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Public Procurement and Private Certification: The Case of the UK TPP

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Comparative Research in
Law & Political Economy



Public Procurement and Private Certification: The Case of the UK TPP

Alex Latu

Abstract

Forestry certification schemes have been considered the paradigmatic instance of a new form of private governance that may challenge state-centered authority and public policy-making. Although governments and intergovernmental organizations are certainly not the schemes' "main architects", they are more involved in the overall effects of forestry certification than is often emphasized, notably through procurement policies. This paper examines a particular interaction of private and public governance organizations, in the realm of forestry certification, among the UK government's Timber Procurement Policy (TPP), a governmental demand-side policy tool, and two major certification schemes – the Forest Stewardship Council (FSC) and the Program for the Endorsement of Forest Certification (PEFC). The analysis applies a broadly conceived framework of supply and demand to consider how the TPP interacts with these private schemes to impact both markets for certified timber and the private schemes' substantive and procedural content. This framework illustrates how the UK government relies on predominantly private regulation - for expertise, convenience and advantages in terms of international trade law - as well as influencing it through both the TPP and more traditional regulation. It is shown that a restricted approach to public procurement can enhance the overall quality of this inter-institutional regulatory framework.

Keywords: Forestry Certification; Public Procurement; International Governance; Regulatory Frameworks

JEL classification: L51; Q23; H11; H57; K32; K33

A celebrated example of the increased role of private or hybrid public/private organizations in international governance¹ is provided by (largely) private forestry certification schemes. These have been characterized as “non-state market-driven governance” systems which “eschew[...] traditional state authority” by relying on voluntary individual assessments about whether to comply with a scheme’s standards and procedures.² While broadly true in that a state’s sovereign ‘imperium’ power is not engaged, governments also possess ‘dominium’ economic power in buying goods and services in the marketplace – these actions known under the rubric of public procurement. Public procurement can be, and has been, a powerful governance tool in its own right, with governments able to ‘link’ their policy objectives to market participation.³ Perhaps unsurprisingly, public procurement policies have responded to the development of forestry certification schemes by incorporating as well as influencing them.

An example of this relationship is the interaction between the UK government’s Timber Procurement Policy (TPP), and the two major certification schemes – the Forest Stewardship Council (FSC) and the Program for the Endorsement of Forest Certification (PEFC). These are regularly assessed as to whether their certificates can be used to show compliance with the TPP, and are currently the only schemes able to do so. The assessments have spurred change in the schemes’ standards and procedures unforthcoming under pressure from other organizations and interests. This includes increasing the up-take⁴ of accountability, transparency, reason-giving and review mechanisms; of the type that have been considered doctrinal elements of an emerging Global Administrative Law (GAL), features that the TPP also exhibits.

How then, to explain what seems to be disproportionate state influence in an oft-considered ‘non-state’ mode of governance? And does this ‘ratcheting up’ of private standards and promoting GAL procedures through public procurement actually assist in achieving the schemes’ ostensible goals – or is it simply a relatively ineffective ‘feel-good’ measure?

¹ See generally Benedict Kingsbury, Nico Krisch & Richard B Stewart, *The Emergence of Global Administrative Law*, 68 LAW AND CONTEMPORARY PROBLEMS 15 (2005).

² Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems Gain Rule-Making Authority*, 15 GOVERNANCE 503 (2002). A fuller description of this theory is set out in BENJAMIN CASHORE, GRAEME AULD & DEANNA NEWSOM, *GOVERNING THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY*. (Yale University Press. 2004).

³ See CHRISTOPHER MCCRUDDEN, *BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT, & LEGAL CHANGE* (Oxford University Press. 2007).

⁴ Other factors have influenced this – see, for example, the discussion in Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: The Case of Forestry*, 17 EUROPEAN JOURNAL OF INTERNATIONAL LAW 47(2006).

This paper considers these questions, proceeding in three parts after briefly setting out the major interests and actors involved. First, the TPP's legal framework and operation are described to get a sense of how procurement works and its relation to so-called 'non-state' governance. Next, the operation of the schemes is discussed, highlighting areas where the TPP has had particular influence or failed to do so. This discussion is built on in the final section, which assesses the overall effect of the TPP and considers it from a supply and demand perspective for both certified timber; and higher standards, including the involvement of procedural administrative-law like elements in their generation and application. The relationship between these and the schemes' underlying goals, as well as – briefly – the utility of considering these procedures as doctrinal elements of a Global Administrative Law, is also discussed.

The regulation-like TPP is concluded to have been successful in spurring change in the schemes not just because of its purchasing power, but also through its association with traditionally legitimate (inter)governmental structures, and their ability to implement coercive regulation. These state-connected elements, albeit falling short of Westphalian imperium power, are contended to make public procurement especially effective in influencing this type of market-driven governance. This may not always be the case, however, and there is certainly potential for private purchasing to play a significant role. The concluding remarks reflect on the different difficulties faced in that context. It is also contended that certification suffers from detriments similar to those seen in self-regulation – particularly as to practical effect. While this limits the extent of change able to be (quickly) catalyzed through demand-side calls for higher standards and GAL-associated procedural safeguards, recognizing this may enable the useful supplementing of public procurement with other regulatory methods.

1. PRELUDE – THE SCHEMES' ORIGINS AND STAKEHOLDERS

The certification schemes' actual operation is discussed in more detail below, but it will be useful to briefly set out their general characteristics and the major interests at play before proceeding further. Forestry certification schemes essentially make forestry policy by setting rule-like, enforceable⁵ standards defining what amounts to a 'sustainably' managed (PEFC) or

⁵ This and other characteristics have been considered to set this style of private regulation apart from other, voluntary, private authority. See Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance be Legitimate? An Analytical Framework*, 1 REGULATION & GOVERNANCE 347, 348 (2007).

‘well managed’ (FSC) forest; and providing for timber products⁶ to be certified as coming from compliant forests. This allows for ‘economic carrots and sticks’ to be more easily used in pressuring timber market participants at the retail and production ends of the supply chain to adopt standards, as opposed to being required to by sovereign command.⁷ The process is thus dependent on voluntary support, with potential standard-users able to support competing schemes depending on their aims. In practice many private retailers have been considered to pledge support only begrudgingly - CSR as Crisis-Scandal-Response - a bargain to stop reputation-damage in the face of mainly FSC-supporting organized consumer protest (FSC having more robust environmentalist support than PEFC).⁸ Nonetheless, the emergence of more industry-friendly schemes in response to the FSC’s broader accountability and more environmentally demanding standards reflects private certification’s responsiveness. Thanks to these features, forestry certification schemes have been considered the paradigmatic instance of a new form of private governance that may perhaps pose a challenge to state-centered authority and public policy-making processes.⁹

This paper argues that governments and intergovernmental organizations are more involved in the overall effects of forestry certification than is often emphasized, notably through procurement policies,¹⁰ but they are certainly not the schemes’ “main architects”.¹¹ Rather, their primary designers have been transnational environmental organizations, acting in conjunction with business, labor, social justice, landowner and professional groups, in response to the failure of public institutions to implement binding traditional regulation concerning forestry.¹² And in their operation, other institutions have been important: other schemes; certification-oriented organizations like ISEAL and ISO; business and environmental interest

⁶ Used here to refer to all timber products, including paper – the sense in which the term is used in the TPP. See CPET, *Definition of Timber Products*, CPET WEBSITE, <http://www.cpet.org.uk/uk-government-timber-procurement-policy/definitions/timber-products> (last visited Jan. 20, 2013).

⁷ See Cashore, Auld & Newsom, *supra* note 2, at 4.

⁸ See DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (Brookings Institution Press, 2005).

⁹ Cashore, *supra* note 2, who, as noted, uses the “non-state market-driven governance” term. See also Meidinger, *supra* note 4, who characterises the phenomenon as “multi interest (global) self governance” and David Vogel, *The Private Regulation of Global Corporate Conduct: Achievements and Limitations*, 49 BUSINESS AND SOCIETY 68(2010), using the term “global civil regulation”.

¹⁰ Public procurement, while acknowledged and subject to some discussion, is not usually heavily focused on in the literature. Moritz Albrecht, *Public Procurement and Forest Governance: A German Case Study of Governmental Influences on Market-Driven Governance Systems*, 1 SOC. SCI. 4 (2012), provides a relatively recent counter-example.

¹¹ Meidinger, *supra* note 4, at 48.

¹² *Id.* at 48, 59. See also *Id.* at 82 and Vogel, *supra* note 9, at 76, noting the possibility of private regulation being embraced in order to avoid governmental regulation.

groups – particularly ‘forest campaigners’ including NGOs such as the Rainforest Action Network; global networks, including business networks and product chains; and governments. These institutions interact and ‘mutually adjust’ within this overall regulatory framework, engaging in reciprocal observation, communication, lobbying and policy adjustment.¹³

The focus here is on the interaction of the TPP, a governmental demand-side policy tool,¹⁴ with the certification schemes, particularly seeking to identify and explain its impact on the markets for both certified timber and the schemes’ substantive and procedural content. One potentially useful way of analyzing this is in terms of supply and demand (broadly conceived) for both of these outcomes.¹⁵ In this respect, it seems useful to think of the key stakeholders as comprising four broad categories:¹⁶ standard-makers/suppliers (most relevantly the certification schemes); standard-demanders (focusing on the TPP, but including other purchasers articulating demands about forestry standards, activist NGOs, and business interests); the standard-targets (forestry managers); and other standard users (from certifiers to the purchasers of certified products who ‘vote with their feet’ as to their preferred scheme). Whether this can be used to provide a convincing account of the TPP’s effect is considered below, but first the TPP’s legal framework and operation are turned to.

