Intersection of Public and Private Authority in Forest Governance in Southeast Asia:
Towards a Theory of the Emergence, and Intersecting Potential, of “Legality Verification” in the Global Forest Sector

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Intersection of Public and Private Authority in Forest Governance in Southeast Asia:
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I. Introduction

The increasing role of non-governmental organizations and firms since the 1990s into management, implementation and enforcement of what were previously treated as public policy functions squarely under auspices of government and international authority, has led to a plethora of scholar and practitioner efforts designed to understand the nature and impacts of these “new governance” arrangements. As a result, we now have a rich literature conceptualizing, theorizing and empirically assessing the role of corporate social responsibility, public private partnerships and market based certification efforts in creating new forms of governance. We also have a better understanding about their potential for addressing key environmental and social challenges to which traditional governmental efforts have, by themselves, been unable to effectively ameliorate. One of the key themes that has emerged from this scholarly attention is to understand better what mix (Gunningham, Grabosky, and Sinclair 1998) of policy instruments and institutions might best fit (Young 2002) specific problems at various scales (Agrawal and Ribot 1999)(Agrawal, Chhatre, and Hardin 2008)(Gibson, McKean, and Ostrom 2000). Practitioners have likewise referred to the need to develop a “portfolio” approach in which institutions and interventions, such as “payments for ecosystem services” are “stacked” to produce effects that one intervention or institution is unable. While this literature makes it clear that while there is a need to understand how interaction occurs, there is little work specifying the current or potential causal mechanisms that might create authoritative interactions.

The purpose of this paper is to overcome this gap by focusing on the wide ranging global coalition that is emerging to combat “illegal logging” though support for “legality verification” of global timber markets. Illegal logging has been asserted to constitute some of the worst forest practices around the world (Kaimowitz 2005), especially in tropical developing countries where forest degradation and biodiversity loss are seen as worrisome global challenges (Tacconi 2007). The focus on “legality verification” as the main policy instrument with which to combat illegal logging, is gaining widespread support and interest especially for those countries exporting to the lucrative US and European markets (Gulbrandsen and Humphreys 2006). To date, interest in promoting legality verification has expanded significantly to include developed and developing country governments including their forest, foreign, international trade and development agencies, as well as environmental groups, forest research organizations, and forest industry associations have emerged to combat illegal logging.
The growing interest in legality verification appears quite puzzling. Most stakeholders agree that by itself, the relatively narrow focus on “legality” will be unable to ameliorate key global forest governance challenges, including deforestation owing to land use change, that have consumed the attention of efforts over the past 30 years to build authoritative and durable forest policy institutions. In fact, 20 years ago the idea of promoting legality verification would have been unimaginable to many environmental groups, who reasoned that such an approach was insufficient for addressing enduring environmental, social, and economic challenges facing the world’s forests.

As a result, the emergence and support for legality verification raises two key questions that confront practitioner efforts to promote environmental stewardship on the one hand, and scholarly literature on global governance, on the other hand. First, does legality verification represent, as many critics of economic globalization have asserted, a case of ‘ratcheting down’ of domestic and global forest governance to rather modest approaches (Gale 1998)? Alternately, is legality verification the beginning of an evolutionary process that might lead to a progressively incremental ‘ratcheting up’ of global forest standards in ways that previous efforts to promote a global forest convention or global market based certification programs were unable (Cashore et al. 2007)? Second, given that legality verification is an instrument that is not designed to singlehandedly ameliorate the multifaceted nature of forest degradation; what potential does it have to intersect with other forms of domestic and international forest governance to produce meaningful effects in ways that single instrument approaches have proven unable?

The purpose of this paper is the begin to shed light on these questions so that scholars and practitioners, might be better able to reflect on the implications of the current and potential role of legality verification. Our point of departure from many current efforts is that we first focus on conceptualizing the unique nature of legality verification and, drawing on this, to developing a theory of when and why legality verification might evolve and intersect with private and domestic institutions designed to promote wider forms of forest governance. The lack of theorizing about broad trends has, we argue, biased analysis of strategic decisions to short term impacts which may hamper efforts to build longer term solutions.

Accordingly, a key assumption of this paper is that an answer to the ‘ratcheting up’ or ‘ratcheting down’ hypotheses are not preordained, but instead will be influenced by whether strategic decisions are consistent with legality verification’s evolutionary and intersecting logics. Such an approach requires developing hypotheses about these logics on the one hand as well as what might be expected for emergence and evolution if strategic decisions are consistent or inconsistent with them.

While a single paper cannot address the complete range of questions and issues surrounding intersection and evolution, our purpose is to identify a framework, review key select developments in consuming and producing nations, and then to reflect on the implications of this review for future research. We proceed in the following analytical steps. Following this...
introduction a second section takes care to conceptualize legality verification as an “ideal type” of governance in contrast to private and global oriented “non-state market driven” forest certification and domestic focused forest governance efforts promoted formally through “forest law enforcement and governance” (World Bank 2006; The World Bank 2006) initiatives and also less formally through a range of efforts to promote “good forest governance” (Cashore 2009). A third section develops an analytical framework with which to situate legality verification in its evolutionary and intersecting context. We develop preliminary hypotheses regarding the effects of “structural logics” in the way legality verification might intersect with global forest certification efforts on the one hand, and domestic efforts to promote enhanced domestic “forest governance” on the other hand. We then review the way support for, and approaches to, legality verification have emerged in two consuming regions, the US and the EU. We then present a preliminary review of support within Southeast Asia in general, and Indonesia and Malaysia in particular, whose forest practices and land management have come under intense and sustained international scrutiny. Owing to space limitations our effort is not to provide an exhaustive empirical account, but simply to highlight whether our framework has merited, and to identify new important pathways for analytical and empirical research that result.

We conclude by reflecting on the implications of this exploratory analytical framework and preliminary empirical evidence for assessing whether legality verification has the potential to provide the “glue” with which to link what heretofore were largely disconnected efforts to improve global forest degradation.

