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NEWS & ANALYSIS

Harnessing Consumer Power: Using Certification Systems to Promote Good Governance

by Pooja Seth Parikh

A vast array of consumer products, including diamonds, timber, coffee, and rugs, have been linked to environmental and social harm around the world. Diamonds, for example, have financed global terrorist operations such as Al Qaeda,¹ and have perpetuated armed conflict and civil wars that have caused the death of more than three million people and driven more than six million people from their homes.² The diamond-fueled civil war in Sierra Leone, in which a rebel insurgency group forcibly conscripted over 12,000 children, hacked off the limbs of over 20,000 people, and committed abductions, rapes, and murders against civilians,³ illustrated for the world the gruesome realities surrounding conflict diamonds. Similarly, timber sales have helped to sustain oppressive dictatorships, civil wars, and human rights violations in countries such as Cambodia, Liberia, and Sierra Leone. Coffee production in Latin America has involved the vast clearing of tree cover, eliminating crucial wildlife habitat. Hand-woven rugs from India and Pakistan have been produced using child labor. These examples, and countless others, have illustrated the linkages between consumer products and global humanitarian and ecological crises and have raised serious ethical issues for consumers, industries, and civil society.

National and international law, to the extent that it exists, has not succeeded in eliminating many of these harmful impacts. Certification has therefore emerged as a new tool that attempts to harness market forces to promote environmental protection, fair labor and fair trade practices, human rights, and conflict-resolution. By identifying raw materials extracted, firms operating, or products produced in an environmentally or socially sustainable way, certification allows consumers to “vote” with their wallets by selecting certified goods and services over other, less desirable alternatives, thus providing incentives for industry to produce these

goods and services. Certification systems have emerged in a wide spectrum of industries, including chemicals, coffee, timber, mining, petroleum, fisheries, transportation, apparel, footwear, rugs, and toys, among others.

This Article examines some of these certification systems, and explores how certification can be used to promote not only environmental and social sustainability, but also “good governance” goals that advance transparent, democratic processes, reduce corruption, and promote peace. Some emerging systems aim to end armed conflict and promote governance directly, such as the international certification system for “conflict diamonds” under the Kimberley Process, which seeks to sever the funding sources for rebel groups engaged in armed conflict in various African countries. There have been similar calls to develop systems to certify “conflict timber” based on this conflict diamond model. More often, however, the governance benefits are indirect byproducts of the certification system. In other words, certification systems designed to promote environmental and social sustainability can also increase transparency, accountability, public participation in decisionmaking, legal use of natural resources, and investment in economic and human development.

This Article will first provide some general background information and conceptual tools to frame the discussion. It outlines the key components of a certification system and summarizes some of the primary benefits and limitations of certification as compared to other types of legal and regulatory tools. It then moves from the general into the more specific, providing examples and descriptions of some certification systems designed to promote three different types of policy goals: environmental protection and sustainability, peace and conflict-resolution, and fair trade and fair labor practices. It then discusses the potential for some certification systems to promote good governance, including peace and stability, legal use of natural resources, public participation and transparency, and investment in economic and human development. Finally, observations and recommendations are offered for how certification can be most effective in achieving its potential, drawing on the experiences of certification systems.

Components of Certification Systems

This section provides a brief overview of the various components of a certification system. While this introductory framework is largely theoretical, each of the components will be discussed in the context of more specific and concrete examples throughout the rest of the Article.

While certification systems vary widely in design and operation, they generally contain certain key components:

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1. Douglas Farah, *Report Says Africans Harbored Al Qaeda: Terror Assets Hidden in Gem-Buying Spree*, WASH. POST, Dec. 29, 2002, at A1; Douglas Farah, *Al Qaeda Cash Tied to Diamond Trade: Sale of Gems From Sierra Leone Rebels Raised Millions*, SOURCES SAY, WASH. POST, Nov. 2, 2001, at A1.
2. Clean Diamonds Trade Act, H.R. 2722, 107th Cong., §2(1) (2001).
3. Tracey M. Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 4 (2003).

(1) establishment of standards; (2) certification assessment for compliance with the standards; (3) certification seal or label; (4) accreditation of the certifier by the certification body; and (5) compliance monitoring. Certification is based on agreed-upon standards which specify the requirements that must be met by the firm or product in order for it to be certified. These standards can be generated internally (for example, a voluntary code of conduct for a firm or an industry), or by outside parties such as a trade association, a supplier, or a nongovernmental organization (NGO), a national government, or an international body. Standards can be “systems-based” or “performance-based.” Systems-based standards specify the management systems that must be in place, but do not specify any minimum level of performance or benchmark that must be achieved. Accordingly, two systems-certified companies could in practice achieve very different on-the-ground performance. Conversely, performance standards specify a benchmark level of on-the-ground performance, but do not specify how it should be achieved. Because performance standards provide a measurable benchmark, they are often used as a basis for product labels.

Certification assessment is the process used to determine whether the firm or product has in fact met the standards. Like standard-setting, certification assessment can be carried out internally or by outside parties. Certification assessment can have two components: (1) certifying the firm when its performance meets the standard; and/or (2) certifying the product by tracking it from the certified source through the chain of custody, in order to guarantee that it comes from a certified source. This chain of custody certification usually requires that products from certified sources be clearly identified and segregated from noncertified products, and that procedures be in place to control the identification and segregation of these products. Not all certification systems offer chain of custody certification.

Following certification assessment, a certification seal or label is often attached to the firm or product so that consumers can readily identify it as being certified. The seal does not necessarily mean that a product was independently certified—rather, the seal is often a self-declared claim that is made without an independent third-party certifier, or in some cases even prior to the existence of widely accepted standards.

Most often, however, the scale and the effectiveness of a certification system will require that outside parties conduct these assessments. Accreditation is a mechanism for the certification body to “certify the certifiers.” Through accreditation, the certification body can ensure that organizations that undertake certification (the certifiers) are competent to do so.

Finally, certification systems require periodic monitoring of certified entities and products to ensure their compliance with the certification standards over time, as well as monitoring and oversight of the accredited certifying organizations to ensure that they are correctly interpreting and applying the standards. Monitoring may also be coupled with a reporting function, which may or may not be made public.

Benefits and Limitations of Certification

Certification’s key benefit lies in its ability to harness consumer purchasing power to promote environmental and so-

cial sustainability. Certification does so by allowing consumers to identify and select sustainable goods and services over less desirable alternatives, thus creating economic incentives for sustainability. Using market power to promote environmental and social sustainability is particularly important where legal or regulatory approaches are nonexistent, ineffective, or impossible to enforce in practice. Moreover, even where governmental legal and regulatory frameworks exist and function, certification can provide a more protective framework than is legally required, by setting standards that are higher than or not covered by government standards. Coupled with product labeling and consumer education, certification can create niche markets for certified goods, often entailing higher prices (premiums) that industries will seek to access by meeting higher standards for environmental and social sustainability.⁴ Industry may also seek certification as a “social license” to operate, thus improving or protecting its corporate reputation, and minimizing its risk of conflicts with local communities or consumer boycotts of its products.

Certification also provides a mechanism for consumers to ensure that multinational corporations respect fundamental environmental and human rights when operating beyond national borders. This is of particular relevance in the age of globalization and free trade, where consumers are concerned about the conduct of multinational companies operating in countries with lax environmental and human rights protections. Currently, there are few “long-arm” jurisdictional statutes that can reach the conduct of U.S. companies abroad. Although the United States has exerted long-arm jurisdiction extraterritorially over certain corporate conduct, such as over anti-competitive behavior,⁵ there is currently no long-arm statute that specifically requires U.S. companies to comply with U.S. environmental or human rights laws when operating abroad.⁶ Certification can provide a way for concerned consumers to reach the conduct of multinational companies, even in the absence of long-arm regulations.

Certification can be more discriminating than industry-wide consumer boycotts, which have also been used by consumers to address misconduct by companies operating outside national borders. Consumer boycotts often target entire sectors or industries, e.g., tropical hardwoods or diamonds,

4. For example, research has shown a price premium of 5% to 10% for the first year’s production of certified timbers in Switzerland. See WORLD WIDE FUND FOR NATURE (WWF), CERTIFICATION: A FUTURE FOR WORLD’S FORESTS 13 (2000), available at <http://www.agrifor.ac.uk/whatsnew/detail/2032367.html> (last visited Jan. 27, 2003). Other examples include a premium of 4% to 12% on softwoods in the European market, a premium of 100% on certified teak paid to Malaysian exporters, and a premium of 30% on FSC-certified lumber offered by a manufacturer in Canada. See MICHAEL E. CONROY, CAN ADVOCACY-LED CERTIFICATION SYSTEMS TRANSFORM GLOBAL CORPORATE PRACTICES? EVIDENCE AND SOME THEORY 7 (2001), available at <http://www.env.duke.edu/solutions/colloquia-7th-papers.html> (last visited Jan. 27, 2003).

5. Sherman Act, 15 U.S.C. §§1-7 (1890).

6. U.S. companies operating abroad could, however, be subject to suit under the Alien Tort Claims Act (28 U.S.C. §1350 (1789)) for violations of a treaty or “the law of nations,” including gross and systematic violations of fundamental human rights. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert denied, 121 S. Ct. 1402 (2001), 2002 U.S. Dist. LEXIS 3293 (S.D.N.Y. Feb. 22, 2002). Also, U.S. companies are prohibited from making corrupt payments to foreign government officials for the purposes of obtaining or keeping business under the Foreign Corrupt Practices Act (FCPA) of 1977, 15 U.S.C. §§78dd-1 et seq.

and thus harm resource-based economies, firms, and individuals dependent on these industries—even those that are not engaging in harmful practices. Certification can help protect the legitimate firms in the industry, allowing consumers to boycott the truly harmful products but also allowing the nonharmful ones through. By doing so, consumers can help to promote, in an efficient and effective manner, adherence to existing and emerging international law.

However, certification also has potential shortcomings when compared with traditional legal and regulatory approaches. First, certification cannot compel compliance with environmental and social sustainability standards. Although some firms may opt to comply in order to protect their corporate reputation, avoid the risk of consumer boycotts, or gain market access or price premiums for their product, these incentives may be insufficient for other firms, particularly where the cost of certification is high. Legal and regulatory approaches can provide more effective “sticks” to govern industry behavior by applying strong and enforceable sanctions for noncompliance. However, although legal and regulatory approaches *can* provide stricter sanctions, this does not mean that they in fact do. Often, certification is proposed where government sanctions do not exist or are not enforced. Moreover, certification does not prevent governments from adopting stricter standards, and often paves the way for such government regulation.

A related limitation is that the proliferation of certification systems initiated by various industries suggests that certification systems are often enacted to co-opt or preempt the development of stricter government regulation or international labor and environmental laws directed at multinational companies or international trade. For example, faced with the possibility of boycotts, the diamond industry was among the first to clamor for a diamond certification system to weed out “conflict diamonds,” fearing a huge loss of profits if diamonds became tainted in consumers’ minds. The industry jumped to initiate certification systems that would purportedly guarantee that its stones originated from conflict-free countries.⁷ Experts pointed out that these industry certification systems were insufficient to determine the origin of the stones, and thus misleading.⁸ At the same time, DeBeers and other diamond industry giants hired lobbyists and lawyers to fight a congressional bill to enact a more effective certification system,⁹ which industry viewed as being too disruptive, and worked to craft a competing bill that would have excluded diamond jewelry from certification restrictions.¹⁰ This suggests that the diamond industry’s initiative to enact a certification system was largely driven by its interest in reassuring its customers, while, at the same time, preventing strict government regulation. Similarly, there is some suggestion that the World Travel and Tourism Council may have created the industry-run “Green Globe” certification program in order to stave off outside regulation of ecotourism.¹¹

Although some industry-initiated certification systems may be motivated by an intent to avoid government regulation, in some cases certification has led to the development of government regulations. For example, a proliferation of organic food certification systems by the organic food industry and NGOs in the United States served as a precursor to comprehensive national government certification of organic products.¹²

Other criticisms levied against certification are associated with the design and operation of the certification systems themselves: unclear and misleading standards, “greenwashing,” risks of corruption, lack of transparency, and ineffectiveness. There are, however, ways to safeguard against some of the problems associated with certification systems.

Policy Goals Underlying Certification Systems

Certification systems have been proposed to address a wide range of problems. This section provides a brief overview of some of the current certification systems used to promote three selected policy goals: (1) environmental protection and sustainability; (2) peace and conflict resolution; and (3) fair labor and fair trade practices. While there are hundreds of existing certification systems in each of these categories, this section is not intended to provide an exhaustive overview of all such systems. Rather, it highlights a few of the different types of systems in each category to illustrate their similarities and variations across different sectors, and for purposes of discussion throughout this Article.

Certification to Promote Environmental Sustainability

Consumer concern over environmental degradation has given rise to a wide variety of certification systems designed to allow consumers to identify and select products produced and services delivered in an environmentally sustainable manner. These certification systems have emerged in a range of industries, including forestry, fisheries, chemicals, tourism, organic food, and coffee, as well as in the area of environmental management. One example from each of these industries is highlighted below.

