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PUBLIC AND PRIVATE REGULATION OF THE FORESTRY SECTOR: THE CASES OF THE UNITED STATES AND CANADA

Общественное регулирование обычно рассматривается как одно из основных прав государства. Это положение восходит к Вестфальской концепции национального суверенитета. Однако в наши дни мы видим подъем наднационального и частного регулирования, которое дополняется и таким образом заполняет пробелы, имеющие место в рамках общественного регулирования. Целью данной статьи является освещение двух различных систем общественного регулирования лесного хозяйства в США и Канаде. На этом основании предлагается рассмотрение этого поля регулирования на базе проведенного анализа современного транснационального и частного регулирования как средства дополнения и представления национального суверенитета. В конечном итоге, изложенные основные положения использованы при рассмотрении вопроса российского лесного сектора как актора, имеющего наибольшие масштабы в современном мировом лесном хозяйстве.

Ключевые слова:
гражданское общество, лесное хозяйство, окружающая среда, правительство, право, развитие, регулирование, сертификация устойчивость, транснациональное частное регулирование, управление.

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Introduction and background

Governmental regulation is not a new concept. Forms of government oversight date back thousands of years, which range from tax collection to infrastructure developments [29]. However, modern explicit recognition of national sovereignty as a form of regulation can be traced to the 1648 Treaty of Westphalia, in which a number of states within Europe agreed upon a set of basic delimitations that granted control over their respective territories [15]. "…Westphalia refers to the peace settlement negotiated at the end of the Thirty Years War (1618-1648), which has also served as establishing the structural frame for world order that has endured, with modifications from time to time, until the present" [15, p. 312]. While modern-day world order is not like that of the 17th century, the underlying theme of national sovereignty has remained. National sovereignty plays a key role in the governance, surveillance and control of natural resources within a geographically defined territory. As the Industrial Revolution began, resource extraction became an ever-growing necessity and source of prosperity [1; 3]. Nations began harvesting their resources, in addition to those of their colonies, at an alarming rate. Deforestation became a major concern and many of today's industrialized countries have not, and will likely not, fully recover original forest coverage; for example, the 1900s Gold Rush in the United States witnessed massive deforestation as a consequence of major growth in the west-

ern regions of the country [16; 23; 38]. This is a concern that resonates today across the developing and in-transition world as these countries seek to access the world market and grow. The 1972 Stockholm Conference on the Human Environment was the first major world meeting to discuss some of these challenges and to promote the, "Preservation and enhancement of the human environment" [45]. It was not until the Brundtland Commission in 1987 in which the concept of sustainable development was adopted on a large scale. The primary result of the Brundtland Commission was the report, *Our Common Future* [28], which called for an international response to environmental degradation [47]; this led to the 1992 United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit, held in Rio de Janeiro, Brazil. This was the first world conference explicitly dedicated to preserving the environment and ultimately led to the creation of the United Nations Environment Programme [28]. Nonetheless, Principle number two states that,

"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction" [43].

This means that, ultimately, nation-states have final sovereignty over their territory as long as they do not cause explicit harm to other nations.

Further, UNCED failed to create a binding agreement to regulate forests and forest products, only managing to produce the "'Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of All Types of Forests' (the Forest Principles)" [9, p. 105]. It is in the absence of international treaties governing the sustainable use of natural resources that we, as citizens, are relegated to the governing practices of our respective countries. Some countries adopt stricter regulations regarding the sustainable harvesting, production, and consumption of products, while others exploit resources with limited concern for environmental responsibility. This can been seen notably in countries in which mass deforestation occurs, ranging from Brazil to Indonesia to Australia [23]. Deforestation is occurring rapidly in a number of countries, while others have significant resource potential, that, if fully exploited, could continue to cause irreparable harm to local and global ecology and biodiversity. Forests play a critical role in maintaining the Earth's atmosphere and appropriate chemical balance (Russian Federal Forestry Agency, undated). As forests cover approximately 74% of the world's landmass, deforestation creates biodiversity collapse and damage to the ecosystem [17]. However, forests also play a critical role in the economies and livelihoods of almost every state [17] with uses ranging from providing essentials such as heat, energy, and shelter to furniture and paper products. As the Rio Conference failed to create an international regulatory programme, it is up to nations and private regulatory certification programs to oversee the sustainable exploitation of wood products.