II. Legality verification as “ideal type”, in contrast to Non-State Market Driven Forest Certification and Domestic Forest Governance

In order to zero in on the key features of legality verification as an ideal type, and to permit an understanding as to how it might intersection with more expansive efforts to promote responsible forest management, we briefly review the key features of NSMD certification and domestic forest governance efforts, which, as we show below, places in historical context why legality has emerged and sheds light on the overall form it has taken.

a. Forest certification as “Non-State Market Driven” (NSMD) global governance

While a complete review of forest certification as NSMD global governance is beyond the scope of this paper, what is important to note is that global forest certification through the “Forest Stewardship Council” (FSC) was promoted heavily by the world’s leading environmental groups following failed efforts to developing a binding global forest convention at the 1992 Rio Earth Summit. The idea behind certification was relatively straightforward: develop a set of wide ranging rules governing sustainable forest management and turn to customers of global forest products to encourage adherence to the standards. The idea was that by drawing on carrots (price premiums) and sticks (shaming campaigns to companies not undertaking certification), economic incentives might provide more enduring support than short lived and ineffective boycotts of tropical wood products prominent in the 1980s; while providing more purposeful
rules than international efforts that many NGOs felt amounted to “logging charters”. As a result, Cashore (2002), Cashore Auld and Newsom (2004) and Bernstein and Cashore (2007) have identified key “ideal type” features with which to categorize forest certification as “non-state market driven” (NSMD) global governance: domestic sovereign states do not require adherence to the rules; wide ranging policies governing social and environmental practices are developed; third party auditing is used to promote verification/compliance, and tracking of eco-certified products are undertaken along global supply chains.

Over the last 17 years efforts to promote responsible stewardship through certification has been mixed. On the one hand there is now considerable support for third party certification among most commercial forestry operations in North America. On the other hand two challenges characterize efforts to build global uptake. First, considerable debate continues over support for the NGO supported FSC on the one hand, and the domestic, government/industry/landowner initiated “FSC competing” programs, now housed under the international umbrella the “Program for the Endorsement of Forest Certification” (PEFC) that emerged to provide what they asserted to be more flexible “business friendly” certification programs that gave more discretion to the forest sector and firms in implementing policy goals. Second, support, though growing, is weakest in tropical development countries where so much scrutiny was first placed (Graph 1). This relatively weaker uptake can be traced to the enduring challenges facing tropical forest degradation and the rather limited economic incentives from the EU and the US compared to the costs involved in implementing certification.

Graph 1: number of hectares under different certification systems

b. Domestic “Good Forest Governance”
At the same time as a range of NGOs and firms were promoting and debating global certification systems a different set of stakeholders were focused on implementing “soft law” initiatives that came out of Rio including developing “criteria and indicators” for sustainable forest management and corresponding call for the development of “national forest programs” in which it was hoped that learning about problems might lead domestic sovereign governments to initiate new policies. While support for these efforts arguably took a back seat initially to forest certification, by the early 2000s it became apparent to many international development and forestry focused NGOs that a focus in promoting capacity building and learning within tropical countries could constitute a fruitful arena because, unlike certification, such an effort would serve to reinforce national sovereignty by helping countries to develop, and implement, their own policy priorities and goals to promote sustainable forest management. As a result, UK, German and EU development agencies undertook, under the auspices of “forest law enforcement and governance”, (FLEG News 2007; The World Bank 2006; Food and Agriculture Organization of the United Nations and Organization 2005) undertook initiatives to improve capacity building as well as fostering policy learning networks in which ideas and resources were emphasized over formal external to force countries to undertaken efforts against their own wishes (Thang 2008).

Co-hosted by producer and consumer countries and the World Bank, key early FLEG outputs include an East Asian FLEG Ministerial Declaration in Bali in 2001, followed by Ministerial declarations in Africa (Yaoundé 2003), in Europe, and in North Asia (St Petersburg 2005), as well as initial talks in Latin America. As a result of these declarations, a number of projects and initiatives have been created to promote FLEG at various scales and regions (Brown et al. 2008; Kaimowitz 2003; Magrath et al. 2007; Perkins and Magrath 2005; The World Bank 2006, 2007, 2005).

As Table 2 reviews, these efforts differed from certification in that they reinforced national sovereignty, encouraged governments to wide ranging standards governing their own environmental, social and economic priorities. And as recent studies have corroborated, in many countries where forest degradation and deforestation constitute serious challenges, governments have had on their books widespread protection and regulations governing forest management (McDermott, Cashore, and Kanowski Forthcoming; McDermott, Cashore, and Kanowski 2009). This meant that instead of attempting to impose standards by confronting national sovereignty through either a global forest convention or global certification; international efforts might be better placed helping countries to develop, enforce and implement their own standards.

Within ASEAN, the Bali declaration service to coalesce region wide deliberations (Defensor and Fathoni 2005) in which key member states committed to fostering and building cross national ties to promote “forest law enforcement and governance” (FLEG) and to combat corruption and forest policy enforcement challenges. Regional FLEG processes opened the door for new initiatives and experiments within and across countries (Brown et al. 2008; BBC 2007; Brack 2005; Cashore et al. 2006; Ching 2007), with varying involvement of civil society and forest sector stakeholders (Thang 2008). Many of these FLEG processes focused much of this effort on building greater capacity for enforcement of existing laws (Tacconi 2007), reducing
contradictory legal regimes, enlisting NGOs to monitor on-the-ground activities, including reducing high levels of illegal logging (Brown et al. 2008; FLEG News 2007; Food and Agriculture Organization of the United Nations and Organization 2005).

