



Constructing a transnational timber legality assurance regime: Architecture, accomplishments, challenges[☆]



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ABSTRACT

The emerging transnational timber legality assurance regime comprises a set of interrelated policy instruments, both public and private, aimed at controlling trade in illegally logged wood and wood products. The potentially productive interactions among these instruments in the emerging forestry regime create prospects for engendering learning, stimulating cross-fertilization, and enhancing accountability. In this article, we analyze the EU's Forest Law Enforcement Governance and Trade (FLEGT) initiative, interacting with public legal timber regulations and private certification schemes, as the core of an emerging transnational experimentalist regime. An experimentalist regime of this type may provide a promising approach to addressing contentious transnational environmental issues like forest governance where there is no global hegemon to impose a single set of rules. However, experience with FLEGT implementation suggests that there are also a number of outstanding challenges to constructing an effective timber legality assurance regime, which if unresolved could undermine its promise. The argument proceeds in three steps, based on an exhaustive analysis of recent developments. First, we outline the architecture and promise of the emerging timber legality assurance regime. Then, we review key accomplishments to date. Finally, we examine the ongoing challenges facing this innovative regime as it moves forward, and consider how they might be overcome through the adoption of a more consistent experimentalist approach.

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1. Introduction

The transnational timber legality assurance regime comprises a set of interrelated policy instruments, both public and private, aimed at promoting sustainable forestry and controlling trade in illegally logged wood products. The potentially productive interactions among these instruments in the emerging forestry regime create prospects for engendering learning through positive and negative demonstration effects, stimulating cross-fertilization, and enhancing accountability. In this article, we analyze the EU's Forest Law Enforcement Governance and Trade (FLEGT) initiative, interacting with public legal timber regulations and private legality verification and sustainability certification schemes, as the core of an emerging transnational experimentalist regime. Building an experimentalist regime of this type may provide a promising approach to addressing contentious transnational environmental issues like forest governance where there is no global hegemon to impose a single set of rules (Overdevest and Zeitlin, 2012). However, recent experience with FLEGT implementation suggests that there are also a number of

outstanding challenges to constructing an effective timber legality assurance regime, which if unresolved could undermine its promise.

Defined in general terms, experimentalist governance is a recursive process of provisional goal-setting and revision based on learning from comparison of alternative approaches to advancing these goals in different contexts. Experimentalist governance regimes in their most developed form involve a multi-level architecture, whose four elements are linked in an iterative cycle. First, broad framework goals (such as 'sustainable forests' or 'legally harvested timber') and metrics for gauging their achievement are provisionally established by some combination of 'central' and 'local' units, in consultation with relevant stakeholders. Second, local units are given broad discretion to pursue these goals in their own way. These 'local' units can be public, private, or hybrid partnerships. But, third, as a condition of this autonomy, these units must report regularly on their performance and participate in a peer review in which their results are compared with those of others employing different means to the same ends. Where they are not making good progress against the agreed indicators, the local units are expected to show that they are taking appropriate corrective measures, informed by the experience of their peers. Finally, the goals, metrics, and decision-making procedures themselves are periodically revised by a widening circle of actors in response to the problems and possibilities revealed by the review process, and the cycle repeats. Experimentalist governance regimes are often underpinned by 'penalty default' mechanisms that induce

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reluctant parties to cooperate by threatening to impose sufficiently unattractive alternatives (Sabel and Zeitlin, 2012; de Búrca et al., 2013).

Experimentalist governance architectures of this type have become pervasively institutionalized across the European Union and the United States, covering a broad array of policy domains, including risk regulation, public service provision, and protection of fundamental rights (Sabel and Zeitlin, 2012). Transnational experimentalist regimes likewise appear to be emerging across a number of major issue-areas, such as disability rights, data privacy, food safety, and environmental sustainability (Sabel and Zeitlin, 2011; de Búrca et al., 2013).

Experimentalist governance architectures have a number of salient virtues. First, they accommodate diversity in adapting general goals to varied local contexts, rather than imposing uniform, one-size-fits all solutions. Second, they provide a mechanism for coordinated learning from local experimentation through disciplined comparison of different approaches to advancing broad common goals. Third, both the goals themselves and the means for achieving them are explicitly conceived as provisional and subject to revision in the light of experience, so that problems identified in one phase of implementation can be corrected in the next. For each of these reasons, such governance architectures have emerged as a widespread response to turbulent, polyarchic environments, where strategic uncertainty means that effective solutions to problems can only be determined in the course of pursuing them, while a multi-polar distribution of power means that no single hegemonic actor can impose her own preferred solution without taking into account the views of others.