Forest Stewardship Council (FSC)

The FSC, formed in 1993, grew out of concerns over the environmental impacts of deforestation, clear-cutting, and loss of biodiversity. Concerned consumers, wary of claims by the timber industry and government about their sustainable forest management practices, found it difficult to identify which forestry operations were in fact operating in an ecologically sustainable manner. The FSC was created to provide consumers with a rigorous, independent system for identifying timber products from ecologically, socially, and economically well-managed forestry operations. Unlike

7. For example, the diamond industry giant, DeBeers, was issuing such guarantees. See <http://www.diamonddesign.com/newsletter/2000/11/conflict.html> (last visited Dec. 20, 2002); Lynne Duke, *Diamond Trade’s Tragic Flaw*, WASH. POST, Apr. 29, 2001, at H1.

8. See Duke, *supra* note 7.

9. Clean Diamond Trade Act, H.R. 2722 IH, 107th Cong. (2001).

10. See Duke, *supra* note 7.

11. A study by the Institute for Policy Studies observed that “[w]hile talking the talk of environmental responsibility, the WTTC, which

represents many of the world’s largest tourism corporations, promotes only self-monitoring, and vigorously opposes any governmental or international regulations.” INSTITUTE FOR POLICY STUDIES, *PROTECTING PARADISE: CERTIFICATION PROGRAMS FOR SUSTAINABLE TOURISM AND ECOTOURISM* 19 (2002).

12. See *The National Organic Program Background and History*, at <http://www.ams.usda.gov/nop/Consumers/background.html> (last visited Dec. 15, 2002).

claims by the timber industry and government, which were based largely on self-assessment and self-promotion, the FSC certification system is based on independent third-party verification. The FSC, through its accredited certifiers, certifies forestry operations in over 40 countries worldwide¹³ and is considered one of the most successful certification systems in terms of transforming industry, generating market demand, and instituting broad stakeholder participation.

The FSC's mission is to support "environmentally appropriate, socially beneficial, and economically viable" management of the world's forests. To this end, the FSC has developed broad Principles and Criteria covering a range of forest management issues, including compliance with national laws, land tenure, indigenous people's rights, community relations and workers rights, and environmental impact.¹⁴ Based on the FSC Principles and Criteria, as well as on FSC guidance, national or regional stakeholder groups develop specific, measurable, and auditable standards for certification applicable to their specific context. The FSC requires consultation with indigenous groups in developing national or regional standards. A national or regional FSC working group can be formed to facilitate the process of developing standards. Each FSC working group is structured as a multistakeholder organization, with three chambers (environmental, social, and economic) that each has an equal one-third of the vote in standard-setting.¹⁵

The standards developed are primarily performance-based,¹⁶ although they also contain some systems requirements, such as a management plan. Forestry operations are FSC-certified if they meet these benchmarks. Certification may be granted where minor improvements are required to meet the standard, but not where there are major failings.

In addition to certifying forestry operations, the FSC also certifies timber by tracking it through the manufacturing and distribution process. This is referred to as certifying "chain of custody." FSC chain of custody certification requires measures such as the separation of certified and noncertified timber as they pass along the supply chain to ensure that timber bearing the FSC logo actually came from FSC-certified forests. Thus, consumers purchasing FSC-certified timber or timber products are assured that they were harvested and processed according to FSC standards.

The FSC does not certify forest products itself. Rather, it accredits certification organizations to conduct certification assessments and monitor compliance. A certification organization can apply to FSC for accreditation to provide forest certification, chain of custody certification, or both. The FSC maintains oversight of FSC-accredited organizations

to ensure that certification decisions are consistent with the FSC's Principles and Criteria.¹⁷

Currently, over 60 million acres of forests are FSC-certified, representing approximately 5% of the world's working forests.¹⁸ By 2000, the demand for FSC-certified timber far outstripped supply, and leading retail chains such as Home Depot and Lowe's were buying FSC-certified lumber. Both Home Depot and Lowe's give preference to FSC-certified wood over wood certified by other certification systems, and have promised to phase out other wood over time.¹⁹ This wood is often sold at a premium.²⁰

The popularity and marketability of FSC-certified timber has led other forestry certification systems, such as the American Forest and Paper Association's (AFPA's) Sustainable Forestry Initiative (SFI),²¹ to adopt stricter standards. SFI was originally created by industry as a way to guard against the risk of consumer boycotts, while avoiding the FSC's strict performance-based standards and independent third-party verification. At first, SFI standards consisted only of broad forest conservation objectives, granting firms tremendous freedom to set their own management specifications. Moreover, SFI required only self-assessment, self-monitoring, and self-reporting to the AFPA, thus minimizing accountability to the public or consumers. However, due to pressure from big retailers such as Home Depot and Lowe's, SFI recently has adopted more stringent standards and initiated a voluntary third-party verification process.²²

Marine Stewardship Council (MSC)

The MSC was created in 1997 by the World Wide Fund for Nature (WWF) and Unilever, a multinational food company, to develop a certification system for sustainable fishery operations modeled on the FSC. Like the FSC, the MSC developed Principles and Criteria for sustainable fisheries management, including health of the population of target species, maintenance of ecological functions and structure of the fishery, and compliance with applicable laws and regulations.²³ These "Principles and Criteria" were developed with multistakeholder consultation. Unlike the FSC, however, the MSC's Principles and Criteria constitute the actual global standards by which performance is assessed; there is

13. Andy Rowell, *Sleeping With the Enemy*, BBC WILDLIFE MAG., Aug. 2001, at http://www.andyrowell.com/articles/sleeping_with_the_enemy/html (last visited Dec. 15, 2002).

14. See FSC Principles and Criteria, included in THE RAINFOREST FOUNDATION, *TRADING IN CREDIBILITY: THE MYTH AND REALITY OF THE FOREST STEWARDSHIP COUNCIL*, Annex 1 (2000), available at <http://www.rainforestfoundationuk.org/FSC> (last visited Dec. 15, 2002).

15. *Id.* at 31.

16. The FSC's performance-based standards include, for example, requirements that forestry operations provide safeguards to protect rare, threatened, and endangered species; maintain ecological function; control the use of exotic species; and implement erosion control measures. See Principle 6, FSC Principles and Criteria, *supra* note 14.

17. See FSC, ACCREDITATION PROGRAM MANUAL pt. I (1998), available at <http://www.fsc.org/principal.htm> (last visited Jan. 23, 2003).

18. CONROY, *supra* note 4, at 6.

19. *Not All Wood Is Good*, at <http://www.mainenvironment.org/WoodProducts/fcsmeridian.htm> (last visited Jan. 17, 2003) (quoting Carl Zichella, Regional Staff Director of the Sierra Club). See also Lowe's Environmental Policy (Dec. 5, 2000), at <http://www.lowes.com/ikn?action=home> (last visited Jan. 22, 2003) (indicating that FSC certification will be given preference over other certification systems). A Home Depot customer service representative also confirmed that they are in the process of phasing out non-FSC wood. Conversation with Joe B., Home Depot (Jan. 17, 2003).

20. Conversation with Anonymous Spokesperson, Lowe's (Jan. 17, 2003) (indicating that, for example, a 12' x 6' piece of non-certified lumber sells for \$9, while a similarly sized piece of FSC-certified lumber would sell for \$16).

21. See <http://www.aboutsfi.org/core.asp> (last visited Jan. 23, 2003).

22. See Gary Gereffi et al., *The NGO-Industrial Complex*, FOREIGN POL'Y, at http://www.foreignpolicy.com/issue_julyaug_2001/gereffi.html (last visited Jan. 17, 2003).

23. See MSC website, at <http://www.msc.org> (last visited Jan. 17, 2003).

no equivalent of the FSC's procedures for national or regional standard-setting working groups. Any fishery operation in the world may request to be evaluated for certification on the basis of these standards. Like the FSC, the MSC accredits independent teams of certifiers to conduct certification assessments and monitoring. Seven fishery operations have been certified to date, and at least seven are currently undergoing certification.²⁴

Responsible Care®

Unlike the FSC and MSC, both involving independent third-party certification, the chemical industry's "Responsible Care®" represents a second-party certification system. Under this system, a firm works with a second party—the American Chemistry Council (ACC), the industry trade association—to generate standards and report compliance. The ACC created Responsible Care® in 1988, establishing general environmental, health, and safety principles for participating firms.²⁵ Individual member firms determine what constitutes "full implementation" of the principles for their own circumstances, measure compliance, and submit compliance reports to the ACC.²⁶ There is no external third-party verification of these compliance reports, and they are not made publicly available.²⁷ This lack of verifiable standards, specific sanctions for noncompliance, and transparency has limited the credibility of Responsible Care®. However, the ACC has recently developed a "hybrid" Responsible Care®/International Organization for Standardization (ISO) 14001 certification process (termed RC 14001) that would improve Responsible Care® by requiring external audits.²⁸

ISO 14001

ISO 14001 is an environmental management system standard developed in 1996.²⁹ It provides a classic example of a systems-based standard, lacking benchmarks against which performance is assessed. Rather, to meet the ISO 14001 standard, a firm must have a framework for setting and reviewing environmental objectives, for assigning responsibility to achieve those objectives and for regularly measuring progress toward them.³⁰ It must also have appropriate management structures, employee training, and a system for

responding and correcting problems as they occur.³¹ Although many firms voluntarily seek a third-party audit to verify conformity to the ISO 14001 standard, third-party verification is not required for certification.³²

Industry has shown strong support for the ISO 14001 certification system. Over 40,000 firms in more than 100 countries worldwide have become ISO 14001-certified³³ in a diversity of sectors including electronics, pharmaceuticals, chemicals, automobiles, and transportation. In part, this can be attributed to competitive advantages of certification, as increasing numbers of companies require their suppliers to be ISO-certified.³⁴ The widespread industry appeal also likely stems from the lack of performance-based standards for ISO 14001 certification. A firm is simply required to commit to having certain management systems in place, but not to any specific outcomes in terms of measurable environmental impact. Proponents of the ISO system point out that this is a key strength of ISO: it is not limited to just those with the capital resources necessary to achieve environmental benchmarks. Rather, even firms lacking in capital and technology can adopt ISO's management standards, which are intended to lead to more consistent compliance and continual environmental improvement over time.³⁵ However, ISO 14001's lack of performance-based standards has also led to criticism of the certification system as providing false proof of environmental success.³⁶

Costa Rica's Certificate for Sustainable Tourism

Tourism certification programs have sprung up around the world, certifying tourism professionals, businesses, attractions, destinations, and services. While some rely on an ISO 14001 systems-based approach, there are also a number of performance-based programs. One of the most effective performance-based programs is Costa Rica's Certification for Sustainable Tourism (CST).³⁷

CST currently certifies accommodations, but also plans to cover tour operators, transportation, and restaurants. CST's standards are primarily performance-based, addressing both environmental sustainability, e.g., emissions, waste management, protection of flora and fauna, water consumption, and energy consumption, and socio-economic issues, e.g., direct and indirect economic benefits to local community, and contributions to community cultural development and health. The standards also include some ISO-like systems-based criteria, such as internal environmental management policies.³⁸

The CST certification board's membership represents multiple stakeholders. CST's five-person technical staff conducts certification assessments based on multiple site visits, including an initial site visit to explain the process, a formal assessment that typically lasts four days, and fol-

24. E-mail correspondence with Caroline Woffenden, United Kingdom (U.K.) Communications Officer, MSC (Jan. 22, 2003) (on file with author).

25. See Responsible Care® Practitioners' Site, at <http://www.americanchemistry.com> (last visited Jan. 22, 2003).

26. See <http://www.americanchemistry.com/rc.nsf> (last visited Jan. 22, 2003) (indicating that under the Responsible Care®'s Pollution Prevention Code, for example: "Each company must identify its own reduction priorities and implement a reduction plan to meet company/facility-set goals.").

27. See *id.*

28. See <http://www.americanchemistry.com/rc.nsf/0/414caef2dbe1f12b852568110053eaa5?opendocument> (last visited Jan. 22, 2003).

29. See <http://www.iso.ch/iso/en/prods-services/otherpubs/iso14000/benefits.pdf> (last visited Jan. 27, 2003).

30. Neil Gunningham & Darren Sinclair, *Voluntary Approaches to Environmental Protection*, at <http://www.naturalresources.org/minerals/docs/oced/Voluntary%20Approaches%20to%20Environmental%20Protection%20-%20Lessons%20from%20the%20Mining%20and%20Forestry%20Sectors.pdf> (last visited Jan. 27, 2003).

31. *Id.*

32. *Id.*

33. See *The ISO 14001 Speedometer*, at http://www.inem.org/htdocs/iso/speedometer/speedo-06_2002.html (last visited Jan. 21, 2003).

34. See *What Is ISO 14001 and Why Should I Care?*, at <http://www.enlightenup.org/environment.environment01.htm> (last visited Jan. 21, 2003).

35. See *id.*

36. See, e.g., Gunningham & Sinclair, *supra* note 30, at 19.

37. See PROTECTING PARADISE, *supra* note 11, at 38.

38. See *id.* at 39.

low-up audits if necessary to ensure that corrections were made.³⁹ It uses a scaled eco-labeling system, rating a facility on a scale of one to five, and thus providing ongoing incentive for improvement. Certification assessment results are posted on the Internet so that the facility's strengths and weaknesses are public.⁴⁰ Surveillance audits are to be conducted every six to 12 months.

There are currently over 60 certified hotels, none of which has yet received CST's top rating of "five."⁴¹ Currently CST is funded by the Costa Rican government, although it is intended to become self-supporting.