While the idea behind promoting good forest governance was widely shared, the very challenges they purported to address, including corruption and lack of resources, have been raised as key reasons as to why a focus on promoting FLEG in the absence of trade or market incentives would be unable to address forest degradation. That is, many development agencies and other stakeholders became concerned that in the absence of more formal requirements and incentives, efforts to promote FLEG might simply result in window dressing that, ironically, might support ongoing corruption and implementation challenges by giving the appearance of change without meaningful changes in “on the ground” behaviors.

c. The emergence of Legality Verification

It is in the context of important, but truncated efforts to promote global forest certification, and support for, but concerns about whether domestic FLEG efforts would be unable to address global challenges, that legality verification can been as gaining increased support among a wide coalition of global forestry stakeholders. As Table 1 reviews, legality verification represents a hybrid of global certification and FLEG efforts: similarly to FLEG efforts legality verification recognizes and promotes national sovereignty; like certification it relies on third party verification. Unlike certification it does not have to rely on altruistic customer evaluations to support eco-friendly practices. Instead, it only need find a way to remove illegal supply (or or portion of it) from global forest products. As students of economics 101 learn and as illustrated by graph 2, removal of supply from a market will result in a shift in the supply curve, resulting in an increase in price. Hence, legality verification turns to markets to provide economic incentives but its mechanisms for doing has arguably a much easier task than was confronted by those promoting forest certification. This feature, as we discuss below, requires, as with forest certification, the use of supply chains and has focused greater attention on both the technical challenges and innovations for undertaking such an effort and owing to potential increases in price of timer, much more concerted and sustained efforts.

Graph 2
It is for these reasons that legality verification has become a favorite approach for the EU and US for two primary reasons. First, there is growing recognition that efforts to impose a binding global forest convention on many developing countries to address tropical deforestation served to focus attention away on other pathways that might be as influential especially in those countries where there was a strong desire to promote “good forest governance,” but in which a lack of capacity, training, and enforcement were key factors in limiting these efforts. In addition, demands for wood products in North America, Japan and Europe tended to work against efforts to build good governance as rampant demand fostered, rather than discouraged, illegal logging. Meanwhile efforts to certify the very best forest practices led, some critics asserted to simply separating markets than improving on the ground results. Hence, verification emerged at once drawing on similar ideas as certification, but emphasizing adherence to national laws and regulations.

| Table 1: Key Features of Legality, Certification and Domestic Forest Governance |
|-------------------------------------------------|---------------------------------|---------------------------------|
| Role of Government                              | Forest Legality Verification    | Forest Certification (NSMD)     |
| Role of Markets                                 | Tracking along supply chain     | Tracking along supply chain     |
| Economic Incentives                             | Weeding out supply increases prices | Demand from customers |
| Policy Scope                                    | Limited                         | Broad                           |
| Assurance                                       | Verification required           | Verification required (Third Party Auditing) |
| Policy Scope                                    | Limited                         | Broad                           |
| Assurance                                       | Verification required           | Verification required (Third Party Auditing) |
| Economic Incentives                             | Weeding out supply increases prices | Demand from customers |

Source: authors of this paper and, for column on certification, Cashore, 2002; Cashore Auld and Newsom 2004; and Bernstein and Cashore 2007
II. Analytic framework

It has been over a decade now that public policy scholars have been focused attention on developing innovative approaches to behavioral changes that draw on, rather than confront, self interest or strategic considerations (Gunningham, Grabosky, and Sinclair 1998) and that consider “baskets” of policy instruments (ibid), the intersecting effects of policy instruments (Boonekamp 2006; Oikonomou, Flamos, and Grafakos 2010; del Río 2010), often housed under the mantra of “payment for ecosystem services” (Sell et al. 2007) “portfolio” or, reflecting the evolutionary focus, “step wise” approaches (Tropical Forest Trust 2006). While advances have been made it is still unclear as to what configuration of policy interventions, and at what governance levels, might produce effective and enduring governance efforts in ways that single approaches are unable.

To begin to overcome these limitations and to focus our framework on questions relevant for the phenomenon of legality verification, we focus our analytic attention in two ways. First, in terms of understanding why broad coalitions might support legality verification, we draw loosely on Vogel’s attention to the ways in which “Baptists and bootleggers coalitions” might force upward standards through global market integration. Second, we theorize about the potential interacting effects with two other important initiatives: efforts to build global “sustainable management” forest certification through eco-labeling and efforts to promote “forest law enforcement and governance” (FLEG) in developing countries.

Doing so leads us to argue that whereas Vogel and others focused on standards, the impact of legality verification appears to come in the form of supply chain tracking, which ironically maybe be hampered if the standards are too high. That is, legality verification may play a supporting role by creating “necessary” but not “sufficient” baseline preconditions that enable other interventions, such as certification and domestic efforts to promote good forest governance, to have direct impact. If this relationship does exit it carries with it fundamental and counterintuitive implications for strategic choices.

a. “Ratcheting up” through Bootleggers and Baptists Coalitions

The central tenet behind Vogel’s path breaking work in which he found that in some cases economic integration led to increases in environmental regulations, rests on the notion that self-interested firms, when confronted with higher environmental, safety and social regulations than their competitors in other jurisdictions or countries, will often align with environmental groups and other social actors to championed increased regulations on their competitors. Because California tends to lead the nation in environmental and social regulations, and hence sees many firms advocating for national policies to create a level playing field, Vogel terms this
phenomenon the “California effect.” (Vogel 2001, 1995). This effect often results in what Vogel refers to as coalitions of “bootleggers and Baptists” in which very different groups with different motivations may coalesce to support the same cause. Important to this phenomenon, as Vogel demonstrates, is that such coalitions are durable precisely because they appeal simultaneously to very different interests. Hence Vogel’s story is not just about the standards – even though these play a prominent role – but also about developing widespread support for such initiatives. To be sure, and as we discuss below, Vogel says it is equally important to understand when economic integration leads to the “Delaware effect” – where companies flee to those jurisdictions with the most lax taxes, regulations, and environmental, social standards. In considering these lessons for legality verification, it is important to develop hypothesis that draw out the various separate focal concerns for scrutiny.

**HYPOTHESES**

*Potential for large coalition*

**H1: Legality verification creates potential for widespread global coalition**

The logic behind this hypothesis is that most forest stakeholders domestically and globally have a strategic self interest in supporting legality verification. Only two key groups are excluded: those undertaking illegal logging practices and those government officials who receive informal payments for permitting such activity.