The purpose of this article is to first discuss public regulation of the American and Canadian forestry sectors, and then proceed to explain how transnational private regulation schemes are attempting to supplement and complement national forestry regulation policies. It will proceed in the following manner: first, the article will define and differentiate between public and private regulation, globally and then within the sphere of commercial forestry exploitation. Second, I will analyse the individual cases of the United States (U.S.) and of Canada through the lens of both public and private regulation. In light of these observations, I will turn to Russia, in which I will discuss its current situation as a major exporter of wood products, and where it falls in the public and private regulation scenario. These case studies will elucidate how different systems of forestry regulation operate, what public regulatory measures exist, how this encourages sustainable harvestry practices, and finally how alternative private systems have arisen as a complement and supplement to traditional governmental regulation.

Definitions

Public Regulation

As previously mentioned, governance is classically seen as an exclusive right of governments that have the authority to make the rules and to enforce them [1]. "'Regulation' is also used more broadly to cover any publicly imposed rules governing a firm or industry, especially safety and environmental rules" [35]. Constitutions and the foundations of societies are based on the delegation of power to certain political organizations. Internationally, it is the governments of respective nations that negotiate and agree or refuse to implement rules on the national level. In the

example of the Earth Summit, the participating nations agreed that natural resources would remain under the exclusive control of the respective nations in which the resources belong. Since there is a lack of international forestry regulation, international public organizations, such as the United Nations, will not be considered. This means that the only legally binding authority over forestland stems from nation-states, and to a certain extent, the supranational European Union over its members. As the nation-states are the main rule makers, different countries have different modes of operating and controlling forestland and wood production.

There are a number of public forestry governance systems [8] that can be broken down into three main modes of operation: first, some countries own the forestland, referred to as public land, as well as the companies that harvest the wood; these are known as state controlled, owned and operated enterprises. This ensures that the state has maximum control over all aspects of the line of production. The former Soviet Union operated on this principal before privatization began. The benefit is that the state maintains the largest amount of oversight; however, market-based, capitalist economies, as envisaged by Adam Smith [37], are in direct contradiction with this approach. Smith's idea was that, to ensure the greatest prosperity, it was necessary for the state to limit itself in all spheres of life, with a few notable exceptions, and let the *invisible hand* guide the economy [37]. This approach has the largest potential for sustainable commercial practices and conservation if the state so desires. However, it can be equally devastating if the primary concern of the state is full resource extraction with little to no regard for environmental safeguards.

Second, a middle ground between full state control and full privatization occurs when countries own the forestland, but lease this area to private companies, which are then granted production rights [8]. This approach can be beneficial because the state has final say over which areas may be exploited for commercial use, whilst allowing for private companies to oversee business operations. This means that it is very easy for a nation to designate conservation areas without having to acquire land from private owners. Some examples of this system include Canada, Russia, India, Nigeria, Australia and Switzerland [8]. One drawback is that there can be uncertainty over whether the sovereign power will grant commercialization permits. Despite uncertainty, state control over the extent of timberland exploitation can prove beneficial for protecting and safeguarding the environment.

Finally, some countries allow for private ownership of forested areas as well as the private production of wood products [8]. This scenario is the most traditional market-oriented approach and therefore, arguably, the most economically efficient. While regulations certainly exist even on privately controlled territory, there is no guarantee that these lands will be sustainably harvested, as there is no explicit legal obligation. Governments that adhere to this system, but wish to conserve habitats must own land that is explicitly dedicated for environmental safeguarding. This often comes in the form of national parks or wildlife refuges. This land is then generally entirely off-limits to commercial use. Nevertheless, this does not oversee the commercialized territories. The United States is the primary example of this system [8].