Experimentalism appears particularly well-suited to transnational domains, where there is no overarching sovereign with authority to set common goals even in theory, and where the diversity of local conditions and practices makes adoption and enforcement of uniform fixed rules even less feasible than in domestic settings. Yet the very polyarchy and diversity that make experimentalist governance attractive under such conditions can also make it difficult to get a transnational regime off the ground. Thus, too many participants with sharply different perspectives may make it hard to reach an initial agreement on common framework goals. Conversely, a single powerful player may be able to veto other proposed solutions even if he cannot impose his own. Hence some kind of penalty default may be required to induce reluctant parties to cooperate in the construction of a transnational experimentalist regime.

One such penalty default is for a large jurisdiction like the EU (or the US) to impose unilateral regulations on transnational supply chains as a condition of market access. An obvious danger, however, is that such unilateral extension of experimentalist regulation will produce resentment and resistance by regulatory addressees in other countries, unless they are given a voice in shaping the standards they are expected to meet. Such one-sided extension may also denature experimentalism itself by cutting out the feedback loop between local learnings from rule application to rule revision. Hence some further mechanism may be required to unblock this impasse by opening up such unilateral regulatory initiatives to joint governance by affected parties in other countries.

Here the disciplines of the world trading system can prove helpful. World Trade Organization (WTO) rules permit member states to restrict imports in order to protect public health and the environment. But they also require states wishing to restrict imports on these grounds to ensure that their proposed measures are non-discriminatory and proportional to the intended goals, take account of relevant international standards, and consult with their trading partners to minimize the impact on affected third parties (Brack, 2013). These disciplines, when they permit such extensions at all, can thus provide a potential mechanism for transforming unilateral regulatory initiatives by developed countries like the EU into a joint governance system with stakeholders from the developing world, if not a fully multilateral experimentalist regime (Sabel and Zeitlin, 2011; Overdevest and Zeitlin, 2012).

The body of this article is organized as follows. First, we outline the experimentalist architecture and promise of the emerging timber legality assurance regime. Then, we review key accomplishments to date, such as the negotiation of FLEGT voluntary partnership agreements (VPAs) between the EU and developing countries, strengthening of civil society participation in forest governance, reform of existing domestic legislation, introduction of formal transparency requirements, diffusion of prohibitions against imports of illegally logged wood, and stimulation of the use of private third-party verified supply-chain tracking systems under public oversight. Finally, we examine the ongoing challenges facing this innovative regime as it moves forward, notably the practical difficulties and delays experienced by FLEGT VPA countries in developing Timber Legality Assurance Systems (TLASs) capable of meeting the EU's licensing requirements, and consider how they might be overcome through the adoption of a more consistent experimentalist approach. More specifically, we argue that rather than imposing an 'all-or-nothing' bar on the issuance of FLEGT export licenses, the EU should support continuous learning from success and failure by monitoring and rewarding incremental performance improvements at both national and firm levels through graduated market access. The analysis is based on an exhaustive review of recent policy documents, reports, academic studies, and presentations to international stakeholder fora, together with personal interviews with European Commission officials, NGOs, and staff from the European Forestry Institute (EFI) FLEGT Support Unit.

2. Architecture

Over the past decade, the European Union (EU) has created a novel architecture for transnational forest governance by advancing a combination of policy measures aimed at promoting sustainable forestry and discouraging trade in illegal wood and timber products. The ambitious vision behind this architecture, laid out originally in the 2003 Forest Law Enforcement Governance and Trade (FLEGT) Action Plan (European Commission, 2003), includes: 1) negotiating bilateral agreements with producer countries to achieve broad stakeholder participation in building institutions to promote sustainable forestry and assure the export of 'legal' timber; 2) supporting private industry and civil society initiatives to promote sustainable forestry and timber legality in developing countries; and 3) introducing legislation that makes it an offense to place illegal timber on the EU market and obliges trading firms to demonstrate 'due diligence' that they have not done so.²

This mix of demand and supply measures, public and private initiatives, and coordination between developed and developing countries set the stage for the creation of a transnational forest governance regime with a number of innovative features. A number of these innovations concern the centerpiece of the legality regime, the bilateral voluntary partnership agreements (VPAs) negotiated between the EU and timber-producing developing countries. Others concern the way this ensemble of policy measures may stimulate the stepwise construction of a transnational forest governance regime through interactions between its individual components (the FLEGT VPAs and the EU Timber Regulation), private certification and legality verification schemes, and public legal timber requirements in third countries. Together, they constitute the core of an emergent experimentalist governance architecture, based on extensive participation by civil society stakeholders in the establishment and revision of open-ended framework goals (VPAs aimed at promoting sustainable forestry and controlling illegal logging) and metrics for assessing progress towards them (legality standards and indicators) through

² The EU FLEGT Action Plan also encourages member state public procurement policies to require evidence of legality. National green procurement policies have contributed significantly to the development of the timber legality regime, but space constraints do not permit us to analyze them further in this article. For the emergence and development of the FLEGT Action Plan, which was driven by a coalition of environmental NGOs, think tank researchers, national governments, European Commission officials, members of the European Parliament, and timber trade organizations, see Overdevest and Zeitlin (2012; forthcoming).

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