CST is being considered as a model for other national and regional programs. In June 2001, six Central American countries concluded an agreement to develop a single regional "Certificate of Sustainable Tourism" based on CST.⁴²

U.S. Department of Agriculture (USDA) Organic Food Certification

As a response to consumer confusion over the plethora of "organic" claims on food products, the U.S. government enacted the Organic Foods Production Act⁴³ in 1990 to establish uniform national standards for the production and handling of foods labeled as "organic." The Act authorized a new USDA National Organic Program (NOP) to set national standards for organically grown food and oversee mandatory certification of organic production. The Act also established the National Organic Standards Board (NOSB) to advise the Secretary of Agriculture in setting the standards for the NOP.

The U.S. federal government established the final standards for organic food in December 2000.⁴⁴ These standards replaced a jumble of state rules and varying private certification standards, providing a national definition of the term "organic" by detailing the methods, practices, and substances that can be used in producing and handling organic crops, livestock, and processed products. The federal standards establish clear organic labeling criteria and specifically prohibit the use of genetic engineering, antibiotics, ionizing radiation, and sewage sludge on foods marketed as "organic." They also require that products labeled "Made With Organic Ingredients" contain at least 70% organic ingredients.

Under this rule, the USDA accredits state or private agencies to certify farms or handling operations that produce organic agricultural products. Only products that originate from USDA-certified farms or handling operations can be labeled as "organic." The statute provides for civil penalties up to \$10,000 for fraudulent labeling. USDA-accredited certifiers can also suspend or revoke certification. The certifiers conduct annual on-site inspections of each certi-

fied operation, and may conduct unannounced inspections and residue tests of organically grown produce at any time.

These new regulations—enacted to promote the organic farming industry by eliminating consumer confusion over the varying state and private standards—have engendered some controversy within the organic farming community. In particular, some farmers, whose standards for organic production exceed that of the USDA's, worry that the national uniform standards will compromise their ability to differentiate their products in the marketplace and therefore eliminate their competitive edge over other organic producers.⁴⁵ Others are concerned that the government's standards may not be stringent enough and that by eliminating competition among certification systems, the USDA certification system eliminates market-based incentives for more progressive and cutting-edge standards for organic farming.⁴⁶

Bird-Friendly Coffee

The Smithsonian Migratory Bird Center established the Bird-Friendly Coffee certification system.⁴⁷ Coffee certified as "bird-friendly" has been grown on farms in Latin America, in accordance with a defined set of criteria for shade tree cover that provides habitat for migratory birds. The standards prescribe minimum requirements for shade cover, limit the use of non-native trees, promote a diversity of shade tree species, encourage the establishment of buffer zones and the use of natural fences, and discourage the removal of epiphytes from shade trees.⁴⁸ Over 100 coffee roasters and retailers have been certified under this system.⁴⁹

Certification to Promote Peace and Conflict Resolution: Conflict Diamonds and the Kimberley Process

The trade in rough diamonds⁵⁰ has financed armed conflict—led by rebel movements and in some cases by "legitimate" governments⁵¹—in several African countries. Global attention has focused largely on the role of diamonds in enabling the military activities of rebel movements seeking to undermine or overthrow existing governments. The trade in rough diamonds from rebel-held areas, termed "conflict" or "blood" diamonds, is estimated to be approximately \$280

39. See *id.* at 39-40.

40. See CST website, at <http://www.turismo-sostenible.co.cr/EN/home.shtml> (last visited Jan. 22, 2003), for publicly available certification assessments.

41. See *id.*

42. See PROTECTING PARADISE, *supra* note 11, at 39-40.

43. Organic Food Production Act, 7 U.S.C. §§6501 et seq. (1990).

44. National Organic Program, 7 C.F.R. pt. 205. The law went into force on April 21, 2001, and compliance by organic food producers and marketers was required as of October 21, 2002. See Alternative Farming Systems Information Center, at <http://www.nal.usda.gov/afsic/ofp/> (last visited Jan. 27, 2002).

45. See Associated Press, *Some U.S. Farmers Worry That They May Be Hurt by New Organic Rules* (Jan. 22, 2001), at http://www.ipm.osu.edu/trans/o1_222.htm (last visited Dec. 16, 2002).

46. See *id.*

47. See <http://www.nationalzoo.si.edu/ConservationAndScience/MigratoryBirds/Coffee/faq.cfm> (last visited Apr. 24, 2003).

48. See <http://www.conservation.org/xp/CIWEB/newsroom/campaigns/buying.xml> (last visited Jan. 27, 2003).

49. See <http://www.nationalzoo.si.edu/ConservationAndScience/MigratoryBirds/Coffee/faq.cfm> (last visited Apr. 24, 2003).

50. In addition to diamonds, other natural resources such as timber, oil, emeralds, and coltan have been used to finance armed conflict. See MICHAEL RENNER, *THE ANATOMY OF RESEARCH WARS 7* (Worldwatch Paper No. 162, 2002).

51. For example, Liberia's former president Charles Taylor used funds from the sale of conflict diamonds and later conflict timber to finance paramilitary units that terrorized Liberia's population, as well as to support Revolutionary United Front rebels engaged in armed conflict and human rights violations in Sierra Leone. See *id.* at 24-25.

million a year,⁵² allowing rebel movements to continue civil wars and widespread human rights abuses on civilians. There have been various attempts to remove conflict diamonds from international trade in order to stem the flow of financing for arms that make civil wars possible. These attempts have taken the form of consumer boycotts, import bans, country-specific certification systems in diamond-producing countries, and now an emerging international certification system for diamonds under the “Kimberley Process.” Certification has been viewed as a means to sever the link between diamonds and these armed conflicts, without harming the legitimate diamond industry. A mandatory certification system would make it more difficult for rebel groups to sell diamonds on the legal market, thus depressing the price of conflict diamonds and reducing the amount of cash available to buy arms and perpetuate wars.

Conflicts Financed by Diamonds

Conflict diamonds have helped create and prolong humanitarian crises in countries such as Sierra Leone, Angola, and the Democratic Republic of the Congo (DRC), where rebel groups and even foreign armies have financed themselves by seizing and selling off natural resources. In Sierra Leone, the Revolutionary United Front (RUF), backed by Liberia, seized control of the country’s diamond fields to fuel its decade-long civil war and terror tactics against civilians. Similarly, Angola’s civil war between the Popular Movement for the Liberation of Angola government and the National Union for the Total Liberation of Angola (UNITA) rebels was financed by pillaging the country’s natural resources, including diamonds. In the DRC, foreign armies from Uganda and Rwanda used the country’s diamonds to finance the conflict to overthrow the Kabila government, while Kabila secured military assistance and support from other foreign forces by granting access to diamonds.⁵³

Country-Specific Certification Systems

As a result of United Nations (U.N.)-imposed sanctions on rough diamonds from rebel-held territory, both Sierra Leone and Angola adopted diamond certification systems. In Sierra Leone, the U.N. Security Council imposed a global ban in July 2000 on direct and indirect importation of all rough diamonds from Sierra Leone, except those certified by the government of Sierra Leone as having been legally mined. The ban was subsequently extended.⁵⁴ The government of Sierra Leone adopted a certification system requiring all rough diamonds for export to be accompanied by a government-issued “certificate of origin.” These certificates are crafted on forgery-proof security paper, and contain a matching numbered label on the sealed parcel of rough diamonds that must be returned by the recipient.⁵⁵ The United Nations also imposed a similar import ban on diamonds

from UNITA-held territory in Angola in 1998, in order to diminish UNITA’s ability to finance its military activities. Angola, in turn, adopted a certification system similar to Sierra Leone’s.

Unfortunately, these country-specific certificate of origin systems were severely undermined by poor enforcement in exporting countries, smuggling, and lax government controls by importing countries. When these systems were initiated, there was little oversight or monitoring by major diamond cutting and trading centers in Belgium, Israel, and Britain. For example, the Belgian government was the only importing country to have established the requisite electronic system to exchange certification data with Sierra Leone.⁵⁶ Similarly, importing countries such as the United States—which consumes more than one-half of the world’s diamonds⁵⁷—do not have sufficient import control systems to weed out conflict diamonds. The current U.S. import control system does not require certification from the country of extraction, only from the country of last export.⁵⁸ The U.S. system is therefore ineffective in identifying diamonds that come from conflict sources, particularly when these diamonds have been laundered through third countries. After the imposition of the U.N. sanctions, the United States required all shipments of diamonds from Sierra Leone and Angola to have a government-issued certificate of origin, but there was nothing preventing conflict diamonds from these countries from being first shipped to another country and then sent to the United States.⁵⁹

Importing countries have since taken their oversight function more seriously. Belgium, where an estimated 70-80% of all rough diamonds on the world market are cut, traded, and passed-through,⁶⁰ has now imposed stricter controls on diamonds. In addition, the Belgium-based Diamond High Council is working with the governments of Sierra Leone, the DRC, Angola, and Guinea to develop tamper-proof certification systems for diamond export. The U.S. government also made some moves toward banning conflict diamonds. On November 28, 2001, the U.S. House of Representatives passed the Clean Diamonds Trade Act.⁶¹ Concerned that this bill was weak, several senators introduced their own bill⁶² on March 18, 2002. Both bills died in committee last year.⁶³ However, both the U.S. Senate and House of Representatives subsequently passed the Clean Diamond

56. See *Conflict Diamonds: Crossing European Borders? A Case Study of Belgium, the United Kingdom, and the Netherlands*, at http://www.niza.nl/uk/campaigns/diamonds/docs/eu_borders/dr-summary.htm (last visited Feb. 20, 2002).

57. See Duke, *supra* note 7.

58. U.S. General Accounting Office (GAO), *International Trade: Significant Challenges Remain in Deterring Trade in Conflict Diamonds: Testimony Before the Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia, Committee on Government Affairs, U.S. Senate* (statement of Loren Yager, Director, Internal Affairs and Trade), at 10 (Feb. 13, 2002) (GAO-2-02-425T), at <http://www.gao.gov> (last visited Apr. 24, 2003).

59. See *id.* at 11.

60. *Conflict Diamonds: Crossing European Borders?*, *supra* note 56.

61. Clean Diamond Trade Act, H.R. 2722 PCS, 107th Cong. (2001).

62. Clean Diamond Trade Act, S. 2027 IS, 107th Cong. (2002).

63. Several bills on conflict diamonds had also been introduced prior to the Clean Diamond Trade Act (H.R. 2722), which was finally passed by the House of Representatives. These earlier bills included the Consumer Access to a Responsible Accounting of Trade (CARAT) Act of 2000 (H.R. 3188, H.R. 5147), the Conflict Diamonds Elimination Act (H.R. 5564), and the Clean Diamonds Act (S. 1084), none of which made it out of committee.

52. *Belgium: Call to Act on Blood Diamonds*, N.Y. TIMES, Apr. 26, 2001, at A9.

53. See Renner, *supra* note 50, at 26-32.

54. U.N. News Service, *Security Council Votes to Continue Ban on Rough Diamonds From Sierra Leone* (Dec. 4, 2002), at <http://www.un.org/News/Press/docs/2002/sc7584.doc.htm>. (last visited Dec. 4, 2002).

55. Associated Press, *Sierra Leone Diamond Certification Wins U.N. Approval* (Aug. 9, 2000), at <http://www.globalpolicy.org/security/issues/diamond/slplan2.htm> (last visited Feb. 20, 2002).

Trade Act⁶⁴; President George W. Bush signed it into law and issued an Executive Order to assist in implementation.⁶⁵ Reported linkages between conflict diamonds and the financing of the Al Qaeda terrorist network have heightened the Bush Administration's interest in the issue.⁶⁶

The Kimberley Process: A Global Certification System

Representatives from over 50 national governments have attempted to eliminate some of the key weaknesses of country-specific certification systems by working together to develop a stricter, global, standardized certification system through what has become known as the "Kimberley Process."⁶⁷ In theory, such a system would be more difficult to undermine than the current country-specific certification systems because importing countries would be obligated to enact the requisite legislation and import controls to support such national systems. Under the existing national systems, rebel groups could continue to trade in conflict diamonds because many countries do not possess legislation banning imports of conflict diamonds. Moreover, even where countries possess such legislation, it is often ineffective. For example, although U.S. legislation bans the import of diamonds from Sierra Leone, its customs regulations only require reporting of the country of last export, not the country of extraction, thus providing a major loophole for conflict diamonds from Sierra Leone that had been laundered through third countries.⁶⁸ The Kimberley agreement would require all participating governments to close existing loopholes by enacting adequate legislation to effectively ban the import of conflict diamonds. Also, unlike the national certification systems, which are undermined by a lack of adequate controls from the importing countries, the Kimberley system would require importers to ensure the validity of certificates and shipping containers and to send exporting countries the documentation and data necessary to monitor compliance.

In a November 2002 meeting in Interlaken, more than 30 nations adopted the "Kimberley Process Certification Scheme," committing to launch it in January 2003.⁶⁹ This certification system is based on internationally agreed-upon

minimum standards for the certificate of origin, with implementation of these standards to occur through national certification systems. Governments of participating countries must issue the certificates, and each shipment of diamonds must be accompanied by a certificate. The certificates must be forgery-resistant, and must indicate country of origin, confirmation that Kimberley Process controls have been followed, and other specifics. Governments also have agreed to use tamper-proof containers for imports and exports; adopt national legislation to enforce the agreement; prohibit imports of uncut diamonds from, or their export to, nonparticipating countries; and collect and exchange data on imports and exports of uncut stones.