2. THE UK’S TPP

2.1. THE TPP’S LEGAL FRAMEWORK

Public procurement regimes have long sought to achieve myriad social and economic goals through policies such as buying national or affirmative discrimination, and more recently have exhibited a preference for ‘green’ products and technologies.¹⁷ These policy aims are usually labeled ‘secondary’, in contrast to the ‘primary’ aim of: “[acquiring] goods or services fulfilling

¹³ Meidinger, *id.* See also JANE LISTER, *CORPORATE SOCIAL RESPONSIBILITY AND THE STATE: INTERNATIONAL APPROACHES TO FOREST CO-REGULATION* (UBC Press, 2011).

¹⁴ MARKKU SIMULA, ITTO, *THE PROS AND CONS OF PROCUREMENT: DEVELOPMENTS AND PROGRESS IN TIMBER-PROCUREMENT POLICIES - ITTO TECHNICAL SERIES NO 34* (ITTO, 2010), available at http://www.itto.int/direct/topics/topics_pdf_download/topics_id=2323&no=0

¹⁵ See the approaches of Tim Büthe, *Beyond Supply and Demand: A Political-Economic Conceptual Model*, in *GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH CLASSIFICATION AND RANKINGS 29* (Kevin Davis et al. eds., 2012), discussing forestry certification at 37; and Nikhil Dutta, *Accountability in the Generation of Governance Indicators*, in *ID*, 437.

¹⁶ Following Büthe, *id.*

¹⁷ Simona Morettini, *Public Procurement and Secondary Policies in EU and Global Administrative Law*, in *GLOBAL ADMINISTRATIVE LAW AND EU ADMINISTRATIVE LAW: RELATIONSHIPS, LEGAL ISSUES AND COMPARISON 187, 187-188* (Eduardo Chiti & Bernardo Giorgio eds., 2011).

a particular function on the best possible terms”¹⁸ understood relatively narrowly, in an economic sense. The term ‘linkages’ describes the variety of ways that secondary goals may be achieved through public procurement. In linking procurement with a government’s regulatory function and policy goals, governments are considered to combine three functions usually distinguished: “*participating* in the market but *regulating it at the same time*, by using its *purchasing* power to advance conceptions of social justice”, somewhat eliding the difference between dominium and imperium power.¹⁹ In contrast, Cashore’s non-state market-driven governance theory appears to see public procurement as identical to economic actions undertaken by any large organization, considering that only the use of imperium power in relation to certification makes the state distinct from other actors, all of whom simply add legitimacy - in the sense of a generalized perception that an entity’s actions are desirable and proper - to the schemes by interacting with them.²⁰ Whether this is an accurate depiction of the TPP is discussed below. Suffice it to note for now that other commentators, and to some extent Cashore himself, recognize that states play an important role in the schemes’ operation, something that is worth noting and which the ‘non-state’ tag may obscure.

Linkages are somewhat in tension with the reforms towards trade liberalization and competition that have taken place internationally. The overall legal position is that governments are usually restricted, although not barred completely from using linkages.²¹ States’ procurement procedures must minimize discretion, maximize transparency, and explicitly bar discrimination.²² The UK is no exception, being subject to EU law and the WTO Government Procurement Agreement (GPA). As EU Member States are parties to the GPA, EU law is more detailed and designed to also comply with the GPA, although there may be some scope for disparity between the regimes. This paper focuses primarily on the EU requirements, assuming that they are broadly in line with the GPA.²³

¹⁸ *Id.* at 187.

¹⁹ McCrudden, *supra* note 3, at 3 [emphasis in original].

²⁰ Cashore, Auld & Newsom, *supra* note 2, at 20-22.

²¹ Morettini, *supra* note 17, at 198 identifies three main global procurement regimes in addition to the EU regime: the UNCITRAL model law, the WTO GPA and the WB Procurement Guidelines. The UNCITRAL model law and the WB guidelines are less relevant to this paper, suffice it to note that they too serve to promote a generally competition friendly, markets based environment.

²² ACL DAVIES, *THE PUBLIC LAW OF GOVERNMENT CONTRACTS* 124 (Oxford University Press. 2008).

²³ DUNCAN BRACK & JADE SAUNDERS, CHATHAM HOUSE, *PUBLIC PROCUREMENT OF TIMBER: EU MEMBER STATE INITIATIVES 10-12* (2004), available at <http://www.chathamhouse.org/sites/default/files/public/Research/Energy, Environment and Development/dbjsnov04.pdf>, take much the same approach.

The main aim of the EU procurement requirements is to open up markets to Member State competition, prohibiting discrimination by governments in favor of national firms. This goal is not necessarily offended by bona fide social or environmental linkages, and there are accordingly dangers of both under-regulation through nebulous ‘effective discrimination’ tests and over-regulation through bright-line rules.²⁴ Community Law, most relevantly through *Directive 2004/18/EC*, has adopted both techniques, applying a discrimination test and bright-line rules of two major sorts: limiting the types of linkages that may be used (requiring that they be closely related to the subject matter of the contract); and limiting the stages in the contracting process when linkages may be considered. Essentially, the relevant stages are: defining the subject matter of the contract; adding technical specifications; excluding bidders; award criteria; and including terms relating to the contract’s performance.²⁵

The most relevant parts of the EU regime for the TPP are as follows. Labor and environmental policies may be legitimately pursued so long as they are the least trade-restrictive means of achieving the goal, a requirement that essentially precludes adopting a single procedure – like a certification scheme – to the exclusion of functional alternatives.²⁶ In terms of linkages, states have the most discretion at the stage of deciding what to buy – ‘defining the subject matter’, say, as sustainable timber, rather than timber. Technical specifications related to the subject matter that favor certain firms in practice, may be adopted so long as they do not favor national firms. Using ‘shortcuts’ to technical specifications through eco-labels is permitted, but the procedures generating them must meet minimum accountability requirements and the specifications must be accessible.²⁷ The European Commission may, after initial hostility to the idea, countenance private forestry labels falling within these provisions,²⁸ although the TPP does not use them in this manner, instead specifying its own requirements. Other methods of achieving linkage are more severely restricted, particularly excluding or limiting bidders from competition. For award criteria, contracts are to be awarded in the basis of the lowest price, or the most economically

²⁴ Davies, *supra* note 22, at 276.

²⁵ *Id.* at 279.

²⁶ Davies, *supra* note 22, at 129-130, 277-278. *See also*, generally, Chap. 5.

²⁷ *Id.* at 280, discussing arts 23-24 of *Directive 2004/18/EC*.

²⁸ *See* Dan Wilsher, *Reconciling National Autonomy and Trade Integration in the Context of Eco-Labeling*, in SOCIAL AND ENVIRONMENTAL POLICIES IN EC PROCUREMENT LAW 408, 431 (Sue Arrowsmith & Peter Kunzlik eds, 2009), discussing the European Commission’s Green Procurement Handbook. The latest version seems to assume that the schemes may meet the definition: EUROPEAN COMMISSION, BUYING GREEN! A HANDBOOK ON GREEN PUBLIC PROCUREMENT (2ND ED.) (2011), available at <http://ec.europa.eu/environment/gpp/pdf/handbook.pdf>

advantageous bid from the perspective of the contracting authority. This latter possibility allows linkages to be used in the criteria for the award of the contract, but only to the extent they are linked with the contract's subject matter, similar to the position on technical specifications. Whether this extends, say, to requiring that the bidder not do business in Burma/Myanmar, is something of an open question.²⁹ Similar difficulties of interpretation appear when including linkages in the terms of the contract's performance, which must "relat[e] to the performance of the contract".³⁰ In the context of forestry certification the European Commission, followed by the TPP, has come to support inclusion of social criteria (such as customary land usage and labor standards) at the award stage rather than earlier, although this may have little practical difference and make little sense.³¹

More generally, the relevant Directives impose procedural requirements of fairness, albeit defined more in relation to competition (i.e. non-discrimination) than in a traditional public law sense,³² transparency, and review. Contracting authorities are required to use objective, qualitative, and quantifiable criteria, and to explain these as well as how they will be used to evaluate bids. Disappointed bidders are able to challenge decisions, although they face difficulties in judicial review claims, contracting not being considered sufficiently 'public'.³³ It is worth noting that this overall framework stands in stark contrast to that applicable to private purchasers, which starts from the general position that they may be as discriminatory as they please in contracting. Similarly, private certification schemes are not (obviously) caught by technical-barriers-to-trade rules – a source of power exploited by both the schemes and procurement policies.³⁴ The schemes' success, however, has seen them involved in certification-oriented organizations such as the umbrella social/environmental standard-setting organization ISEAL as a precautionary pre-emption of possible trade-law-based challenges. A desire to remain attractive to government procurers is also considered to keep the schemes

²⁹ Davies, *supra* note 22, at 281-282.

³⁰ *Id.* at 283, *Directive 2004/18/EC*, art 26.

³¹ DUNCAN BRACK, CHATHAM HOUSE, SOCIAL ISSUES IN TIMBER PROCUREMENT POLICIES, 34, 56-65 (2010), available at <http://www.illegal-logging.info/uploads/SITPfinaldraft.pdf>. See also EUROPEAN COMMISSION, BUYING SOCIAL: A GUIDE (2010), available at <http://ec.europa.eu/social/BlobServlet?docId=6457&langId=en> for an overview of when social issues are considered able to be included.

³² Davies, *supra* note 22, at 137-138.

³³ See *id.* at 145-168, discussing the range of remedies open to disappointed bidders.

