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Discerning the Forest From the Trees: How Governments Use Ostensibly Private and Voluntary Standards to Avoid WTO Culpability

Lawrence A. Kogan*

I. INTRODUCTION

A. The Purpose of This Article

The purpose of this article is to explore whether national and/or regional governments can be held responsible under the General Agreement on Tariffs and Trade (GATT)/World Trade Organization (WTO)¹ law if it can be proven that their official policies and activities directly or indirectly permit, support or otherwise influence the adoption, promulgation and/or maintenance of ostensibly private and voluntary standards that result in discriminatory trade practices or in the creation of unnecessary obstacles to international trade.

It is generally agreed that official government regulatory policymaking and private standard setting activities currently taking place within many WTO member countries are not sufficiently transparent and inclusive of foreign stakeholder input. It is also generally agreed that regulations *and* standards (whether technical, social or environmental) can materially impact international (cross-border) trade flows when not drafted and implemented in a benchmarked and balanced manner.²

Some governments, more than others, recognize that standards can improve their countries' industrial and technological global competitiveness and have increasingly synchronized their use with official regulations.³ As a result, such countries may have *more than* acquiesced in the development of 'private' environmental and corporate social responsibility (CSR) certification and labelling standards regimes that have had the effect of denying market access to a host of foreign products and services. In particular, companies operating within natural resource-based developing countries have incurred significant and unnecessary costs and administrative burdens to satisfy such developed country environmental certification and eco-labelling standards. According to a recent study, 'making certification a condition for trade in international markets could reduce exports of wood products from these countries – with considerable negative impacts on forest-dependent populations'.⁴

This article focuses strictly on the relationship between private European-centric sustainable forest management (SFM) schemes that have arisen during the past twenty years and the official policy goals articulated by the European Community (EC), and later by the European Union (Eu)⁵ within its Fifth

Notes

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- 1 General Agreement on Tariffs and Trade, 33 I.L.M. 1125 (1994) (GATT); World Trade Organization (WTO).
 - 2 Lawrence A. Kogan, *National Foreign Trade Council, Looking Behind the Curtain: The Growth of Trade Barriers That Ignore Sound Science* (May 2003) available at <www.wto.org/english/forums_e/ngo_e/posp47_nftc_looking_behind_e.pdf>.
 - 3 Erkki Liikanen, European Enterprise Commissioner, Commission Marks World Standards Day With Focus on Environment and Standards, in IP/01/1408 (12 October 2001) available at <www.europa.eu/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1408%7C0%7CRAPID&lg=EN>.
 - 4 Carolyn Fischer, Francisco Aguilar, Pujja Jawahar and Roger Sedjo, *Resources for the Future – Forest Certification: Toward Common Standards?*, World Bank Foreign Investment Advisory Group Discussion Paper 05-10 (Washington, DC: World Bank, April 2005), available at <www.rff.org/Documents/RFF-DP-05-10.pdf>.
 - 5 The European Community (EC) was previously known as the European Economic Community (EEC), which was formed pursuant to the Treaty of Rome, on 25 March 1957. It consisted of six 'common market' countries: Belgium, France, Italy, Luxembourg, the Netherlands and former West Germany. The EEC was renamed the EC on the signing of the Maastricht Treaty, on 7 February 1992, which led to the formation of the unique political union now recognized as the European Union (EU). The EC remains one of three pillars of the EU–i.e., the Community pillar, which concerns economic, social and environmental policies. See e.g., 'European Community', Wikipedia at: <www.en.wikipedia.org/wiki/European_Community>; 'The Three Pillars of the European Union' Wikipedia at: <en.wikipedia.org/wiki/Three_pillars>. Last visited on 15 July 2007.

and Sixth Environmental Action Programmes (EAPs). The analysis and findings which follow, however, are equally relevant to ascertaining whether a nexus exists between official EU government sustainable development and corporate governance policies and currently evolving private EU-centric (CSR) standards. The establishment of such a link is required before culpability can be ascribed for alleged violations of WTO law. This article does not address the merits of any claim of trade discrimination or disguised trade protectionism (i.e., the purported effects on international trade flows in forest/wood products) that could conceivably be brought against the EC and its Member States by an aggrieved GATT/WTO member as a consequence of such standards.⁶

In particular, this article examines the GATT/WTO case law surrounding a WTO member's responsibility for activities undertaken within its sovereign borders by or on behalf of recognized private standards bodies. This requires a two-step analysis:

- (1) Did the EU and its Member States *fail to take 'measures'* to reasonably ensure that ostensibly 'voluntary' SFM certification and eco-labelling criteria were not prepared, developed or applied by non-governmental organizations operating as standardizing bodies within Member State territories in a manner that either discriminates against 'like' developing country tropical forest product imports *or* creates unnecessary obstacles to trade (i.e., did it commit nonfeasance)?⁷
- (2) Did the EU and its Member States *affirmatively take 'measures'* which have had the effect of, directly or indirectly, requiring or encouraging non-governmental organizations operating as standardizing bodies within EU Member State territories to prepare, develop or apply ostensibly 'voluntary' SFM certification and eco-labelling criteria in a manner that either discriminates against 'like' developing country tropical forest product imports *or* creates unnecessary obstacles to trade (i.e., did it commit malfeasance)?⁸

These two questions relate directly to Article 4 and Annex 3 of the WTO Technical Barriers to Trade

(TBT) Agreement, and indirectly to Article 2 of that treaty. Those provisions refer to obligations imposed on all WTO Member States to ensure against, and to otherwise not directly or indirectly require or encourage, the preparation, adoption or application of 'standards' by 'standardizing bodies' in their territories that are inconsistent with the Code of Good Practice.⁹ This obligation exists irrespective of whether the standardizing bodies themselves have accepted the Code. TBT Annex 3.D and E specifically parallel the language of TBT Articles 2.1 and 2.2, which impose specific obligations with respect to 'technical regulations'. They respectively oblige Members to ensure that internal technical regulations and standards are *not* prepared, adopted or applied (1) in a manner that discriminates against otherwise 'like' imported and domestic products; and (2) with a view to create or with the effect of creating unnecessary obstacles to trade.

This article reflects several assumptions. *First*, it has been assumed that the various SFM certification and eco-labelling criteria constitute 'standards' as defined in TBT Annex 1.2 and the accompanying explanatory note. This assumption is based on the author's observation that: (1) the documents 'provide for common and repeated use, rules, guidelines, or characteristics' for a group of identifiably 'similar' or 'like' wood-based products; and (2) prescribe certain preferred 'process and production methods' defining how and under what circumstances raw forest wood resources may be extracted, processed and assembled into finished forest wood products. Yet, documents that address characteristics of products or processes can just as easily constitute 'standards' as they can 'technical regulations', depending on whether they are mandatory in character and effect. *Second*, it has been assumed that the SFM criteria are set forth in documents approved by a 'recognized non-governmental body', but which may not be based on international 'consensus', since most non-EU WTO members do not approve or recognize these standards. *Third*, it has been assumed that the private standards developers constitute 'non-governmental standardizing bodies' that effectively have legal power to enforce a technical regulation, by virtue of the EU Commission's *de facto*

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6 GATT/WTO culpability can result if such a nexus is established *and* it can *also* be shown that EU-centric SFM standards: (1) arbitrarily discriminate against 'like' forest/wood products from non-EU (developing) countries; or otherwise (2) impose unnecessary obstacles to international trade that are intended to or actually protect domestic EU forest-based industries/companies at the expense of developing country industries/companies, or have the effect of denying market access to foreign forest/wood product exports. Technical Barriers to Trade 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods, 33 I.L.M. 1125 (1994) (hereinafter TBT), at Articles 2.1–2.3.

7 TBT Article 2.2

8 TBT Articles 4.1 and 8.1. *See also* Laurel A. Brien, *Understanding the International Agreement on Technical Barriers to Trade and Related Provisions of the US Trade Agreements Act of 1979* (Washington, DC: US Department of Commerce, International Trade Administration, Office of Trade Policy, September 1984) (explaining the barriers to trade requirements). *See also* TBT Articles 2.2 and 2.5 (additional restrictions on barriers to trade).

9 TBT, Annex 3.

and informal delegation of regulatory authority, within the meaning of TBT Annex 1.8. It is well known that the EU Commission can formally or informally delegate regulatory authority to regional standards bodies to craft consistent product standards implementing EU regional policies and directives that must be transposed at the EU Member State level.¹⁰

The first of these assumptions does not preclude a finding that the SFM criteria in question could actually constitute 'technical regulations' within the meaning of TBT Annex 1.1 if the requisite degree of EU government intervention or involvement in the preparation, adoption or application of the standards is found. Coincidentally, the same evaluation must be undertaken to resolve the central question posed by this article – whether the European governments have been involved in SFM standardization processes to such a degree and extent, that private SFM standards employed to discriminate against or deny market access to foreign forest/wood products would be deemed part of an overall governmental regulatory scheme attributable to the EU and/or its individual Member States, and thus, susceptible to challenge under GATT/WTO law.

II. CONTEXTUAL BACKGROUND

A. A Call to Regulate Forest Products and Practices

During the late 1980s, environmental non-governmental organizations (NGOs), particularly those operating within Europe, had become concerned that free trade could give rise to unintended negative environmental consequences (externalities). They feared that continuing increase in the rate of deforestation and forest degradation throughout the world could potentially contribute to widespread industrial farming and monoculture, pollution of waterways and the

loss of carbon dioxide 'sinks' which, they also believed, could contribute to global warming and potentially to climate change. Although the average European forest had been considered to prevent irreversible environmental harm caused by industrial activities, ENGOs nevertheless claimed that many other forests, especially those in Asia, Latin America and Africa, and even forests in North America, had been over exploited because of a conspicuous lack of regulation.

During approximately the same period, EU Member State governments, inspired by the vision of the founding 'Fathers of Europe',¹¹ had first embraced the newly articulated United Nations concept of *negative* Malthusian sustainable development (SD). That concept was defined in the 1987 UN report entitled *Our Common Future*,¹² which had been premised, in large part, on the Club of Rome's¹³ controversial 1972 book *Limits to Growth*.¹⁴ SD, as so defined, responded to the environmental fears, economic frustrations, and social restlessness of a nascent civil society comprised of millions reared in Marxist ideology who, following the fall of the Berlin Wall, had found themselves politically 'free' but economically dislocated. The concept of negative SD not only facilitated political 'solidarity' among the EC, its Member States and their citizens, but also provided legal justification for the creation of a new centralized and paternalistic pan-European organization (the EU) with grand regional and international ambitions. In fact, Europe's 'manifest destiny' – achieving *global* SD (i.e., correcting the negatives of globalization, and thus, the market failures of economic neo-liberalism and free trade) has remained one of the key tenets of the 1992 EC Treaty.¹⁵ In the context of forestry, this has meant searching for an effective way to regulate international trade flows in forest wood products to 'save' the global environment.