What the participating governments chose to exclude from the agreement is also significant. First, the agreement does not require participants to regulate the flow of diamonds from the mine or field to the point of first export. Although it contains "recommendations" that participants do so by licensing diamond miners and mines, these are not binding requirements, which increases the possibility that conflict diamonds could enter at this stage without being detected by export certification authorities. Second, after the diamonds enter the foreign port, there are no further requirements for maintaining chain of custody of the diamonds. Therefore, smuggled conflict diamonds could enter legal trade at this stage, prior to reaching the consumer. To address this problem, the agreement recommends industry participation in a "chain of warranties" all the way to the consumer. However, industry participation in this chain of warranties is voluntary, and monitoring and enforcement is to be self-regulated by industry. Third, participant countries agreed only to very limited monitoring provisions. The agreement contains no provisions for independent third-party monitoring. Monitoring can only be triggered if a participant country reports another participant country's non-compliance. Even then, a review mission is only conducted if there are "credible indications" of significant non-compliance with the certification system, and only if the participant nation consents.⁷⁰

Despite its limitations, the Kimberley Process has played an important role in forcing some degree of national action to limit the trade of conflict diamonds. The Kimberley Process certification system technically took effect on January 1, 2003, as agreed upon in the Interlaken Declaration.⁷¹ Some countries, such as Canada⁷² and the DRC,⁷³ have al-

64. Clean Diamond Trade Act, S. 760, H.R. 1415, 108th Cong. (2003). See Amnesty International's Clean Diamond Trade Act website, at http://www.amnestyusa.org/diamonds/diamond_act.html (last visited Apr. 23, 2003).

65. Press Release, *Grassley Hails Final Passage of Conflict Diamonds Bill* (Apr. 11, 2003), at <http://www.grassley.senate.gov/releases/2003/p03r04-11b.htm> (last visited Apr. 22, 2003); Executive Order Implementing the Clean Diamond Trade Act, July 29, 2003, at http://www.ustreas.gov/offices/eotffc/ofac/legal/eo/diamond_eo.pdf.

66. See Farah, *supra* note 1; Global Witness, *For a Few Dollars More: How Al Qaeda Moved Into the Diamond Trade*, at <http://www.diamonds.net/newsfiles/7975.pdf> (last visited Apr. 25, 2003).

67. For list of participating countries in the Kimberley Process meeting in November 2001, in Botswana, see Wameya, *supra* note 1. For a list of countries participating in the Kimberley Process Certification Scheme, see *List of Participants*, at <http://www.kimberleyprocess.com/BulletinDisplay> (last visited Jan. 20, 2003).

68. U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, SIERRA LEONE: DIAMONDS FUELED CONFLICT (Jan. 12, 2000), at <http://www.web.net/pac/> (last visited Jan. 24, 2003).

69. Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds, at <http://www.kimberleyprocess.com/BulletinDisplay> (last visited Nov. 21, 2002). The Interlaken Declaration was adopted by Angola, Australia, Botswana, Brazil, Burkina Faso, Canada, Cote d'Ivoire, China, Czech Republic, Democratic Republic of the Congo, the European Com-

munity, Gabon, Ghana, Guinea, India, Israel, Japan, Republic of Korea, Lesotho, Malta, Mauritius, Mexico, Namibia, Norway, Philippines, the Russian Federation, Sierra Leone, South Africa, Swaziland, Switzerland, Tanzania, Thailand, Ukraine, the United Arab Emirates, the United States, and Zimbabwe. See *id.* Some countries have since joined the Kimberley Process Certification Scheme, bringing the total number of participants to at least 55. See *List of Participants*, *supra* note 67.

70. See generally Kimberley Process Certification Scheme, at <http://www.kimberleyprocess.com/BulletinDisplay.asp?Key=38> (last visited Nov. 21, 2002). See also U.S. GAO, *supra* note 58.

71. See *Important Notice 1/4 From Abbey Chikane* (Dec. 12, 2003), at <http://www.kimberleyprocess.com/BulletinDisplay> (last visited Nov. 21, 2002) (confirming that the commencement date for the Kimberley Process remained January 1, 2003, as agreed in Interlaken).

72. See Natural Resources Canada's official Kimberley Process website, at http://www.mmsd1.mms.nrcan.gc.ca:80/kimberleyprocess/qa_e.asp (last visited Apr. 24, 2003).

73. See *Kinshasa Inaugurates National Diamond Certification Program*, U.N. Integrated Regional Networks (Jan. 9, 2003), at <http://www.aallafrica.com/stories/200301090436> (last visited Jan. 9, 2003).

ready launched their national diamond certification systems, while others are working to put in place the necessary structures to do so. In the United States, for example, the U.S. Congress has passed implementing legislation,⁷⁴ which has been supplemented by an Executive Order.⁷⁵ In the meantime, the United States had authorized the U.S. diamond industry to voluntarily issue Kimberley Process Certificates to accompany rough diamond export shipments.⁷⁶ Although the United States had then not yet complied with the full requirements of the Interlaken Declaration—as it has not yet fully enacted implementing legislation and was allowing the Kimberley Process certificates to be issued by industry rather than government—it was clearly moving in the direction of compliance. The international oversight body for the Kimberley Process has indicated that “punitive action” against noncompliance will be exercised beginning February 1, 2003.⁷⁷ However, it is not clear what such “punitive action” would be, as the agreement itself does not specifically provide for such measures.⁷⁸ Moreover, given the weak provisions for monitoring and enforcement in the certification system, it is unlikely that a threat of “punitive action” will compel compliance. Rather, it seems that participants will remain in varying degrees of compliance until monitoring and enforcement measures, or political and diplomatic pressures, are intensified. Nonetheless, the Kimberley Process has made a significant contribution thus far in galvanizing international support for the issue and in generating momentum for national action.

The Kimberley Process, if ultimately successful in limiting the trade in conflict diamonds, may serve as a prototype for certification systems intended to minimize the trade in other natural resource commodities used to finance armed conflict, such as timber.⁷⁹ Widespread forest destruction and timber sales helped the Khmer Rouge to sustain its civil war in the 1980s and 1990s.⁸⁰ “Conflict timber” has also helped sustain Liberia’s support for the RUF rebels in Sierra Leone,

becoming a primary source of revenue after U.N. sanctions limited the trade in conflict diamonds.⁸¹ Revenues from conflict timber in Liberia have even helped to undermine the U.N. sanctions against conflict diamonds by funding “sanctions-busting” activities such as the smuggling of arms.⁸² Such revenues have also helped to fuel armed conflict in the DRC that has killed over 300,000 people.⁸³ Global Witness has recommended a total embargo on Liberian timber in order to eliminate the destabilizing effects of conflict timber on Sierra Leone and Liberia. However, the experience with conflict diamonds indicates that such country-specific sanctions alone may not be sufficiently effective—and that a global certification system may be needed to effectively curb the trade in conflict resources. It remains to be seen whether the Kimberley Process certification system will in fact limit the trade in conflict diamonds. If it succeeds, then the global community may have a valuable new tool at its disposal to address the problem of conflict timber and other natural resources that fuel conflict.

Certification to Promote Fair Labor and Fair Trade

Consumer concern over the impacts of globalization on workers has given rise to a movement to promote fair labor practices and fair trade relationships worldwide. Students, NGOs, and labor groups have used boycotts and negative publicity to pressure multinational companies to improve their labor and trade practices overseas. Since the early 1990s, a growing number of multinational companies, such as Nike, have responded by publishing workplace codes of conduct, which they seek to enforce in their own factories and their suppliers’ factories. However, these codes are generally self-enforced, with no outside verification of a company’s compliance with its standards. Independent certification systems have emerged in a number of sectors, such as rugs and coffee, to provide third-party verification of fair labor and fair trade standards and thus a more credible basis for consumer choice.

Nike’s Code of Conduct

NGOs, trade unions, and student activists have campaigned aggressively against the use of unfair labor practices by U.S. apparel manufacturers operating abroad. The controversy and negative publicity surrounding the use of “sweatshop” labor has yielded a plethora of certification groups, codes of conduct, and independent monitoring efforts by NGOs.

For example, Nike—a target of consumer boycotts because of its use of “sweatshop” labor—instituted an internal code of conduct for fair labor practices.⁸⁴ This code of conduct contains both general principles on fair labor, as well as more specific standards that bind Nike partners and contrac-

74. The Clean Diamond Trade Act is comprised of two companion bills, S. 760 and H.R. 1415. See Amnesty International’s Clean Diamond Trade Act website, at http://www.amnestyusa.org/diamonds/diamond_act.html (last visited Apr. 23, 2003).

75. See Press Release, *supra* note 65. The Executive Order implementing the legislation, see *supra* note 65, prohibits, in the absence of a waiver, “the importation into, or exportation from, the United States on or after July 30, 2003, of any rough diamond, from whatever source, unless the rough diamond has been controlled through the KPCS.”

76. See Philip T. Reeker, Deputy Spokesman for the U.S. Department of State, *Implementing the Kimberley Process*, Rappaport, Jan. 2, 2003, available at <http://www.diamonds.net/news> (last visited Jan. 20, 2003). See also <http://www.worlddiamondcouncil.com> (indicating that diamond industry groups formed the U.S. Kimberley Process Authority, the single issuance authority for Kimberley Process certificates on Jan. 8, 2003) (last visited Jan. 21, 2003).

77. See *Important Notice 1/4 From Abbey Chikane*, *supra* note 71.

78. The agreement itself simply provides that if a compliance issue arises, the Chair is to “inform all Participants” and “enter into dialogue on how to address it.” See Kimberley Process Certification Scheme, *supra* note 70, §VI, ¶ 16.

79. Global Witness—the NGO watchdog group that first brought “conflict diamonds” to the world’s attention—defines “conflict timber” as “timber that has been traded at some point in the chain of custody by armed groups, be they rebel factions or regular soldiers or by a civilian administration involved in armed conflict B either to perpetuate conflict or take advantage of conflict situations for personal gain.” GLOBAL WITNESS, *THE LOGS OF WAR: THE TIMBER TRADE AND ARMED CONFLICT 7* (2002), available at <http://www.fafo.no/pub/rapp/379/379.pdf> (last visited Jan. 23, 2003).

80. *Id.* at 5.

81. GLOBAL WITNESS, *LOGGING OFF: HOW THE LIBERIAN TIMBER INDUSTRY FUELS LIBERIA’S HUMANITARIAN DISASTER AND THREATENS SIERRA LEONE 4* (2002).

82. *Conflict Diamonds Evade U.N. Sanctions*, AFRICA RECOVERY, Dec. 2001, at <http://www.un.org/ecosocdev/geninfo/afrec/vol15no4/154diam.htm> (last visited Feb. 20, 2002).

83. GLOBAL WITNESS, *THE LOGS OF WAR*, *supra* note 79, at 5.

84. See Nike Code of Conduct, *Manufacturing Processes*, at <http://www.itcilo.it/english/actrav/telearn/global/ilo/code/nike2.htm> (last visited Jan. 24, 2003). Other apparel industries, such as Liz Claiborne, Nike, Reebok, and Gap Inc. have also issued similar codes of conduct. See also Gereffi et al., *supra* note 22.

tors globally. These standards include restrictions on forced labor, child labor, and hours of work, and require contractors to provide certain minimum levels of compensation and benefits to employees. This internal code of conduct is a “certification” system in a loose sense, in that there are standards (generated by the firm) that the firm must enforce in order to report such compliance to the public.

Although third parties are not generally involved in the actual standard-setting or verification process under corporate codes of conduct such as Nike’s, they can use pressure tactics to compel companies to conform to their internal rules. For example, Verite, an independent monitoring association, evaluated conditions at Nike’s factory site in Mexico, found nonconformance with Nike’s fair labor standards, and made its findings public. Shortly thereafter, Nike released its plan for corrective action and a timetable for the factory to comply with Nike’s code of conduct.⁸⁵ Similarly, the Worker Rights Consortium, an NGO largely driven by the work of college students, conducts independent inspections of the factories of American apparel manufacturers abroad to ensure that collegiate apparel was produced according to fair labor standards.⁸⁶

Rugmark

Rugmark is a global NGO working to end child labor in the carpet-making industry in South Asia by certifying carpets that were produced without child labor. In order to be certified by Rugmark, carpet manufacturers sign a contract to produce all their carpets without child labor, register all looms with Rugmark, and allow access to looms for unannounced inspections. Each carpet is individually numbered so that the carpet’s origin can be traced back to the loom on which it was produced in order to protect against counterfeit labels. Purchasers can submit the country of origin and label number to Rugmark, and Rugmark will verify whether the carpet was in fact certified by Rugmark. In the United States, only licensed Rugmark importers are legally permitted to sell carpets carrying the Rugmark label.⁸⁷

Fair Trade Coffee

The Fairtrade Labeling Organization (and its U.S. affiliate Transfair USA) provides a certification system for “fair trade coffee.” Transfair USA’s standards require coffee buyers to pay a certain minimum price to growers and specifies certain contractual terms favorable to small-scale coffee growers. In December 2000, Transfair USA had convinced Starbucks, Green Mountain, and some 3,000 other locations in the United States to carry its coffee.⁸⁸

85. See Gereffi et al., *supra* note 22.

86. See <http://www.workersrights.org/about.asp> (last visited Jan. 24, 2003). Other systems that have engaged in independent monitoring of the apparel industry include the Fair Labor Association (<http://www.fairlabor.org>) and Social Accountability International (<http://www.sa-intl.org>).