³⁴ Vogel, *supra* note 9, at 75; LARS GULBRANDSEN, TRANSNATIONAL ENVIRONMENTAL GOVERNANCE: THE EMERGENCE AND EFFECTS OF THE CERTIFICATION OF FORESTS AND FISHERIES 78 (MPG Books. 2010).

broadly within the bounds of state-centric international trade law.³⁵ The obligations, if any, of governments in relying on external regulators in this manner is an issue not directly addressed here, but which raises normative questions in its own right.

In sum, the EU regime permits secondary objectives, although in a circumscribed, perhaps over-regulated, manner. This may be changing - legislative proposals are under way to enable the better use of procurement in support of secondary policies.³⁶

2.2. THE TPP

The UK TPP is a policy statement, binding on central (but not local) government.³⁷ It defines the concepts of legal and sustainable timber and until recently mandated that central government may buy only such timber.³⁸ This linkage is achieved by contractual clauses, in regard to specification of the goods, award and performance of the contract. Suppliers are required to prove, on demand, that the supplied goods comply, and may rely on two types of proof: Category A, this paper's main focus, which involves certification; and Category B, a residual and difficult category that essentially requires actual proof, but in allowing for functional equivalence complies with procurement rules.

The TPP's origins date back to the late 1990s and early 2000s, a time of high NGO pressure driving policy debate on forestry issues,³⁹ states having been unable to establish a binding agreement on forests at the 1992 Rio Earth Summit. After Rio, the UK government became more involved in pro-sustainable forestry policy, recognizing a need to "put its own house in order".⁴⁰ As one of the largest net importers of timber,⁴¹ public purchasing represented an opportunity to reflect its policy preferences, and voluntary guidance advising on

³⁵ CHRIS TOLLEFSON, FRED GALE & DAVID HALEY, *SETTING THE STANDARD: CERTIFICATION, GOVERNANCE AND THE FORESTRY STEWARDSHIP COUNCIL*, 257-259 (UBC Press. 2008); Meidinger, *supra* note 4, at 56-57.

³⁶ See European Commission, *Reform Proposals*, EUROPEAN COMMISSION – THE EU SINGLE MARKET, http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/reform_proposals_en.htm (last visited May. 11, 2013).

³⁷ Since July 2000, after a statement in Parliament – the policy was announced in 1997.

³⁸ FLEGT timber has been added (discussed below). The policy statement is set out in the latest edition of the *TIMBER PROCUREMENT ADVICE NOTE APRIL 2010* (2010), available at [http://www.cpet.org.uk/files/TPAN April 10.pdf](http://www.cpet.org.uk/files/TPAN%20April%2010.pdf) (last visited Jan. 20, 2013), with an annex of definitions, some of which are expanded in stand-alone documents available through the CPET website, <http://www.cpet.org.uk/>. Four editions of the Note (and one interim Note in 2004, on file with the author) have been produced in 2005, 2008, 2009 and are similarly accessible.

³⁹ EMILY FRIPP, ANTHEA CARTER & RUPERT OLIVER, EFECA, *AN ASSESSMENT OF THE IMPACTS OF THE UK GOVERNMENT'S TIMBER PROCUREMENT POLICY - REPORT FOR DEFRA AND CPET*, 3 (Efeca. 2010), available at [http://www.cpet.org.uk/files/Defra%20Timber%20Impacts%20of%20TPP%20Efeca%20 Final%20Report.pdf](http://www.cpet.org.uk/files/Defra%20Timber%20Impacts%20of%20TPP%20Efeca%20Final%20Report.pdf)

⁴⁰ Cashore, Auld & Newsom, *supra* note 2, at 139.

⁴¹ *Id.* at 131-132; Fripp et al., Efeca, *supra* note 39, at 3.

the purchase of legal and sustainable products issued in 1997 developed into a binding policy in July 2000, following a pledge at the G8 summit earlier that month to address the trade in illegally harvested timber.⁴² Other countries were developing similar policies around this time, including Denmark, which the UK conferred with, but the UK was one of the earlier adopters and represented a significant market.⁴³ Progress in implementing this policy was slow and included embarrassing breaches, causing an increase in NGO pressure to make the policy work.⁴⁴ In 2002 a major stakeholder consultation was undertaken to assess then-current procurement practices and implementation issues, resulting in a commitment to gradually achieving 100 per cent legal and sustainable timber, definitions of those terms, preliminary criteria for assessing whether existing schemes met those definitions, and a recommendation that a permanent point of expertise be established to assess the schemes.⁴⁵

In the end, the Central Point of Expertise on Timber (CPET) was established in 2004 to manage and oversee the TPP's implementation at arms-length from government, and an operator contracted by the Department for Environment, Food and Rural Affairs (DEFRA) to run it.⁴⁶ CPET's two major oversight mechanisms are the Oversight Committee comprised of "technical experts" which reviews conflict of interest issues,⁴⁷ and the Reference Board. The Reference Board comprises representatives of the CPET service provider, DEFRA and unpaid volunteer members who are appointed because of their experience and relationship with particular stakeholders, but do not formally represent anybody – the minutes reveal regular attendance from affiliates of trade and forestry activist groups, mainly WWF UK, FERN, Confor and the UK Timber Trade Federation (TTF).⁴⁸ Its purpose is to communicate planned activities to forest stakeholders in order to facilitate consultation and transparency, as well as to

⁴² FERN, BUYING A SUSTAINABLE FUTURE? TIMBER PROCUREMENT POLICIES IN EUROPE AND JAPAN (FERN REPORT) (2009) 24, available at http://www.fern.org/sites/fern.org/files/FERN_buying.pdf

⁴³ Fripp et al., Efeca, *supra* note 39, at 3. Fern, *id.*, provides overviews of different countries' TPP development.

⁴⁴ Gulbrandsen, *supra* note 34, at 69.

⁴⁵ ANTHEA CARTER & MIKE GARFORTH, ERM, PROCUREMENT OF TIMBER PRODUCTS FROM 'LEGAL AND SUSTAINABLE SOURCES' BY GOVERNMENT & ITS EXECUTIVE AGENCIES, 10-12, 18, 23 (2002) on file with author; FERN, *supra* note 43, at 25.

⁴⁶ See CPET, *About CPET*, CPET WEBSITE, <http://www.cpet.org.uk/about-cpet> (last visited Jan. 20, 2013); and CPET, TERMS OF REFERENCE FOR THE CPET REFERENCE BOARD - VERSION 3 (2005), available at <http://www.cpet.org.uk/about-cpet/resolveuid/46bfb94ec5619bbbfde549486536038>, stating that CPET was created because public sector buyers cannot be expected to grasp the complex nature of legal and sustainable forest management. There have been two operators, Proforest and Efeca (since October 2012).

⁴⁷ CPET, *Oversight Committee*, CPET WEBSITE, <http://www.cpet.org.uk/about-cpet/oversight-committee> (last visited Jan. 20, 2013).

⁴⁸ CPET, *Reference Board*, CPET WEBSITE, <http://www.cpet.org.uk/about-cpet/reference-board> (last visited Jan. 20, 2013).

inform the government of stakeholder opinions. It meets at least every six months, with minutes made publicly available.⁴⁹ A final important component is the, remunerated, Technical Panel of “recognized forestry experts” appointed since 2008 by DEFRA, in consultation with the Reference Board, to assist with the technical difficulty of reviewing the schemes.⁵⁰ It has since also been used to provide advice to CPET on the TPP’s development.⁵¹ Thus far, panel members have been independent experts without links to any forest certification schemes or the UK government.⁵² CPET is involved in three major functions: assisting in the TPP’s development; developing criteria and methodology for assessing the schemes; and actually assessing them.

The major definitions of “legal and sustainable” for the TPP have gone through four editions,⁵³ with two major overhauls (reflecting changes to the policy itself): the removal of legal-only timber as an option, replacing it with Forest Law Enforcement Governance and Trade (FLEGT) compliant timber; and the inclusion of social criteria (including customary land usage and labor standards) in 2010. CPET conducted consultations or engaged in stakeholder engagement at each point, which seems to usually consist of a notice and comment procedure run through its website, then publishing, anonymized, the comments received, in accordance with government guidelines.⁵⁴ No further changes are expected.⁵⁵ Those policy changes required Ministerial approval, although CPET facilitated consultation and provided advice. Perhaps the area where CPET itself conducts its most detailed work, however, is in using the policy to adjust the criteria and methodology for assessing the schemes, and carrying out the assessments. Thus far, there have essentially been four: the initial assessment (and

⁴⁹ *Id.*

⁵⁰ CPET, CERTIFICATION SCHEME ASSESSMENT TECHNICAL PANEL: TERMS OF REFERENCE (2008), *available at* [http://www.cpet.org.uk/uk-government-timber-procurement-policy/evidence-of-compliance/files/Technical Panel Terms of Reference 08.pdf](http://www.cpet.org.uk/uk-government-timber-procurement-policy/evidence-of-compliance/files/Technical%20Panel%20Terms%20of%20Reference%2008.pdf).

⁵¹ CPET CATEGORY A TECHNICAL PANEL, REPORT OF THE TECHNICAL PANEL MEETING ON 19-20 NOVEMBER (2009), *available at* http://www.cpet.org.uk/files/Report_TPmeeting_091119-20_Final-2-1.pdf/at_download/file. This role is not apparent from the Terms of Reference, *supra* note 50.

⁵² Email on behalf of CPET, to author (Dec. 11, 2012) (on file with author).

⁵³ Brack, *supra* note 31, at 33. *See also supra* at note 38.

⁵⁴ Email on behalf of DEFRA, to author (Nov. 1, 2012) (on file with author), referring to the context-specific approach taken based on the UK’s Consultation Principles 2012 (and, presumably, the earlier Code of Practice 2008). For documents relevant to past consultations, see CPET, *Reviews and Comments*, CPET WEBSITE, <http://www.cpet.org.uk/uk-government-timber-procurement-policy/evidence-of-compliance/cpet-s-assessment-of-evidence/review-comments-1>.