Often a country will employ a mix of these scenarios [8] by owning, for example, some woodland while allowing for the rest to be privately controlled. Other countries will own some companies, or parts of companies, whilst allowing for limited private oversight. All three of these systems still fall under the regulation of the nation-state since it is the sovereign entity that selects which system it desires. The cases of the U.S. and Canada demonstrate two different means of organizing and regulating the commercial use of forests.

Private Regulation

According to Abbott and Snidal [1], the pre-1985 era saw states maintaining exclusive use of the regulatory field. The pre-1985 era exemplifies the classic conception of governmental regulation. Resources under private management were still controlled under public parameters. The following decade witnessed a transformation in which companies started playing a larger and larger role in the creation of new rules and regulations; finally, the past two decades have seen non-governmental organizations (NGOs) begin to have greater influence [1]. There are two main categories of behaviour for non-state actors (NSAs) and NGOs, the first of which is political lobbying and participation in government-organized events. For example, the 1992 Earth Summit was the first time that NGOs and NSAs began to receive serious attention on the global scale [33]. NGOs have no explicit legal power during negotiations and lobbying, however, they are able to demonstrate the will of a group of individuals; further, they are able to represent other like-minded organizations in the pursuit of a desired goal. Often, "umbrella" organizations will participate in these conferences for

the purpose of uniting a large group of supporters under the same flag. This is beneficial for two reasons; from a practical standpoint, it is unrealistic for thousands of small NGOs to participate at a conference when one NGO could represent the ensemble; additionally, from a pragmatic viewpoint, the power of a large, unified group has greater sway [33].

The second area of activity for NSAs and NGOs is in the actual creation of new rules and regulations. This is known as *transnational private regulation* (TPR) and is the focus of the private regulation discussion within this article. This field, which now represents a multi-billion dollar industry, and growing at an extraordinary rate [23], is based on an understanding that NGOs create a set of rules to which companies voluntarily adhere. "Transnational private regulation (TPR) constitutes a new body of rules, practices, and processes, created primarily by private actors, firms, NGOs, independent experts like technical standard setters and epistemic communities [5, p. 20–21]." "Transnational" distinctly refers to cross-border affaires. This is an issue that occurs between and amongst countries. The word "private," as Cafaggi [5] has mentioned, refers to private actors and not the government. These actors can be local, international, for profit, non-profit, groups of like-minded individuals or standard-setters. The most prominent actors in this field are private companies and international non-governmental organizations. This means that we are in a situation of, as Jean-Christophe Graz and Andreas Nölke have stated, "Governance without government" [22, p. 12]. The individuals who oversee this process are not government officials, but private actors. A post-Westphalian world order is beginning to emerge as regulation is transferred to private authorities. This does not mean that the nation-state is obsolete as it still maintains ultimate authority. This field of transnational private governance has the implicit consent of the government to operate. "While the private dimension of governance refers to a process involving actors other than states, it also relies on an explicit or implicit *state recognition* " [22, p. 12]. This means that, if it so desired, the government could ban the practice of private regulation. Additionally, governments around the world have taken a greater interest in third-party certification programmes, ranging from participating in standard setting to mandates that public bodies procure products originating from certification organisations [30]. "Regulation" is the "governance" aspect of the field. As Cafaggi [5, p. 20–21] describes, it is the, "Body of rules, practices and processes." This means that rules are being determined not by the government, but by private actors. Enterprises or organisations that voluntarily adhere to this form of private regulation are subject to these rules.

There are currently over 400 different "labelling schemes," administered through various national and international NGOs around the world, that provide certification to companies wishing to adhere to stricter environmental and social responsibility standards [23]. While the effectiveness of these programmes at achieving their respective goals is not the purpose of this article, it is important to understand what they are trying to accomplish (for research relating to the effectiveness of TPR, refer to [4; 12; 13; 22; 49]). The remarkable growth of these organisations demonstrates the increasing power of private-private partnerships. One of the common critiques of these forms of regulatory schemes is the difficultly in verifying their activities and behaviour; in response to this criticism, umbrella organisations have arisen to oversee and regulate the regulators. One of the principal organisations is the International Social and Environmental Accreditation and Labelling Alliance (ISEAL), "Whose mission is to strengthen sustainability standards systems for the benefit of people and the environment" [25]. Like the organisations that it regulates, it is voluntary by nature, allowing organisations that have a vested interest in the benefits to join and thus receive certification. As this field continues to grow, governments, organisations, companies and individuals will become more conscious of its behaviour and inner-workings, thus providing an additional layer of oversight.