87. Overview of the Rugmark Foundation, at <http://www.rugmark.org/about.htm> (last visited Jan. 24, 2003).

88. Conservation International-Newsroom: Campaigns and Coffee, at <http://www.conservation.org/xp/CIWEB/newsroom/campaigns/buying.xml> (last visited Jan. 23, 2003).

Promoting Good Governance Through Certification

Good governance is necessary to improve environmental sustainability, human rights, and social and economic conditions worldwide. Although good governance can be intangible and difficult to measure, certain key principles of good governance have emerged. These principles include accountability of leadership, transparency of process, access to information, respect for human rights, access to justice, and public participation in decisionmaking processes. This section examines how certification systems can help to promote implementation of these principles. It begins by looking at how certification of conflict diamonds can advance peace and stability—a necessary precondition for governance—by limiting the financial resources that fuel armed conflicts in several African countries. This section also examines the role of certification in promoting legal use of natural resources and in promoting transparency and public participation in natural resource decisionmaking. Finally, this section discusses how certification can promote investment in economic and human development, and thus promote good governance by limiting sources of conflict that threaten government stability and building the capacity of civil society to participate in governance processes.

Promoting Peace and Government Stability

There is a strong link between natural resource wealth and armed conflict, which certification can help to sever. A recent study exploring this link found that about 25% of the roughly 50 armed conflicts that were active in 2001 had a strong resource dimension, in the sense that resource exploitation helped trigger, exacerbate, or finance violent conflict.⁸⁹ Countries that depend on oil and mineral wealth face a much higher danger of civil war than states that are resource-poor. In fact, another recent study estimated that a state that depends heavily on the export of oil and minerals faces a risk of civil war of 23% for any given five-year period, whereas an identical country with no significant natural resource exports has a civil war risk of just 0.5%.⁹⁰

The presence of natural resource wealth heightens the risk of armed conflict in two ways. First, rebel groups finance themselves by seizing and selling off natural resources. For example, UNITA rebels in Angola earned more than \$5 billion from diamond mines under their control, while the Angolan government exploited petroleum reserves of \$3.5 billion a year to finance its military activities.⁹¹ The Khmer Rouge received \$10-\$20 million a month from logging, used to perpetuate its reign of terror in Cambodia.⁹² It is estimated that the civil war in Sierra Leone was prolonged by at least 18 months due to rebels’ access to diamonds.⁹³ Timber and minerals financed Charles Taylor’s coup in Liberia, and they continue to support the various

89. See Renner, *supra* note 50, at 6.

90. *The Relevance of OECD Guidelines for Multinational Enterprises to the Mining Sector and the Promotion of Sustainable Development 7*, at http://www.natural-resources.org/minerals/generalforum/csr/csr_mining.htm (last visited Jan. 27, 2003).

91. See Jay E. Austin & Carl E. Bruch, *Legal Mechanisms for Addressing Wartime Damage to Tropical Forests*, 16 J. SUSTAINABLE FORESTRY 167, 171 (2003).

92. *Id.*

93. *Id.*

parties in the war in the DRC.⁹⁴ Financing war through the sale of natural resources not only prolongs armed conflict, but also deprives the country of capital that is desperately needed for development, thus making it more difficult to return to peacetime after the conflict.⁹⁵

Second, unjustly managed resource extraction can lead to expropriation of land, environmental damage, and human rights violations, fueling grievances that lead to armed conflict. For example, the armed conflicts in Aceh and West Papua, Indonesia, are rooted in the Suharto-era policy of awarding resource licenses to supporters of the regime, thus displacing and suppressing indigenous communities. Similarly, Bougainville's guerilla war stems from civil discontent resulting from the severe social and environmental impacts of the government's copper mining operations.⁹⁶

Certification of natural resources has been used to try to break the linkages between natural resources and armed conflict. It can do so, first, by decreasing the value of conflict resources and thereby limiting rebel movements' ability to finance war. This boosts political stability and enables governments to regain control of their natural wealth, which in turn generates necessary tax revenues for economic development in war-torn countries. Tax revenues can also be invested into technology that can help further minimize smuggling of the resource—for example, in the case of diamonds, formal mines and deep mine shafts that are easier for the government to oversee than surface alluvial deposits.⁹⁷ Second, certification can reduce armed conflict by promoting sustainable use of resources that protects human and civil rights, thus minimizing civil strife associated with unjust natural resource management, as discussed above.

Although certification has the potential to contribute to the achievement of peace, it is unlikely to be the cure-all for global conflict. Rather, it can provide valuable market-based incentives that can help to bolster political and diplomatic peace processes. For example, certification may have played a role in bringing an end to the diamond-fueled civil war in Angola, where a U.N. peace process was also in motion.⁹⁸ Where certification succeeds in promoting peace and bolstering the stability of legitimate governments, it helps to lay the necessary foundations for normalized societal relations and good governance.

Promoting Legal Harvesting/Extraction of Natural Resources

Widespread illegal harvesting and extraction of natural resources represents an inability or a lack of political will on the part of government to control illegal activity, and thus a governance problem. Moreover, illegal harvesting and extraction are often linked with smuggling, which removes valuable resources from governments through tax evasion, allows rebel movements to evade sanctions and boycotts,

94. *Id.*

95. *Id.* at 172.

96. See Renner, *supra* note 50, at 44-45; *Relevance of OECD Guidelines*, *supra* note 90, at 7.

97. See Price, *supra* note 3, at 8.

98. The United Nations lifted the ban on diamonds originating in UNITA territory based on its findings that the "main tasks of the peace process had been completed." United Nations, *Angola: Security Council Lifts Sanctions Against Unita* (Dec. 9, 2002), at <http://www.un.org/News/Press/docs/2002/sc7589.doc.htm> (last visited Dec. 10, 2002).

and perpetuates corruption. Certification systems can help to promote the legal harvesting and extraction of natural resources by specifically requiring legality as a condition for certification, and by increasing incentives for legal trade, either by requiring certification as a condition of export (in mandatory certification systems) or providing market-based incentives for legal trade (in voluntary certification systems).

Several certification systems discussed in this Article are based on standards requiring compliance with national laws and regulations governing natural resource extraction. For example, the FSC's Principles and Criteria require that timber "respect all applicable laws of the country in which they occur, and international treaties and agreements to which the country is a signatory."⁹⁹ Moreover, the FSC's chain of custody certification helps to ensure that the origin of all FSC-certified wood is known, providing transparency that can limit illegal logging. Thus, the environmental group Greenpeace has endorsed FSC as "the best protection against illegal . . . logging."¹⁰⁰ Brazil has even tried, in effect, to privatize regulatory control by using FSC-certification as a means to reduce illegal logging.¹⁰¹ However, in practice, FSC's legality principle seems to be less established than its principles of environmental and social sustainability, and does not seem to play a consistent or significant role in certification decisions.¹⁰² As a result, certain FSC-accredited certifiers have recently begun promoting independent certification of legality alongside FSC certification.¹⁰³ Moreover, there are unconfirmed reports that the FSC itself is developing a "certificate of legality" that will verify that wood derives from forests covered by legally sanctioned forest management plans.¹⁰⁴

In the fisheries sector, the MSC also considers compliance with local laws and regulations as a condition for certification.¹⁰⁵ Another example is the Catch Documentation

99. See FSC Principle 1, FSC Principles & Criteria, *supra* note 14.

100. See Greenpeace-Amazon, *The Santarem Five and Illegal Logging: A Case Study*, at <http://www.greenpeaceusa.org/forests/santarem.pdf> (last visited Jan. 28, 2003).

101. See *Monitoring Mahogany*, ITTO TROPICAL FOREST UPDATE, Dec. 1, 2002, at 16. The World Wildlife Fund has also stated that environmentalists in Brazil were using the FSC "to certify that wood being marketed was cut legally rather than taken by illegal loggers in the Brazilian tropical forest." *Brazil: Certification for Timber*, N.Y. TIMES, Sept. 20, 2001, at A6, available at <http://www.query.nytimes.com/search/full-page?res=9A07E3D9103BF933A1575AC0A9679C8B63> (last visited Apr. 25, 2003).

102. In fact, a recent workshop report on international environmental crime suggests that legality certification tools are lacking in the timber industry, noting that, "when Swedish flat-packed furniture giant IKEA wanted to make sure all its timber was legally sourced, it had to go out and develop its own systems to this end." See GAVIN HAYMAN & DUNCAN BRACK, INTERNATIONAL ENVIRONMENTAL CRIME: THE NATURE AND CONTROL OF BLACK MARKETS 32 (Royal Inst. of Int'l Aff. Workshop Rep., 2002).

103. For example, the SGS is now promoting a new service to independently certify the legality of forest operations. The service is effectively being offered as a method of privatizing regulatory control over forestry operations. The SGS is encouraging governments to commission the company to undertake compulsory nationwide certification to support government enforcement efforts. See Rupert Oliver, *Report for AF&PA, Trade and Environment Program in Europe*, at http://www.afandpa.org/products/International/april_june_2002.doc (last visited Dec. 8, 2002).

104. See *id.*

105. See *MSC Principles and Criteria*, at <http://www.msc.org/assets/docs/fishery%20certification/MSC%20Principles%20&%20Criteria.doc> (last visited Jan. 28, 2002) (indicating that the Principles reflect a

Scheme launched by the Convention for the Conservation of Antarctic Marine Living Resources to identify legal catches of Patagonian Toothfish, which makes market access in members' territories conditional upon catches possessing adequate detail of their legal status.¹⁰⁶

Similarly, both the country-specific and global diamond certification systems require that diamonds be legally mined. Sierra Leone's diamond certification system provides a particularly good example of how a mandatory certification system can help to increase trade within legal channels of operation. This government-certification system prohibits the export of all diamonds that are not legally mined and accompanied by a government-issued certificate. Legally mined diamonds are those from areas of government control, produced through a chain of legally authorized transactions, including use of land, permission to mine, purchase by authorized dealers, and export by licensed exporters. A study by Global Witness reports that since the institution of the system in 2000, revenue from diamond export taxes has increased dramatically, an indication that more diamonds are going through legal channels.¹⁰⁷ Also, consistent with the increased revenue from export taxes, official exports were reported to be eight times greater in 2000 than in 1999.¹⁰⁸ These factors reflect an increase in the numbers of diamonds traded through legal channels, and suggest that fewer diamonds are being traded illegally. Global Witness also found that although there was room for improvement, the certification system was generally working to weed out conflict diamonds from the legal channels of trade, due to safeguards such as tamper-proof containers and licensing of miners.¹⁰⁹ Additional safeguards proposed in the Kimberley Process system, such as requiring importing countries to adopt stricter import controls, would likely further promote the legal trade in diamonds.

Voluntary certification systems can also create incentives to reduce smuggling. For example, high consumer and retailer demand for FSC-certified wood creates financial incentives for foresters to obtain FSC certification, which requires that the timber be legally harvested. The potential price premium and access to markets gained through certification may thus outweigh the benefits of dealing in illegally harvested products.

However, these very incentives for certification may also create incentives for increased corruption and fraud. For example, although the Kimberley Process requires all exported diamonds to be accompanied by government-issued certificates, a trader in conflict diamonds may be able to obtain the necessary certificate by bribing a cash-strapped civil servant or by forgery. Although the Kimberley Process certification system specifies certain fraud-minimization measures, such as forgery-proof certificates and tamper-proof containers, these are not fail-safe measures and a deter-

mined trader may be able to find a way around them, particularly with the help of a cooperative government official.¹¹⁰ Moreover, the Kimberley Process certification system lacks effective independent monitoring and compliance-inducing mechanisms, further limiting its ability to enforce these requirements against national governments. Similarly, in voluntary certification systems like the FSC, market incentives for certification such as price premiums, market access, or certification assessment or consultancy fees may also provide incentives for more fraudulent or lenient certifications by accredited certifiers.¹¹¹ Therefore, although increased numbers of certified products likely indicate a corresponding increase in legal use and production of natural resources, the increase may be due in part to higher levels of corruption or fraud, and therefore must be viewed in context.

Promoting Public Participation and Transparency in Natural Resource Decisions

Public participation in natural resource decisionmaking is a cornerstone of good governance. Including citizens' voices in decisionmaking promotes governmental accountability and increases the likelihood that decisions will take into account the concerns of those directly affected by them. Promoting public participation is, in effect, promoting the democratic process by fostering transparency and broadening the base of people involved in the decisionmaking, which can strengthen the ultimate decisions. Moreover, public participation in the process is more likely to generate public support for the eventual outcomes of that process.

Certification systems can promote public participation in natural resource decisionmaking by explicitly requiring consultation with local and indigenous groups in decisions over natural resource management. For example, the FSC's Principle 4 specifically requires that "consultations shall be maintained with people and groups directly affected by management operations" as a condition for certification. This is reported to have had a "beneficial impact on policy discussions and stakeholder relations, especially in countries with otherwise weak forestry governance. National multistakeholder working groups have been defining good forestry, how to assess it, and who should be responsible."¹¹²

Certification can also help to increase transparency in natural resource decisions, particularly by requiring public reporting and public access to certification assessments, compliance reports, corrective action reports, and other such documents. Moreover, chain of custody certification allows consumers to determine the origin of the products they purchase, which is typically hidden from consumers in the murky labyrinth of global trade.