⁵⁵ Fripp et al., Efecca, *supra* note 39, at iv.

reassessment) in 2004/2005; and three biennial assessments from 2006-2010. Assessments from 2010 will occur every four years.⁵⁶

In creating the criteria it would use to assess what amounted to “sustainable” and “legal” (the broad wording used in announcing the binding TPP), a government-commissioned study, drawing on previous consultations, found itself able to identify 26 criteria across the four sections it identified as common to the five certification schemes reviewed: standards (13); certification (6); accreditation (1); and chain of custody and claims (6). These then went through an ‘iterative review process’, receiving comments sequentially from Government Departments, the schemes under review and the Reference Board, to which the TTF and WWF contributed. These comments were used to finalize the criteria and most were fully or partially incorporated before being submitted to DEFRA for final confirmation and made publicly available.⁵⁷ Since then, the criteria have been updated in 2006 and 2010 after consultation processes. Both involved notice and comment procedures with the comments again anonymized and made publicly available. There are currently 32 criteria spread out over five categories – their impact on the certification schemes will be seen in later sections. Criteria are rated on a three-part scale – inadequate (0), partially addressed (1), and acceptable (2). Schemes have to score at least 1 on each criterion, as well as 75 per cent of the total possible score for sustainable criteria to be considered legal and sustainable. Guidance for the interpretation of the criteria is also published.

Turning to methodology, there have similarly been three iterations: the initial methodology used in 2004, then adopted as the ‘first edition’ in 2006 and revised in 2008.⁵⁸ It appears that at least the schemes are consulted in respect of methodology developments,⁵⁹ but this is less publicized than in respect of the criteria. In any event, the methodology has largely remained constant. The two key points are that each scheme is assessed against the criteria based solely on publicly available documentation – no assessments of the actual general outcomes of certification will be made; and that schemes are given a chance to review and comment on

⁵⁶ Despite indications to the contrary on their website - email on behalf of CPET, to author (Dec. 20, 2012) (on file with author). Assessments were initially intended to be annual.

⁵⁷ CPET, UK GOVERNMENT TIMBER PROCUREMENT POLICY: ASSESSMENT OF FIVE FOREST CERTIFICATION SCHEMES (PHASE 1 FINAL REPORT) (2004), available [http://www.cpet.org.uk/files/Phase 1 Final Report - 2004 archive.pdf/at_download/file](http://www.cpet.org.uk/files/Phase%201%20Final%20Report%20-%202004%20archive.pdf/at_download/file). The schemes assessed were the five most commonly encountered by procurement staff, based on earlier work.

⁵⁸ Accessible through searching the CPET website, <http://www.cpet.org.uk/>, and on file with author. Major differences concern providing for biennial (not annual) reviews, and the Technical Panel.

⁵⁹ The Reference Board was involved in the decision to create the Technical Panel – see *supra* note 50.

draft assessments before they are finalized and made public. Since the first assessment, provision has been made for stakeholders and interested parties to comment on the schemes to be reviewed at least 30 days before the review, providing comments are relevant to specific criteria and relate to the scheme's requirements or system implementation. This includes "objective verifiable evidence relating to noncompliance with the documented scheme requirements after October 2004" to be submitted by stakeholders or interested parties, although other comments concerning actual certification outcomes are barred. Comments received are summarized and published, unattributed.

Overall then, before 2004, the TPP ran the risk of being an empty promise. Making it binding and establishing CPET has changed that and made the policy workable, reflecting the UK's stance on forestry issues. In reviewing the schemes for compliance with its comprehensive criteria it sets itself up as an external arbiter of the schemes. Although ultimately accountable to the UK Government, it provides for participation in its decision-making for both the schemes and NGOs, and the wider public. Decision-making occurs in a transparent manner, and a wide variety of material is made publicly available, reflecting both domestic public law principles and EU requirements concerning public procurement. However, some aspects of its operations, such as the composition and selection process for the Technical Panel and Reference Board, remain opaque from the publicly available materials.

A final point to note about CPET is the advocacy and leadership role it has played in influencing other public procurement policies in and outside the EU. A large degree of harmonization has occurred across these, and as one of the first-movers in this area, the UK and CPET have been used as a model. CPET has also liaised with Member States informally and "behind the scenes", becoming a "player in EU policy",⁶⁰ speaking to the use of public procurement, and the schemes, as part of an overall intergovernmental policy approach rather than as simply legitimizing the schemes' authority.

3. HOW THE FSC AND PEFC OPERATE, AND INTERACT WITH THE TPP.

A detailed account of forestry certification, its incorporation of what can be considered GAL elements and possible reasons why is beyond this paper's scope. Suffice it to say that GAL scholarship has posited the existence of a global administrative space (including forestry certification and other 'administrative' activities) where a shared normative character of

⁶⁰ Fripp et al., *Efeca*, *supra* note 39, at 34-35.

publicness serves to validate actions and decisions, giving them a law-like character;⁶¹ and that this framework has been considered usefully applicable to the operation of forestry certification schemes, including their interactions with other institutions.⁶² This section sketches out what the FSC and PEFC do and the processes they use in order to contrast them with CPET and the TPP. Particular attention is paid to areas where the TPP has affected the schemes, most notably their standards and standard-setting procedures; to issues that the TPP and the schemes exhibit different capabilities and effectiveness in addressing; and to areas where the TPP seems to have had little impact – particularly ‘on the ground’.

The major differences between the FSC and schemes, both non-profit, relate to the fact that the PEFC is essentially a bottom-up umbrella scheme that reviews largely autonomous national programs that apply for PEFC endorsement according to its Sustainability Benchmark – overarching requirements set at the international level – and decides whether to endorse them. The FSC, in contrast, is more of a top-down operation, with relatively stringent Principles and Criteria set centrally, and then put into practice either by the development of compliant national standards tailoring them to specific environments; or adaptation of the generic standards by certifiers.⁶³ In practice, adapted standards reportedly constitute a significant proportion of FSC’s standards as-applied,⁶⁴ with attendant ramifications for FSC’s characterization as centralized. Current reforms seek to bring more oversight over these relationships and move away from adapted standards. The FSC system has historically been aligned with forestry activist NGOs, more demanding standards and increased transparency, being created in 1993 out of frustration with the failure of state-centric processes to generate rule-like forestry standards. The PEFC emerged in 1998-1999, aggregating landowner-dominated national programs to compete with the FSC. It has been considered to be aligned more with landowners and industry,⁶⁵ although it has steadfastly maintained its goal was to provide a more workable certification scheme for small and family forest owners. Despite their differences, both of these schemes are considered by CPET to have four major elements:

⁶¹ See Kingsbury et al. *supra*, note 1; Benedict Kingsbury, *International Law as Inter-Public Law*, in NOMOS XLIX: MORAL UNIVERSALISM AND PLURALISM 188, 191-192 (Henry R. Richardson and Melissa S. Williams, eds., NYU Press, 2009); and Benedict Kingsbury, *The Concept of ‘Law’ in Global Administrative Law*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 23, 30-31 (2009).

⁶² See particularly Meidinger, *supra* note 4. There are also similarities in Cashore Auld & Newsom, *supra* note 2; and Gulbrandsen *supra* note 34.

⁶³ See generally Meidinger, *supra* note 4, at 54-56; Gulbrandsen *supra* note 34, at 54-63.

⁶⁴ Tony Rotherham, *Forest management certification around the world – Progress and problems*, 87 THE FORESTRY CHRONICLE 603(2011).

⁶⁵ See, for example, Gulbrandsen *supra* note 34, at 59.

standards and standard-setting; (forest management) certification; accreditation; and chain of custody (certification). Each of these is discussed in turn, briefly setting out the differences between the PEFC and FSC schemes as they currently operate, and discussing whether the TPP has affected them.

3.1. STANDARD-SETTING AND STANDARDS

Through standard-setting, the schemes decide what ‘sustainable’ or ‘well-managed’ ought to be defined as. Obviously, this is a key element, one which could simply set out a:

... vague corporate code of conduct created by staffers using focus groups to determine the minimum commitments necessary to allay public distrust.⁶⁶

However, both the FSC and PEFC further claim to be both participatory and transparent, attributes considered important in achieving legitimacy amongst standard users.⁶⁷ The FSC, open to membership of those who support its goals, albeit with restrictions on governmental influence, has a complex governance system with a tripartite general assembly – split into environmental, social and economic chambers that are further divided into northern and southern sub-chambers – and voting power allocated equally.⁶⁸ This is designed to avoid domination by specific interest groups, particularly industry. One of the major roles of the assembly is to revise the Principles and Criteria, although most operational activity is delegated to a Board appointed by the Assembly.⁶⁹

The PEFC also has a General Assembly with restricted membership criteria, dominated by ‘national members’ responsible for national certification schemes, allowing for more government influence and privileging landowner interests,⁷⁰ although the UK government is not formally involved at this level. The Assembly sets the basic Sustainability Benchmark standards which national schemes are assessed against. Most rule-making in the PEFC, however, is done at the national level with the Benchmark leaving much more discretion to national members.⁷¹ On the whole, both the PEFC and FSC employ notice and comment

⁶⁶ Meidinger, *supra* note 4, at 54, referring to the Sustainable Forestry Initiative (SFI) scheme.

⁶⁷ Something Bernstein & Cashore, *supra* note 5, among others, consider particularly important for a scheme’s success.

⁶⁸ Gulbrandsen *supra* note 34, 78 and 54-55.

