# Interactions in 'Private' Environmental Governance

## Errol Meidinger

Professor of Law
Director, The Baldy Center for Law & Social Policy
*The State University of New York at Buffalo*
*eemeid@buffalo.edu*

Summit on Private Environmental Governance

Washington, DC
June 10, 2013

# Thesis

Must understand environmental governance as:
- Composite of activities
- Carried out by multiple actors
  - → State and non-state
- Performing distinguishable but interrelated tasks
- Interacting in multiple ways
- Transnational
- Changing over time
- Goal: see <u>overall pattern</u> of governance
  - Highly <u>dynamic</u>
  - Hence '<u>interactions</u>' (rather than 'relationships')

# Overview

- Outline
  - Importance of program interactions
  - Conceptual framework
  - Forest governance example
  - Key questions
- Goals
  - Open up the topic of regulatory interactions
  - Learn from the discussion

# Rise of Private Governance

- Non-state actors take on functions traditionally thought to be reserved to the state

- Rule making, adjudication, enforcement, sanctioning, monitoring, etc.

- ISO, forest certification, organic foods, green building, etc.

# Research Progression

**Illuminating "<u>private</u>" environmental governance**

- 1997: **"Look Who's Making the Rules: the Roles of the FSC and ISO in International Environmental Policy,"** *Human Ecology Review*, 4:52
- 2001: "Private Environmental Certification Systems and U.S. Environmental Law: Closer than You May Think," *Environmental Law Reporter*, 31: 10162
- 2003: "The New Environmental Law: Forest Certification," *Buffalo Environmental Law Journal*, 10:211
- Have always seen 'private' environmental regulation as closely related to 'public'

**Illuminating the <u>connections</u> between private and public environmental governance**

- 2006: "The Administrative Law of Private/Public Forestry Regulation," *European Journal of International Law*, 17:47
- 2007: "Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems," in Brütsch and Lehmkuhl*, Law and Legalization in Transnational Relations*
- 2008: "Competitive Supra-Governmental Regulation: How Could it Be Democratic?" *Chicago Journal of International Law*, 8(2): 513

**TEAM EFFORT needed <u>Transnational Business Governance Interactions: Conceptualization and Framework for Analysis</u>, with Kenneth Abbott, Burkard Eberlein, Julia Black, and Stepan Wood, Regulation and Governance (forthcoming)** (contact me for the most recent version <u>eemeid@buffalo.edu</u>)

# Transnational Business Governance Interactions (TBGI) Network

- **Kenneth W. Abbott**, Arizona State University Law School (nanotechnology, climate change, health, international relations)

- **Julia Black**, London School of Economics Law Faculty (financial regulation, risk assessment, regulatory legitimation)

- **Burkard Eberlein**, Schulich School of Business, York University (accounting standards, EU regulation, infrastructure governance)

- **Errol Meidinger**, SUNY Buffalo Law School (forestry governance, food safety, new modes of governance)

- **Stepan Wood**, Osgoode Hall Law School, York University (corporate social responsibility, ISO standard setting, smart regulation)

- Growing network >60 researchers

# Governance Task Categories (ANIMEE)

- <u>Agenda setting</u>, goal definition

- <u>Norm formulation</u>, rule and policy making

- <u>Implementation</u> by targets

- <u>Monitoring</u>, information gathering, verification

- <u>Enforcement</u>, compliance promotion, sanctioning

- <u>Evaluation</u>, review and adjustment

# Actors

- Possible: individuals, organizations, institutions, structures
  - Framework allows for macro-meso-micro and agency-structure continuum
- Organized programs seeking to shape agendas, make rules, implement them, adjudicate compliance, monitor, and/or review and evaluate performance
  - Standard setting programs
  - Certification organizations
  - Advocacy NGOs
  - Monitoring organizations
  - Firms
  - Industry associations
  - Government agencies (local, national, international)
  - Et al.