At first, ENGOs had endeavoured to reform objectionable forestry practices through public disclosure of allegedly 'unsustainable' producer activities and

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- 10 Lawrence A. Kogan, *Unscientific 'Precaution': Europe's Campaign to Erect New Foreign Trade Barriers* (Washington Legal Foundation Working Paper Series No. 118 (National Foreign Trade Council, September 2003), pp. 20–22, available at <www.itssd.org/White%20Papers/WLFKoganArticle2.pdf>.
- 11 *Founding Fathers: Europeans Behind the Union* (Deutsche Welle, 23 March 2007) <www.dw-world.de/dw/article/0,2144,2397555,00.html> (last visited 11 April 2007); Dr Angela Merkel, Chancellor, Federal Republic of Germany; President, EC, Address at the Official Ceremony Celebrating the 50th Anniversary of the Signing of the Treaties of Rome (25 March 2007) available at: <www.eu2007.de/en/News/Speeches_Interviews/March/0325BKBerliner.html>. Cf. Isabelle Petit, *Dispelling a Myth? The Fathers of Europe and the Construction of a Euro-Identity*, 12 Eur. L.J. 5 (September 2006), 661–79 (arguing that the distance between the EU and its member states was not deliberate).
- 12 World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development* (1987); available at <www.ringofpeace.org/environment/brundtland.html>.
- 13 The Club of Rome – About, available at <www.clubofrome.org/about/index.php> (last visited 11 April 2007).
- 14 Donella H. Meadows, Dennis L. Meadows, Jorgen Randers and William W. Behrens III, *Limits to Growth: A Report to The Club of Rome* (1972), available at <www.clubofrome.org/docs/limits.rtf>. The concerns expressed therein reflect the negativism of 18th century Reverend Thomas Robert Malthus. See T. Robert Malthus, *An Essay on the Principle of Population* (1798), available at <www.econlib.org/library/Malthus/malPop.html>.
- 15 See note 5 above. See also Lawrence A. Kogan, *'Europe's Warnings On Climate Change Belie More Nuanced Concerns'*, The Institute for Trade, Standards and Sustainable Development (ITSSD) (21 June 2006) at: <www.itssd.org/White%20Papers/Europe_sWarningsonClimateChangeBelieMoreNuancedConcerns.pdf>.

organization of public 'consumer' boycotts against the finished timber products themselves. However, these initiatives lacked credibility with the public and failed to change manufacturer production practices. The governments of Austria and the Netherlands then tried to ban imports of unsustainably produced tropical timber and the Dutch proposed regulations that would have required timber certification. These initiatives gave rise to substantial domestic and foreign industry complaints of trade discrimination, and prompted foreign governments, especially in Canada and the United States, to threaten the EU with GATT/WTO litigation.¹⁶

B. The Rise of Private Sustainable Forest Management (SFM) Standards

Faced with the prospect of multiple GATT/WTO actions, EC/EU Member State governments and the EC/EU Commission and Parliament¹⁷ abandoned the 'stick' approach and pursued alternative 'soft' policy instruments to achieve their SD policy goals.¹⁸ They urged ENGOs and industry to develop their own more sophisticated programmes ('carrots') that could positively induce changes in natural resource procurement, manufacturing and consumer buying habits.

The governments of Germany, the Netherlands and Denmark, for example, launched voluntary SFM certification initiatives¹⁹ that they hoped would provide them with an *indirect* means to regulate the market access of foreign wood/timber products,²⁰ *without* also creating 'government footprints' that could trigger *prima facie* GATT/WTO violations.

Although private in 'form', such standards have been official and public in 'substance'. They require the satisfaction of numerous subjective and complex²¹ environmental and social criteria,²² grounded on *other than* best available scientific evidence, and economic-cost benefit analysis, that impose costly monitoring, verification and certification burdens on industry. They have also given rise to a new industry of third party²³ overseers/auditors. Indeed, European governments have long hoped that these measures would create new wholesale and retail markets for SFM branded products bearing point-of-purchase labels/tags with a 'coveted' ENGO/SFM certification.

This new market would depend on the ability of companies to distinguish their forest/wood products from foreign competition based on questionable 'performance-based criteria': whether they were subject to verifiably 'sustainable' methods of extraction, manufacturing, processing, finishing and delivery,²⁴ and on whether the underlying forests were themselves

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- 16 Annett Görne and Michael Richards, 'EU Role in the International Environment: DG XI', in Gill Shepherd, David Brown, Michael Richards and Kate Schreckenber (eds), *The EU Tropical Forestry Sourcebook 98* (1997), available at <www.odi.org.uk/tropics/Sourcebook/EN/DGXI.pdf>.
- 17 *Europe and the Forest* – Vol. 3 (European Parliament Working Paper, 1997) available at <www.europarl.europa.eu/workingpapers/forest/eurfo_c_en.htm>; See also Duncan Brack, Kevin Gray and Gavin Hayman, *Controlling the International Trade in Illegally Logged Timber and Wood Products* (London: Royal Institute of International Affairs, February 2002), p. 43, available at <www.abc.net.au/4corners/content/2002/timber_mafia/viewpoints/brack.pdf> (examining the ways in which forests are managed by government).
- 18 The Ministerial Conference on the Protection of Forests in Europe (MCPFE) was launched in 1990 'as a platform of dialogue' for the European Community, approximately 46 European signatory states and international stakeholders of forests and forestry. 'It declares recommendations in favour of the protection and sustainable management on forests in Europe', and 'is linked to global [UN] and other regional processes and initiatives dealing with issues on forests and forestry.' See 'The Ministerial Conference on the Protection of Forests in Europe – General Information', website at <www.mcpfe.org/general>. The concept of SFM was firstly defined by the MCPFE in the Resolution H1 of the Helsinki Conference (1993) as: 'the stewardship and use of forests and forest lands in a way, and at a rate, that maintains their biodiversity, productivity, regeneration capacity, vitality and their potential to fulfil, now and in the future, relevant ecological, economic and social functions, at local, national, and global levels, and that does not cause damage to other ecosystems' . . . A set of pan-European C&I (criteria and indicators) comprising quantitative indicators has been endorsed by the MCPFE process (MCPFE, 2002) to evaluate and report on progress towards implementing SFM in the pan-European region.' See 'European Forest Types: Categories and Types for Sustainable Forest Management Reporting and Policy', European Environment Agency (2nd Edition, May 2007) at p. 11, at: <www.reports.eea.europa.eu/technical_report_2006_9/en/eea_technical_report_9_2006.pdf>.
- 19 Görne and Richards, as note 16 above.
- 20 Fischer *et al.*, as note 4 above.
- 21 Dietrich Burger, Jürgen Hess and Barbara Lang (eds), *Deutsche Gesellschaft für Technische Zusammenarbeit Forest Certification: An Innovative Instrument in the Service of Sustainable Development?* (2005), p. 27, available at <www.gtz.de/de/dokumente/en-forest-certification-introduction-and-summary.pdf>.
- 22 *Competitiveness of the European Union Woodworking Industries*, European Commission, Enterprise DG (October 2000), at Europa website, Publications, Theme: Competitiveness Policy, available at <www.europea.eu.int/comm/enterprise/library/lib-competitiveness/librcompetitiveness.html>. See also Jeremy Wall, *European Commission Views on Mutual Recognition Opportunities – A DG Enterprise View of Mutual Recognition Between SFM Certification Schemes in the Forestry Sector* (7-26 June 2000), p. 4, available at <www.sfcw.org/mutualrecognition/doc-pdf/MRSeminar2-1-8.pdf>.
- 23 Fischer *et al.*, as note 4 above, pp. 11-12.
- 24 *Draft FSC Discussion Paper – Options for Revision of FSC Policy on Chain of Custody for Sold and Assembled Products*, FSC Reference Code: FSC-DIS-40-002 (31 March 2003), available at <www.fscoax.org/principal.htm>; *Options for Revision of FSC Policy on Chain of Custody and Labeling for Assembled Products*, FSC Discussion Paper, FSC Reference Code: FSC-DIS-40-003 (19 November 2003), pp. 3, 5-7, available at <www.fscoax.org/principal.htm>; *Footprints in the Forest: Current Practice and Future Challenges in Forest Certification*, FERN (February 2004), pp. 11-14, available at <www.fern.org/pubs/reports/footprints.pdf>, <www.wwf.se/source.php/1002966/wwf-1073273.pdf>; <www.bcn.es/agenda21/>

'sustainably' managed' (cultivation and stewardship). Ultimately, SFM certification and labelling would also be based on a showing of questionably verifiable²⁵ links (an audited 'chain-of-custody') between and along the various stages of the forest/wood product global supply chain.²⁶

Consistent with EU SD policy objectives, the most widespread of these standards is premised on the extra-WTO Precautionary Principle.²⁷ The best known ENGO certification and eco-labelling standards programme for forest/wood products was designed and implemented by the Forest Stewardship Council ('FSC') in 1993. The FSC's SFM Principle 9 requires a broad 'Wingspread' application of the extra-Precautionary Principle to ensure the maintenance and conservation of all high conservation value forests.²⁸ Approximately nineteen percent of the forests certified under FSC standards are currently located in the developing world.²⁹

Since FSC standards criteria were environment-centric and not performance-based, the European forest-based industries, with EU government assistance, developed their own SFM standards development body. The Pan-European Forest Certification Framework ('PEFC')³⁰ was created in 1998 and launched

in 1999, and its standards borrowed heavily from the broad criteria of the ISO 14000 environmental management system.³¹ PEFC standards also reflected a less stringent formulation of the extra-WTO Precautionary Principle (i.e., a case-by-case 'Precautionary Approach')³² that finds support within a number of multilateral trade and environmental agreements and international declarations. By 2003, the Euro-centric PEFC system evolved into the largest forest certification and eco-labelling scheme in the world. Its members now include twenty European member countries, three developing countries (Chile, Brazil and Malaysia) and Australia, Canada and the United States.