Transnational private forestry regulation

Transnational private forestry regulation arose from the failure of the Earth Summit in 1992 to establish an international treaty for the regulation of forests and wood products. Founded in 1993, the Forest Stewardship Council (FSC) was the first organisation to develop certification standards for wood products. The Programme for the Endorsement of Forestry Certification (PEFC) followed in 1999. These two organizations make up the vast majority of certified wood around the world. While the wood export industry of the world is valued at more than $233 billion, only 9% of the world's forests are certified; they are primarily held in the global north despite impressive resource potential in the global south in countries such as Brazil and the Democratic Republic of the Congo [23]. The FSC has been ISEAL certified, whereas the PEFC has not [26].

Transnational private forestry regulation seeks to fill the gaps or complement national forestry regulation to ensure sustainable harvestry practices.

"The major issues have included the following: Limits on clear felling, duties to protect old growth forests, duties to protect endangered species and habitats, the relationship between natural forests and plantations, limits on use of chemicals and genetically modified organisms, limits on the introduction of non-native species, duties to workers, duties to local communities, duties to indigenous peoples" [30, p. 63]; see also [20; 21; 34]*.

Due to a lack of national or international regulations regarding the explicit implementation of sustainable forest harvestry practices, these two organisations, acting independently and as umbrella organisations for national programmes, arose. To further understand the explicit cases of the United States and Canada, and the interplay between the realms of public and private governance, this article will analyse these two countries respective public sector forestry regulations, and then delve into the case of transnational private regulation as a means to supplement and complement the aforementioned.

The United States

Public

The United States is one of the world's largest producers and consumers of wood and wood products, including round wood, sawn wood, wood-based panels, fibre-furnish and paper and paperboard [18]. Of the approximately 304 million hectares of forest land, 70%, or 208 million hectares, is designated as timberlands [11]. "Timberlands are defined as forest lands used for the production of commercial wood products. Commercial timberland can be used for repeated growing and harvesting of trees" [11]. Revenue for the U.S. forestry industry totalled approximately $106 billion in 2012, or about 0.7% of the U.S. GDP, and currently employs about 1 million individuals [11; 39; 40; 48]. Despite being one of the largest forestry industries of the world, the United States is a net importer of wood products, resulting in a negative relative comparative advantage (RCA) [44]. While the United States is able to maintain a positive net export for certain categories of wood products, such as pulp, a strong domestic economy, particularly in the construction industry, ensures that it remains a net importer of wood products [44].

The United States employs an entirely privatized system of timberland ownership designed for commercialization. The 70% of U.S. timberland that is designated for commercial use is controlled and supervised by private commercial entities. The United States government, either federal or state, owns the remaining 30% of forestland. This land is maintained largely for the purpose of conservation through national forests, national parks, and individual state controlled territories or wildlife refuges, such as the Arctic National Wildlife Refuge (ANWR). A small percentage is retained for research purposes. The United States, therefore, is an exemplary case of a privately controlled system of forestry oversight for commercially designated timberland. The industry has a strong and well-coordinated core that is coupled with hundreds of thousands of tertiary private forestry organizations that provide additional structural support to the system [7]. The result is that the U.S. forestry industry is extremely sturdy, independent and resilient to outside influence. The structural makeup of the U.S. forestry industry places it into the category of the third system in which private entities principally own and exploit the timberland.