⁶⁹ FSC, FSC INTERNATIONAL BYLAWS (2002), available at <http://us.fsc.org/download.fsc-international-bylaws.114.pdf>, Rule 18.

⁷⁰ Tollefson, *supra* note 41, at 308; Meidinger, *supra* note 4, at 56; Gulbrandsen *supra* note 34, at 59.

⁷¹ Meidinger, *supra* note 4, at 68.

procedures that compare favorably to governmental procedures, and provide for at least some stakeholder involvement.⁷²

The TPP has had a clear, direct, impact on the PEFC in this respect. In 2004, the PEFC was assessed as non-compliant with two major criteria: its standard-setting process was not sufficiently balanced with respect to the mix and voting power of shareholders; and it was insufficiently transparent, failing to provide public information such as audits and public summaries. In the face of this, the PEFC quickly adjusted its processes and successfully submitted them for reassessment, standing in sharp contrast to the efforts of activist NGOs who had been lobbying with little success for such changes for a number of years⁷³ (albeit to the dismay of some who had hoped for the PEFC's exclusion from the TPP⁷⁴). While an admirable change, it is worth recalling that at the end of the day, the only vote that matters for most TPP matters is the UK government's.

Two further areas highlight the complex interaction between the TPP and the schemes: the inclusion of social issues, and perhaps to a lesser extent, the EU Forest Law Enforcement Governance and Trade (FLEGT) and related regulation. The ability of governments to legally incorporate criteria concerning social issues such as customary land usage and labor standards into their procurement contracts has been much debated. While other EU Member States took the leap earlier, the UK did not feel comfortable doing so until 2010, after much ink was spilled debating the ways in which social issues might be legally included.⁷⁵ Thanks, however, to the lack of restraints on certification schemes in including such requirements, this had little effect – through allowing certification as proof of compliance with the TPP, the UK was largely able to free-ride on the schemes' higher standards, notably the FSC but also the PEFC.⁷⁶ Now the TPP includes social criteria, there may be scope for the 'ratcheting up' seen in relation to governance and also more generally in content through the regular reviews.⁷⁷

⁷² *Id.*

⁷³ EMILY FRIPP, CHATHAM HOUSE, UK GOVERNMENT'S TIMBER PROCUREMENT POLICY: WHAT HAVE THE IMPACTS BEEN?, 5 (2005), available at http://www.illegal-logging.info/uploads/EAC_Procurement_Impacts.pdf; Christine Overdeest, *Comparing Forest Certification Schemes: The Case of Ratcheting Standards in the Forest Sector*, 8 SOCIO-ECONOMIC REVIEW 47(2010).

⁷⁴ FRED GALE & MARCUS HAWARD, GLOBAL COMMODITY GOVERNANCE: STATE RESPONSES, 222 (Palgrave MacMillan. 2011).

⁷⁵ For an overview of the debate and different policies see Brack, *supra* note 31. Legislative reform may clarify the issue further - see *supra* note 36 and accompanying text.

⁷⁶ Brack, *supra* note 31, at 41-46.

⁷⁷ Gale & Haward, *supra* note 74, at 222; Fripp, et al. Efeca, *supra* note 39, at 29.

As noted earlier, FLEGT timber has been incorporated into the TPP. Strictly speaking, FLEGT might be seen less as an example of the TPP's effect on the schemes, and more of how regulation has seemingly been inspired by, and incorporates certification elements. Nonetheless, the association of the TPP with governmental policy may also help explain why the schemes pay attention to it on the basis that increased governmental regulation is more likely when private regulation is seen as ineffective,⁷⁸ and is accordingly worth discussing. FLEGT provides for developing countries that find it difficult to meet certification schemes' requirements due to poorly formulated, unclear or inconsistent legal frameworks, to enter into Voluntary Partnership Agreements (VPA). This makes it illegal to import timber from those countries without a FLEGT license stating that the timber has been legally harvested. In entering into a VPA, countries agree on a legality standard; establish a chain of custody; implement a verification system; and establish the license issuing authority and independent monitoring, something that may require considerable institutional strengthening and capacity building. One of the quid pro quos is that FLEGT timber is admitted into the TPP. Rather than competing with certification schemes, the process is seen as complementing them and mutually reinforcing, although some concerns have been raised with possible 'race to the bottom' effects. FLEGT is considered to deliver improved governance structures that certification can build on; and does not necessarily address issues beyond strict legality (such as good management) nor offer market recognition through claims and labeling as the schemes do.⁷⁹ In effect, inter-governmental regulators are designing regulation around the certification schemes to correct perceived deficiencies, with an eye on the overall result. A similar effect can be seen in the EU Timber Regulation obliging importers to exercise due diligence in ensuring their timber is legal, something that certification may be a part of.⁸⁰

3.2. FORESTRY CERTIFICATION

Once the standards are set, specific areas of forest are checked by a scheme-approved, accredited certifier to ensure that management passes muster, although the extent of

⁷⁸ See Meidinger, *supra* note 4, at 59, discussing government/certification scheme interactions.

⁷⁹ Benjamin Cashore & Michael W Stone, *Can legality verification rescue global forest governance?*, 18 FOREST POLICY & ECONOMICS 13 (2012); Alexander Hinrichs & Flip Van Helden, *Can the FLEGT Action Plan and Voluntary Forest Certification Reinforce Each Other?*, ETRN NEWS 186 (2012); PROFOREST, FLEGT LICENSED TIMBER AND EU MEMBER STATE PROCUREMENT POLICIES (2010), available at <http://www.proforest.net/objects/publications/flegt-licenced-timber-and-eu-member-state-procurement-policies>

⁸⁰ Fripp et al., Efec, *supra* note 39, at 17, also noting the similar Lacey Act in the US.

stakeholder consultation and transparency varies. Continued compliance with issued certification is regularly checked, often annually,⁸¹ and mechanisms are available to deal with disputes. Stakeholder consultation during the process is required by the TPP, and this requirement also caused the PEFC to change its procedures in 2005, making it more accountable and inclusive beyond the forest owners/companies with whom it is predominantly concerned, albeit the likely practical effects of this have been treated skeptically.⁸² Both PEFC and FSC accredited certifiers are independent of the schemes, this being considered important in assuring independence and impartiality.⁸³ Although there are clear reasons why self or industry-certification can incentivize under-compliance, third-party certifiers farming out this task to certifying bodies has been similarly considered to incentivize the promotion of lowest-common-denominator standards in order to enhance market demand for services. The interlinked accreditation function, discussed next, is considered to address this issue to some degree. Both schemes also make certification information publicly available (the PEFC to a lesser extent, and, as noted above, spurred by the TPP), allowing for critical scrutiny, which actually occurs through watchdog organizations like FSC-Watch.⁸⁴ While the TPP requires performance based assessments, review mechanisms and public availability of assessments,⁸⁵ as discussed above CPET has largely resiled from assessing actual on-the ground effects.⁸⁶ Given that this is where major dissatisfactions with the schemes lie,⁸⁷ its significance is discussed below.

3.3. ACCREDITATION

Certifiers must be accredited to the schemes' satisfaction – a process of 'certifying the certifiers' to ensure that they are competent and produce credible, consistent results. The FSC

⁸¹ CPET, *Forestry Certification - Introduction*, CPET WEBSITE, <http://www.cpet.org.uk/uk-government-timber-procurement-policy/evidence-of-compliance/category-a-evidence/introduction>, (last visited Jan. 20, 2013).

⁸² Meidinger, *supra* note 4, at 73. Gulbrandsen *supra* note 34, at 69-70, 71-73.

⁸³ PEFC, *Certification and Accreditation*, PEFC WEBSITE, <http://www.pefc.org/standards/national-standards/certification-accreditation-requirements>, (last visited Jan. 20, 2013); Gulbrandsen *supra* note 34, at 58 (discussing the FSC).

⁸⁴ See generally FSC-Watch, *About*, FSC-WATCH WEBSITE, <http://www.fsc-watch.org/about.php> (last visited Jan. 20, 2013).

⁸⁵ See CPET, CRITERIA FOR EVALUATING CERTIFICATION SCHEMES (CATEGORY A EVIDENCE) THIRD EDITION (2010), available at <http://www.cpet.org.uk/uk-government-timber-procurement-policy/files/Category%20A%20Criteria%20April%202010.pdf>, criteria 2.3, 2.5 and 2.6.

⁸⁶ See *supra*, the discussion following note 59.

⁸⁷ See FSC watch, *supra* note 84 "FSC standards aren't bad ... The trouble is that the standards are not being applied in practice"; see also Fripp et al., Efeca, *supra* note 39, at 29.

has an integrated accreditation program⁸⁸ that performs this role, carrying out office and field audits and making its accreditation assessments publicly available. The PEFC's nature as an endorsement program means that it requires national accreditation bodies to comply with ISO/IEC 17011:2004 (also the sole criterion required by the TPP⁸⁹) to ensure that they operate in a consistent manner worldwide; and that accreditation bodies belong to the International Accreditation Forum (IAF). The PEFC acknowledges that this means that errors cannot be eliminated completely, and it accordingly requires a degree of certification-related information to be made publicly available.⁹⁰ In practice, the possibility of withholding accreditation has been considered an effective disincentive to certifiers setting the bar too low, particularly with reference to the FSC.⁹¹ Once more the TPP's criterion can be seen as having little effect on this more 'on-the-ground' aspect.