# Interaction

- Def: "myriad ways in which governance actors and institutions engage with and react to one another"
- <u>Competition</u>: turf, revenue, reputation, legitimacy, adherents, etc.
- <u>Coordination</u>: emulation, division of labor, division of constituencies
- <u>Cooptation</u>: incorporation, absorption, steering, domination
- <u>Chaos</u>: no clear pattern, possible mutual oblivion
→Can coexist
→ Patterns change over time

# TBGI Analytical Matrix

| Dimension of interaction | Component of regulatory governance | | | | | |
|---|---|---|---|---|---|---|
| | Agenda, goal-setting | Norm formation | Implemen-tation | Monitoring, information gathering | Enforce-ment, compliance | Evaluation, review |
| Who/what interacts | | | | | | |
| Drivers & shapers | | | | | | |
| Mechanisms & pathways | | | | | | |
| Character of interaction | | | | | | |
| Effects of interaction | | | | | | |
| Change over time | | | | | | |

# Forest Governance Example

- Transnational forest governance <u>in three movements</u>
  - 80s
  - 90s
  - 2000s
- EU legality program
- Modern forestry Governance in the TBGI framework
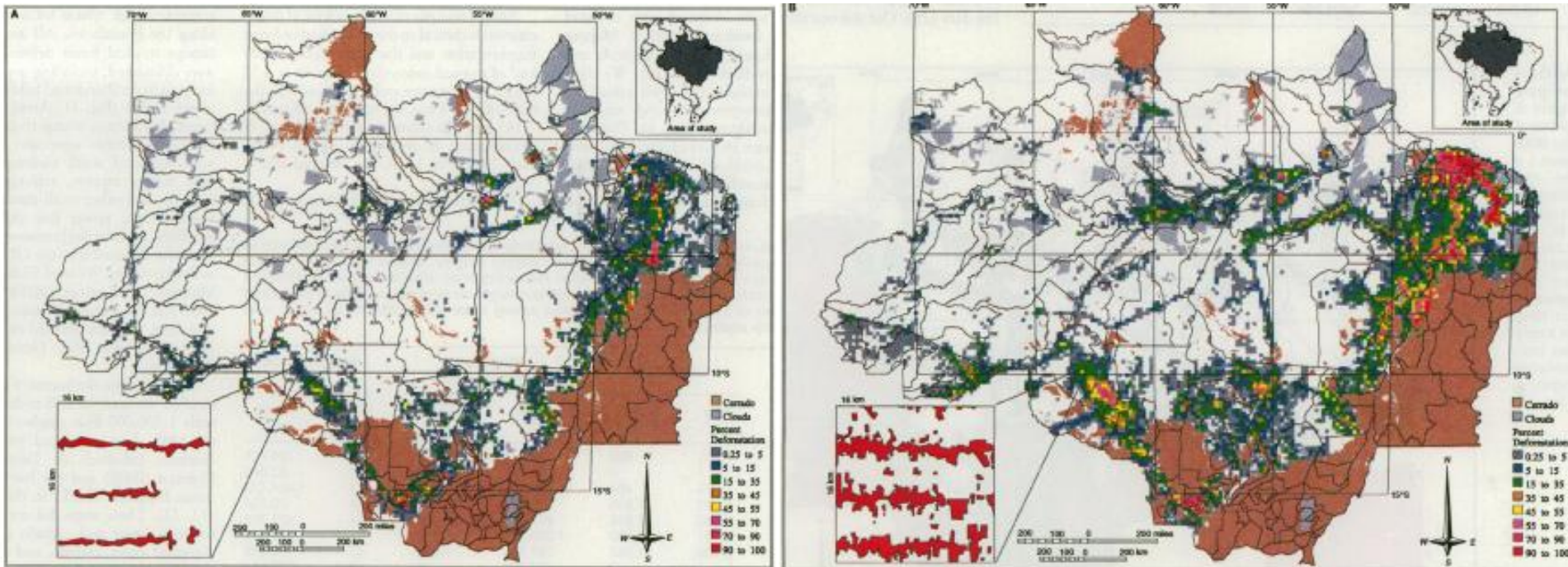
# 1980s: Governance by Governments
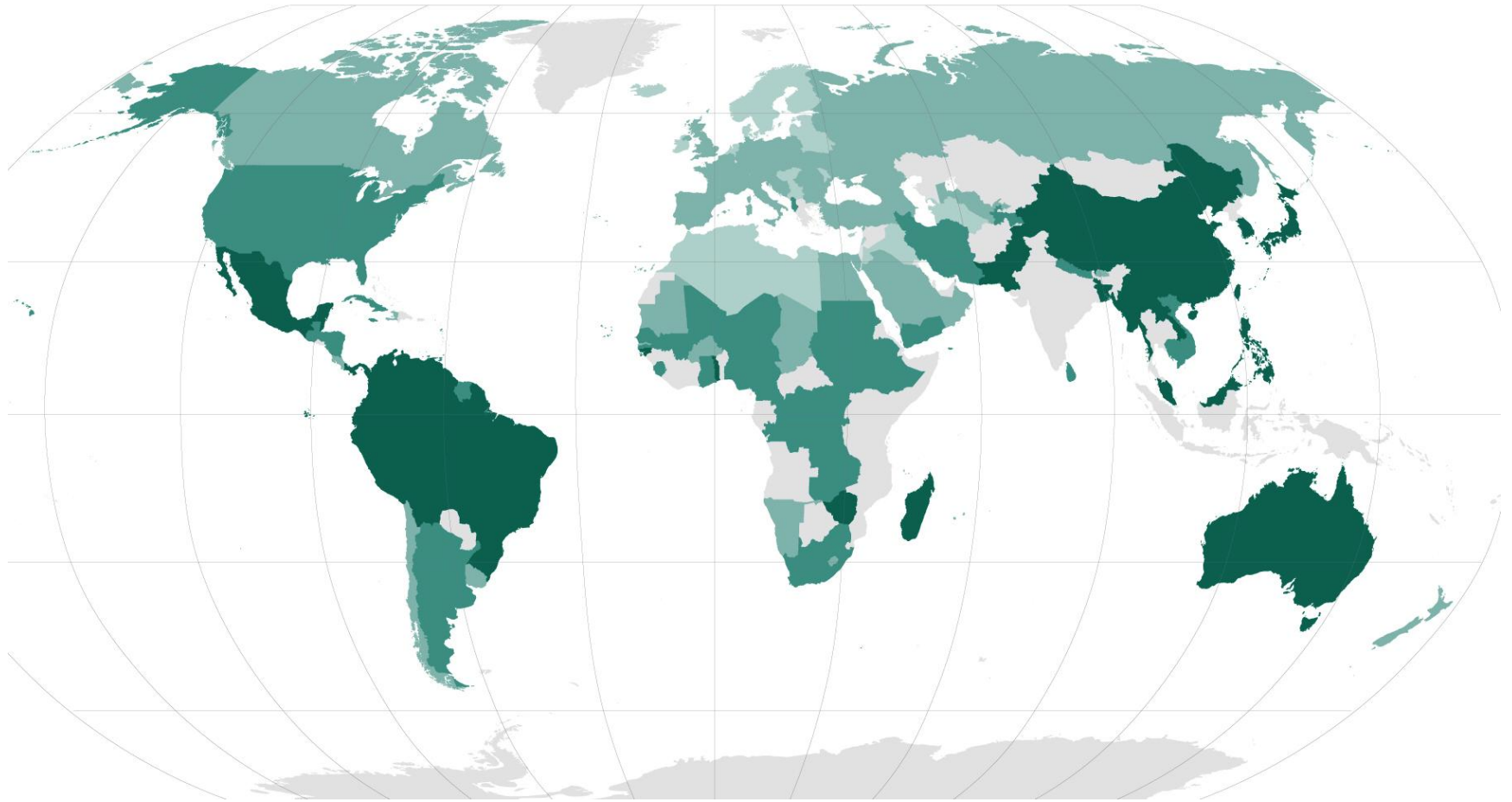
# "Tropical Forest Crisis"