*Implications for rules development*

**H2: The rules governing legality verification must be limited in scope**

The more legality is defined broadly to include environmental regulations or sustainable forest management, the more likely the bootleggers and Baptists coalition will be reduced. If one or two key countries decide to walk away from this coalition, there is a strong risk that it will serve to segment markets rather than help to transform practices.

**H3: The rules governing legality must reinforce, rather than detract from, national sovereignty of the participating states**

If developing country governments are “forced” to undertake efforts they otherwise would not have and to which they might be opposed, they will be unenthusiastic and tentative members of the broad coalition. If legality is focused on helping such governments reinforce their own domestic concerns but currently have difficulty achieving, then such global coalitions will be embraced for their help in reinforcing rather than detracting from national sovereignty.

**H4: When enforced, the rules governing legality cannot be so broad as to require that legality verification include whether a forest manager adheres to an individual country’s own environmental or social standards**

The logic behind this hypothesis is that if legality requires that verifiers assess whether forest managers have adhered to a country’s own environment and social regulations, then those
countries with higher regulations – such as those with mandatory no harvest buffer zones – will be put at a competitive disadvantage to competitor countries with no such rules in place. We would expect in such a situation a downward pressure on governments with high environmental regulations to reduce their domestic standard to achieve market access – which could inadvertently create a Delaware effect.

**H5: The rules governing legality should only include those practices that every government would have a self interest in pursuing.**

There are a range of forest management practices that are in the strategic self interest of most governments including requiring a level of cut that allows harvests “in perpetuity”, the development of associated management plans that encourage reforestation, as well as eliminating theft and promoting payment of taxes. These rules would be enhanced by the adoption of legality verification because they would be beneficial laws for the governments and stakeholders.

*Implications for supply chain tracking*

**H6: The most important role for legality verification is whether and how it can promote tracking of forest products along global supply chains.**

Implementing tracking systems of global forest products serves to create necessary preconditions for both eco-certification and domestic good forest governance. These more ambitious efforts, which cover a wider ranging set of rules and standards, could both benefit from legality verification developing supply chain tracking. This is important since its seems counterintuitive that main global certification system that was seen as “imposing from outside” standards on domestic countries, and efforts to promote internal good forest governance, might both be promote and encourage synergies through supply chain tracking.

**H7 Following the development of supply chain tracking, the cost of any increases in standards will be borne by customers not firms**

The logic behind this hypothesis is two-fold. First, strategists want to ensure that their decisions draw on a range of strategic self interest to develop such a coalition. Second, they need to focus efforts on those technological solutions and global systems that appear most likely to advance global tracking in ways that don’t just separate markets (Johnson 2010; Moiseyev et al. 2010) but have some effect on reducing illegal logging. The more strategists focus on these issues, and the more supporters recognized that prices are then likely to rise because supply has been reduced, the more likely those gaining higher rents will want to contribute resources to ensuring such tracking. Such an effort hence requires simultaneous attention to maintaining an interest on the part of legal harvesting companies to developing tracking that will deliver in reducing supply and hence increasing prices, while also paying attention to hastening technological innovations that often go uncovered.

**INDIRECT EFFECTS**
NSMD global certification

So why would a focus on building tracking of supply chains be more important than direct impacts of legality verification itself? We now turn to discuss two important efforts: certification and FLEG which while strongly supported, have been unable to achieve the results their supporters and creators had originally intended. Since a key barrier to promoting forest certification was the difficulty in building global tracking systems on the one hand, and price premiums on the other hand, it seems plausible that efforts to build global forest certification capable of ameliorating tropical forest degradation would occur after, rather than before, the institutionalization of legality verification. This is because once global tracking is in place standards could be expanded in ways that reward, rather than penalize, participating firms.

H8: Legality verification is a prerequisite for global forest certification because it permits standards to be raised that reward, rather than penalize, participating firms.

The logic behind this hypothesis is that currently, in the absence of strong price premiums and market signals, firms in the tropics reason they cannot support certification they will bear the costs rather than customers and consumers. However once global tracking is in place and institutionalized, then at this point raising standards will be borne through customers as higher prices, rather than firms. Such change in logic for broader global certification systems is only achievable once supply chain tracking of legality was entrenched.

Domestic Forest Governance

Likewise we expect domestic forest governance efforts to be enhanced through legality verification because economic incentives, owing to supply and demand functions discussed above, are more likely to develop. Though such incentives will be weighed against other factors such as corruption and capacity challenges, all else being equal we would expect legality verification to provide long-term incentives for promoting “good forest governance.” Whereas legality efforts are relatively narrow, domestic forest governance initiatives are broad and address a range of issues relevant to forest management.

H8: Legality verification provides long-term incentives for baseline governance that may “tip the scales” in support of domestic policies and coalitions seeking to promote “good forest governance”

III. What Has Happened: Consumer and Producer Dynamics

Since we are currently in the midst of the evolutionary and intersecting dynamics our framework is attempting to uncover, it is impossible to empirically assess whether the intersecting effects have occurred. However, we can review current efforts to assess whether they are compatible with our framework and whether revisions or additional insights can be
gleaned. We do so by first tracing the emergence of legality verification in the European Union and the United States. We focus specifically on definitions of legality that are emerging, why this is so, and reflect on what our hypotheses would say about the implications of this definition for support in developing countries. We then briefly review the responses that have occurred in Southeast Asia including overall trends and support in Malaysia and Indonesia.

a. Legality Verification: the EU and US Approach

From as early as 2001, NGOs were actively pointing to the discrepancies in the timber trade as a sign of large scale illegal activity and calling for something similar to the Lacey Act, which at the time made the importation of illegally procured animal products, a criminal offense in the US (Environmental Investigation Agency 2001). At the same time, the FAO made illegal logging one of their centerpiece issues by devoting significant attention to it as part of their State of the World’s Forests report (Food and Agriculture Organization 2001). Perhaps unsurprisingly, with heightened attention on the Lacey Act as a US legal tool, the amendment of that law to include plant products would become the central policy intervention to reduce illegal logging. However, in Europe a more technocratic approach was developed with the EU initiative on Forest Law Enforcement, Governance and Trade (FLEGT) which was approved for negotiation with partners in 2005 (Council Regulation (EC) on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, 2005). In both cases, the central effort would be to make the ‘Legality Verification’ the centerpiece of international efforts to combat illegal logging.