To date, most EU Member State national forest management programmes have been accredited as meeting PEFC criteria. Also, the United States' Sustainable Forestry Initiative, and the national forest certification schemes of Australia, Chile and Brazil have been approved. Of the remaining developing country members, only Gabon's forest certification scheme is currently undergoing an assessment for PEFC certification. Malaysia's previously initiated forest management plan has still not yet been assessed as being compatible with PEFC,³³ let alone the FSC standards.³⁴

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- ajuntamentsostenible/fusta/footprints.pdf>; *Annex 4: Chain of Custody Certification of Wood – The Purpose of the Chain of Custody Rules*, available at <www.pefc.org/internet/html/documentation/4_1311_400/4_1208_165/5_1177_452.htm>.
- 25 Ewald Rametsteiner and Florian Kraxner, 'Markets for Certified Forest Products – 2002-2003', in *Forest Products Annual Market Analysis, 2002-2004*, LVI (UNECE/FAO Timber Bulletin), p. 5.
- 26 Jeremy Wall, *A View from DG Enterprise & Industry*, Directorate I, Unit 3 Forest-based Industries, Community Biomass Action Plan External Stakeholders' Group First meeting (4 March 2005), pp. 10, 12, available at <www.ec.europa.eu/energy/res/biomass_action_plan/doc/enter.pdf>; *Can Europe's Forests Satisfy the Increasing Demand for Raw Material and Energy under Sustainable Forest Management?*, Background Paper for the Workshop Mobilizing Wood Resources United Nations Economic Commission Europe (UNECE) (22 December 2006), available at <www.unece.org/trade/timber/workshops/2007/wmw/presentations/Backgroundpaper_1222.pdf>; Joan A. Salmurri Trinxet, *Screening Chapter 20: Forest-based Industries* (European Commission Enterprise and Industry Directorate-General), p. 12, available at <www.abgs.gov.tr/tarama/tarama_files/20/SC20EXP_Forest%20Industry.pdf>.
- 27 Lawrence A. Kogan, *Exporting Precaution: How Europe's Risk-Free Regulatory Agenda Threatens American Free Enterprise* (Washington, DC: Washington Legal Foundation, November 2005), available at <www.wlf.org/upload/110405MONOKogan.pdf>; Lawrence A. Kogan, *Precautionary Preference: How Europe Employs Disguised Regulatory Protectionism to Weaken American Free Enterprise*, 7 Int'l J. Econ. Dev. (December 2005), 2-3, available at <www.spaf.com/IJED_PUB/index.html>; Lawrence A. Kogan, *Exporting Europe's Protectionism*, Nat'l Interest 77 (Fall 2004), available at <www.keepmedia.com/pubs/NationalInterest/2004/09/01/586792?extID=10026>.
- 28 Janet Cotter, H. Paul Johnston and David Santillo, *The Precautionary Principle and Forest Exploitation: Implications for the Implementation of the FSC Principle 9 9-10*, Greenpeace Research Laboratories Technical Note No: 08/00, 16 (3 November 2000), p. 16, available at <www.greenpeace.to/publications_pdf/precaution%20and%20forests.PDF>.
- 29 Fischer *et al.*, as note 4 above, p. 3.
- 30 *Pan European Forestry Scheme Recently Launched*, Certificate Information Service (CIS) Newsletter 2 (Eur. Forest Inst., 30 June 1999). See also Eric Hansen, Keith Forsyth and Heikki Juslin, *Forest Certification Update for the ECE Region, United Nations* (Summer 2000), p. 2, available at <www.unece.org/trade/timber/docs/dp/dp-20.pdf>. The PEFC's name was later changed during 2003 to the Program for the Endorsement of Forest Certification. *Forest Newswatch* (Forest Newswatch, 28 January 2004), available at <www.forestnewswatch.com/content/view/540/>.
- 31 Raul O' Ryan and Gabriel Fierro, *International Trade and Sustainability of the Chilean Forestry Sector* (2000), p. 10. This view was not universally held. Cf. William E. Mankin, *Letter to the Editor*, 9 Tropical Forest Update 2 (1999), available at <www.itto.or.jp/live/contents/download/tfu/TFU.1999.02.English.pdf> (stating that, 'ISO 14001 is not a label signifying a 'green' or 'environmentally friendly' product').
- 32 See Lawrence A. Kogan, *World Trade Organization Biotech Decision Clarifies Central Role of Science in Evaluating Health and Environmental Risks for Regulation Purposes*, 2 Global Trade and Customs Journal 3 (March 2007), available at <[www.itssd.org/Publications/GTCJ_04-offprints_Kogan\[2\].pdf](http://www.itssd.org/Publications/GTCJ_04-offprints_Kogan[2].pdf)>; Lawrence A. Kogan, *Backgrounder WTO Addresses Precautionary Principle* (Washington, DC: Washington Legal Foundation, 8 December 2006), available at <www.itssd.org/Publications/wto-biotech-foods-dec0806.pdf>; Lawrence A. Kogan, *The Precautionary Principle and WTO Law: Divergent Views Towards the Role of Science in Assessing and Managing Risk*, 5.1 Seton Hall J. Dipl., (Winter/Spring 2004), available at <www.diplomacy.shu.edu/journal/KOGAN%20-%20Precautionary%20Principle%20&%20WTO%20Law.pdf>.
- 33 PEFC Members and Schemes, available at <www.pefc.org/internet/html/members_schemes/4_1120_59.htm> (last visited 11 April 2007).
- 34 *Clarification Regarding the Relationship Between FSC and MTCC* [Malaysian Timber Certification Council], FSC News (13 September 2006), available at <www.fsc.org/keepout/en/content_areas/29/60/files/06_09_15_FSC_MTCC_Statement_update_2006_NH_mk.pdf>.

Consequently, it is evident that ‘the majority of [PEFC] certified forests are in Europe and North America; developing countries account for only 8% of the total certified area (2% in Asia and the Pacific, 3% in Latin America, and 3% in Africa)’.³⁵

The difficulties of securing PEFC or FSC accreditation eventually prompted developing countries such as Indonesia, Malaysia and Ghana to develop their own competing timber certification and eco-labelling schemes.³⁶ These regimes were designed to protect Indonesian and Malaysian forest/wood industries from the discrimination and market access barriers their products encountered as the result of not bearing the EU-centric FSC and PEFC SFM certification labels.

The FAO Asia-Pacific Forestry Commission since concludes have that ‘most corporations that encourage forest certification probably are most interested in the potential marketing benefits and in managing risks that might affect the corporate image’.³⁷ However, it is also more than possible that these ‘market leaders’ are employing enlightened environmentalism as a form of disguised trade and academic commentators who have studied developed country industries’ embrace of SFM standards protectionism.³⁸

III. ANALYSIS OF THE APPLICABLE GATT/WTO LAW

A. Ascertaining Whether a Measure is a ‘Technical Regulation’ – The Three Elements

To determine whether the TBT Agreement applies to a given measure, it must first qualify either as a ‘technical regulation’ or as a ‘standard’, within the meaning of TBT Annex 1.1 and 1.2. TBT Annex I provides that ‘technical regulations’ will be viewed as

mandatory documents, and ‘standards’ as voluntary documents.³⁹ TBT Annex 1.1 describes a technical regulation as ‘a document which lays down [either] product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with . . . labelling requirements as they apply to a product, process or production method’ (emphasis added).

In *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)*,⁴⁰ the WTO Appellate Body focused on the three components of this treaty definition. *First*, the regulation must apply to an ‘identifiable’ product or class.⁴¹ *Second*, the regulation must assert one or more characteristics of the product or class, and such characteristics can be intrinsic, prescribed or negative attributes.⁴² *Third*, it must require mandatory compliance with the listed characteristics.⁴³

The Appellate Body observed that the requirement that a document apply to identifiable products or groups of products underlies a WTO member’s core obligation under TBT Article 2.9.2, to notify other members ‘of the products to be covered’ by a proposed ‘technical regulation’.⁴⁴ Yet, a product need not be mentioned explicitly in a document for that product to be an identifiable product. Identifiable does not mean expressly identified.⁴⁵ As a practical matter, then, the requirement that a ‘technical regulation’ be applicable to identifiable products relates to aspects of compliance and enforcement. As a matter of logic, it would be impossible to comply with or enforce a ‘technical regulation’ without knowing what the regulation applies to.⁴⁶

The Appellate Body in *EC – Asbestos* also affirmed the breadth of product characteristics that could conceivably fall within the definition of a ‘technical regulation’. They can include ‘any definable ‘features’,

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35 Fischer *at al.*, as note 4 above, p. 13.

36 See M.D. Markopoulos, *Regional Community Forestry Training Centre for Asia and the Pacific, Standards-Based Approaches to Community Forestry Development in Asia and the Pacific – A Regional Assessment and Strategy* (5 December 2002), pp. 17-18, available at <www.recoftc.org/site/fileadmin/docs/publications/The_Grey_Zone/2002/SBA_in_Asia-Pacific.pdf>.

37 *Ibid.*, at p. 7.

38 See Lawrence A. Kogan, ‘Enlightened’ Environmentalism or Disguised Protectionism: Assessing the Impact of EU Precaution-Based Standards on Developing Countries (National Foreign Trade Council, April 2004), available at <www.wto.org/English/forums_e/ngo_e/posp47_nftc_enlightened_exsum_e.pdf>; *Memorandum of the Woodworking Industries to the European Institutions* (European Confederation of Woodworking Industries, November 2004), pp. 8-18, available at <www.cei-bois.org/factsandfigures/documents/CEI-Bois%20Memorandum%202004.pdf>.

39 Explanatory Note to Annex 1.2.

40 Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (EC – Asbestos)*, WT/DS135/AB/R, (WTO, 5 April 2001).

41 *Ibid.*, at para. 70, cited in Appellate Body Report, *European Communities – Trade Description of Sardines (EC – Sardines)*, WT/DS231/AB/R (WTO, 26 September 2002), at para. 176.

42 *EC – Asbestos*, at para. 70.

43 *Ibid.*

44 *Ibid.*, cited in *EC – Sardines*, at para. 180.

45 *EC – Asbestos*, at para. 70, cited in *EC – Sardines* at para. 180.

46 *Ibid.*, cited in *EC – Sardines*, at para.185.

'qualities', 'attributes' or other 'distinguishing mark' of a product' (emphasis added).⁴⁷ This means that characteristics can relate *directly* to the 'features and qualities intrinsic to the product itself', *as well as, indirectly* to the means by which products are identified, presented and made to appear.⁴⁸

The Appellate Body's reference to 'any objectively defined . . . 'qualities', 'attributes' . . . of a product' can reasonably be interpreted to include abstract certification criteria that are used to ascertain whether a particular forest is sustainably managed. Similarly, it can include criteria used to ensure that an unbroken chain-of-custody between that forest and a particular finished forest product is established. After all, 'quality' and 'attribute' can be interchangeably defined as 'an intelligible feature by which a thing may be identified . . . Quality is a general term applicable to *any* trait or characteristic . . . Attribute implies a quality *ascribed to* a thing or being the traditional attributes of a military hero' (emphasis added).⁴⁹ Additionally, the term 'intelligible' used in this definition means 'apprehensible by the intellect only; capable of being understood or comprehended'.⁵⁰

The Appellate Body, in *EC – Asbestos*, also examined the mandatory nature of 'technical regulations'. It found that measures *must* 'lay down . . . set forth, stipulate or provide the characteristics of products in a binding or compulsory fashion [or] *ha[ve] the effect of prescribing or imposing*' (emphasis added) them.⁵¹

Thus, it is necessary to ascertain the circumstances surrounding 'the preparation, adoption and application' of a given measure (or series of measures) in order to determine its essential *character*.⁵² In other words, a measure must be 'examined *as an integrated whole*, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it' (emphasis added).⁵³ The Appellate Body in *EC-Asbestos* ultimately found that the prohibition against the marketing of chrysotile asbestos *laid down* "characteristics' for all products that might contain such substance [as well as] the 'applicable administrative provisions' for certain products . . . excluded from the prohibitions in the measure.'⁵⁴ Consequently, it

held that the measure fell within the definition of a 'technical regulation' as set forth within Annex I of the TBT Agreement.