1978          Amazonian deforestation          1988



(Skole and Tucker, Science, 1993)

# Tropical Forest Crisis

- Causes (among others):
  – Agricultural land conversion
  – Growing global timber markets
  – Inadequate state control (underfunding, corruption)
- Governance failure
  – Developing country governments unable or unwilling to control timber practices
  – Failure to achieve binding forest convention in Rio, 1992
  – South: international forestry standards as a northern barrier to trade
  – ENGO despair
    - Desperate search for alternative governance mechanisms

# 1990s: Rise of Forest Certification

- Forest Stewardship Council (1993)
- Rulemaking by tripartite, non-state, global "General Assembly"
  - Notice and comment
  - Public explanation
  - National and regional adaptation
- Certification (adjudication) by third-party certifiers
  - Public consultation and 'peer review'
  - Public summary and explanation
  - Formalized accreditation processses
- "Chain of Custody" product tracking
  - Heavy reliance on supply chain technology
- Logo on certified products
- Leveraged into place by brand threats by forest campaigners

FSC

# Rapid Uptake of Forest Certification

- Forest campaigns with brand threats
- Government procurement programs
- Certification of state forests by non-state organizations
- Surprising and threatening to established forest governance actors
- Rise of competing/mutually adapting programs (FSC/PEFC)
- Imbricated with state legal systems