Given the abstract nature of legality verification, stakeholders with different strategic interests have varied both in support, and whether they support broad or narrow definitions. What is important for forest legality verification and which stands in contrast to verification systems such as CITES (Convention on International Trade in Endangered Species) or the Nuclear Test Ban Treaty (NTBT) which focuses on ensuring compliance between states, legality verification operates with the active inclusion of the private sphere of the international timber industry, environmental NGOs, local communities in addition to states.

The US approach to legality verification has been undertaken under the auspices of an amendment to the US Lacey Act which had focused on stemming imports of illegally harvested fauna to include flora. The EU, until recently, has instead worked to reach Voluntary Partnership Agreements (VPA) for constructing a series of bilaterally negotiated treaties regarding the technical details of legal verification such as a mutual definition of legality and the development of a secure licensing system (Brown 2006). Yet, inspired by increasing support of the Lacey Act within developed nations, and its ability to cover all countries simultaneously, the EU parliament took one further step in early July 2010 by requiring that importers act in “due diligence” to avoid importing illegal timber.

i. The Politics and Practice of Defining “Legality”
The amended Lacey Act and the EU parliament regulation do not define legality per se. Both state that any violation of foreign government’s laws is ‘not legal’. The EU text demonstrates this openness nicely, “In the absence of an internationally agreed definition, the legislation of the country where the timber was harvested, including regulations as well as the implementation in that country of relevant international conventions to which that country is party, should be the basis for defining what constitutes illegal logging. (Obligations of operators who place timber and timber products on the market, 2010)” However, it is this same broadness which is crucial for the operation of these statutes. By taking this position it leaves the regulation immune to WTO rebuke as well as avoids the thorny process of bilateral negotiation.

The EU’s Voluntary Partnership Agreement’s (VPA), which characterized the bulk of EU efforts until the EU Parliament’s legislation above, undertakes a different approach to defining legality. In 2005 the European Commission was given the mandate to negotiate on behalf of the entire European community in developing Voluntary Partnership Agreements with select countries. The aspiration of these negotiations was for eventually “Imports into the Community of timber products exported from partner countries shall be prohibited unless the shipment is covered by a FLEGT license (Council Regulation (EC) on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, 2005).” This approach has developed five key features. The primary components of any VPA are a legality standard, establishing a chain of custody, a verification system, determining who in the partner country is the license issuing authority, and independent monitoring (European Commission 2003). Each of these attributes of the VPA requires substantial negotiation and each of the ten nations which have entered into VPA negotiation have their own challenges in establishing a completed VPA.

Each bilateral negotiation results in a detailed definition of legality which requires ‘multiple stakeholders’ to agree. As of July 2010 Cameroon, Republic of the Congo (not Congo DRC), Gabon, Malaysia were considering penultimate drafts while Ghana and Indonesia have all stakeholders agreed upon a definition of legality. In both of these countries there are marked similarities in the types of criteria and indicators which demonstrate legality. Both require that a logging operation can demonstrate local community benefits, transportation documents and some type of cutting permit (Oduro and Gyan 2007; Standard of Timber Legality Verification: Indonesia 2007). Also, there are some idiosyncratic differences as well, Indonesia requires equipment permits for logging machinery while in Ghana stocking volume data must be determined prior to the cut (Ibid and Ibid). However, the most informative differences revolve around the manner of establishing rights to cut. In Ghana the definition requires, “There is transparent competitive bidding for timber rights allocation in the form of timber utilisation contracts (TUCs) (Oduro and Gyan 2007).” Furthermore, salvage permits and stumpage fees apply to the operations as part of the definition indicating a central role of taxation upon forestry for it to constitute legality in Ghana (Ibid). In a very different variation, Indonesia establishes different regulations based upon cutting on private land, community-based forests and state land not actively under management (Standard of Timber Legality Verification: Indonesia 2007). The central mechanism for establishing these different rights fails under the Indonesian government making timber concessions, but this mechanism has been shown be flawed by unclear division of powers within the government (Casson and Obidzinski 2007;
Lawson and MacFaul 2010). This suggests that the definition of legality for Indonesia may allow for wood to be legal and illegal simultaneously based on which interpretation of governing authority is given precedent.

While the specific definitions of legality range from broad to narrow, this same trait represents the approach to administering the different approaches. In the case of the Lacey Act and the EU Parliament regulation, the emphasis is on importer focused due care/ due diligence standard, while the VPAs create a strict licensing scheme to be primarily handled on the exporting country side.

This question of “due care” is crucial for understanding how the Lacey Act behaves as a governance mechanism. The cost of not following ‘due care’ is $200,000 USD, marginal considered that a seized shipment could run into millions of dollars of lost material (Environmental Investigation Agency 2008). However, the nature of the “due care” requirement and the amended Lacey Act is that it creates uncertainty for the companies. Accordingly, the advice to companies for navigating the Lacey Act requirements revolves around ways to reduce risk. Lawyers note that a key action is to avoid “red flags” such as abnormally low prices or offers to sell product for cash without paperwork (Asner and Pickering 2009). As the Lacey Act has ‘strict liability,’ innocence is determined only by the facts of whether illegal activities occurred along the supply chain (ibid). Other plausible strategies to reduce risk include developing long term relationships with suppliers and visiting their production facilities (Environmental Investigation Agency and World Resources Institute 2010; Negley April 20 2010). Additionally, a key suggestion is the adoption of timber certification as it would provide documentation for the timber (ibid and ibid). However, it is important to note that certification would not guarantee that no prosecution would occur. As the standard for liability is “fact based” not “document based,” the certification would go a long way to establish ‘due care’ but would not prevent prosecution (Environmental Investigation Agency and World Resources Institute 2010). These pieces of advice help a company avoid prosecution and mitigate damage in the case of a seizure, but the implementation and enforcement of the Lacey Act is still developing.