However, provisions requiring consultation, access to information, or access to justice will only advance public participation if the affected public has the technical and finan-

recognition that a sustainable fishery should be based upon "compliance with relevant local and national laws and standards and international understandings and agreements").

106. See *Explanatory Memorandum on the Introduction of the Catch Documentation Scheme (CDS) for Toothfish*, at <http://www.ccamlr.org/pu/E/cds/p3.htm> (last visited Dec. 19, 2002).

107. GLOBAL WITNESS, REVIEW OF THE SIERRA LEONE DIAMOND CERTIFICATION SYSTEM (2001), available at <http://www.globalpolicy.org/security/issues/sierra/report/2001/0425gw.htm> (last visited Jan. 23, 2003)

108. See *id.*

109. See *id.*

110. The Thai government's certification requirement for Cambodian timber was undermined by such a problem. In that case, the Thai government demanded that loggers obtain a certificate of origin from the Cambodian government, which the government readily provided to any logger for a flat fee of US \$35 per cubic meter. GLOBAL WITNESS, *supra* note 80.

111. See RAINFOREST FOUNDATION, *supra* note 14, at 5, 35-36.

112. Steve Bass et al., *Standards and Certification: A Leap Forward or a Step Back for Sustainable Development?*, in 2 THE FUTURE IS NOW: EQUITY FOR A SMALL PLANET 21-31 (International Inst. for Environment and Development 2001).

cial ability to participate in consultations, to use and understand the information made available, and to assert their grievances through the formal complaint mechanisms. Therefore, to yield real governance benefit, a certification system must not only include such provisions, but also build the capacity of, and provide opportunity for, the public to use them.

Promoting Investment in Economic and Human Development

Lack of investment in economic and human development is both symptomatic of poor governance and a hindrance to good governance. Lack of such investment is symptomatic of poor governance—particularly in countries rich in natural wealth—as it often indicates that money is being diverted by corruption, lost to smuggling, or used to finance natural resource-based military activities. At the same time, lack of such investment hinders good governance by fostering economic and social strife that threatens governmental stability, and by failing to equip civil society with the skills and resources needed to effectively participate in decisionmaking. Certification can promote investment in economic and human development by increasing government funding available for investment, protecting legitimate industry, and directly requiring measures to promote economic and social well-being as a condition for certification.

Certification can increase the availability of funds for economic and human development by ending armed conflict and expanding the tax base. As discussed above, armed conflict drains a country's natural reserves that could be spent on human and economic development. By helping to end armed conflict, certification can help to replenish a government's coffers. Governments also lose extensive amounts of money through smuggling of natural resources. For example, in 1999, Sierra Leone's official diamond exports were about \$1.2 million, compared with a conservative industry estimate of \$70 million as the real commercial value. The other \$68.8 million of estimated value was probably lost to illicit and criminal activity.¹¹³ Similarly, the DRC loses as much as 85% of its diamonds to smuggling, an estimated value of approximately \$854 million.¹¹⁴ As discussed above, certification systems can help to lessen this diversion of natural resources into illegal trade, and thus increase the flow of tax revenues to the government. This tax revenue could be used to diversify the country's economy so that it is less natural resource-dependent, and thus less vulnerable to natural resource conflicts and fluctuations in commodity markets.

Certification can also advance economic and social welfare by protecting legitimate industry in natural resource-dependent countries. For example, many countries depend on diamond income for their economic self-sufficiency, including Botswana, Namibia, and South Africa.¹¹⁵ Most of

the diamonds in these countries are not in fact conflict diamonds. In fact, out of worldwide production of rough diamonds worth \$7.5 billion in 2000, conflict diamonds are estimated to account for between 3% (according to DeBeers) and 15% (according to some NGOs).¹¹⁶ Certification of legally harvested natural resources seeks to block the illegal industry while allowing legitimate industry to continue, thus protecting a key source of income and jobs. Consumer boycotts and sanctions, on the other hand, often target an entire industry, which can have devastating consequences in resource-dependent countries.¹¹⁷ However, in spite of their impacts on legitimate industry, sanctions may be necessary and preferred over certification in certain circumstances, particularly where certification would be unworkable or ineffective. For example, given Liberia's key role in the smuggling of conflict diamonds from surrounding countries, the United Nations imposed an all-out ban on diamonds exported from Liberia, rather than allow government-certified diamonds to be exported from the country.¹¹⁸ Because such a government-run certification system would likely have been undermined by smuggling, a full ban was deemed to be the more effective option in Liberia; although the United Nations continued to allow exports of certified diamonds in Sierra Leone and Angola where corruption and smuggling was not as entrenched.

Finally, certification systems can promote investment in economic well-being and human development directly, as a condition of certification. For example, certification by Transfair USA requires that small-scale coffee farmers receive higher prices from, and improved long-term contractual relationships with, buyers of the coffee. The fair trade price in mid-2001 represented a 110% increase in the price that farmers previously received for coffee. This price premium is used in part by the coffee cooperatives to improve infrastructure of the co-op and to build schools and clinics, and the rest is returned directly to farmers.¹¹⁹ Similarly, certification by the FSC for sustainably managed forests may help to alleviate the poverty of forest producers, as sustainable harvesting implies longer forest productivity, breaking the boom-and-bust cycle of temporary mill towns.

Challenges and Safeguards—How to Make Certification More Effective

This Article has presented some of the ways in which certification can advance good governance. However, the ability for certification systems to advance good governance depends on a multitude of factors, including the design and functioning of the certification system, the capacity for implementation of the system, and the ability of stakeholders to participate in the system, among others. This

Service, *U.N. Backs Scheme to Block Blood Diamond Trade* (Apr. 15, 2003), at <http://www.ens-news.com/ens/apr2003/2003-04-15-01.asp> (last visited Apr. 22, 2003).

116. See Bruce Stanley, Associated Press, *Deal Reached on Conflict Diamond Trade* (Nov. 29, 2001) (DeBeers estimate); Duke, *supra* note 7 (NGO estimate).

117. For example, sanctions contemplated by the U.N. Security Council against the timber industry in Liberia would eliminate 10,000 relatively well-paid jobs and affect 90,000 people. Michael Fleshman, *Conflict Diamonds Evade U.N. Sanctions*, AFRICA RECOVERY, Dec. 2001 (quoting Ed Tsui of the U.N. Office of Humanitarian Affairs).

118. See Price, *supra* note 3, at 5.

119. CONROY, *supra* note 4, at 15.

113. U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, SIERRA LEONE: CONFLICT DIAMONDS—PROGRESS REPORT ON DIAMOND POLICY AND DEVELOPMENT PROGRAM (2001), available at http://www.dec.org/pdf_docs/pdabt690.pdf (last visited Jan. 27, 2003).

114. Price, *supra* note 3, at 8.

115. In Botswana, for example, the diamond industry contributes one-third of the country's gross domestic product, more than one-half the public revenues, and 80% of its export earnings. Environment News

section explores some of the obstacles to certification, and provides some safeguards that can make certification more effective in both achieving its direct goals and advancing good governance.

This section draws examples from various types of certification systems to illustrate some of the obstacles and impediments to certification. Because the FSC is one of the oldest, most widely adopted and institutionalized certification systems, it is also one of the most closely watched. Therefore, many examples in this section are about problems faced by the FSC. This is not meant to indicate that the FSC has more pitfalls than other certification systems; indeed, the FSC is considered to be among the more effective systems. Rather, these FSC-based examples are discussed because they are illustrative of problems found in certification systems generally, and because they offer opportunities to identify creative solutions to these problems.

Clear and Strict Standards

In order for a certification system to be effective, it must have clearly defined standards which form the foundation for the system. Certification systems are most effective when standards are performance-based, specific, implementable, and auditable at the field level, as such standards make it easier to identify noncompliance, and thus have generally higher credibility among consumers. Standards defined as “general principles” or systems-based standards are more subject to interpretation and thus it is more difficult to determine whether they are being observed. This risks allowing certification to be used as a means to cover irresponsible practices. In addition, in order to ensure adherence, the standards must provide for credible sanctions for noncompliance, such as removal of benefits, e.g., a certification seal, public disclosure of breach, remedial measures, e.g., product recall or reparation of environmental damages, or expulsion from an industry association.

Although the FSC system is often lauded for its clear, strict, performance-based standards, a recent study points out some failings of these standards in practice, and thus serves to indicate some key safeguards for standard-setting. First, the study examined FSC standards for percentage-based labeling, which were adopted in May 2000 to increase quantities of FSC-certified wood to meet rising consumer demand. Under this policy, assembled wood products can carry the FSC logo if the product contains 70% or more wood from certified sources; chip and fiber products can carry the logo with only 17.5% certified material in the product. The study points out that few, if any, checks can be applied to the noncertified portion of the product. Therefore, the FSC only requires that the certified company has a policy in place to check that the noncertified wood it uses in the product does not violate FSC principles. In practice, this amounts to little more than a systems-based standard and industry self-certification with respect to the noncertified wood in percentage-based products. As a result, customers buying FSC-certified wood risk buying products from controversial sources. According to the study, this provides an example of how the FSC has made the mistake of adopting standards that increase the quantity of certified product, but in turn limit overall quality assurance. The study recommended that the FSC label not be permitted for use on prod-

ucts containing nonrecycled wood from nonassessed sources, in order to avoid misleading consumers.¹²⁰

The same study also pointed to another shortcoming in the FSC standards: “certification conditionalities,” which permit a firm not in compliance with a particular standard to be certified provisionally, rather than denied certification. The FSC allows certification to be granted immediately, on the expectation that the necessary improvements will be made by the forest manager within a stipulated period of time. According to this study, this practice weakens the FSC’s performance-based assessment approach to one of “continuous improvement.”¹²¹ The study points to several examples, including a case study of FSC certification in the Perhutani Forest in Java. In this case, there was considerable evidence of an abusive land tenure regime and extensive illegal logging, which would have taken considerable time to resolve through measures such as anti-corruption programs or changes in government policy concerning land tenure. However, the FSC-accredited certifier elected to treat these measures as post-certification conditions, rather than pre-conditions, so that the certification could be granted immediately. Not surprisingly, the conditions were never complied with.¹²²

Similarly, the MSC certified the New Zealand hoki fishery on the basis of conditions to be met after certification was granted, drawing heavy criticism from environmental groups. These groups decried the MSC’s decision to certify the fishery in spite of its high levels of environmental damage and animal deaths, including the drowning of 1,000 fur seals and 1,100 seabirds each year.¹²³ In response, the MSC pointed out that some of these concerns would be addressed by a series of corrective actions that the fishery would be required to take to retain its certification. However, environmental groups called for the immediate withdrawal of certification because the hoki fishery did not currently meet the MSC’s standards and therefore it would be misleading to consumers to allow the fishery to certify its products.¹²⁴

These examples illustrate the importance of clear and strict standards in guaranteeing content-based assurances to consumers, and thus retaining their credibility. Relaxing standards through, for example, percentage-based labeling or certification conditionalities, may increase the quantity of certified product, but at the risk of losing credibility with stakeholders and the public. However, relaxing standards can help to increase supply of the certified product, which may in some cases may be necessary to meet consumer demand. For example, as discussed earlier, the demand for FSC-certified wood currently exceeds supply. Percentage-based labeling can help FSC to increase the supply of certified wood, even if it sets a lower standard by allowing the in-

120. RAINFOREST FOUNDATION, *supra* note 14, at 6, 22. The study also noted that percentage-based labeling by a FSC-accredited certifying body, SmartWood, was found to violate Norwegian consumer protection statutes. *Id.*

121. *Id.* at 6, 23

122. *Id.* at 72, 83.

123. *See Controversy Surrounds Fishery Certification*, SEAWEB OCEAN UPDATE (June 2001), available at <http://www.seaweb.org/resources/49update/cert.html> (last visited Jan. 22, 2003).

124. *See id.*; *Marine Stewardship Council Accredits New Zealand Hoki Fishery as “Sustainable” Despite Fact It Kills Threatened Albacores, Drowns Over 1,000 Seals Each Year, Damages Sea Floor With Huge Trawling Nets*, at <http://www.eces.org/articles/static/98506800072188.shtml> (last visited Jan. 22, 2003).

clusion of some noncertified wood product. In this situation, it is arguably preferable for consumers to have access to wood containing some certified wood product than no FSC-certified wood product at all. Therefore, the real question is where to strike the balance between the need to maintain the integrity of the standard and the need to ensure adequate supply.

