTS TO IMPROVE FOREST GOVERNANCE

In recent years, mainstream aid donors outside of the forest sector have largely abandoned the old aid conditionality and have sought to reinforce the ownership and initiatives of recipient governments. Their own contributions have been limited to agreeing the broad outlines of an aid contract aligned with policy, as represented by the nationally-owned poverty reduction strategy and supportive of the Millennium Development Goals.⁴ Their various contributions have been harmonised, applying only minimum conditions provided certain key welfare objectives are met. Forest sector aid in the same period has proceeded in the reverse direction, using aid conditionality and other pressures to force forest ministries to accept reforms in which they often show little interest. The most renowned instance of this has been in Cambodia, where the World Bank and some western bilateral donors persuaded the government to implement a forest crime detection programme in 1999. *Inter alia*, this involved the introduction of an independent forest monitor to assess and comment on the effectiveness of the government's own internal controls. This role (sometimes also described - perhaps more accurately - as 'independent observation') was given to Global Witness, a UK-based environmental rights non-governmental organisation which had spent the previous four years exposing corruption within the Cambodian forest industry and laying out its close links to the government. Following some initial success, the World Bank and other donors then persuaded a second partner, the Government of Cameroon, that Global Witness should also undertake pilot activities there. This was integrated within a wider process of forest governance reform, involving three levels of monitors: a private sector legal and accountancy firm to monitor concession allocations; an activist non-governmental organisation (Global Witness) to monitor forest operations; and surveillance by a specialist non-governmental organisation (the World Resources Institute's 'Global Forest Watch') to track changes in forest cover and exploitation by remote sensing techniques. Global Witness operated from 2000-2004 on a succession of temporary contracts to the Government of Cameroon, and was eventually replaced by another environmental monitor, Resource Extraction Monitoring.⁵ Global Witness and Resource Extraction Monitoring have also been funded by donors to undertake similar independent forest monitor work on a variety of exploratory contracts

in countries as diverse as DR Congo (where Global Witness has worked on a pilot contract to the Government), Honduras, Ghana, Congo-Brazzaville and Mozambique. Funding has been provided to another environmental rights monitor in Indonesia, the Environmental Investigation Agency, independent of the Indonesian government. (Such unofficial activities might be described as 'external monitoring' to distinguish them from official 'independent monitoring').⁶

Independent forest monitor activities of the type undertaken in Cambodia, Cameroon, and elsewhere provide one model for the independent forest monitor component being promoted by the European Union in its 'voluntary partnership agreements' with selected tropical producer states.⁷ These voluntary partnership agreements are an outcome of the EU's Forest Law Enforcement, Governance and Trade Action Plan, which includes a proposal (voluntary in its early stages, though the intention is to move to binding legislation at some point) to restrict timber imports into the territory of the EU to 'verified legal' production. Negotiations are presently underway with four tropical producers (Malaysia, Indonesia, Ghana and Cameroon) to establish the first set of voluntary partnership agreements.

Such attempts to reform the functioning of the forest sector by additional pressures on the existing forest control bodies were not entirely new. A Forest Practices Board was established in Tasmania, Australia in 1985. 'Multistakeholder forest protection committees' were formed in the Philippines beginning in 1992, with World Bank support and with a remit to report on maladministration and illegal logging activities. In British Columbia, Canada, a Forest Practices Board was set up by the government in 1995, following activism by Canadian and US environmental non-governmental organisations. An 'outsourced monitoring system' was put in place by the Government of Ecuador with some donor support, beginning in 1999, under pressure from national environmental non-governmental organisations.

All of these innovations are worthy of note but it is the independent forest monitor activities of the non-governmental organisations that are of particular interest here, because of the ways in which they signal the movement of non-state actors into territory which was formerly the exclusive domain of the state.⁸ The rest of this paper focuses on the roles that such activist non-governmental organisations may play in improving forest governance.