Given the EU Parliament regulation was inspired by the Lacey act, it is not surprising that it takes a similar approach. In their due diligence standard they specifically cite three elements needed for risk management: “access to information, risk assessment and mitigation of the risk identified (Obligations of operators who place timber and timber products on the market, 2010).”The idea is that importers now must be accountable for the goods which they bring into the EU. This accountability will be managed primarily through documentation requirements, however, at this time the regulation is too recent and member countries have not voted on the specific details of their versions. The strength of the regulation itself remains unclear as it lacks a minimum fine and leaves it open for each country to create their own procedures for enforcement and costs. Yet, with the fixed rules about documentation it appears that at a minimum this statute will greatly enhance the tracking of wood products.

ii. Who supports and opposes legality verification in consumer states?
The 2008 amendment of the Lacey Act was born from a coalition of environmentalists and timber industry officials jointly approaching two legislators in Oregon, Congressman Blumenauer and Senator Wyden. In the case of the Lacey Act, illegal logging was a prime target for both domestic industry officials from groups such as American Forest & Paper Association (AF&PA) and Hardwoods Federation; and environmentalists such as TRAFFIC, World Wildlife Fund (WWF), World Resources Institute (WRI) and Environmental Investigation Agency (EIA) (Wrobleski 2007; World Wildlife Fund and TRAFFIC 2007; Environmental Investigation Agency and World Resources Institute December 4 2008; Barringer 2007). Both sides saw the Lacey Act as a powerful regulatory tool which was already poised to apply to plants and had been established as applying to foreign trade and global supply chains (Ottitsch 2010). Furthermore, both had recognized that amending the Lacey Act mutually served their interests. “AF&PA and its members are doing the right thing and believe that any reduction in illegal logging will assist our legal products in competing against products manufactured from lower-cost illegal material.” (Wrobleski 2007) Cassie Phillips, vice president in charge of Sustainable Forests and Products at Weyerhaeuser stated, “The Lacey Act will protect the forest-products industry’s global reputation by helping eliminate illegal logging, which in some places is carried out by organized crime, spreading violence and deforestation in some developing countries...It will cost the global industry economically, but we will all gain in the longer term as illegally sourced wood is removed from the marketplace (Environmental Investigation Agency and World Resources Institute December 4 2008).” However, this is not to say all parties were welcoming the amendment of the Lacey Act with open arms.

There were two groups in opposition. First, Monsanto and BIO (Biotechnology Industry Organization) stated that special exceptions were needed so as to allow for the transportation of select plant samples into the US for potential biotechnology issues (Khatchadourian 2008)\(^8\). This was resolved by the amendment including a special exception for “scientific” samples and crop cultivars. The second major opponent was a group of small forestry industry companies which had a host of concerns. A coalition formed under the leadership of the International Wood Products Association (IWPA) which claimed to represent 745,000 small businesses who were worried about the impact of the amended Lacey Act (Forester 2007). This coalition claimed that the additional documentation requirements were burdensome and wished to be granted special “innocent owner” exceptions. They also suggested that the rules were unclear and timber as a product is too hard to track. While this coalition would concur that illegal logging is an ill, they were worried that they would face new costs which would be easier for the large timber companies to bear whereas they would not be able to easily source their timber (Ibid)\(^9\). Despite these objections, the amended Lacey Act passed both houses of Congress and be signed into law to become the foremost regulatory tool in the US for dealing with ‘demand’ for illegal timber products\(^10\).

In the EU Parliament the 2010 regulation passed with much fanfare. With 644 votes in favor, 25 votes against, and 16 abstentions; it seemed clear that the bill had widespread appeal. The only gathered opposition which opposed the bill was the United Kingdom wing of Europe of Freedom and Democracy (EFD) broke ranks with the rest of the EFD to oppose the bill (Votewatch.eu 2010; Ottitsch 2010). In fact, reviewing the debate on the bill shows all members
speaking in favor and lauding the broad public appeal of the bill (Girling 2010). On the other hand, small forest owners are concerned and at this point oppose both VPAs and the EU legislation (and subsequent commission directive), as they are concerned that they, too, will be subject to further burdensome regulations as a result (Ottitsch 2010).

iii. Who supports and opposes legality verification in supplier states?

Responses in supplier states have been mixed, though support and strategic positions has changed dramatically over time. Key strategic differences within Southeast Asia can be explained by a country's position on global supply chains from timber producer, to, manufacturer, to importer (Ottitsch 2010; Wenming 2010). While it is beyond the scope of this paper to offer a systematic assessment, we identify key themes that have emerged and shaped support or opposition to forest legality verification in two key forest producing countries: Indonesia and Malaysia.

Indonesia

Both the approach to the US Lacey Act, and the EU VPA negotiations, appears to have been strongly influenced by pre-existing efforts of the Indonesian government to promote forest legality. Following domestic FLEG efforts noted above, the Indonesian government experimented by creating the Badan Revitalisasi Industri Kayu (BRIK, Indonesian Institute for the Revitalization of the Timber Industry) which was charged with monitoring and verifying the legality of timber. To accomplish these objectives, ETPIK issues a certificate of legality to forest companies which provide all required documents, including transportation permits. However, the ready availability of these certificates on the black market raises doubts about the effectiveness of this approach (Colchester 2006).

Hence domestically there was an interest in attempting to find some type of solution to overcoming enforcement challenges that legality verification might help overcome.

The Lacey Act

There appears to be widespread support for the US Lacey Act among forest stakeholders and the industry because it is seen both as reinforcing baseline governance while treating all nations the same. It also provides a mechanism for gaining access to US markets in ways that Indonesia views as much easier to meet than demands for certified forest products or boycott campaigns: the former of which were seen as imposing far too many costs than benefits, while boycotts were seen as protectionist, blunt and discriminatory. The Lacey Act approach also appeared as much more lean and efficient than the EU VPA process that, like ITTO and certifications before it, once again required extensive negotiations with domestic and global stakeholders that might yield additional unanticipated demands or costs – as well as potentially challenging through the back door national sovereignty. Though there remains uncertainty about how US federal agencies implement the act are still of concern, it appears that the Lacey act approach is gaining traction with many Indonesia forestry officials. This is somewhat ironic in that the very coalition
of bootleggers and Baptists in the US that championed the Lacey act are usually met with scorn by exporting countries as protectionist (Cashore 1997), in this case these efforts are considered by key stakeholders to be reinforcing sovereignty and providing market benefits, rather than losing market share. Certainly more research needs to be undertaken to assess whether part of the support for the Lacey Act in Indonesia is related to differing domestic coalitions who are either attempting to maintain their access to informal payments or those who are trying to weed out what is asserted to be widespread corruption.