B. Relevant GATT Case Law Distinguishing Between Mandatory and Voluntary Measures

The key factor considered by GATT tribunals in determining the character of a measure has been whether there was sufficient governmental involvement in the promulgation and application of private standards such that specific private party behaviour was directly or indirectly compelled. The Appellate Body, in *EC – Asbestos*, recognized that it was necessary to undertake a holistic analysis of all of the facts and circumstances surrounding a given measure's preparation, structure and operation, in order to distinguish a 'mandatory' 'governmental measure' from a purely 'voluntary' initiative, for purposes of Articles III.4, XI and XXIII of the GATT.

In *Japan – Restrictions on Imports of Certain Agricultural Products*,⁵⁵ a GATT panel interpreted the GATT Article XI.2(c) exception to the Article XI.1 prohibition against contracting party import 'restrictions'.⁵⁶ There, the panel examined whether Japanese import restrictions were actually mandatory governmental measures or "only an appeal for private measures to be taken voluntarily by private parties".⁵⁷ It ruled that the Japanese government's informal administrative guidance to restrict production of certain agricultural products could be considered to be a 'governmental measure' for purposes of Article XI.2(c) because it *emanated from* the government.

In particular, the panel found that Japan's measures 'were effectively enforced by detailed directives and instructions to local governments and/or farmers' organizations, which were part of a Japanese 'centralized and mutually collaborative structure of policy implementation'.⁵⁸ Consequently 'the practice of administrative guidance played an important role' in the enforcement of the measure, especially where it

Notes

47 *EC – Asbestos*, at para. 67, cited in *EC – Sardines*, at para. 189.

48 *Ibid.*

49 *Merriam-Webster's Collegiate Dictionary* (10th edn, 2000), p. 952.

50 *Ibid.*, at p. 607.

51 *EC – Asbestos*, at paras 67–69.

52 TBT Article 2.2 Annex 3.E.

53 *EC – Asbestos*, at para. 64.

54 *Ibid.*, at para. 75.

55 GATT Panel Report, *Japan – Restrictions on Imports of Certain Agricultural Products*, BISD 35S/163 (1989), cited in *Japan – Trade in Semiconductors*, GATT Panel Report (adopted 5/4/88), 35th Supp. BISD 116 (1989), at para. 107.

56 Import restrictions are permitted under that exception if they are *necessary* to the enforcement of 'governmental measures' restricting domestic supplies.

57 BISD 35S/163.

58 *Ibid.*

was used as a 'traditional tool of government policy based on consensus and peer pressure'.⁵⁹

In *European Economic Community – Restrictions on Imports of Dessert Apples*,⁶⁰ a GATT panel evaluated Chilean allegations that the EEC imposed a series of import restrictions that adversely affected its apple exports and violated the GATT Article XI.1 general prohibition against import restrictions. In essence, Chile argued that the EEC restrictions were not necessary to the operation of 'governmental measures', and consequently, ineligible for exception under GATT Article XI.2(c).⁶¹

Notwithstanding the 'combined elements of public and private responsibility' inherent in the European apples regime, the panel ruled that *the regime as a whole* constituted a 'governmental measure' for purposes of Article XI.2(c)(i). It based its determination upon an examination of the circumstances surrounding the regime's establishment, structure *and* operation. The panel found that 'the regime as a whole was established by Community regulations'.⁶² Structurally, the panel noted that, 'there were two possible systems, direct buying-in of apples by Member State authorities and [ostensibly 'voluntary'] withdrawals by producer groups'.⁶³ It also noted that 'the system of [general] withdrawals by producer groups', which the EEC preferred, was essentially a 'market intervention scheme'⁶⁴ that required 'indirect operational involvement of public authorities' (emphasis added).⁶⁵ The panel found that the systemic structures for 'both direct intervention by Member States *and* the decentralized withdrawal of apples from the dessert apple market by producers' organizations' were similar.⁶⁶ In each case, the system was structured to allow 'market price movements in relation to target prices *fixed by the EEC*' to activate or suspend operations and price targets (emphasis added).⁶⁷

In actual operation, the panel found that Member States purchased quantities of apples from European producer groups and compensated them for 'voluntarily' withdrawing them from the dessert apple

market.⁶⁸ This practice served to assure producers a minimum price without prescribing a ceiling on the quantity eligible for marketing and purchase which, as the panel found, 'could act as an incentive for producers operating at the margin of profitability'.⁶⁹ The panel concluded that the system's operation '*depended on Community decisions fixing prices, and on public financing* [since] apples that were withdrawn were disposed of in ways prescribed by regulation'.⁷⁰

In *Japan – Trade in Semi-Conductors*,⁷¹ a GATT panel examined whether a series of government measures allegedly responsible for the Japanese semi-conductor industry's export restrictions *to the EEC* was voluntary or mandatory, for purposes of GATT Article XI.1 ('prohibited restrictions'). In doing so, it reviewed the complex of measures in their entirety, considering the totality of the circumstances under which they arose, their structure and their operation.

The panel found that the export restrictions in question arose from a bilateral agreement between Japan and the United States to curb the widespread 'dumping' of Japanese semi-conductors within the United States, and to expand foreign (us) access to the Japanese semi-conductor market.⁷² It also noted that *the measures, when viewed as an integrated whole, formed a coherent system of administrative guidance* possessing both voluntary and mandatory features. Apparently, the Japanese government had issued repeated requests directly to Japanese producers and exporters not to export semi-conductors at prices below company-specific costs. It additionally enacted a reporting statute mandating aggregation of company and product-specific cost data, with criminal penalties for violations. The Japanese government also systematically monitored company and product-specific cost and export price data, as well as provided companies with quarterly supply and demand forecasts in order to directly influence manufacturer production levels.⁷³ These last two components 'operated to facilitate strong peer pressure to comply with . . . [the government's] . . . requests'.⁷⁴

Notes

59 Ibid.

60 BISD/36S/93 L/6491 6/22/1989.

61 An import restriction may fall within the Article XI.2(c) exception if it is 'necessary to the enforcement of governmental measures' restricting domestic supplies.

62 EEC Regulation 1035/72 (as amended)

63 BISD/36S/93 L/6491 6/22/1989, at para. 12.9.

64 Ibid., at para. 12.11.

65 Ibid.

66 Ibid.

67 Ibid.

68 BISD/36S/93 L/6491 6/22/1989, at para. 12.10, fn. 13.

69 Ibid., at para. 12.11.

70 Ibid., at para. 12.9.

71 GATT Panel Report (adopted 5/4/88), 35th Supp. BISD 116 (1989).

72 Ibid., at para. 102.

73 Ibid., at paras 99 and 117.

74 Ibid., at para. 117.

The panel articulated two criteria that needed to be satisfied before it could conclude that the Japanese 'measures would be operating in a manner equivalent to mandatory requirements', (emphasis added). First, there must be 'reasonable grounds to believe that sufficient [government] incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs [must be] essentially dependent on government action or intervention'.⁷⁵

The panel concluded that since Japanese producers and exporters were aware of the US – Japan agreement, 'the Japanese government's measures did not need to be legally binding'.⁷⁶ In other words, 'there were reasonable grounds to believe that there were sufficient incentives or disincentives for Japanese producers and exporters' not to export below company-specific costs.⁷⁷ The panel additionally concluded that the resulting 'administrative structure' was dependent on the Japanese government 'to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs'.⁷⁸ Consequently, the panel held that the restrictions in question effectively constituted 'governmental measures' violating GATT Article XI.1.⁷⁹

Japan – Semi-Conductor can be interpreted as narrowly focusing on the 'mandatory' character of the phrase 'other measures' to confirm the existence of an Article XI.1 prohibited quantitative export restriction. Alternatively, this decision can be read as more broadly identifying the degree of government involvement necessary to ensure that industry does not violate declared governmental policy, for purposes of TBT Article 4.1. Although the measures taken by the Japanese Government to prevent Japanese semi-conductor producers and exporters from 'dumping' their products in the US market were not legally binding, they were nevertheless successful in compelling industry compliance. Indeed, it is arguable that they were too successful, since they *effectively* caused the Japanese semi-conductor industry to inadvertently impose similar restrictions on European exports without considering that the bilateral anti-dumping agreement did not apply to Europe.

In *Japan – Measures Affecting Film and Paper*,⁸⁰ the United States instituted a non-violation claim alleging that the Japanese government had inhibited the distribution and sale of imported consumer photographic film and paper in Japan by using several broad categories of restrictions on distribution, large retail stores and product promotion. In determining whether a government 'measure' existed for purposes of invoking GATT Article XXIII.1.(b), the panel opined as follows:

[A] government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXIII.1.(b) . . . [I]t is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner, can potentially have adverse effects on competitive conditions of market access . . . Moreover . . . it [is] conceivable, in cases **where there is a high degree of cooperation and collaboration between government and business, e.g., where there is substantial reliance on administrative guidance and other more informal forms of government-business cooperation**, that even non-binding, hortatory working in a government statement of policy could have a similar effect on private actors to a legally binding measure . . . or . . . regulatory administrative guidance (emphasis added).⁸¹

The panel then held that, 'a broad definition of the term 'measure' . . . which considers whether or not a non-binding government action *has an effect similar to a binding one* . . . should be used for purposes of Article XXIII.1.(b) (emphasis added).'⁸² In rendering its holding, the Panel Report pointed to the increasingly difficult task of determining whether government rather than private action is involved.⁸³

In *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*,⁸⁴ Korea changed from a unified beef distribution system that handled both domestic and imported beef to a dual retail system which effectively forced importers to choose between handling domestic or imported beef. The United States alleged that the

Notes

75 Ibid., at para. 109.

76 Ibid., at para. 111.

77 GATT Panel Report (adopted 5/4/88), 35th Supp. BISD 116 (1989).

78 Ibid., at paras 116 and 117.

79 Ibid., at para. 117.

80 Panel Report, *Japan – Measures Affecting Film and Paper*, WT/DS44/R (22 April 1998).

81 Ibid., at para. 10.49

82 Ibid.

83 Ibid., at paras 10.52 and 10.56.

84 Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (10 January 2001).

dual rate system was a 'governmental measure' that treated imported products 'less favourably' than like domestic beef, thus violating Article III.4.