Effective Third-Party Certification Assessment and Monitoring Provisions

Independent, impartial, third-party certification assessment and compliance monitoring is also necessary to ensure the effectiveness and credibility of the certification system. Most industry codes of conduct, or even certification systems conducted by trade associations, such as Responsible Care®, rely on self-monitoring and self-reporting, which lessens public credibility. Recognizing this, Responsible Care® is, in some countries, turning to external verification and independent audit to provide credible monitoring and reporting.¹²⁵

Even where a certification system includes third-party certification, it is not always effective, as the independence of certifiers can often be compromised by bribes, threats, corruption, or financial incentives. For example, in the Perhutani case study discussed above, the FSC-accredited certifier (SmartWood) appeared to have been motivated by financial incentives to certify a forestry operation, in spite of the site's lack of compliance with the FSC standards. In this case, there was demonstrable evidence of intimidation and violence against local villagers, sometimes with fatal consequences; extensive illegal logging; and serious tenure disputes. Although the assessment team recommended that certification be denied until these issues were resolved, the SmartWood certification panel certified the operation, apparently in order to advance SmartWood's strategic business development in Asia and Europe.¹²⁶ In order to minimize the risk of such financial or other incentives tainting the independence of certifiers, certification systems can rely on practices such as peer review of certification decisions, increased oversight and monitoring by the accrediting organization, and effective public complaint mechanisms.

Independent and effective monitoring should occur at all points in the chain of custody in order to provide credible assurances of quality. Several certification systems that have adopted third-party certification have failed to ensure that monitoring continued through the entire production process. For example, Sierra Leone's diamond certification system only required government certification at the point of export and monitoring at the first border of entry. It did not require continued monitoring as diamonds were exported to other countries for cutting, polishing, or trading, and was therefore insufficient to regulate indirect imports. Diamonds from Sierra Leone could therefore be sent to an intermediary country, and then sent to a third country without certification or monitoring. As one report noted, the Sierra Leone certification system could only be effective if the

diamonds were accompanied by a certificate until they were polished and sold as jewels.¹²⁷

A recent U.N. panel report¹²⁸ also documented problems of ineffective monitoring in chain of custody certification. The panel found that a Ugandan-Thai forest company called DARA Forest was colluding with parties in the Ugandan government to establish a system to fraudulently obtain FSC certification for wood extracted illegally and unsustainably from the DRC. According to its own internal documentation, DARA Forest intended to deceive SmartWood (the FSC-accredited certifier) by presenting Budongo forest, a sustainably managed forest in Uganda, for certification assessment. Once this forest was certified, DARA Forest planned to import the logs from the DRC and process them in Uganda together with the wood extracted from the certified Budongo forest in Uganda. In this way, DARA Forest would attempt to have its entire production marketed as FSC-certified wood. This would not be possible if SmartWood's chain of custody monitoring could adequately ensure that wood from noncertified sources did not enter the certified trade chain. However, as the Rainforest Foundation has documented in numerous case studies,¹²⁹ the flaws in FSC's chain of custody certification allow for easy abuse. In particular, the Rainforest Foundation notes that "nonexclusive" chains of custody, where a forestry operation produces both certified and noncertified timber, are often impossible to assess, due to the high cost of monitoring wood from noncertified sources. The Rainforest Foundation therefore has recommended that the FSC establish procedures for monitoring legality of noncertified wood back through the entire trade chain, and abolish "nonexclusive" chain of custody certification options in trade chains that have been found to engage in false labeling.¹³⁰

In order to ensure continued compliance with the certification standards, monitoring must take place over an extended period of time. This is especially important if the standards have changed over time. For example, Green Globe, a mass international tourism certification program, originally did not require performance-based standards or an independent audit for certification. However, it was later renamed Green Globe 21 and revamped to include an independent audit, and later overhauled again to include performance-based standards. Given all of Green Globe's revisions, there are hundreds of companies out there that were authorized to use Green Globe logos in the past, and that continue to display them today, although they have not been through and may not qualify for certification under Green Globe 21. The lack of monitoring and recertification of these companies has damaged Green Globe's credibility as an independent certification agency.¹³¹

125. See, e.g., Dow Canada, *The Responsible Care® Verification Process*, at <http://www.dow.com/webapps/lit/litorder.asp?filepath=facilities/pdfs/noreg/722-00027.pdf&pdf=true> (last visited Apr. 25, 2003).

126. See RAINFOREST FOUNDATION, *supra* note 14, at 72, 79-81.

127. See *Conflict Diamonds: Crossing European Borders*, *supra* note 56.

128. See U.N. SECURITY COUNCIL, REPORT OF THE PANEL OF EXPERTS ON THE ILLEGAL EXPLOITATION OF NATURAL RESOURCES AND OTHER FORMS OF WEALTH OF THE DEMOCRATIC REPUBLIC OF CONGO (2001), available at <http://www.reliefweb.int/w/Rwb.nsf> (last visited Dec. 5, 2002).

129. See RAINFOREST FOUNDATION, *supra* note 14.

130. See *id.* at 7, 29, 101.

131. See PROTECTING PARADISE, *supra* note 11, at 36, 52

Effective Processes for Accrediting Certifiers

While some certification bodies, such as Costa Rica's CST, are small enough in scale to conduct certification assessment themselves, most rely on accreditation of certifiers. The certification bodies—the “owners” of the certification system—establish standards for accreditation, accredit certifiers, and monitor their performance to ensure that they are adequately upholding the standards of the certification system. Certifiers that fail to do so can, in theory, lose their accreditation. Because certifiers are the ones in the field, interpreting and applying the standards on a day-to-day basis, effective accreditation of the certifiers is crucial to maintaining the legitimacy of a certification system.

Effective accreditation standards and processes can ensure that certifiers are independent and impartial, so that they produce fair and consistent certification decisions. Certification bodies should therefore seek to eliminate potential conflicts of interest that would threaten this impartiality. However, as the Rainforest Foundation report indicates, the FSC permits—and even creates—various conflicts of interest for the organizations that it accredits. First, the FSC allows certifiers to also offer forest consultancy services, creating a major incentive for certifiers to certify forest operations (who are often the same clients who have paid them for their consultancy services).¹³² A key safeguard to avoiding this type of conflict of interest, adopted by several accreditation programs, would be to prohibit certifiers from even offering informal advice.¹³³

Second, the FSC-accredited certifiers have strong financial incentives to certify as many forest operations as possible, even when they do not comply with FSC principles.¹³⁴ The Rainforest Foundation report notes that there is extensive competition among FSC-accredited certifiers for certification business, which can be quite lucrative. In order to attract customers, certifiers impose the least stringent standards they can, and often ignore failings and defects that would prohibit certification.¹³⁵ Moreover, the FSC lacks sufficient monitoring or disciplinary procedures to ensure compliance by certifiers, which further perpetuates their lack of accountability. According to the report, there is little oversight of certifiers by the FSC, even after corrective action requests have been issued against them; the step of suspension of accreditation has been taken only once, despite the fact that there have been many reasons for serious concern about the quality of the work of various certifiers; and although the FSC manual allows the FSC to carry out unannounced inspection visits, this has never been done.¹³⁶ The Rainforest Foundation recommended that the FSC eliminate accreditation of independent certifiers, and instead require forest managers to seek certification directly from the FSC International Secretariat. The Secretariat would appoint assessors, who would be approved by a national working group in the country, and the Secretariat would make

certification decisions on the basis of recommendations provided by the assessors.¹³⁷ Many of the conflict of interest problems could also likely be minimized by more consistent oversight and unannounced inspection of certifiers, as well as more credible sanctions for noncompliance, including removal of accreditation.

A certification body must also ensure that its standards that are applied in the field are in fact consistent with the certification system. The Rainforest Foundation report found that although the FSC technically requires certifiers' specific assessment systems to reflect the FSC Principles and Criteria, it has accredited ones that are not actually equivalent. For example, the FSC requires that certifiers include in their assessment systems a definition of “major failings,” the problems and issues that would mandate denial of certification to a forestry operation. However, according to the report, this requirement has been largely ignored, as the FSC has accredited certifiers that have failed to define what would constitute a “major failing.” Without a definition of “major failing,” there is almost nothing a forestry manager can do that would necessitate a denial of certification.¹³⁸

The Kimberley Process diamond certification system also raises interesting issues about monitoring the certifiers, as the certifiers in this system are national governments. If a government is corrupt, ineffective, or “captured” by industry, can an international body prevent or remove its “accreditation” to certify diamonds as conflict-free? Under the Kimberley Process agreement, the answer is effectively: “No.” There is no independent assessment of a government's ability to comply in order for it to become a participant: a government simply needs to assert that it is “willing and able to fulfil the requirements of the system,” and there is no real mechanism to determine whether the government is *actually* able to fulfil the requirements. Moreover, once a government becomes a participant to the system, there is essentially no independent investigation allowed into its certification practices unless there is “credible evidence” of “significant noncompliance,” and the government consents to the investigation. Several experts, including the U.S. General Accounting Office (GAO),¹³⁹ have suggested that there should be more monitoring of national governments' compliance in this system. Effective monitoring would include routine review missions at least once every two years to examine whether there is a designated export/import authority; whether all diamond mines are licensed (and whether others are prohibited from mining); whether all miners are licensed; whether there are up-to-date production statistics and a computerized database of producers; whether all buyers, sellers and exporters are keeping the requisite records; whether forgery-proof certificates are being used; whether the importing authority is notifying exporters of import confirmation; whether tamper-proof containers are being used; and whether there are sufficient numbers of qualified inspectors.¹⁴⁰

132. A similar conflict of interest is raised where accounting firms provide both financial auditing and consultancy services to a single client, as illustrated by the highly publicized relationship between Arthur Anderson and its audit client, Enron.

133. See RAINFOREST FOUNDATION, *supra* note 14, at 35.

134. See *id.* at 5.

135. See *id.* at 36.

136. See *id.* at 17-18.

137. See *id.* at 6.

138. See *id.* at 19, 7, 29.

139. See U.S. GAO, *supra* note 58, at 15.

140. IAN SMILLIE, THE KIMBERLEY PROCESS: THE CASE FOR PROPER MONITORING 11-12 (Occasional Paper of the Diamonds and Human Security Project 2000), available at <http://www.diamonds.net/selectednews.asp?list=4> (last visited Jan. 28, 2003).

Reliable Ways to Distinguish Legitimate From Nonlegitimate Goods

Because certification relies largely on market forces, consumers must have reliable information to distinguish legitimate from nonlegitimate goods. In some limited cases, such as an all-out ban on certain goods, consumers may be able to physically distinguish legitimate from nonlegitimate goods. For example, until recently, Convention on International Trade in Endangered Species (CITES) banned all sales of ivory to protect elephants from poaching. Thus, consumers could easily tell that any ivory being sold was illegally harvested. However, at a recent CITES convention, delegates agreed to one-time sales of stockpiled ivory by Botswana, Namibia, and South Africa in 2004. The CITES statement said that the permission for the one-time sale would be supervised through a "rigorous" control system.¹⁴¹ In order for any control system to work, there must be some way to distinguish the legal ivory from the illegal, poached ivory. Since there is no intrinsic way to tell the difference, any such system would likely have to rely on some sort of certification system to distinguish the two. However, this kind of certification requires effective monitoring and enforcement at each link in the chain of custody. Unless the certification system is closely monitored and enforced, illegal ivory will find its way into the legal market, thus providing incentives for poaching. Kenyan wildlife officials, who recently made their biggest seizure of ivory in three years, fear that the decision to allow the one-time sale of ivory stockpiles is already encouraging poachers and illegal dealers.¹⁴² In addition, conservationists in countries as far away as India worry that the release of African stockpiles will make poaching and smuggling of Indian elephants easier.¹⁴³

Where it is impossible to physically distinguish between legitimate and nonlegitimate products, consumers must rely on certification seals or labels. However, there is often a proliferation of labels, as industry has learned that they can be used to their advantage. This can often have the effect of confusing the consumer. For example, in eco-tourism certification, the plethora of eco-labels has confused consumers and undermined the credibility of eco-tourism certification programs. In a number of countries, there are several competing and overlapping certification programs, making it difficult for consumers to distinguish among them. In Costa Rica, at least four programs—CST, New Key, Green Globe, and ECOTEL—have all rated accommodations based on their environmental performance.¹⁴⁴

The best solution to consumer confusion is consumer education. Educated consumers will know what to look for in assessing certified products, such as chain of custody certification and independent verification. In most industries, few certification systems actually offer such protections, so the

ones that do stand out as the most credible among consumers. Another way to address the problem of consumer confusion is for the government to adopt a certification system, as happened in the case of organic food labeling in the United States. The government label could then potentially provide a consistent, reliable baseline standard for consumers. However, although the government label may help to combat consumer confusion, it also risks misleading consumers if its standards are less strict than other prevailing systems. For example, leading organic producers in the United States have criticized the government's organic food certification and labeling system as being insufficiently protective, and have strongly opposed the government's regulatory monopoly on such certification.¹⁴⁵

Even more reliable methods for consumers to distinguish between legitimate and nonlegitimate goods may lie in technology. For example, technological innovations (such as diamond bar coding) can make chain of custody certification for diamonds more effective by limiting opportunities for corruption and tampering. A recent study by Global Witness noted that currently there are systems that can: calculate and record the individual profiles of rough diamonds; confirm the identity of a parcel of stones that has been registered with this method; mark rough diamonds with individual bar codes or other readable inscriptions; mark cut diamonds with bar codes and logos; identify and verify the identity of cut or rough diamonds that have been coded; and record and verify the individual optical signature that a cut diamond exhibits using laser refraction.¹⁴⁶ Similar types of technology may exist or be developed to assist consumers in distinguishing legitimate from illegitimate products in other certification systems.