EU VPAs

At the same time, the Indonesian approach to negotiating EU VPA agreements (Colchester 2006), while understandably cautious, was the first in SE Asia to draft a complete agreement framed within timber legality assurance systems (TLAS). As Ahmad Maryudi explains, the Indonesian TLAS (SVLK, Standar Verifikasi Legalitas Kayu) was submitted to the Ministry of Forestry following five years of negotiations in the fall of 2008. The lengthy process was in part owing to debates about whether the agreement would merely cover distribution and trade of timber products, or cover broader forest management questions include planning, execution and harvesting as well. In addition, a key point of contention which may reflect different competing interests domestically is that EU negotiators asked that Indonesia agree to have agreed to third party verifiers for monitoring legality as part of the VPA agreement. This is a fascinating development in which state actors maintain full authority for creating and developing rules, but who voluntary give up enforcement to outside parties in an effort to bypass potential corruption or uncertainties about implementation (Cashore et al. 2010) This request was agreed in August 2009, paving the way for the formal agreement. Approving the SVLK and signing the VPA as Maryudi has argued, “appears to hold potential to working in tandem with local institutions, to develop a durable and effective institution for reducing illegal logging in the country”

Malaysia

In contrast to Indonesia, Malaysian has been slower, but open to promoting legality verification. Arguably one of the impediments to Malaysia’s participation is that while it has received sustained international scrutiny, any domestic forest agencies feel that its longstanding land use (Abdullah and Hezri 2008) policies, protected forests, and gazetted forest lands, make its domestic policies one of the most advanced and sustainable in Southeast Asia. Hence, Malaysia does not have the same domestic political crisis regarding forest legality as its counterparts in Indonesia. As the most economically advanced of Southeast Asian nations, it does not suffer from the same type of governance challenges as do other countries. It is arguably in part for these reasons that international scrutiny in Malaysia has focused on its widespread conversion of natural forests in Borneo and Peninsular Malaysia to Palm Oil plantations – an altogether different problem than forest legality verification. Other hurdles also confront efforts to develop forest legality. First, the industry remains skeptical that a price premium will ever materialize and with the EU unwilling to formally commit to higher prices for
access to its markets, stakeholders fear that verification may cost countries more than the
benefits that will accrue. In addition, and reflecting federal jurisdictional issues governing forest
management, differences across sub-national jurisdictions are slowing negotiation. While the
11 peninsular states and the state of Sabah in Borneo Malaysia are now supporting efforts, the
state of Sarawak is hesitating for two key reasons. First, stakeholder bodies have sought to
expand definitions of legality to include indigenous land claims, which would significantly raise
the costs of implementing forest legality. Second, Sarawak exports almost nothing to EU and US
markets, thus rendering its calculations for compliance a negative one. Nonetheless, progress
has been made in signing a VPA. EU commitments to provide resources for capacity building
may in part explain ongoing advances. At the same time, hurdles in developing legal
verification, and skepticism about just what it can and cannot do, remain (Freezailah 2010;
Johnson 2010).

IV. Conclusion /discussion

The focus on illegal logging as a key global forestry problem definition – something many
stakeholders rejected as being too weak just 20 years ago- and the solution to promote legality
verification through global supply chains, has confronted practitioners and scholars of global
forest governance. Do these efforts illustrate the inability of broader and more comprehensive
efforts to address global forest degradation, or are the beginning of a “progressive
incremental” ratcheting up of forest standards and authoritative governance?

This paper has attempted to shed light on the theoretical issues and empirical observations
with which to begin a systematic assessment of these questions. What seems to be clear, and
to which most stakeholders agree, is that the direct effects of legality verification, while
important, will not by themselves be able to address the plethora of challenges related to
global forest management. However, the ability of legality verification to intersect with private
certification systems on the one hand, and domestic “good forest governance” efforts on the
other hand, seems worthy of further analytical and empirical attention. Such a focus, we argue,
needs to be reoriented towards an assessment of how widespread coalitions around legality
verification might be nurtured, and the effects of such coalitions in building global supply chain
tracking of legally harvested forest products. This is because once a global system of supply
chain tracking is entrenched, important intersecting effects could be expected to occur that
would institutionalize and reinforce private certification and domestic forest governance.

On the private certification front, global supply chain tracking has emerged as a prerequisite
with which to promote responsible forest management through global supply chains. However,
reliance on customer and consumer support though emerging and important, has been
confronted by the significant costs and hurdles confronting firms and suppliers, who reason
that the economic incentives for doing so often fall short of the costs. However and somewhat
ironically, a focus on weeding out legality (graph 1) may provide broader incentives to build
such tracking systems because weeding out illegal supply will be expected in to increase prices
— indeed it was estimated that prices could go up by as much as 15% (Seneca Creek Associates and Wood Resources International 2004). Recognition of this explains the much greater coalitions that have emerged to address forest legality — some of whom are vehement opponents over whether to support the FSC and PEFC certification programs.

What is important in this context and which has significance for studies of institutional fit and smart regulation, is that greater care must be placed on understanding whether intersection is about such structural issues as managing supply chains, how to nurture coalitions of support, and/or policy development. In this case it appears that a focus on widespread policy development may serve to undermine the long term potential of legality verification to intersect with private certification. This is because once global tracking is relatively robust and complete, we would then expect certification to be much more economically palatable — indeed even beneficial — as standards could be increased in a way that rewards, rather than penalizes participating firms — as costs would now be borne by consumers and customers rather than producers.