Despite private ownership, this does not mean that national or state-based forestry regulation does not exist. For example, in 1970, the U.S. Environmental Protection Agency (EPA) was established to implement environmental laws, including the Clean Water Act and the Clean Air Act [10]. This requires that forestry companies obtain permits to operate, even if the land is privately held, to ensure a certain level of environmental protection. The Lacey Act of 1900 banned the import, export, acquisition and transport of wildlife or plants protected under national and international law. "In 2008, the Lacey Act was amended to include a wider variety of prohibited plants and plant products, including products made from illegally logged woods, for import" (U.S. Fish and Wildlife Service, undated). Further, individual states may impose stricter environmental regulations for the protection of the environment and the population. While preventing illegal logging is one necessary element in ensuring sustainable harvestry practices, it is not explicitly dedicated to this concept. As long as the land is privately owned, clear-cutting, which is the practice of harvesting an entire swath of land without

* This is a brief and general summary of the forestry guidelines as laid out by the FSC®, PEFC® and other forest-based sustainability initiatives and is in no way legally binding. Please direct specific enquires to the respective organizations.

forest regeneration efforts or protection of its biodiversity, as well as the reaping of old-growth forests, is not unequivocally banned.

Private

In absolute numbers, forestry certifications, through the FSC or PEFC compliant national certification programmes, account for approximately 50,000,000 hectares, one of the highest in the world [23]. However, this represents only about 13% of national forest area, which is only slightly higher than the world average of 9.1% [23]. Further, two-thirds to three-quarters of all certified wood in the United States is managed under one of the PEFC national certification systems.

Cashore, Auld and Newsom's [7] seminal work on transnational private forestry regulation sought to compare the underlying features between five industrialized countries and regions, the United States, Canada (British Columbia), the United Kingdom, Germany and Sweden. Specifically, the work attempted to unveil and highlight the differences between these regions in granting pragmatic, moral and cognitive legitimacy to the Forest Stewardship Council [7]. Legitimacy, upon which Cashore et. al. [7] base their work, is broadly defined as, "A generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions" [42]. The authors pursued this goal by analysing the behaviour of forestry companies, third-party stakeholders and organisations as well as the structure of the forestry industry and a number of economic indicators, such as production, consumption, imports and exports. The authors sought to unveil the characteristics within each country that led to the decision to grant or refuse legitimacy of the FSC over the PEFC and other certification programmes, and to understand the differences between the five countries and regions in question [7].

Results of this study revealed a number of elements intrinsic to the U.S. forestry industry that not only created resistance to certification programmes in general, but also in choosing the FSC over other organisations. The main indicators were the structure of the U.S. forestry industry, strong domestic demand and close ties between the industry and individual state regulators [7]. Two main structural elements of the U.S. forestry industry prevented the FSC from penetrating deep into the market. First, the strong and well-coordinated core industry, for example the companies involved in the direct harvesting of lumber, meant that they were able to maintain unified resistance. While their size meant that they were easy targets, they were also more capable of opposing FSC advances. Further, the many fragmented, tertiary organisation, such as suppliers, added a level of complexity for the FSC [7]. Additionally, as the U.S. consumes the majority of the wood it produces, and imports the remaining share, it is resistant to external market demands [7; 23]. While strong demand exists oversees for certified products, such as in the European Union, the U.S. industry is relatively sheltered. Finally, according to Cashore et. al. [7], as of publication, there had been relatively little public dissatisfaction with unsustainable harvestry practices, leading to relatively little public regulation. Companies saw the investment in certification as ultimately risky with few clear economic benefits and limited moral encouragement.

Overall, the highly privatized U.S. forestry industry that is dependent on the domestic economy adheres to the traditional liberal-market mentality. Private ownership of timberlands and wood production allows for the free-market to take its course. There is little public regulation focused explicitly on sustainable harvestry practices. Timberlands that have been designated for private exploitation, versus nationally owned protected land, are relegated to the desires of the respective companies and consumers, and fall outside the domain of sustainability standards. While still in its infancy, this has led to a growing field of TPR, in which some companies have independently sought certification, proving that they have adhered to stricter environmental and sustainability standards. While this amount remains relatively small as a percentage of U.S. forestland, the absolute area remains noteworthy; this absolute total demonstrates that a market-demand does exist and that it is actively seeking to fill the gap between mandatory public regulation and environmentally conscious forest management. As the movement continues to grow [22], sustainable harvestry initiatives may take stronger root in lack of, or as a complement to, public regulation.

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