The *Korea – Beef* panel found that, notwithstanding the available free choices for exercise by individual retailers under the dual rate system, '[t]he choice given to meat retailers was *not an option* between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only . . . [In other words,] the legal necessity of making a choice was . . . imposed by the measure itself' (emphasis added).⁸⁵ In rendering its holding, the panel made clear that Article III.4 addresses 'governmental intervention that affects the conditions under which 'like' goods, domestic and imported, compete in the market within a Member's territory',⁸⁶ but not market conditions that are 'solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits'.⁸⁷

IV. ANALYSIS OF THE FACTS: EU SFM RESTRICTIONS, GOVERNANCE RULES, POLICIES AND FUNDING PRIORITIES

C. Informal EU SFM Restrictions May Actually Constitute Formal Measures

At least one commentator has noted how *informal restrictions* such as *timber* certification schemes, had 'emerged as a global issue after an initial focus on the tropical timber trade' (emphasis added).⁸⁸ He emphasized that, apart from the confusion they create in the marketplace, there is genuine concern about the credibility of these schemes and the possibility that they could be used to discriminate against

particular products.⁸⁹ Accordingly, a WTO Member's guarded acceptance of voluntary SFM certification systems operated by local non-governmental organizations may actually reflect central government planning to avoid potential WTO liability should those schemes later become WTO – non-compliant. Pursuant to such reasoning, if a WTO Member does not have a legislated certification scheme in place, and has taken reasonable steps to prevent the private certification schemes employed within its commercial markets from discriminating against another country's exports, it cannot be held intentionally responsible under GATT/WTO law.⁹⁰

A prior discussion paper from the European Forestry Institute asked whether forest certification's voluntary nature exempts it from WTO rules. The report argued that *minimal government intervention* is all that is needed to draw certification into WTO jurisdiction, leaving certification vulnerable to legal challenges from WTO members.⁹¹ Clearly, European governments have recognized the need to appear removed (by several degrees) from local private SFM certification and eco-label regimes in order to avoid WTO culpability and the prospect of expensive retaliatory tariffs imposed by other WTO members. And, it has given rise to central government efforts to ensure that the activities of the private standardizing bodies that implement and manage such schemes within their sovereign territories cannot be easily attributed or otherwise imputed to them.⁹²

At least one commentator recognizes how informal measures *encouraged by* governments but having no direct links to official government regulations may actually be *intended* to restrict and actually *have the effect of* restricting international trade.⁹³ According to this commentator, such measures include the SFM certification and eco-labelling schemes endorsed by retailers that are especially prevalent within

Notes

85 *Ibid.*, at para. 146.

86 *Ibid.*, at para. 149.

87 *Ibid.*

88 Mohd Yusoff Mydin and Abdul Rahim, *Factors Affecting the Facilitation of Sustainable Management in Planted Forests in developing Countries: An Overview*, UNFF Intersessional Experts Meeting on the Role of Planted Forests in Sustainable Forest Management, New Zealand (24–30 March 2003).

89 *Ibid.*

90 See M.K. Haener and M.K. Luckert, *Forest Certification: Economic Issues and Welfare Implications*, 24 Canadian Public Policy – Analyse de Politiques, (Special Supplement 2, 1998), S88, available at <www.economics.ca/cgi/jab?journal=cpp&view=v24s2/CPpv24s2p083.pdf> citing B. Cabarle, J. Cashwell, M. Coulombe, J. Mater, W. Stuart, D. Winterhalter and L. Hill, *Forestry Certification: An SAF Study Group Report*, 93 *Journal of Forestry* 4 (1995), 8; *Certification and the World Trade Organization*, European Forest Institute, Certification Information Service (10 May 1999), available at <www.efi.fi/cis/english/background/wto.php>.

91 *Certification and WTO*, EU Forest Watch 45 (July 2000), available at <www.fern.org/pubs/fw/fw450700.htm>. See also Jan Klabbbers, *Forest Certification and the WTO* (European Forest Institute, 1999), p. 22, available at <www.efi.fi/publications/Discussion_Papers/DP_07.pdf>, citing Christian Tietje, *Voluntary Eco-Labeling Programs and Questions of State Responsibility in the WTO/GATT Legal System*, 29 *Journal of World Trade* 5 (1995), 123–58.

92 'An act, fact or quality is said to be . . . attributed vicariously . . . [or] . . . imputed to a person when it is ascribed or charged to him, not because he is personally cognizant of it or responsible for it, but because another person is, over whom he has control or for whose acts or knowledge he is responsible.' *Black's Law Dictionary* (5th edn, 1979), pp. 682–3.

93 Michael Adams and Jairo Castaño, *World Timber Supply and Demand Scenario, Government Interventions, Issues and Problems* (International Conference on Timber Plantation Development, 7–9 November 2000), available at <www.fao.org/docrep/005/ac781e/AC781E03.htm>.

Europe. 'In Europe, actions of this type have been especially popular in Germany, the Netherlands and the United Kingdom. An important and as yet unresolved question is the extent to which these actions are, or may be, a restriction on trade by discriminating either intentionally or unintentionally amongst producers.'⁹⁴

Other commentators have also noted that government promotion of 'private' timber certification schemes is intentional, and may perhaps constitute an *unofficial delegation* of sovereign forest management responsibilities to non-government parties. 'Rather than engage in direct intervention, governments are increasingly using certification to structure self-regulatory systems for forest producers' (emphasis added).⁹⁵ These experts reason that, although governments are not directly involved in the operation of such initiatives, there is growing evidence that governments indirectly intervene to provide the necessary legal framework for such initiatives to flourish.⁹⁶

Still, others argue that, although a growing number of governments have apparently delegated forest management to private certification schemes, this does not necessarily displace government regulatory programmes. Rather, certification actually tends to incorporate and extend existing programmes, while laying the groundwork for new regulation.⁹⁷ At least one such commentator has pointed out that governments have increasingly exercised *indirect legal control* over certification schemes by adopting policies (e.g., public procurement, fast-track approvals, etc.) that explicitly or implicitly promote certification, without actually making it a legal requirement.⁹⁸

Governments also 'may try to *steer* certification programmes either informally, by providing technical expertise or supporting research'.⁹⁹ Alternatively, a government may enact regulations that govern a certification scheme's underlying ability to operate within its territory or that otherwise bolster the scheme's credibility. Such regulations may be in the form of redefined management standards, imposed rules or procedures, detailed public participation and transparency requirements, or certifier accreditation

and registration systems.¹⁰⁰ 'At the very least, governments may try to ensure that certification processes are consistent with related policy initiatives.'¹⁰¹

B. EU Governance Rules and Quasi-Delegations of Legal Authority

During the past decade, the EU Commission, Member State governments and ENGOs have developed a mutually supportive relationship that is more robust and extensive than it appears. Pursuant to one or more alternative EU governance instruments, the EU Commission has increasingly delegated legislative or regulatory authority to expert or specialized NGOs for purposes of directly or indirectly carrying out Community policies.¹⁰²

Such delegations have been disproportionately focused on creating environment, health and food safety standards that require application of the *extra-WTO* Precautionary Principle. Reliance on the *hazard-based* Precautionary Principle satisfies civil society demands for industry accountability and transparency even where it is only suspected that industry products, technologies and/or activities might possibly give rise to health or environmental harm.¹⁰³ Indeed, these delegations have tended to reflect the growing role that private standards play in promoting official regulatory policy.¹⁰⁴

In many cases, the EU Commission has promoted industry accountability and transparency by encouraging greater public participation in Community policy-making and implementation. It has done so by expanding the number of specialized NGOs that it recognizes as falling within the broader universe of standardizing bodies to which it may ultimately delegate authority.¹⁰⁵ The Commission may have gone beyond the intent of the TBT Agreement in making some such designations, although this is uncertain.¹⁰⁶ And, depending on the circumstances, a given delegation of EU authority to a particular NGO may or may not entail a transfer of *some* of its legal powers to

Notes

94 Ibid.

95 Markopoulos, as note 36 above, at 62.

96 Ibid., at 36.

97 Ibid., at 36–37.

98 Ibid., at 37.

99 Ibid.

100 Markopoulos, as note 36 above, at 37–38.

101 Ibid.

102 *Commission White Paper on European Governance*, COM (2001) 428 final (25 July 2001), at 18–20, available at <www.eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf>.

103 Ibid.

104 Gerhard Leibrock, *Methods of Referencing Standards in Legislation With an Emphasis on European Legislation*, Enterprise Guides Report (European Commission, Enterprise Directorate-General, Standardization Unit – Single Market: Regulatory Environment, Standardization & New Approach, 2002), pp. 3–4, 8–9.

105 *European Governance*, as note 99 above, at 18–20.

106 See TBT Annex I.8 (definition of a 'non-governmental body').

enforce a technical regulation or directive. Therefore, whether the Commission has retained for itself the sole legal authority of enforcement in a given situation is a question of fact.¹⁰⁷

The primary methods of EU delegation are 'co-regulation' and 'self-regulation'. By definition, co-regulation is the more formal method of delegation, and it is used to authorize recognized EU technical standards bodies to develop EU environmental and food safety product standards that implement Community environmental legislation. Co-regulation entails 'a Community legislative act [that] entrusts the attainment of the objectives defined by the legislative authority to [economic operators, the social partners, non-governmental organizations, European associations or other recognized parties]'.¹⁰⁸ Co-regulation combines government action with private action by concerned actors, with legislation and regulation focused on 'overall objectives, basic rights, enforcement and appeal mechanisms, and conditions for monitoring compliance . . . [drawn] on the experience of interested parties, particularly operators and social partners'.¹⁰⁹

Self-regulation is a comparatively less formal means of delegation, not involving direct Commission participation because of its ostensibly private and voluntary nature. By its very definition, self-regulation invites voluntarily 'economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines', without recognizing any particular stance or approach.¹¹⁰

Given the nature of self-regulation, it is uncertain whether the EU Commission is sufficiently *indirectly* involved in the private standards-setting process that the standards and their effects on trade can be attributed to it. Yet, it is clear that the Commission is empowered to scrutinize self-regulation practices for compliance with the environmental provisions of the EC (Maastricht) Treaty¹¹¹ and to report to Parliament those practices '*contributing to the attainment of the Treaty objectives and . . . being compatible with the Treaty provisions emphasis added.*'¹¹² Furthermore, the Commission is charged with *not* making regulatory

actions where self-regulation '*of this kind already exists and can be used to achieve the objectives set out in the Treaty*' (emphasis added).¹¹³ '*Voluntary agreements can also be concluded on the basis of a legislative act, i.e., in a more binding and formal manner in the context of co-regulation, thereby enabling parties concerned to implement a specific piece of legislation.*'¹¹⁴

Arguably, the EU Commission's discrete use of these mechanisms has thus far enabled it to escape GATT/WTO challenge. Non-EU WTO members, including developing countries, have long suspected disguised protectionism at work but have been unable to prove it. However, this may soon change.

C. The Facts Surrounding Ostensibly Private SFM Schemes

I. FSC and PEFC SFM Certification and Eco-labelling Standards – Generally

The FSC and the PEFC are just two of the several NGOs operating within the territories of EU Member States. Each of these organizations have prepared, developed and applied certification and eco-labelling standards evaluating a product's SFM 'qualities', and by extension, the product manufacturer's and product supply chain's SFM practices. The FSC and PEFC standards are ostensibly 'voluntary' and 'private'.¹¹⁵ Since they have not been legislated as mandatory requirements by the EU Commission or its Member States, companies can choose whether or not to abide by them. Companies that elect to do so, however, are subject to strict certification requirements that are enforced by third party verifiers accredited by the standards bodies.