3 THE NON-GOVERNMENTAL ORGANIZATION RECORD

At one level, the non-state environmental monitors appear to have had a very significant impact on the management of the sector. It is arguable, for example, that the momentum which is carrying the voluntary partnership agreements forward would not have occurred without strong pressure from the non-governmental organisation lobby, and without the types of information that the independent forest monitors and other external monitors have so tenaciously unearthed. Even where the reforms have been resisted (and this is the case in almost all the major instances), the governance of the sector is not what it was

before, and some significant and positive changes can be identified. Considering the complexity of the forest sector and the fact that the movement in question had none of the force or legitimacy of an international convention, this must be worthy of note. If some of the early voluntary partnership agreements negotiations come rapidly to agreement, others are almost certain to follow. While the benefits to the adopters will be largely reputational – for (judging by the experience of the forest certification movement) very little is likely to follow by way of a price increment and non-signatories will not be excluded from the market (at least in the early years) – ‘verified legal timber’ is now very firmly on the forest trade agenda.

Interestingly, however, while non-governmental organisations were the driving force of the early initiatives which laid bare the contribution of forest industry to poor governance, there seems much less likelihood that they will be major actors in the second wave of reform now underway, which seeks to routine independent monitoring within trade regimes. While it is difficult to predict the manner in which the sector will evolve in the coming months, it seems unlikely at this juncture that the environmental rights non-governmental organisations will continue to play such central and decisive roles. This would not have been entirely unexpected even in the early days. Despite the immense publicity they generated and the great praise heaped on them by environmental activists, their activities have always courted controversy particularly in producer states. Global Witness was dismissed from its contract to the Government of Cambodia in 2003, for instance, and replaced by a private sector operator, *Société Générale de Surveillance*, with a narrower set of terms of reference and much reduced ambition. This contract was not renewed after its first term. The process went better in Cameroon, after a somewhat shaky start. A particularly innovative feature here was the new institutional structure created to support the independent forest monitor, involving a ‘Reading Committee’ (*Comité de lecture*), to review and validate the monitor’s reports. However, Global Witness did not apply for renewal when the initial experimental phase expired, and its replacement has worked under increasing difficulties. Similarly, in Ecuador, the outsourced monitoring system has suffered some significant challenges, constitutional and other, which have come close to destroying it completely. The reform continues, though, with limited non-governmental organisation support. The Philippines programme was less controversial (its industry was already in decline) and still survives in some provinces, though impetus was greatly diminished when World Bank funding ended.

4 QUESTIONS OF IMPACT

Some interesting questions are thus raised about these attempts to improve the compliance of the forest industry with its ostensible contractual terms, and to introduce additional verification measures into the existing (and often malfunctioning) control agencies of the producer ministries. For example:

- How do the different legal categories of actor perform in comparative terms? These include various types of private sector agencies, both specialist

forest auditors and legal/accountancy firms; activist and 'more neutral' non-governmental organisations, as well as government agencies.

- Can any conclusions be drawn about the impacts of different types of monitoring, and the different areas of activity (concession monitoring vs. field monitoring of forest operations, for example)?
- What kinds of constituencies and concerns are likely to prevail at the end of the day – industry, environment, the poverty lobby, good governance?
- How can the fluctuations in influence of the different actors, particularly non-governmental organisation monitors, be explained?

We will review each of these in turn, and then consider what can be learnt from these initiatives of wider interest to compliance practice.

4.1 Issues of legal status

Though the superiority of non-governmental organisation approaches has been quite widely extolled, it is not necessarily the case that non-profit organisations always perform better than profit-oriented ones, nor that they function well in all respects. Instances can be found in which both public and commercial actors have operated in exemplary fashion. Interpretation of the evidence requires care, not least because non-governmental organisations are free to publicise their work in ways that are denied many other operators, particularly those working to industry standards and/or as financial auditors. This has some advantages, most prominently the heightened power it gives to advocacy-oriented organisations through the threat of publicity. No class of actor is necessarily inherently superior, though the terms on which they are permitted to function exert a strong influence over their effectiveness.

4.2 Effectiveness of different types of monitoring

Again, advocacy-oriented non-governmental organisations have significant advantages here, in the high profile that they are able to adopt, but this may be at the expense of long-term sustainability, particularly where they operate across sensitive national boundaries. Given the governance considerations earlier discussed, the most radical and cost-effective initiatives are not necessarily the ones that make the most noise, but may be those that attack patrimonialism at its roots. Thus, in the case of Cameroon, it could be argued that the greatest impact overall will come from the monitoring of concession allocations – because this goes to the heart of the patronage relationships that are responsible for poor forest governance. By contrast, the environmental monitors can claim greater success in publicising realities on the ground, but are not necessarily in a position to do much about them, particularly in the longer term. Still, there is also a view that the most effective interventions are likely to be multifaceted ones – combining transparent

concession allocations with independent observation of field operations, and backed up by satellite monitoring to track the condition of the forest and infrastructural developments over the longer term.