3.4. CHAIN OF CUSTODY CERTIFICATION (AND LABELLING)

Finally, the chain-of-custody issue. Forestry certification schemes also provide for certification of chain of custody – in order to ensure that the end-product can be certified as made up of at least some percentage of material from a standard-meeting forest. This allows the end product to be labeled with the scheme's (trademarked) logo, and claims (based on the relevant standards) made about the product. When the TPP included a 'progressing to sustainable' category of assessment, for example, the FSC began developing a label to reflect this.⁹² In practice, this means that a third-party certifier must assess whether the chain of conduct standard is being met at each production and logistical stage a product goes through. This aspect of the schemes operates in essentially the same manner as described above. Depending on the standards that have been met, the schemes restrict the claims that may be made on behalf of the products through controls over the use of the schemes' labels and logos, largely through trademark law.⁹³ The TPP requires compliance with ISO 17011 or equivalent, a certified chain of custody to be put in place, and that if material is mixed, the un-certified

⁸⁸ It is the only forestry certification body to do so: FSC *Accreditation Program*, FSC INTERNATIONAL, <http://ic.fsc.org/accreditation.28.htm> (last visited Jan. 20, 2013).

⁸⁹ CPET, *supra* note 85, criterion 3.1.

⁹⁰ PEFC, *supra* note 83.

⁹¹ Tollefson, *supra* note 41, at 35-36.

⁹² Fripp, *supra* note 73, at 5.

⁹³ Meidinger, *supra* note 4, at 74-75.

material needs to be legal.⁹⁴ Again, the desk-based nature of CPET's assessments hinders it from dealing head-on with the practical implementation of the standards, or emerging issues like fraudulent certificates.⁹⁵

In sum, the TPP can be seen as influencing the schemes to ratchet up or buttress their standards and processes on paper, including processes involving GAL elements⁹⁶ such as participation - to members through governance structures and stakeholder consultations at ground-level - when these changes would otherwise have been unforthcoming. The changes seem to have occurred largely due to a commitment to implementing credible pro-forestry procurement rather than from any legal or normative obligation that using private regulators in this way should see them comply with domestic public law requirements or incorporate GAL elements, although something of this does seem to be developing in relation to eco-labels under the EU procurement regime.⁹⁷ Again, it is difficult to see the TPP as simply passively adding to the schemes' legitimacy. Its demands for change do not utilize the schemes' internal processes;⁹⁸ and it relies on their advantages vis-à-vis government when considered necessary (social criteria) while otherwise using traditional regulation to impact their operation (FLEGT, EU Timber Regulation). Further, in highlighting perceived flaws in the schemes and having them addressed, any legitimacy accorded to the schemes is of a conditional type – the schemes are seen as functioning well in *conjunction* with 'backstop' assessments through the TPP.

4. THE TPP'S EFFECT – FORESTRY PRACTICES, STANDARDS AND GAL ELEMENTS

The rise of private governance is often theorized with emphasis on the supply of, and demand for, inter or trans-national rules, in more or less nuanced ways.⁹⁹ This broad picture is borne out in the forestry certification literature, which highlights the failure of state-based regulators to adequately meet the global demand for a regulatory framework beyond a "logging

⁹⁴ CPET, *supra* note 85, Part 4.

⁹⁵ Fripp et al., Efeca, *supra* note 39, at 30.

⁹⁶ Meidinger, *supra* note 4, provides a GAL focused assessment of the schemes. *See also* the account in Gulbrandsen, *supra* note 34, from 66.

⁹⁷ *See supra*, notes 27-28 and accompanying text.

⁹⁸ Compare Cashore, Auld & Newsom, *supra* note 4, at 21, on rule-development.

⁹⁹ *See* Büthe, *supra* note 15, at 30-32. His model attempts to incorporate more of a political dimension.

charter”;¹⁰⁰ and the response to this by concerned actors, particularly NGOs. It has similarly been theorized that the commitment to a standard’s accuracy – referring to whether the standard reflects or is perceived to reflect something sought by users or targets in the real world¹⁰¹ and GAL procedures will reflect the interplay of supply and demand hypotheses. On this account, users and targets of standards are likely to demand a certain level of accountability or accuracy in order to be useful for their decision-making (the demand hypothesis); and standard-generators have an incentive to provide certain types of accountability in order to successfully compete for users (the supply hypothesis). While the end outcome in particular cases will be influenced by further factors, it should reflect this broad interplay. The following discussion builds on the previous section to set out the TPP’s positive and negative effects on forestry and then considers whether they can be usefully explained in this manner.

4.1. THE TPP’S EFFECTS ON FORESTRY - POSITIVES

Aside from the on-paper ratcheting up discussed above, evaluations of the TPP’s effect generally focus on the market for certified products, which it is considered to have positively impacted in two broad ways:¹⁰² increasing the uptake of certification in the UK; and in the EU, through procurement harmonization.

Assessing the TPP’s exact quantitative impact on the UK market is prevented by a paucity of data, due largely to an absence of procurement reporting requirements and broad categorizations of expenditure (“furniture”).¹⁰³ Early assessments tended to simply assume that central procurement expenditure in general, expressed as a percentage of GDP, (about 20 per cent for OECD countries) would be more or less proportionate to government spending on timber. As Brack points out, adjusting for expenditure on public employment and non timber-intensive defense spending, this is a questionable assumption. The situation is further complicated by widely varying estimates and definitions of total central government procurement.¹⁰⁴ Suffice it to say that conservative estimates of UK central procurement

¹⁰⁰ Cashore, Auld & Newsom, *supra* note 2, at 11.

¹⁰¹ See Dutta, *supra* note 15, at note 14.

¹⁰² See Fripp et al., Efeca, *supra* note 39; Brack, *supra* note 31; Gulbrandsen, *supra* note 34, from 66.

¹⁰³ Fripp et al., Efeca, *supra* note 39, at 6.

¹⁰⁴ Brack, *supra* note 31, at 10-11; DUNCAN BRACK, CHATHAM HOUSE, LOCAL GOVERNMENT TIMBER PROCUREMENT POLICIES: CASE STUDIES (2007) 6-7, available at <http://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/0807brack.pdf>

expenditure on general goods and services put it at about 10 per cent of total GDP – this total equating to roughly £130-150 billion at the time of the establishment and initial operation of the binding TPP¹⁰⁵ – and including local government (on which the TPP is not strictly binding), about 15 per cent. The value of the UK timber market (excluding paper) around this time was approximately £11.1 billion,¹⁰⁶ so if procurement in this sector was proportionate to procurement generally, a conservative estimate of the TPP's direct impact would be in the region of £1-1.5 billion. At this time, central government also spent approximately £1.7 billion on pulp and paper,¹⁰⁷ so the two figures together give a broad, if almost certainly inaccurate, idea of the minimum size of the market. This justifies some skepticism of higher estimates of the TPP's effect on the timber market, which range from 10-40 per cent.¹⁰⁸ In any event, there is broad agreement on the TPP having some, significant, direct effect on the timber market, and also knock-on impacts beyond this due to suppliers' preferences for simple supply chains, these effects being estimated at between 10-25 per cent of total market leverage.¹⁰⁹

It is this effect that has been considered the TPP's most significant impact – that it has “...under-deliver[ed] in terms of direct spend ... but [over-delivered] on wider market impacts”.¹¹⁰ However, this ‘over-delivery’ has been in tandem with other governmental and NGO pressures on private timber purchasers to adopt procurement policies at least as stringent as the TPP,¹¹¹ and it is thus difficult to assess the TPP's exact role. Interviews with market actors strongly suggest that the TPP played an important role as a “market catalyst” to private sector change, albeit not unanimously, with some considering that forthcoming traditional regulation and knock-on effects of *private* procurement practices were more important.¹¹² It seems plausible to conclude that the TPP has impacted the increase in certification in the UK, which, thankfully, can be measured more precisely. Between 2003 and

¹⁰⁵ Brack, Local Government Timber Procurement, *id.*; Fripp et al., Efeca, *supra* note 39, at 6-7 (giving figures from 2003/2004).

¹⁰⁶ According to the UK Timber Trade Federation's 2006 and 2008 reports, *available at* http://www.ttf.co.uk/News_Info/Statistics.aspx

¹⁰⁷ Fripp et al., Efeca, *supra* note 39, at 7 notes that during 2003/2004 the public sector spent £1.2 billion on furniture; £22.3 billion on construction; and £1.7 billion on pulp and paper.

¹⁰⁸ Fripp et al., Efeca, *supra* note 39, at 6.

¹⁰⁹ Brack, *supra* note 31, at 11.

¹¹⁰ Fripp, et al. Efeca, *supra* note 39, at 16, iii.

¹¹¹ *Id.* at 16.

¹¹² *Id.* at 19-21, *see also* 30.

2009, for example, the UK's overall exposure to PEFC/FSC certified wood increased from 47 to 63 per cent, while uncertifiable hardwood imports remained constant.¹¹³

The TPP's overall effect also includes the knock-on effect it has had in the public international sphere. As was noted above, other governments have adopted timber procurement policies, and informal networks have developed whereby the bodies responsible for their implementation have moved towards harmonization of their content, with CPET taking an active role, particularly in the EU. Given that the TPP largely reflects the practice at EU level, standard users and targets have an extra incentive to comply and this too has likely increased certification uptake.

While the specific direct and indirect impacts of the TPP on the market for certified timber are difficult to accurately assess – but are likely between 10-40 per cent – they remain significant, enabling the UK to more effectively combat illegal logging and absorb a larger volume of certified material than would be expected as a result just of supplier-driven efforts.¹¹⁴ Further, the TPP's connection to formal and informal international regulation is likely to add to its ability to act as a 'market catalyst'.

4.2. THE TPP'S EFFECTS ON FORESTRY – PERCEIVED SHORTCOMINGS

The TPP's impact has also been subject to criticisms. These can be split into four broad categories: its under-implementation; its effect on the schemes' governance structures; discrimination against certain timber sources; and a focus on certification that fails to adequately translate into practical impact. The last two are really iterations of more general criticisms leveled at the schemes, with the final questioning whether certification really contributes to the underlying justice of the issue, which both schemes purport to do.