The multi-step certification process begins by establishing whether the finished product originated from sustainably managed forests, determined by referencing a list of criteria and indicators prepared and developed by the particular SFM standards body. Thereafter, a series of third party verifications take place. Each indicates that the forest products, including raw timber and

Notes

107 Ibid.

108 Committee on Constitutional Affairs, *Draft Report on the Conclusion of the Agreement Between the European Parliament, the Council and the Commission on Better Law-Making*, Provisional 2003/2131 (ACI) (14 August 2003), 13–17.

109 *Communication from the Commission – Action Plan 'Simplifying and Improving the Regulatory Environment'*, COM (2002) 278 final (5 June 2002), p. 12, available at <www.ec.europa.eu/governance/impact/docs/key_docs/com_2002_0278_en.pdf>; *Communication from the Commission – Simplifying and Improving the Regulatory Environment*, COM (2001) 726 final (12 May 2001), p. 8, available at <www.eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0726en01.pdf>.

110 Provisional 2003/2131 (ACI), as note 108 above, at 14–17.

111 Treaty on the European Union, 29 July 1992, 1992 O.J. (C 191) 1 at Article 2; Article 174(2); Article 6, available at <www.europa.eu/eur-lex/en/treaties/dat/EU_treaty.html#0001000001>.

112 Ibid.

113 *Plan 'Simplifying and Improving the Regulatory Environment'*, as note 106 above, at 11–12.

114 Ibid.

115 Markopoulos, as note 36 above, at 16.

non-wood elements, extracted from a particular sustainably managed forest, can be traced along each of the successive links of the global product supply chain (processing, formulation, refinement, manufacturing and assembly) through to the finished product. At that point, the final product may be issued a 'chain-of-custody' certification that completes the certification dossier. The final certification indicates that the finished product has been sourced originally from a sustainably managed forest, and is eligible to receive an on-product eco-label from the standards body. Chain-of-custody certification is the linchpin that connects the SFM eco-label with the SFM certified forest ecosystem.¹¹⁶ If any of the links of the chain are broken, SFM certification is held in doubt. Most of the FSC and PEFC certifications in global circulation are chain-of-custody certifications.¹¹⁷

The on-product label usually bears the standards organization's brand logo and some basic information concerning its SFM certification and origin. The labelling criteria typically do not specify, nor do the labels contain, any additional substantive information about the product's extraction, processing or production. Nor is there any discussion of the product's environmental performance or any special end-use characteristics.¹¹⁸ FSC or PEFC SFM branded on-product labels are simply intended to inform European consumers about the relative environmental characteristics of competing forest products, and to help the ultimate seller differentiate its product line and company reputation (i.e., to carve out new 'artificial martiets') through association with the SFM cause.

Most interestingly, FSC and PEFC SFM standards were ostensibly created by *private* organizations to

induce *EU* industry's *voluntary* participation. However, not only do these standards schemes apparently reflect and implement well articulated EU Commission and/or Member State goals and policies, but they are also global in scope, applying to all developing country forest product exports.¹¹⁹ In addition, their creation and development was likely facilitated, promoted and funded by government. In short, the EU Commission and Member States have developed an *extra-WTO* Precautionary Principle-based SFM policy framework that is implemented indirectly through the ostensibly private activities of the FSC and PEFC private standards bodies that promote EU cultural preferences favourable to EU industry.¹²⁰

2. EU Tropical Forest Policy Emphasizes the Role of SFM Certification and Labelling Standards

The SFM standards developed and applied by the FSC and PEFC are generally consistent with EU Commission tropical forest and SD policy objectives. Indeed, the EC's Fifth Environmental Action Programme (5EAP)¹²¹ specifically prioritized sustainable forestry management, citing the 'importance of maintaining and protection biological biodiversity in forests, and the use of timber certification and labelling to achieve it'.¹²²

Consistent with the 5EAP, EC Regulation 2501/2001,¹²³ which authorized the Generalized System of Preferences that had governed 'privileged access for Third World Products to the European market'¹²⁴ from 1 January 2002 to 31 December 2005,¹²⁵ and its successor, had also given priority to SFM certification schemes applicable to tropical wood products.¹²⁶

Notes

- 116 For further discussion of chain of custody, see Canada, Standing Committee on Natural Resources and Government Operations, *Forest Management Practices in Canada as an International Trade Issue*, at ch. 2, 'Certification – Consumer Information Through Labeling' (June 2000), available at <www.parl.gc.ca/InfoComDoc/36/2/NRGO/Studies/Reports/nrgo01-e.html>.
- 117 Rametsteiner and Kraxner, as note 25 above.
- 118 The brand-like label contains the standards body logo and bears copy stating that the product was obtained from a sustainably managed forest – nothing more.
- 119 'Policy Implications of Forest Products Market Developments in 2002 and 2003', in *Forest Products Annual Market Analysis 2002–2004* (UNECE/FAO Timber Bulletin), p. 5.
- 120 See Lawrence A. Kogan, *Exporting Europe's Protectionism*, above, at 96-97.
- 121 *Towards Sustainability – The European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development*, available at <www.europa.eu.int/comm/environment/actionpr.htm> (Fifth EC Environmental Action Programme); See also *Progress Report on Implementation of the European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development*, COM (95) 624 (10 January 1996), available at <www.europa.eu.int/comm/environment/env-act5/chapt1-4.htm#125> (discussing the implementation of the 5EAP).
- 122 *Progress Report*, *ibid.*
- 123 Council Regulation 2501/2001, Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2002 to 31 December 2004, 2001 O.J. (L 346), available at <www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R2501:EN:html>.
- 124 Catherine Stoneman and David Brown, *DG VIII*, in *The EU Tropical Forestry Sourcebook*, 89, Box 3.
- 125 This regulation's original funding period was extended from 31 December 2004 until 31 December 2005. See Council Regulation 2211/2003, Amending Regulation No. 2501/2001 Applying a Scheme of Generalised Tariff Preferences for the Period from 1 January 2002 to 31 December 2004 and Extending it to 31 December 2005, available at <www.eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Regulation&an_doc=2003&nu_doc=2211>.
- 126 Council Regulation No 2501/2001, as note 119 above, at Preamble para. 21, Articles 21–22, Annex IV para. 1, and Ad Article 21. Brussels subsequently decided that 'The [GSP's] environmental arrangement [had] taken an extremely limited approach to environmental protection; [i.e.] it applie[d] only to tropical timber', and recommended moving 'to a broader concept of sustainable development and governance'. See *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee – Developing countries, International Trade and Sustainable Development: the Function of the Community's Generalised System of Preferences (GSP) for the Ten-year Period*

Similarly, Environment Development Fund budget line B7-10, which had been used to administer development aid to the African, Caribbean and Pacific countries pursuant to the Lome Convention,¹²⁷ included support for the definition and development of certification systems within one of its priority areas.¹²⁸

Furthermore, the 5EAP complimented the European region's funding of SFM activities in Asia and Latin America pursuant to EC Regulation 443/92.¹²⁹ The Regulation has continued to provide the legal basis for EC financial and technical assistance 'targeted at the poorest sections of the population and the poorest countries in the two regions'.¹³⁰ It emphasized 'the importance of environmental and forestry issues by stipulating that 10% of Community aid for ALA countries be allocated to the environment, especially to the protection of tropical forests', and committed the EU to supporting SFM certification programmes.¹³¹

The EU Global Environment Budget Line 'B7-8110', managed by prior Directorate General XI, also outlined a number of priority areas for forest management, including promotion of forest certification and criteria and indicators. Actually, DG XI's Unit D4 ('Global Environment')¹³² played an important role in formulating EU forestry policy and shaping the EC's position on timber certification.¹³³ One 1996

Commission Staff Discussion Paper entitled 'EU Policy Options on Forest and Timber Certification' in particular outlined four options for EU SFM policy. They included: (1) actively contributing to (facilitating) the development and definition of SFM certification standards; (2) establishing the framework for a 'voluntary' EU-level certification scheme; (3) using preferential tariffs and promoting national forest management plans; and (4) negotiating a global forest convention.¹³⁴

Moreover, the EU's Sixth Environmental Action Programme, which provides a strategic direction to the Commission's environmental policy over the next decade, also incorporates SFM. The programme recognizes forests as both 'a key natural resource and an important economic asset', and obligates forest-based industries 'to satisfy the objectives of the four priority areas identified in the programme, namely, climate change, nature and biodiversity, environment and health, and natural resources and waste'.¹³⁵ In general, it instructs EU governments to take measures necessary to ensure sustainable forest management, consistent with local, regional and international initiatives, including forest certification schemes, by influencing consumer perceptions and behaviours.¹³⁶

In addition, EU policy initiatives encouraging sustainable forest management have been memorialized within its recently published brochure entitled,

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from 2006 to 2015', COM (2004) 461 final (July 7, 2004), at 9–10, available at <www.trade.ec.europa.eu/doclib/docs/2005/march/tradoc_121937.pdf>; Council Regulation 980/2005, Applying a Scheme of Generalised Tariff Preferences, 2005 O.J. (L 169), available at <www.eur-lex.europa.eu/LexUriServ/site/en/oj/2005/l_169/l_16920050630en00010043.pdf>.

127 *Commission White Paper on Europe and the Forest* (2 September 1999), p. 16, available at <www.europarl.eu.int/workingpapers/forest/eurfo220_en.htm> (identifying SD as a key theme, with particular attention paid to deforestation). The Lomé IV Convention was superseded on 23 June 2000 by the ACP – EC Partnership Agreement signed in Cotonou, Benin (Cotonou Agreement), which expanded the number of participating countries to 77. See 2000 O.J. (L 317), p. 3.

128 *Commission White Paper*, *ibid.*

129 Council Regulation 443/92, on Financial and Technical Assistance to, and Economic Cooperation with, the Developing Countries in Asia and Latin America 1992 O.J. (L 052) available at <www.eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992R0443:EN:html>. (establishing budget lines B7-3000/3001 and governing ALA co-operation in general). Brussels later proposed the adoption of broader sustainable development goals and sought replacement of this regulation. See *Proposal for a Regulation of the European Parliament and of the Council, Concerning Community Cooperation with Asian and Latin American Countries and Amending Council Regulation 2258/96*, COM (2002) 340 final (2 July 2002), available at <www.ec.europa.eu/comm/external_relations/la/doc/com02_340en.pdf> (withdrawn 27 September 2005); *Communication from the Commission to the Council and the European Parliament – Outcome of the Screening of Legislative Proposals Pending Before the Legislator*, COM (2005) 462 final (Sept. 27, 2005), p. 10, available at <www.eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0462en01.pdf>.

130 See *Financial and Technical Assistance and Economic Cooperation, Developing Countries in Asia and Latin America (ALA)* (Activities of the European Union, Summaries of Legislation), available at <www.europa.eu.int/scadplus/leg/en/lvb/r14001.htm>. See also PE-Lima: ALA – European technical assistance for the financing agreement covering EU-Andean Community of Nations Cooperation on Statistics – 0608 – Prior Information Procedure (2002), available at <www.dgmarket.com/eproc/eu/349731?full=t>; Notice of Invitation to Tender EuropeAid/117282/D/W/JM, Issued by the Government of Jamaica For a Project Financed by the European Community (EC) (2003), available at <www.deljam.cec.eu.int/en/tender/TENDER-NCHIP.doc>; Supply Procurement Notice, Supply of Twenty-five Motorcycles, Lao P.D.R. (2003), Delegation of the European Commission to Thailand, available at <www.deltha.cec.eu.int/en/tenders/laos_spn_text_6%20Oct%202003.htm>.