4.3 What constituencies are likely to prevail?

It is too early to assess the likely impact of all the measures that are being put in place, some of which could lead to a significant tightening up of forest administration. However, there is a view that what began as a courageous governance reform strategy with strong equity and environmental links could well end up being captured and domesticated by the industrial lobby, and converted into a facet of ecolabeling with restricted (and largely commercial) aims. If this occurs, the explanation might be as follows. The movement started off with four sets of objectives, all of them held to be mutually supportive (trade legalisation, governance reform, pro-poor development and environmental conservation). However, the sovereign character of the forest estate reduces the likelihood that all four dimensions will be taken up into policy. Least likely to be acceded to are the pro-poor and governance dimensions. Addressing the former requires a radical process of tenurial reform, of a kind that is only really guaranteed in a situation of major social transformation. It is less likely to come about through administrative edict (and if such is the case, then the danger is that the reform will be captured by elites). Addressing the governance dimension would require dismantling of the kinds of politico-economic forces that lead to the association of the forest sector with poor overall governance. To the extent that the major culprit is the windfall profits that international market integration offers extractive industries, then the best way to reform governance would be to suppress the export trade. However, because of the sovereignty and global trade dimensions, the international community has to limit its brief to reform, and to focus on trade sanitisation not trade suppression. The environmental rights monitors are generally hostile to large-scale industry (and may well have good grounds to be so), but given this position, the willingness of some of them to sign up to contracts as official industry monitors is questionable. Pursuing an anti-industry agenda is arguably incompatible with maintaining the independence from all sectional interests that official verification work requires. Thus, non-governmental organisation monitors actively associated with anti-industry campaigns either are unlikely to retain official contracts for long, or have to change their orientation to make them more business friendly if they are to sustain their activities.

This leaves only the trade and environmental dimensions. Trade sanitisation measures may be welcomed by the legitimate international industry, which has much to gain by squeezing out the less reputable local 'political' operators. It also fits in with the processes of industry consolidation, on both the supply and demand sides. These have their origins in the same environmental pressures but also serve other competitive interests and address other aspects of commercial risk. Trade sanitisation is supportive of environmental sustainability – at least at enterprise level. While this is likely to be much better than the *status quo* for

tropical forests and their residents, it does not guarantee forest conservation in the longer term, particularly in the more complex old growth forest environments. Nor does it completely immunize the forest sector from the 'extractive industry curse'. Such initiatives find it difficult to reform the basic structure of forest governance, which is itself a product of that curse. Despite almost a decade of donor pressure and conditionalities, and of independent monitoring, many of the less functional tropical forest ministries are still marked by unbalanced and over-concentrated structures of decision-making (powerful ministers but in weak ministries), non-transparency as regards sanctions for breaches of law and regulations, and excessively discretionary, unchecked powers for key individuals. It will be interesting to see if the voluntary partnership agreements currently under negotiation are able to address these difficulties.

4.4 Inconsistent influence

The last point may also help to illuminate the uneven role played by non-governmental organisations in the processes of forest sector reform. Steadily increasing influence of such non-state actors in standard setting and monitoring of state performance is by no means assured, nor is their ability to control the direction of change in line with their own value commitments. There is a distinct risk of perverse effects. Among the reasons for this are the following:

- Non-governmental organisations use various strategies to find a seat at the table in forestry negotiations, but are highly dependent on patronage. For external non-state actors, this usually means reliance on donor support. This support is intermittent and uncertain, and the relationship is ambiguous. At the national level, the lack of legal status of non-governmental organisations in Forest Law Enforcement, Governance and Trade negotiations also weakens their bargaining power. National non-governmental organisations are not precluded from influential roles, but these are also likely to depend on patronage. This is particularly disadvantageous to advocacy groups that operate largely in negative mode.¹
- The heterogeneity of non-state actors, the rivalries between them (both ideological and for funding) and the different positions adopted by external and local non-governmental organisations add to the difficulties. They are often unable to gain weight through cooperation amongst themselves.
- Non-governmental organisations may be thrown into competition with commercial organisations, and this may either limit their radicalism or alternatively reinforce it. The former would lead to convergence with private sector operators. The latter would have more potential, though it could diminish the room for manoeuvre in the producer context, while perhaps reinforcing it externally.