# 1990s Forest Governance
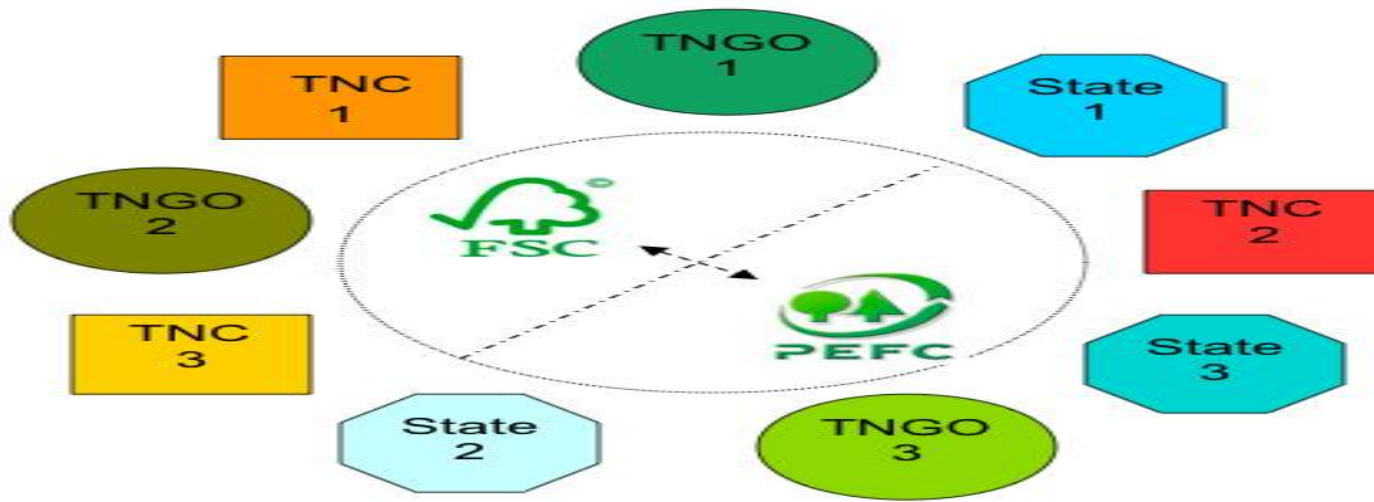
# Similar Developments in Other Sectors

- Agri-food
- Apparel
- Coffee
- Finance
- Fisheries
- Green Building
- Mining
- Etc.
- "Similar" but:
  - Also different
  - Highly dynamic
  - Need analytical framework

# Chilean Salmon Farming
## (circa 2000)
(Loosely adapted from Iizuka and Borbon-Galvez, 2008)

| Actor | Component of regulatory governance | | | | | |
|---|---|---|---|---|---|---|
| | Agenda, goal-setting | Norm formation | Implemen-tation | Monitoring, information gathering | Enforce-ment, compliance | Evaluation, review |
| Industry Association | ✓ | ✓ | ✓ | | | |
| State Agencies | | ✓ | ✓ | ✓ | ✓ (partial) | |
| Public-Private Consult. Body | | | ✓ | | | ✓ |
| Independent Natl Std Body | | ✓ | ✓ | | | ✓ |
| Regional Government | | | ✓ | | | |
| Norway and Scotland | ✓ | ✓ | | | | |

# Mexican Produce (circa 2005)
## (Loosely adapted from Iizuka and Borbon-Galvez, 2008)
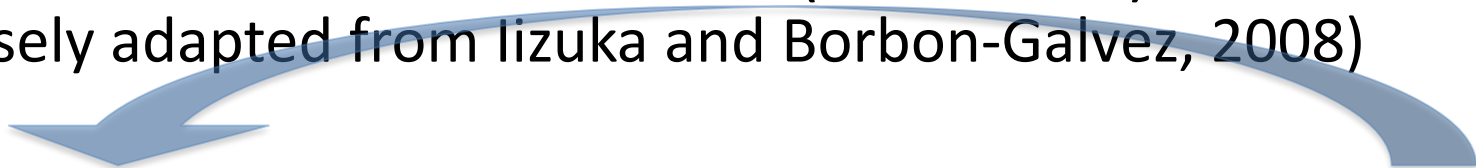
| Actor | Component of regulatory governance | | | | | |
|---|---|---|---|---|---|---|
| | Agenda, goal-setting | Norm formation | Implemen-tation | Monitoring, information gathering | Enforce-ment, compliance | Evaluation, review |
| National Agency Group | ✓ | ✓ | ✓ | ✓ | | |
| Government Ministers | ✓ | | ✓ | | | |
| Japan Min. of Agriculture | ✓ | | ✓ | | | ✓ |
| Industry Association | ✓ | | ✓ | | | ✓ |
| Public/Private Consult. Body | ✓ | ✓ | ✓ | | | |
| Intl. Food Stds. Bodies | ✓ | ✓ | | | ? | |