In terms of under-implementation, ten years after its implementation, the supposedly binding TPP had only been sporadically adopted by agencies subject to it. Further, adopters had not all stayed up to date with its changes, nor implemented routine compliance-checking.¹¹⁵ Although the overall movement is considered to be towards full compliance, this has been hampered by the absence of a strong enforcement mechanism – CPET receives

¹¹³ *Id.* at iv.

¹¹⁴ Fripp et al., Efeca, *supra* note 39, at 19, 27.

¹¹⁵ *Id.* at 16, note 15, 8; “*very subjective estimate... 50-60% with model clauses; 10% checked for compliance*” [emphasis in original].

complaints from suppliers about non-compliance, but can do nothing.¹¹⁶ Implementation has thus largely depended on the (seemingly generally low) degree of motivation in public sector institutions, perhaps signaling the influence that activist NGOs have had in the TPP's creation and implementation.

The impact of the TPP on the schemes' standards and processes, as discussed above, has been largely positively received, although doubt has been expressed about the practical effect of the procedural GAL-type elements adopted under TPP pressure. As well, the extent of participation and transparency in CPET's assessments have been criticized, on the basis that the UK government is only one stakeholder in voluntary processes with their own rules for governance and stakeholder engagement.¹¹⁷ Through the TPP, the UK has been seen as garnering disproportionate influence in a manner antithetical to the 'balanced and participatory' CPET criterion, with concerns raised, at different times, by both environmentalists and producer-slanted groups.¹¹⁸ As noted above, certain aspects of CPET are less-than-transparent. Further, there is a sense that governments are co-opting the schemes for their policy purposes, from TPPs to FLEGT and the EU Timber Regulation, without ensuring that certification schemes are able to deliver these goals.¹¹⁹ Given that the TPP has not *required* the schemes to make changes through imperium, these largely seem to be complaints as to its influence based on competing notions of accountability and legitimacy – points which are discussed further below.

Although the TPP allows for functional equivalents to certification, the increased uptake of certification in the UK that it has influenced has also lead to concerns of over-reliance - indeed, 'Category B' evidence is seldom relied on. Contractors at times 'play it safe' by insisting on FSC-only as the 'gold standard', which has the potential to disadvantage (and arguably has disadvantaged) developing countries and sectors, particularly hardwoods, which have legitimate difficulties or lack incentives to obtaining certification.¹²⁰

In effect, that criticism ties in to one of the reasons certification is perceived as inadequately translating to practical on-the-ground effects. The idea is that the increase in demand for certification has not seen a corresponding increase in certified forest area. Rather,

¹¹⁶ *Id.* at 10, note 15. This perhaps implies that other remedial options, see *supra* at note 33 and accompanying text, are not seen as cost-effective.

¹¹⁷ *Id.* at 30.

¹¹⁸ Gale & Haward, *supra* note 74, at 222.

¹¹⁹ Fripp et al., Efeca, *supra* note 39, at 30.

¹²⁰ *Id.* at 13.

there has been a ‘shuffling of deckchairs’ with non-certified product simply going to less discerning markets,¹²¹ although increased procurement harmonization across governments may ameliorate this. Perhaps more concerning is the assertion that the schemes simply do not focus enough on ensuring that certified forests actually comply with standards, and the TPP’s overly frequent attention on processes and paper standards contributes to this, distracting schemes from “real work on the ground”.¹²²

4.3. EXPLAINING THIS OVERALL EFFECT – SUPPLY AND DEMAND?

To briefly recapitulate, the UK TPP, ostensibly a simple set of purchasing guidelines, has operated in a more regulation-like manner, externally reviewing private certification schemes, which have taken the reviews seriously. While this has generally been seen as increasing the uptake of certified timber and assisting to provide under-supplied goods such as enhanced participation and stricter standards, the TPP has also been considered to come up short both in terms of contributing to on-the-ground implementation and also in respect of its effect on GAL elements like transparency and participation. The following discussion considers the utility of considering these overall effects as a result of supply and demand hypotheses, focusing on the TPP as a demand-side policy tool.

As discussed above, it is useful to consider four broad stakeholder groups:¹²³ standard-suppliers (most relevantly the schemes); standard-demanders (the UK government through the TPP, but also other purchasers articulating demands about forestry standards, activist NGOs, and business interests); the standard-targets (forestry managers); and other standard users (including certifiers and purchasers who contribute to market entrenchment). Fitting the TPP into this is slightly complicated, as it represents the UK’s demands as to standards but is also a site of contestation external to the schemes where other standard-users, targets, and interested parties influence these. As well, the UK government is a potential standard-maker through traditional regulation. Nonetheless, this framework provides useful insights.

The demand hypothesis, developed in relation to indicators but potentially generalizable to other global governance areas, predicts that as decisions made on the basis of standards involve higher stakes, the intensity of user demands (including targets) for accuracy and accountability will increase; all else being equal, this should result in greater provision of

¹²¹ Fripp et al., Efeca, *supra* note 39, at 25-26; Simula, ITTO, *supra* note 14, at 77-78.

¹²² *Id.* at 31, although the assessments have since become quadrennial.

¹²³ See *supra* note 16 and accompanying text.

these by standard-suppliers.¹²⁴ Transferring this idea into the domain of certification schemes is, again, slightly complicated. Certification can be more or less ‘accurate’ both in setting standards likely to achieve good forestry outcomes; and in correctly certifying that an end product has come from a standard-compliant forest. However, depending on the standard-user involved, there may be less demand for good outcomes than simply for a product with a logo, especially as compliance is ‘invisible’ and unlikely to affect performance.¹²⁵ Some contractors’ tendency to play it safe and buy FSC-only can be viewed as reflecting this type of demand.

The TPP has a history of being more concerned with achieving the underlying aims of the schemes than this, albeit that its initial faltering steps towards implementation and the general lack of commitment by central government institutions to the TPP arguably show the importance of activist NGO pressure. It might be thought, then, that the TPP would exhibit more intense demands for certification to show practical effect, resulting in greater provision of higher standards and on-the-ground implementation by the standard-making schemes. While there is certainly an appetite for both of these amongst CPET, NGOs providing input into the TPP and the UK government, the TPP’s demands, as expressed through its assessment criteria, have been generally restricted to ‘paper’ standards, with only minor opportunities to review actual outcomes.¹²⁶

Considering why this might be the case, the ability of the TPP to marshal credible threats to the schemes,¹²⁷ as well as the availability of other regulatory tools seem to have explanatory utility. As Dutta puts it, demands are likely to be mitigated by the likelihood that they will be heeded. Both major schemes rely a lot on independent certifiers and consider this a core part of their operation. A demand to change this by a ‘piggy-backing’ non-member would face more difficulties than in situations where one scheme can be played off/benchmarked against the other, which was effectively the case in catalyzing more accountable governance and increased participation/consultation in the PEFC - the FSC providing a readily available compliant alternative. Should both schemes refuse to comply, the UK could be put in the untenable situation of assessing all timber on a case-by-case basis. Further, CPET considers it lacks the resources to conduct thorough on-the-ground field

¹²⁴ Dutta, *supra* note 15, at 439-440. *See also* Büthe, *supra* note 15, at 34-37.

¹²⁵ As opposed, say, to making investment decisions based on indicators.

¹²⁶ *See supra*, the discussion following note 59.

¹²⁷ Dutta, *supra* note 15, at 455.

checks,¹²⁸ perhaps reflecting the UK's reluctance to internalize this resource-intensive task despite potentially beneficial outcomes. The difficulty in unequivocally stating the TPP's direct market-impact may also weaken the demands it can conceivably make. In relation to the schemes' improvements as to GAL's posited doctrinal elements, which have been somewhat skeptically treated in respect of the PEFC, it might be added that the focus on sustainable forestry, and the risk of overly undermining its regulatory 'partners',¹²⁹ minimizes the extent of the procedural demands likely to be made to the (apparently currently low) level sufficient to avoid criticism. International legal instruments can influence this – take, for example, the promotion of multi-stakeholder consultation as a means to avoid unlawful discrimination in trade.

Given this, it is perhaps unsurprising that the UK government is also using other strategies in addressing forestry issues – working with other governments to implement more traditional regulation that may operate more effectively. Through the TPP, the focus has been on ratcheting up schemes' standards – and the criticism that this distracts from on-the-ground issues is potentially symptomatic of wider problems with the schemes' relative lack of control over certification.¹³⁰

Turning now, briefly, to the supply hypothesis. This sees standard-developments as a result of competition by suppliers to secure the patronage of users, and predicts increased accuracy and accountability in these situations. The general adaptability of forestry schemes in doing this has been noted elsewhere,¹³¹ but the major questions raised here concern why inter-scheme competition has not resulted in more practical effects; and why the TPP has been able to exert significant influence despite concerns that this undermines accountability elements of the schemes' governance structures.

The first issue can only be briefly discussed in the space available, but the above discussion on the differing demands from various users and targets helps outline why schemes might not prioritize on-the-ground effects, let alone effective GAL desiderata, in competing with each other. With relative ambivalence amongst some users as to standards' content, and

¹²⁸ Email on behalf of CPET, to author (Dec. 20, 2012) (on file with author).

¹²⁹ Compare Dutta, *supra* note 15, at 453-454.

¹³⁰ See, for example SIMON COUNSELL & KIM LORAAS, THE RAINFOREST FOUNDATION, TRADING IN CREDIBILITY: THE MYTH AND REALITY OF THE FSC, 6-7 (2002). Meidinger, *supra* note 4, at 73 similarly considers the degree of trust reposed in certifiers "difficult to explain", although Tollefson, *supra* note 41, at 35-36 is more positive.