- The context of policy development in this sector is multi-faceted. Non-governmental organisations are unusual in the extent to which they are likely to support three sets of values: biodiversity, governance and poverty alleviation. These values are not always compatible. By their vocation, advocacy non-governmental organisations are unfavourably disposed to trade-offs, and are not well-placed to accommodate them.
- Finally, there are multiple financial factors to be considered. The financing of verification is a controversial issue, and whatever way it is resolved, advocacy non-governmental organisations are unlikely to be advantaged. To the extent that the issues relate to global and national public goods, then putting the burden of compliance onto the timber industry may appear unjust. But transferring the whole burden of compliance onto the national level is not only also unjust (to the extent that the values under discussion are global public goods), but is also likely to marginalise actors such as advocacy non-governmental organisations which those national governments see as a thorn in their flesh.

5 LESSONS FOR COMPLIANCE PRACTICE?

This paper is being presented in the section of the conference on ‘creating a culture of compliance’. While the verification of legal timber lies largely outside the boundaries of international law, the need to create a culture of compliance still presents itself, and is probably the main challenge to the Forest Law Enforcement, Governance and Trade movement today. Various practical measures might be suggested, most notably the utility of a set of internationally-recognised ‘principles of responsible verification’. These could serve to reassure producer governments that official monitors will respect their sovereignty and authority, though they could also reassure doubters that information about the realities of forest governance will be openly and transparently shared. Institutional innovations such as *Comités de lecture* could play a confidence building role, though these need to be freed from over-dependence on single authorities and politicians if they are to function effectively. Additional measures might be required to convince governments that verification is not a threat to legitimate forest industry (for example, broadening involvement in independent forest monitor through peer review mechanisms). Professional accreditation of prospective independent forest monitors might also be advised, in recognition of both the need to standardise provision in a field with important international trade dimensions and also on grounds of ‘*Quis custodiet ipsos custodes?*’ (here implying ‘who monitors the monitor?’). However, the number of providers is presently very small, and the ideological gulf between different classes of operator fairly substantial, so such formal accreditation may be premature.

Attempts to reform the sector confront a ‘governance conundrum’. A complete reform of forest governance is often required, but where such radical reform is most needed, the government is least likely to accede. This underlines the size of

the task which confronts the movement for forestry reform in many societies. It also points to the need to ensure that whatever steps are taken to address poor forest governance should see enlargement of the spheres of engagement and ownership – in short, generating high levels of public legitimacy - as a primary concern.

6 REFERENCES

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² *Ibid* p.33

³ *Ibid* p.35

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⁵ For a review of both these programmes, see Brown, D *et al* (2004) Forest law enforcement & governance: The role of independent monitors in the control of forest crime', *ODI Forestry Briefing Papers*, N^o. 5.

⁶ For a discussion of monitoring terminology, see: Brown, D with Luttrell, C & research associates in Cambodia, Cameroon, Indonesia and The Philippines, *Review of Independent Forest Monitoring*, ODI London for: Policy Division, Department for International Development (DFID), LONDON (2004).

⁷ See for example: 'Legality assurance systems: Requirements for verification', *EU Forest Law Enforcement, Governance and Trade Briefing Note*, N^o. 5; and 'Guidelines for Independent Monitoring', *EU FLEGT Briefing Note*, N^o. 7; both Brussels, 2007.

⁸ See, for example, Hall, R. & Biersteker, T. (eds.) *The Emergence of Private Authority in Global Governance*, Cambridge University Press.

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[*VERIFOR is applied policy research project involving four partners: ODI, London [lead agency]; CATIE, Costa Rica; CIFOR, Cameroon; and RECOFTC, Thailand. It is funded by the European Commission and the Governments of the Netherlands and Germany. See: www.verifor.org/]

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