# 2000s: Resurgence of State Centered Governance through Legality Programs

- **FLEGT: Voluntary Partnership Agreements** between producer countries and EU
  - Exporting countries promise to define and assure legality of EU bound timber
  - "Voluntary," but expectation that exporting to the EU would get harder
- **Government Procurement Policies**: evidence of legal sourcing required
- **US Lacey Act Amendments** 2008: ban all transactions in illegally harvested wood products
- **EU Timber Regulation** 2010: bans first time placement of illegally harvested timber or wood products on the EU market
- **Australian Illegal Logging Act** 2012: criminalizes importation or processing of illegally harvested timber

# EU Legality Program

- <u>Voluntary Partnership Agreements (VPAs)</u>: exporting state treaty commitment to:
  - Define what counts as legality (participatory process)
  - Implement a legality tracing system so that legal wood can be identified
  - Heavily shaped by EU and other country practices
- <u>EUTR Illegal Timber Prohibition</u>: Bans first time placement of illegally harvested timber products on the EU market
  - Operators must use Due Diligence systems
    - <u>Risk Assessment</u>: information and risk classification
    - <u>Risk Mitigation</u> (for non-negligible risk): stricter controls, other suppliers, etc.
    - Can be done by certification programs, industry associations, individual firms
    - Externally audited
  - Enforced by a transnational network of EU, member state, and exporting state agencies, as well as timber producers, traders, and brokers

| Dimension of interaction | Norm Formulation (Policy and Rule Making) (Working hypotheses: much variation and little research to date) |
|---|---|
| Who/what interacts | • **Major importing and exporting states; certification programs, producers, timber traders, large retailers**<br>• In VPA countries: also local governments and local CSOs;<br>• In EUTR: primarily operators, monitoring orgs (certifiers) and competent authorities |
| Drivers/Shapers | • (among many others) **shared state interests in asserting sovereignty** |
| Mechanisms & pathways | • Much **rule borrowing and adaptation**<br>• Working through 'running code' or 'rough consensus' on broad goals and principles |
| Character of interaction | • **North → South dominance**, through **both state and market interactions**<br>   • **Increased northern technical and financial assistance to willing countries** |
| Effects of interaction | • **Domestic legal reform**<br>• **Growing transnational harmonization of forest law**<br>• **Increasingly similar, interlinked policy making structures**<br>• VPAs: **growing CSO participation and transparency in developing countries**<br>• Discussion of possible extension to other processes and commodities |
| Change over time | • From state centric to transnational network interactions, to intertwined North-South and economic supply chain centered policy making<br>• Possible **upward trend in average stringency**<br>   • Possible lowering of strictest standards |

| Dimension of interaction | **Enforcement, Compliance**<br>**(Working hypotheses: much variation and little research to date)** |
|---|---|
| Who/what interacts | • **Northern and Southern state agencies, certifiers (can be MOs), timber producers, brokers, importers, processors, retailers, TENGOs (especially forest campaigners), local CSOs and whistleblowers** |
| Drivers/shapers | • (among many others) global growth in adoption of management systems |
| Mechs/paths | • Best practice promulgation and diffusion; market chain regulation |
| Character of interaction | • **Discussions to define RA and RM procedures**<br>   • **Dominated by EC staff, but many entrepreneurial projects**<br>• **Both division of labor/cooperation and increased risk of confrontation due to mutual universal auditing**<br>• **B**ackground threat of penalties |
| Effects of interaction | • **Apparent 20-30 percent decline in illegal logging worldwide**<br>• **VPAs (+?): Increased protection of indigenous and community rights**<br>• **Increased regulation of both market and state actors** |
| Change over time | • **Significantly increased number of enforcers**<br>• Growth of a **global surveillance system, heavily reliant on supply chain controls**<br>• Proportionally decreased reliance on producing state agencies, but also likely increases in their activities.<br>• Possible creation of **bifurcated domestic versus export enforcement** systems |

# Critical Questions

- Efficacy

- Efficiency

- Equity

- Democracy

- Urgent need for focused research and dialogue among activists, practitioners, researchers