131 Communication from the Comm'n to the Council and the Eur. Parliament, *Forests and Development: The EC Approach*, at j-k, p. t-u, and w, COM (1999) 554 (9/2/99), available at <www.193.194.138.128/FIELD/Multi/EU/EUForests.pdf>.

132 Görne and Richards, as note 16 above, at 98-9.

133 *Ibid.*

134 *Ibid.*

135 *Commission White Paper*, as note 124 above, vol. 3, ch. 2, Summary.

136 *The Proposal for the Sixth Environmental Action Programme of the European Community entitled Environment 2010: Our Future, Our Choice*, COM (2001) 31, final, at 34-35, available at <www.europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0031.pdf>.

'Sustainable Forestry and the European Union – Initiatives of the European Commission'.¹³⁷ Included prominently among the top official priorities are *activities that promote sustainable forest management and the development of forest certification and eco-labelling schemes*.¹³⁸

In fact, the EU had shown interest in tying eco-labelling and furniture product branding together with regional sustainable forest management policy several years earlier. A 2001 report prepared for the European Commission recommended that SFM certification be included as an indispensable criterion for award of such a label, *through official EU involvement*, if necessary. '[I]f [private] demand does not exist, it can be created through awareness activities or through procurement requirements in the case of public procurements' (emphasis added).¹³⁹

Lastly, the EU has more recently sought to reevaluate, update and improve its regional as well as international support for and oversight of ostensibly private EU SFM policy implementation practices, including the FSC and PEFC SFM certification schemes.¹⁴⁰

No doubt, this has been encouraged by private groups which have articulated new justifications for increased EU government (direct as well as indirect) intervention. For example, they include the establishment of SFM practices as a new form of public intellectual property (i.e., 'traditional knowledge') warranting protection and preservation as a matter of 'cultural diversity'.¹⁴¹ They also include European industry calls for the EU Commission to tie its support for SFM initiatives to possible EU climate change emissions-trading system (ETS) regulatory reforms. Such recommendations, if approved, would "allow[] the use of EU forest-based carbon credits in the EU ETS, in line with the current Kyoto Protocol rules and any

future agreements and decisions adopted by the United Nations Framework Convention on Climate Change ("UNFCCC").¹⁴²

3. The EU Has Authorized Direct Funding of Private Initiatives that Promote EU SFM Policy

The evidence shows that the EU directly funded regional SFM policy initiatives carried out by private parties, including ENGOs. From 1 January 2000 to 31 December 2006, Council Regulation (EC) 2494/2000 authorized the funding of activities and projects contributing to the 'sustainable management of tropical forests'.¹⁴³ Regulation 2494/2000 enumerated specific activities that should have been engaged in to achieve this policy objective, including the use of forest certification and labelling schemes in the marketplace to influence 'socially responsible private' production and consumption habits.¹⁴⁴

Regulation 2494/2000 also called for close collaboration and disclosure between the EU Commission, the Member States and their cooperation partners, such as NGOs, to ensure the success of these initiatives.¹⁴⁵ According to this regulation, 'cooperation partners which may receive assistance under this Regulation shall include . . . non-governmental organizations . . .' (emphasis added).¹⁴⁶

4. The EU Has Directly and Indirectly Funded ENGO SFM Activities

Council Decision 97/872 (Dec. 16, 1997) authorized the EU to fund NGO environmental projects including those that promoted SFM.¹⁴⁷ According to a review

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137 *Sustainable Forestry and the European Union, Initiatives of the European Commission*, European Communities Brochure (Brussels: European Commission, September 2003), available at <www.europa.eu.int/comm/agriculture/publi/brochures/forestry/index_en.htm>.

138 *Ibid.*, at p.11.

139 Jurgen Barsch, E. Deliege and P.W.J. Luiten, *The Feasibility of an EU Eco-Label for Furniture* (FRG Umweltbundesamt (Federal Environmental Agency, February 2001), at pp. 31, 35, available at <www.ec.europa.eu/environment/ecolabel/pdf/furniture/feas_study.pdf>.

140 *Communication From the Commission to the Council and the European Parliament Reporting on the Implementation of the EU Forestry Strategy*, (2005) 84 final (10 March 2005), pp. 4-7, and 9, available at <www.eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0084en01.pdf>; *Commission Staff Working Document – Annex to the Communication on the Implementation of the EU Forest Strategy*, COM (2005) 84 final (10 March 2005), at 15, 26, 30, 63-6, 77, 80, 84-5, available at <www.ec.europa.eu/agriculture/publi/reports/forestry/workdoc_en.pdf>.

141 See Mauro Agnoletti, *Summary Report of the European Society for Environmental History Conference on "Cultural Heritage and Sustainable Forest Management: the Role of Traditional Knowledge"* (8-11 June 2006) at: <www.esch.org/news_item.2007-01-13.6176877058>.

142 See "Submission to the European Commission on the Review of the EU Emissions Trading Scheme Directive: The Need to Lift the Ban on Forest-Based Carbon Credits", Sustainable Forestry Management Limited (13 June 2007) at p. 3, at: <www.endseuropedaily.com/docs/70618a.pdf>.

143 Council Regulation 2494/2000 on Measures to Promote the Conservation and Sustainable Management of Tropical Forests and Other Forests in Developing Countries, 2000 O.J. (L 288), 15 November 2000, available at <www.europa.eu.int/abc/doc/off/bull/en/200011/p106047.htm>.

144 *Ibid.*, at Article 4 (1)(a) and (c).

145 *Ibid.*, at Article 6(6).

146 *Ibid.*, at Article 5.

147 Council Decision 97/872 on a Community Action Programme Promoting Non-governmental Organisations Primarily Active in the Field of Environmental Protection, 1997 O.J. (L 354), available at <www.europa.eu/bulletin/en/9712/p102177.htm>.

of that action programme's performance, EU financial contributions covered both 'running costs' and activities 'meant to enable environmental NGOs to carry out . . . activities for the benefit of Europe's environment and society as a whole . . . [that met] the principles underlying the 5EAP' (emphasis added).¹⁴⁸ It conditioned eligibility for such funding on ENGOs being 'active at a European level', even if they are members of 'umbrella' organizations or are only local affiliates of established national or regional member organizations.¹⁴⁹ The report also referred to the "Green 8" . . . [which had] been *involved in numerous policy areas to the further development and implementation of the Community environmental policy and legislation*' (emphasis added).¹⁵⁰ The 'Green 8' has since become the 'Green 10'.¹⁵¹

Significantly, the report found that most ENGOs receiving EC funding had little membership support, were '*extremely dependent on the EC*' (emphasis added), and had sought increases in the percentage of government matching funds which would be eventually

granted.¹⁵² Lastly, it revealed that among the fields of work being financed under this budget line was EU forest certification discussions and eco-labelling, the Pan-European process and DG Enterprise forest-based industries Committee activities, as well as European Forest NGO coordination activities.¹⁵³

As per the report's recommendation,¹⁵⁴ the European Parliament subsequently renewed this ENGO action programme for the period beginning 1 January 2002 until 31 December 2006.¹⁵⁵ The renewed action programme was also compatible with the EC's Sixth Environmental Action Programme (6EAP) covering years 2001–2010.¹⁵⁶ Both the Commission and the 'Green 10' have since endeavoured to secure extended financing for these and other related programmes for years 2007–2013 under the EU 'LIFE' (L'Instrument Financier pour l'Environnement)¹⁵⁷ consolidated funding mechanism.¹⁵⁸ In addition, individual EU Member States have provided significant funding for NGO participation in projects that have advanced government SFM policies.¹⁵⁹

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- 148 *Report From the Commission to the Council and the European Parliament on the Experience Gained in the Application of Council Decision 97/872 of 16 December 1997, on the Action Programme Promoting European Non-governmental Organizations Primarily Active in the Field of Environmental Protection*, COM (2001) 337 final 2 (9 October 2001), pp. 2 and 17, available at <www.europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0337.pdf>.
- 149 *Ibid.*, at p. 15.
- 150 *Ibid.*, at pp. 42 and 43.
- 151 Friends of the Earth Europe, *Green 10 Member Groups*, available at <www.foeeurope.org/links/green10.htm>.
- 152 COM (2001) 337 final 2, as note 148 above, p. 11, citing (The Evaluation of the Budget Line B4-3060, p. 106). The renewed action plan that went into effect on January 1, 2002 reflects a higher matching fund percentage. *See below*.
- 153 *Ibid.*, at p. 46.
- 154 *Ibid.*, at p. 16.
- 155 Council Decision 466/2002/EC Laying Down a Community Action Programme Promoting Non-governmental Organizations Primarily Active in the Field of Environmental Protection, at Preamble para. 2 and Article 7, 2002 O.J. (L 75), available at <www.europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_075/l_07520020316en00010006.pdf>, amended by Council Decision 786/2004/EC, 2004 O.J. (L 138.7), available at <www.eur-lex.europa.eu/LexUriServ/site/en/oj/2004/l_138/l_13820040430en00070011.pdf>.
- 156 *Communication From the Commission to the Council, The European Parliament, The Economic and Social Committee and the Committee of the Regions, On the Sixth Environment Action Programme of the European Community 'Environment 2010: Our Future, Our Choice' – The Sixth Environment Action Programme*, COM (2001) 31 final (24 January 2001), available at <www.eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0031en01.pdf>. *See also* Executive Summary, at 3-4, available at <www.ec.europa.eu/environment/newprg/pdf/6eap_xsum_en.pdf> (outlining the 6EAP's strategic approach for meeting its goals).
- 157 LIFE, Europa website, <www.ec.europa.eu/environment/life/life/index.htm>.
- 158 *See Proposal for a Regulation of the European Parliament and of the Council Concerning the Financial Instrument for the Environment (LIFE +)*, COM(2004) 621 final (29 September 2004), available at <www.eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0621en01.pdf> (proposal for a 'new Financial Instrument for the Environment [that] will group together most of the current support programmes for the environment and . . . be funded under Expenditure Heading 2 of the Financial perspectives 2007–2013, *Conservation and Management of Natural Resources*'); Friends of the Earth Europe, *Green 9 Proposed Amendments to the LIFE+ Regulation (COM(2004)621)*, 2005, available at <www.foeeurope.org/publications/2005/Green9_amendments_to_LIFE+.pdf> ('This amendment aims to ensure continuity in the objectives, aims and methodology of Decision No 466/2002/EC of the European Parliament and of the Council, regarding support to Non Governmental Organisations primarily active in the field of Environment'). *See also* UK Department for Environment, Food and Rural Affairs (DEFRA), *LIFE + Implementation*, 9 November 2006, available at <www.defra.gov.uk/environment/life/life-implementation.htm> (outlining implementation of the LIFE+ programme in the UK); Press Release, Europa, Environment: Commission Welcomes Final Political Agreement on LIFE+, 28 March 2007 (IP/07/431), available at <www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/431&format=HTML&aged=0&language=EN&guiLanguage=en>.
- 159 Paul Silfverberg and Pekka Alhojärvi, *Finnish – Russian Development Programme on Sustainable Forest Management and Conservation of Biodiversity in North-West Russia – Evaluation Report on the Nature Conservation Component* (Helsinki: Ministry of the Environment, 19 April 2004), pp. 15, 22, 24, 31–2, 44, 55–9, available at <www.miljo.fi/download.asp?contentid=18434&lan=en>. In addition to Finland, the UK, Germany, France and the Netherlands have provided funding to conserve tropical forests. Görne and Richards, as note 16 above, at chs 11-13, 18 and 22.