On the “good forest governance” front, we would expect legality verification to similarly reinforce such efforts for two reasons. First, economic incentives that might “tip the scales” between domestic efforts to promote good forest governance over those firms and officials who, owing to corruption or weak enforcement of social and environmental standards, benefit from the lack of effective governance, can be seen as positive, if insufficient. Second, to the extent that global efforts to promote legality verification come with technological and capacity enhancing efforts — something the EU has committed to doing — there could be a more significant and indirect long term effects in reinforcing domestic good forest governance efforts. Importantly, and unlike global certification or global forest convention efforts, legality verification, if consistent with the hypotheses above about rule development, could be seen as reinforcing, rather than detract from, national sovereignty. Such evaluations alone would go a long way to addressing what were seen as hurdles in developing global approaches to responsible forest management.

That legality verification can been seen as inadequate for its direct effects, but having significant potentially for reinforcing both global private certification and domestic good governance is reason enough for political scientists to give this intervention careful and sustained scrutiny. The lessons for precisely how intersection might occur will have importance beyond the forest sector, as well as informing strategic choices over developing and nurturing durable institutions with which to address longstanding environmental and social challenges governing global resources management.
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Obligations of operators who place timber and timber products on the market,.


The use of the term “ideal type” does not imply that it is preferable over others, but rather signals an efforts to develop a consistent conceptual understanding of the phenomenon with which to theorize and assess how such efforts work in practice.
China has had strong demand for some timber products, but the vast majority is supplied from internal plantation timber and Russian Far East softwood. There is really no domestic demand in China for tropical hardwood (which is the focus of the “good forest governance” efforts). China just gets in the mix as a supplier and manufacturer.

Owing to time and space constraints this section will present overall trends that appear to be emerging, while future revisions of this paper will, following analysis of research conducted in Malaysia and Indonesia in the summer of 2010, provide a more detailed and exhaustive account.

Sur has defined verification systems as “…a process covering the entire set of measures aimed at enabling the Parties to an agreement to establish that the conduct of the other Parties is not incompatible with the obligations they have assumed under that agreement.”

These differences in simply what constitutes legal timber raises interesting questions for the future of the FLEGT process as it aims itself towards greater private industry and NGO involvement as well as the eventual establishment of regional FLEGT agreements. The future of VPA agreements is still somewhat unclear and different evolutionary pathways exist regarding whether they can lead to a ‘racheting up’ of standards. An example of a possible direction is the Rainforest Alliance’s SmartWood program has launched generic standards for Verification of Legal Origin (VLO) and Verification of Legal Compliance (VLC) (Rainforest Alliance 2010; Rainforest Alliance 2010). The aim of these standards is to replicate the method taken by certification systems where individual country standards are built by modifying a generic or global standard (Donovan 2010). Thus, the VLC acts as the strongest standard of legality, representing all of the SmartWood principles of legality which includes social and environmental expectations; the VLO standard would represent the more modest claims related to the payment of fees, legal right to harvest and chain of custody (Ibid). While there is no governing authority regarding third party certifiers, the ideal of this approach is for third party auditors to directly take part in the governance of forest resources. Rainforest Alliance suggests that they should hold such a role because mechanisms such as FLEGT are not free from conflicts of interest on the part of participating governments (Donovan 2010). This is an ironic suggestion; the for-profit certifier suggests that they should have a larger role in development of legality verification by questioning if the approach being taken is corrupted by love of saving money (ibid). This serves to again highlight the universal problem of legality verification brought up by Sur, there is a balance between the quality and depth of certainty and at what point they would “be too costly and too intrusive and would constitute an intolerable impediment to the normal functioning of the State (Sur 1991).

While this limitation is important for understanding the role of verification systems, it is not a crippling problem as verification remains one of the central interventions available to deal with international law.

Of all the countries in VPA negotiation, only Ghana has agreements covering all of the dimensions but it has not yet began actively delivering ‘legality verified’ timber.

The Ninth Circuit defined due care as “Due care means that degree of care which a reasonably prudent person would exercise under the same or similar circumstances (APHIS 2009).”

Consideration of this issue leads to the conclusion that the biotechnology industry was requesting special exception to be allowed to transport illegally cultivated plants. In the article by Khatchadourian the industry officials explicitly state they obey all laws, but it is an immediately onerous acknowledgement to suggest that they require exemption to the Lacey Act.

While the small business owners are easy to sympathize in this case, their claims are not well founded. The additional paperwork which the amended Lacey Act adds is a brief document, PPQ 505, which asks for the scientific species name, monetary value, country of origin and the volume imported. Those not involved in getting the products through customs face no additional paperwork requirement. As for the burden of “due care,” it is established that “knowing” is not an equal standard for all parties. Thus, the small owners are still vulnerable to loss of illegally harvested products in their possession but they are much less vulnerable to the more severe penalties in the Lacey Act. Also, the difficulty in tracking timber is resolved in the “due care” requirement as it asks they take reasonable precaution when dealing with “red flags” which amounts to not participating in suspicious activity. None the less, their objections should be considered carefully. If the Lacey Act amendment effectively restructures the timber supply chain then the small scale businesses would face far greater uncertainty as they could be more vulnerable to changing market conditions, especially if these changes lead to favoring more capitaly enriched companies who can deal with large secure suppliers. If this came to be, the Lacey Act could lead to
unintended consequences of further centralizing the American timber industry in the hands of large scale businesses.

In the US timber industry the language of dealing with illegal logging, ‘demand’ side usually connotes enforcement within the US while ‘supply’ side usually denotes preventing the violation of laws within the foreign source of the timber (Forester 2007)

Of course, this regulation now has to go to each member state for ratification and perhaps at this stage the level of enthusiasm will appear in the form of how stringent the penalties and requirements will be

This section draws heavily on (Cashore et al. 2010), especially the box by Ahmad Maryudi. This section also draws on preliminary analysis of research findings from officials with officials in Malaysia in Indonesia conducted in the summer of 2010.

This section will be significantly revised following more systematic analysis of research conducted on these cases in July and August 2010.