¹³¹ See Meidinger, *supra* note 4, from 85, characterising the schemes as 'learning systems'.

targets who are not universally welcoming of intensive scrutiny, it seems that the ‘market equilibrium’ is currently not conducive to rewarding change in this direction. This is of course subject to influence by methods such as public awareness campaigns or (TPP type) public comparisons and benchmarking,¹³² making these activities an important addition to the overarching regulatory framework in this area. Similar to problems noted in self-governance, this sub-optimal outcome is a useful reminder of market-driven governance’s potential limitations in achieving substantive goals as opposed to merely increasing the trade in certified products, especially given the difficulties of sustaining pressure for these goals – although periodic procurement assessments involving independent assessors and participatory elements would seem to go some way towards mitigating this.¹³³

This paper began by noting the second issue – the puzzle of why the independent schemes have seemingly been so sensitive to the TPP’s demands, despite perceptions of disproportionate unaccountable influence that might drive away standard-users and dissatisfy scheme-members. One reason highlighted has been the TPP as the gateway to some, significant, degree of market access. This influence is of the type that, as Cashore notes, may be exerted by any large organization outside of the schemes’ formal standard-setting procedures. The above discussion noted the significance of private procurement practices in stimulating market demand and standards, and private entities face fewer restrictions in performing this role. Proliferation of these sorts of demands and assessments thus seems useful in monitoring the schemes’ effects and sustaining pressure for more exacting standards, procedures, and perhaps outcomes.¹³⁴

Does this then leave public procurement, and the TPP’s influence, simply to be considered as operating in this manner and no more? This perspective seems to provide an incomplete picture. For one thing the TPP’s connection to the state – “by definition possess[ing] legitimate authority”¹³⁵ – increases its influence over the schemes, with positive assessments enhancing a scheme’s reputation and legitimacy amongst users, particularly other governments, to an extent private entities are likely unable to. This effect is particularly important to the private schemes.¹³⁶ The supply hypothesis sees enhanced accountability as a means to attract

¹³² See Overdevest, *supra* note 73.

¹³³ See Vogel, *supra* note 9, who emphasizes this point, particularly at 81-83.

¹³⁴ Gulbrandsen, *supra* note 34, provides examples at 67-70. The TPP is noted as being “particularly influential”.

¹³⁵ Bernstein & Cashore, *supra* note 5, at 351.

¹³⁶ *Id.*

users, something that may also be achieved through reputation.¹³⁷ It seems, then, that the reputational benefits of state-association, in conjunction with market access and other benefits of relationships with government, have been considered to outweigh accountability concerns in relation to TPP compliance. This has been assisted by the TPP's processes – while there is room for improvement on accessibility to information, and ultimate decisions lie with the UK government, it is based on ideals of neutral expert assessment alongside GAL-type elements that allow for wider input and conceivably further legitimate its operation. Also, the end decision of whether to respond to perceived demand rests with the schemes in accordance with their internal processes. Accordingly, criticisms as to disproportionate influence largely seem to be disgruntlement with the fact that the TPP's authority, processes and assessments are difficult to credibly ignore.

There are, however, other factors giving the TPP particular influence that, while falling short of sovereign commands, lend credence to the general feeling behind these complaints. As McCrudden points out, the idea of linkages in public procurement denies a strict distinction between imperium regulation and dominium action in the marketplace, an idea that is echoed elsewhere.¹³⁸ Against the background of international trade law hostile to governments acting as the schemes do, the TPP operates as a regulatory tool utilizing the schemes in aid of governmental policy, and is integrated with more traditional (inter)governmental regulation, when possible, to this end. This remains a background threat to private regulators that incentivizes them appearing effective from a governmental perspective. Further, its detailed, rule-like criteria and binding elements, especially given its knock-on private effects, points to an intended and actual influence that arguably goes beyond Cashore's vision of market actors individually evaluating whether to grant authority to the schemes – albeit falling short of legislating that only certain timber products may be supplied. Developments in procurement law, and perhaps, in the future to international trade law, may make it easier for governments to play an even more active role.

Cashore appears to see public procurement as operating solely to increase the schemes' legitimacy, potentially to the point where they may challenge state authority. The above discussion shows that overall the TPP operates in a more complicated manner. It involves the schemes in a holistic (co)regulatory approach in which the state plays a particularly important

¹³⁷ See the discussion of reputation in Dutta, *supra* note 15, at 462.

¹³⁸ See Davies, *supra* note 22.

role. While it imparts some legitimacy to the schemes, it does so in a manner that reinforces the importance of the TPP's, and the state's, role as an effective backstop. As Albrecht puts it in the, similar, German context, through procurement: "formerly voluntary certification systems are transformed into political technologies with state legitimacy".¹³⁹ Increasing acceptance of private governance may eventually reduce the importance of these effects, but this paper argues that states are able to play an important and distinctive role in certification - something recognized by multiple commentators¹⁴⁰ - through procurement, but which fixating on the supposedly 'non-state' nature of certification can under-emphasize.

5. CONCLUSION

This paper began by posing two questions: how to explain what appeared to be disproportionate state influence over a celebrated instance of so-called 'non-state' market-driven governance; and whether the TPP's 'ratcheting up' of private standards and promotion of the procedures associated with GAL actually assisted in achieving the schemes' ostensible goals.

Beginning with the latter, it is clear that the TPP's positive on-paper changes have not necessarily resulted in either practical, on-the-ground impact or a focus on implementing effective GAL elements; nor have the GAL features present in the schemes always been useful in achieving practical effects (or even 'on-paper' changes). The reasons for this reflect a complicated interplay of interests, which were usefully viewed through the supply and demand framework outlined above. The market-driven schemes' designed sensitivity to user/target demands limits their efficacy in achieving their ostensible aims when faced with demands that are more interested in a bustling certified products market. GAL elements in the schemes were not necessarily useful in achieving better outcomes or standards, with participatory elements in schemes able to be dominated by interests preferring the status quo. More useful was the external site provided by the TPP, which disrupted this by effectively injecting GAL elements into the broader, inter-institutional regulatory *mélange*, providing for public, side-by-side comparisons of the schemes. Although its practical effect has been limited thus far by this aspect of the schemes' operation, sustained pressure through clearly articulated demands combined with credible, publicly available assessments represent an avenue for changing this

¹³⁹ Albrecht, *supra* note 10, at 17.

¹⁴⁰ Including Meidinger, *supra* note 4, at 59-60; Gale & Haward *supra* note 74, at 265-266; Albrecht, *id.*; Gulbrandsen, *supra* note 34, see 68-69.

and expanding the realm of credible demands. There is thus potential utility in this sort of assessment from both public and private entities, perhaps in conjunction with traditional regulation, particularly if this mode of governance continues to increase.

As for the TPP's apparently disproportionate influence, it was argued that in addition to its purchasing power, state-based elements such as its association with traditionally legitimate (inter)governmental structures, and their ability to implement coercive regulation rendered schemes particularly likely to comply with it. This was contended to occur in a manner that left states having a distinct and important role in the certification schemes' mode of governance, rather than simply enhancing their legitimacy as might be thought from descriptions of 'non-state' market-driven governance. More generally, the overall regulatory picture is of the UK government relying on predominantly private regulation, for expertise, convenience and advantages in terms of international trade law, as well as influencing it through both the TPP and more traditional regulation. This intermingling of state-based and private regulatory authority raises further questions as to the desirability of applying distinct 'public' and 'private' legal regimes to each of them, as well as possible obligations that ought to attach to states taking advantage of the effects of this difference.

Much of the TPP's positive effect can arguably be traced back to the *restrictions* imposed by international trade law – the inability to 'pick winners' and the imposition of non-discrimination requirements. Were it not for these, undertaking the laborious and costly exercise of comparing the schemes in a credible manner would seem less likely; so too would the associated phenomenon of 'harmonizing up' to the higher benchmark. As shown by Vogel, private purchasing institutions' general unwillingness, a few altruists aside, to even support FSC without 'coercion' through consumer protests casts doubt on their general willingness to engage in TPP-like conduct rather than support whichever scheme seems to provide the most pragmatic benefit. This is especially so once factors like commercial sensitivity and fear of consumer backlash in case support of an 'inferior' scheme is perceived are factored in. So while private procurement may theoretically have a lot of scope, in practice this is unlikely to be fully realized. Less restricted public procurement, then, might in fact make it less likely for it to continue to play the role it currently does in enhancing the quality of this overall, inter-institutional, regulatory framework.

Finally, and as has been established elsewhere, the procedural mechanisms of transparency, reason-giving and review evident in the schemes' operation and their interactions

with other key actors seem susceptible to analysis from a GAL perspective. Considering the role of public procurement in detail helps to explain why. Advocates of greater transparency, participation and the like have something of a natural ally in public actors that are themselves subject to these norms due to garden-variety domestic administrative law. Through inter-institutional interactions such as procurement-related assessments, these administrative law obligations have a wider effect on the schemes, their global operation and related actors. These obligations themselves are affected by international law applicable only to public actors – particularly their procurement actions – that again serve to differentiate their activities from self-interested private parties engaged in market-driven competition. In this context, the idea that a shared normative character of publicness serves to validate administrative actions (broadly considered, and including the largely private forestry certification phenomenon) to the extent of giving them a law-like character seems a plausible way of conceptualizing what might otherwise appear as a grab-bag of procedures. Further assessment as to whether other cases exhibit these characteristics promises to shed more light on this conceptual approach and its relevance to the haphazard area of global governance.

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