5. The EU Has Directly and Indirectly Funded FSC and PEFC SFM Activities

It is extremely difficult to trace all EU funding paths to particular ENGOs and their specific activities. Many ENGOs are comprised of members that are themselves ENGOs, any one of which can use their own EU funding to support common initiatives of their umbrella organization.¹⁶⁰ Alternatively, an ENGO can share funding with its affiliate offices in other countries through private inter-company transactions and revenue and expense allocation agreements, information about which may or may not be disclosed on the organization's consolidated income tax returns. In this case, many of the national members of the FSC are national offices of either the World Wildlife Fund, Friends of the Earth or Greenpeace, suggesting that the task of tracing official funding may be challenging, to say the least.¹⁶¹

Yet, certain linkages have been discerned. Available EU Commission funding disclosures reveal that the FSC and the PEFC have both, at one time or another, been funded by the EU to promote SFM certification and eco-labelling schemes. For example, the EU supported the establishment of the FSC when it provided funding under Budget Line 8110 'to Support the attendance of 34 delegates from developing countries at the founding assembly of the Forest Stewardship Council (FSC), Toronto' in 1993.¹⁶² Also, the EU, in part, financially supported Mexican national forest plan initiatives that adopted FSC SFM standards.¹⁶³ Furthermore, the EU Commission funded the Scottish NGO 'Just World Partners' during 2002 in the amount of 2,221,846 Euro for a regional sustainable forestry project in Central America. This NGO is a UK member of the FSC Social Chamber. The project was aimed at 'developing market linkages for community producers and *facilitating the sale of FSC certified timber to Europe*' (emphasis added).¹⁶⁴ Moreover, the EU Commission was reported by an ENGO to have funded an international meeting on forest certification schemes hosted by PEFC during June 2000, almost a year after that organization's founding.¹⁶⁵

Anecdotal evidence shows how such funding was likely used against multinational companies in the home improvement retail business. For example, groups related to the FSC launched public disparagement campaigns to compel these companies to reform not only their procurement of forest/wood products, but also the production practices of their foreign developing country suppliers,¹⁶⁶ in compliance with FSC SFM standards.¹⁶⁷ Similarly, FSC SFM certification standards have been incorporated as environmental benchmarks into a suite of ostensibly voluntary international social and environmental standards known as the 'Equator Principles'. These principles were adopted by the World Bank under duress several years ago, and later, by mostly European commercial banks. They require international financial institutions to undertake a stringent nonscientific environmental review of their potential financing of projects entailing environmentally sensitive activities in 'critical natural habitats', including 'high conservation value' tropical rain forests, consistent with the *extra-WTO* Precautionary Principle.¹⁶⁸ Activist groups later launched public disparagement campaigns against American commercial banks during 2002-2005 to compel their embrace of Eurocentric FSC SFM standards.¹⁶⁹

V. CONCLUSION

During the past twenty years, European governments created a national, regional and global policy framework that facilitated and promoted the development, adoption and implementation of private Euro-centric SFM certification and eco-labelling standards. SFM standards-related activities were undertaken within the borders of specific EU Member States and the European region by recognized private standardization bodies, namely the FSC and the PEFC. These activities were, at the very least, indirectly funded by European governments. They also clearly reflected a key regional EU policy priority: the global

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160 Just World Partners website <www.justworld.org.uk/mainframe.htm> (last visited 13 April 2007). See also FSC Membership List, Forest Stewardship Council website <www.fscoax.org/principal.htm> (last visited 13 April 2007).

161 FSC FAQs – Who are FSC's Members?, available at <www.fsc.org/en/about/about_fsc/faqs/5>.

162 ODI Projects – Support to the attendance of 34 delegates from developing countries at the founding assembly of the Forest Stewardship Council (FSC), Toronto, available at <www.odi.org.uk/tropics/projects/1349.htm>.

163 See Natasha Landell-Mills, Jason Ford and Kirsti Thornber, *Country Profile for Mexico*, Working Paper (International Institute For Environment and Development, January 1999), p. 12.

164 Just World Partners website, <www.justworld.org.uk/mainframe.htm> (last visited 13 April 2007).

165 *Certification Harmonization*, EU Forest Watch 45 (July 2000), available at <www.fern.org/pubs/fw/fw450700.htm>.

166 Jim Carlton, *J.P. Morgan Adopts 'Green' Lending Policies*, Wall Street Journal (25 April 2005), at B1; Jim Carlton, *Once Targeted by Protesters, Home Depot Plays Green Role*, New York Times (6 August 2004), at A1, cited in Lawrence A. Kogan, *Precautionary Preference: How Europe Employs Disguised Regulatory Protectionism to Weaken American Free Enterprise*, 7 Int'l J. Econ. Dev. (December 2005), 246, available at <www.itssd.org/White%20Papers/ijed-7-2-3-kogan.pdf>.

167 Carlton, *Once Targeted*, *ibid*.

168 Kogan, as note 166 above, at 249-50.

169 Carlton, *J.P. Morgan*, as note 166 above.

promotion of SFM as part of environment-focused *negative* SD.

The GATT case law and the TBT Agreement provide that when governments, which are charged with the responsibility of preventing private standards setting activities undertaken within their jurisdictions from creating unnecessary obstacles to international trade, become sufficiently involved in those activities, they may be attributed to them as a matter of law. Consequently, if it can be proven that such activities gave rise to discrimination against 'like' foreign products or constituted disguised trade protectionism, governments may be held accountable in a WTO dispute settlement proceeding initiated by aggrieved WTO members.

The evidence in this case reveals that the EU Brussels institutions and Member State governments have been sufficiently involved in the ostensibly private SFM standards setting and implementation activities of the FSC and the PEFC to have those activities and their market effects on developing country forest/wood products attributed to them. As a result, the SFM standards activities of such groups can fairly be characterized as part of an overall EU governmental regime, and thus, as an extension of EU 'governmental conduct'. Therefore, to the extent aggrieved WTO developing country members can prove that the FSC or PEFC standards resulted in actual trade discrimination or that they were intended to create or had the effect of creating unnecessary obstacles to trade, they may hold the EU and its participating Member States culpable under GATT/WTO law.¹⁷⁰

VI. LOOKING FORWARD – IS SIMILAR REASONING APPLICABLE TO CSR STANDARDS?

Even more far reaching and problematic than the Euro-centric SFM standards previously discussed, are the corporate social responsibility (CSR) standards that have emanated from Europe since 2001.

They are intended to alter corporate behaviour and corporate governance law throughout the world.¹⁷¹

It is commonly recognized that such standards arose as the result of immense political pressure applied by European green, social and labour groups. As with the SFM standards, significant differences of opinion immediately arose concerning the character of the CSR standards to be adopted, and the role that European governments should serve in the CSR standard setting and implementation process. Predictably, NGOs demanded the adoption of across-the-board mandatory rules while industry 'stressed the voluntary nature of CSR'.¹⁷² These differences have been exacerbated by calls from constituencies within the European Parliament and Commission to establish a European Social Label that certifies compliance with EU CSR standards¹⁷³ some of which can be either mandatory (legal) or voluntary.¹⁷⁴

Clearly, European proponents of CSR standards have pushed to link regional CSR initiatives with official EU bilateral and regional trade and aid agreements, and with international standards and regulatory development at the United Nations (UN), International Labor Organization (ILO), the Organization for Economic Cooperation and Development (OECD) and the WTO.¹⁷⁵ Indeed, the EU's institutions have sought to establish Euro-centric CSR standards as *de facto international standards* for various purposes. These include: increasing the accountability of international businesses to social and environmental stakeholders; reforming WTO law to reflect such CSR standards; achieving environment-focused *negative* SD; increasing European industries' global competitiveness; and promoting global governance – each a clearly stated priority of European regional policy.

During 2006, the EU Brussels institutions re-examined CSR as part of an overall effort to improve the quality of business regulation within Europe. Their goal, in part, was to promote a more positive public attitude towards entrepreneurship and to restore confidence and trust in business, by ensuring that 'entrepreneurs are appreciated not just for making a good profit but also for making a fair contribution to

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170 See Brien, as note 8 above.

171 *Commission Green Paper – Promoting a European Framework for Corporate Social Responsibility*, COM(2001) 366 final (18 July 2001), available at <www.europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0366en01.pdf>. See also *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, COM(2002) 347 final (2 July 2002), p. 2, available at <www.eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0347en01.pdf>.

172 COM(2002) 347 final, *ibid.*, at 4.

173 *European Parliament Votes for Regulation*, Human Rights and Business Matters 6 (Autumn-Winter 2002), available at <www.business-humanrights.org/Links/Repository/927613/link_page_view>, cited in *Unscientific Precaution*, as note 10 above at 44–45.

174 Committee on Employment and Social Affairs, *Report on the Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, (COM(2002) 347 – 2002/2261(INI)), FINAL A5-0133/2003 (28 April 2003), available at <www.ec.europa.eu/employment_social/soc-dial/csr/sipade2.pdf>.

175 COM(2001) 366, as note 168 above, at 6, para. 17.

addressing certain societal challenges'.¹⁷⁶ Some commentators, including this author, remain skeptical about whether the actions proposed can ameliorate the significant economic and legal costs that European and international businesses have borne as the result of such initiatives.¹⁷⁷ Nevertheless, one thing is certain:

Brussels has set forth an ambitious agenda that will inevitably lead to the increased involvement of European governments in CSR standards-related activities. This, no doubt, will keep internationally focused businesses and their counsels very busy, discerning the forests from the trees, for years to come.¹⁷⁸

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176 *Communication From the Commission to the European Parliament, the Council and the European Economic and Social Committee Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, COM(2006) 136 final (22 March 2006), p. 2, available at <www.eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0136en01.pdf>.

177 See Carlo Stagnaro and Lawrence A. Kogan, *Corporate Social Restriction*, TechCentralStation (4 April 2006), available at <www.tcsdaily.com/article.aspx?id=040406F>.

178 COM(2006) 136 final, as note 173 above, at 2, 4 and 8.

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