Participation of All Stakeholders

Public involvement in certification systems, throughout the standard-setting, certification assessment, and monitoring stages, can help to ensure that the certification system meets the specific needs of local communities. By advancing community needs, a certification system in turn can generate public support for the system, increasing the demand for certification and the amount of product being certified. For example, by meeting the needs of local farmers, fair trade coffee certification generates community support and is able to expand in scope and coverage. In addition, local communities may enhance the effectiveness of a certification system by providing valuable input, such as information on the organization being assessed, objective evidence of compliance or noncompliance with requirements, or other information that may not be apparent to auditors. While several certification systems profess to consider stakeholder views and require public consultation, few actually have included meaningful public participation in the certification process. Case studies on public participation in

141. U.N. News Service, *U.N.-Supported Convention Adopts Stronger Controls on Wildlife Conservation* (Nov. 18, 2002), at <http://www.unep.org/Documents/Default.asp?ArticleID=3171&DocumentID=270> (last visited Nov. 18, 2002).

142. See BBC News Service, *Ishbel Matheson, Kenya Seizes Poached Ivory* (Feb. 25, 2003), at <http://www.news.bbc.co.uk/go/pr/1/hi/world/africa/2797325.stm> (last visited Mar. 3, 2003).

143. *An Elephantine Dilemma: African Sales of Stockpiled Ivory Could Boost Illegal Trade in India Too, Worry Conservationists*, at <http://wysiwyg://36/http://www.indiatogether.org/ecology/articles/elephant1102.htm> (last visited Dec. 2, 2002).

144. PROTECTING PARADISE, *supra* note 11, at 70.

145. See Associated Press, *Some U.S. Farmers Worry They May Be Hurt by New Organic Rules*, *supra* note 45. Some farmers, whose standards for organic production exceed that of the U.S. Department of Agriculture's, are concerned that the national uniform standards will compromise their ability to differentiate their products in the marketplace by displaying certification seals from alternative certification systems with stricter standards for "organic." *Id.*

146. GLOBAL WITNESS, *CONFLICT DIAMONDS: POSSIBILITIES FOR THE IDENTIFICATION, CERTIFICATION, AND CONTROL OF DIAMONDS 31* (2002).

the FSC certification system provide examples of the extent of public participation, both in developing the certification system and in shaping individual certification decisions.

As discussed above, the FSC requires a multistakeholder process of developing regional or national standards based on the FSC's global Principles and Criteria. The Rainforest Foundation reports that these regional or national working groups and standard-setting processes have generally been inclusive and effective at promoting dialogue between interest groups.¹⁴⁷ The FSC process in British Columbia, for example, carefully maintained multistakeholder representation by setting up an extra chamber specifically to represent indigenous people, and by actively seeking out people that were normally excluded from forestry decisionmaking and bringing them together to draft regional standards.¹⁴⁸ Similarly, the Saami, an indigenous group in Sweden, was able to effectively participate in national standard-setting processes, helping to create forestry management standards that preserve their traditional, forest-based livelihoods.¹⁴⁹

At the same time, the Rainforest Foundation report also pointed to counter-examples in which the public had not had meaningful participation in the standard-setting process. For example, in Ireland, the balance of power was deliberately manipulated to ensure that economic interests would have a decisive share of the votes¹⁵⁰; in Malaysia, social stakeholder groups withdrew when it became clear to them that their presence would only legitimize a process that did not actually attempt to take their concerns into account¹⁵¹; and in Ontario, the provincial government tried to bypass regional multistakeholder standard-setting processes by attempting to strike a mutual recognition deal with FSC-Canada.¹⁵² On balance, however, it seems that certification development processes are often open to public involvement, and the public—or at least some component of the public with the capacity to do so—has regularly played a meaningful role in such processes.

In contrast, public participation in the FSC seems to be much more limited in individual certification decisions. According to the Rainforest Foundation report, although the FSC principles require certifiers to consult with stakeholders in making certification decisions, they provide little guidance as to how stakeholder views are to be considered. Because certifiers have a strong financial incentive to certify forest operations, they often neglect the views of local communities. Moreover, the report noted, certifiers' ability to assess complex land tenure questions and issues concerning indigenous peoples can be limited.¹⁵³ Both factors result in little consideration of community needs and views in individual certification decisions, in spite of the FSC principles and often regional or national standards requiring such consideration.

For example, in SmartWood's certification of the Perhutani Forest in Java, local concern over corruption and tenure rights were ignored altogether in the assessment pro-

cess.¹⁵⁴ Similarly, notwithstanding a public summary report from its assessment team indicating pervasive land tenure problems expressed by villagers, an FSC-accredited certifier vouched for the Forestry Industry Organization in Thailand without providing any evidence that these problems were even considered in the final certification decision.¹⁵⁵ Public participation in individual certification decisions would likely improve if the certification body (in this case, the FSC) were to provide clearer guidance on public consultation. For example, the certification body could require a specified minimum number of consultations, educational and information dissemination efforts to enable the public to effectively participate in the consultation process, and direct outreach to communities to ensure all elements of the community are consulted with. In addition, the certification body would need to exercise greater oversight over certification decisions, and require that certifiers have sufficient experience with and understanding of public participation issues.

Public reporting and complaint mechanisms can help to ensure that certification systems remain accountable to the community. While certification systems may provide for such mechanisms, marginalized stakeholders may have difficulty accessing them. For example, the Rainforest Foundation's investigation of the FSC illustrates some of the obstacles faced by such stakeholders: documents explaining the complaint procedure are long, highly legalistic, and available only in English; complainants are required to deposit money to defray the costs of investigating a complaint; only FSC members are permitted to complain; and the timeliness requirements can be difficult for small NGOs to comply with.¹⁵⁶

Similarly, lack of capacity or resources may exclude marginalized stakeholders from other aspects of certification procedures, such as standard-setting or consultation in individual certification decisions. For example, important groups (such as indigenous peoples) may be invited to attend standard-setting meetings, but may not have the resources to travel or a representative able to understand and provide input to the process. Similarly, an illiterate community may be invited to submit written public comments, but would be ill-equipped to do so. Therefore, capacity-building programs and resources for local communities should be a key component of a certification system.

Transparency Throughout the Certification Process

Transparency is vital for stakeholders to trust that a certification assessment is not being manipulated by special interests, is free of corruption, and is consistent with the standards of the certification system. Transparency helps to prevent against "greenwash"—certification systems that appear to be ecologically friendly when they are not. Transparent certification systems allow the public to access key certification procedures and documents, thus enabling the public to make its own decision about whether or not the result is acceptable and to more effectively participate in the certification system.

147. See RAINFOREST FOUNDATION, *supra* note 14, at 32.

148. See *id.* at 109.

149. See *id.* at 32.

150. See *id.* at 115.

151. See *id.* at 124-235.

152. See *id.* at 112-13.

153. See *id.* at 39.

154. See *id.* at 73.

155. See *id.* at 66.

156. See *id.* at 45.

Public participation and consultation are key to the transparency of a certification system. As discussed above, public consultation helps to make stakeholders more aware of the issues, and in turn, enables them to provide valuable input into certification procedures and decisions. In order to increase transparency, public consultation should include a diverse and representative range of people and appropriate consultation methods to enhance participation by all.

In addition, transparency can be enhanced by making information easily accessible and publicly available to stakeholders. This should include information on the certification body, the accreditation process, and the accredited certifier, which would allow the public to assess the independence and effectiveness of the accrediting and accredited organizations. The Rainforest Foundation's study of the FSC reveals that this information may not be provided, even where certification bodies claim to do so. For example, although the FSC claims to provide annual "summary reports" of the accreditation process, they are not routinely made available to the public, and the public receives no information about corrective action requests involving accredited certifiers.¹⁵⁷ Access to this kind of information is necessary to maintain the credibility and effectiveness of a certification system.

The public should have access to information on the certification standards, guidelines for interpretation, and assessment and monitoring procedures. A good model for this is the FSC regional working group in British Columbia that provided not only the standards developed, but also all related methodologies and a chronicle of the standard-setting process to the public.¹⁵⁸

Finally, the public should have access to the full range of factual documents necessary to understand the basis of certification decisions, such as full certification assessment reports, including any findings of nonconformance with the standards, and post-certification compliance reports. This is an area that most certification systems are only starting to address. The Rainforest Foundation reported that the public has very little information about the basis for FSC certification assessments, finding that the public certification summary reports do not provide enough information for the public to determine whether certification was conducted rigorously and that there are sometimes significant discrepancies between the public report and the full report.¹⁵⁹ Although some restrictions on public disclosure may be necessary to protect commercial confidentiality, these restrictions should be narrowly construed so as to protect only the truly sensitive trade or business information. In addition, because the costs of producing and distributing the required public information may often be prohibitive for small-scale enterprises, certification systems should include processes to assist small-scale enterprises in complying with their public disclosure obligations, such as financial and technical assistance or simplified disclosure requirements for such enterprises.

Capacity-Building

Certification depends on the capacity of certifiers to implement the system, as well as the capacity of participants to

seek and maintain certification. Both developing countries and smaller scale operations often lack sufficient capacity to implement and participate in certification systems. Therefore, in order to ensure effective implementation and participation, a certification system would need to build in mechanisms to improve the capacity of these groups.

Natural resources are often found in developing countries that lack the capacity to implement certification systems, posing significant obstacles to implementation of international certification systems. For example, many African countries rich in diamond resources—including Sierra Leone, Namibia, Angola, and the DRC—lack strong inspector training, computers to record data, and high-level technology to identify conflict diamonds. Such lack of capacity is often reflected in differential rates of participation in certification systems. For example, most certified forests are found in developed countries—in fact, just two developed countries (Sweden and the United States) account for 61% of FSC-certified forests around the world.¹⁶⁰ In effect, certification has identified good current practice, mainly in the richer nations with the capacity to participate in and implement certification programs, leaving the worst forestry problems in the developing countries largely unaffected. There is therefore a strong need for capacity-building programs for developing countries.

Capacity-building programs are also needed to enhance the ability of smaller scale operations to participate in certification systems. Currently, 85% of FSC-certified wood comes from large-scale forestry operations,¹⁶¹ suggesting that there are deterrents to participation by smaller operations. One such deterrent has been the potentially high cost of FSC certification for small-scale forestry enterprises. The FSC has developed some ways to lower the costs of certifying these small-scale enterprises in order to increase their participation. One approach has been through group, or "umbrella," systems under which the combined forest area of all participants is viewed as a single management unit. Umbrella certifications have cut the cost to roughly one-tenth of that of the usual single forest certification price.¹⁶² The FSC also offers less complex certification procedures for small operations that are not part of a group system. Another model created to assist small-scale forest enterprises is the U.K. Woodland Assurance Scheme, a state-created alternative certification system made intentionally compatible with the FSC's requirements. Under this system, forest owners who are already in compliance with the U.K.'s National Forestry Standard can enjoy the benefits of FSC certification with only modest additional work and significantly reduced costs and bureaucracy. In addition to cost, technological know-how often deters small-scale operations. In particular, standards can often be too complicated, technical, and lengthy for small-scale foresters, particularly those in developing countries who often do not have formal forestry training or are illiterate. One solution can be for certification organizations to provide simplified standards and capacity-building workshops targeted to small-scale foresters.

157. See *id.*

158. See *id.* at 109.

159. See *id.* at 45.

160. See Gunningham & Sinclair, *supra* note 30, at 13.

161. See Bass et al., *supra* note 112, at 2.

162. See WWF, *supra* note 4, at 7, 11, 12.

Reduce Incentives for Smuggling

Smuggling can undermine the effectiveness of a certification system. For example, if the Revolutionary United Front were able to smuggle conflict diamonds out of Sierra Leone and enter them into legal trade, the diamond certification system would not be effective in cutting off its source of funding. Rather, the certification system would simply serve as a public relations boost for the diamond industry, providing consumers with a false sense of security and having little real impact on the trade in conflict diamonds. Therefore, it is important to reduce incentives for smuggling, and increase incentives for entering products into legal trade.

There are a number of financial incentives that can be used to target the often well-established culture of smuggling surrounding many natural resources. For example, in Sierra Leone, the government auctions any illegally harvested or conflict diamonds that it confiscates, distributing 40% of the proceeds to the person responsible for confiscation.¹⁶³ This helps create incentives for disclosure, openness, and accountability. In addition, the government has made diamond-producing communities stakeholders in the correct operations of export systems by distributing 0.75% of the value of all export taxes to these communities. This has created incentives for disclosure by the people who are most likely to have the information and increased incentives for legal trade of diamonds, thus resulting in greater tax revenue for the government and funding that the producing communities can use towards development and mining reclamation.¹⁶⁴

In mandatory government certification systems, such as those for diamonds, certification may actually increase incentives for smuggling, unless adequate safeguards are taken. Because these systems require that all exported diamonds be accompanied by a government-issued certificate and have in place various mechanisms to detect conflict diamonds, traders of conflict diamonds would be more likely to try to smuggle them than go through legitimate government channels where they could be detected and confiscated. In order to reduce smuggling in this situation, it is necessary to convince as many diamond traders to register and do business through legal channels as possible. This means enhancing access to import and export licenses, as limiting the number of license holders could lead to corruption and increased smuggling, making license holders “gatekeepers” to diamond transactions.¹⁶⁵ Another key safeguard—one that is conspicuously missing from the Kimberley Process agreement—is a mandatory, auditable “chain of warranties” from the mine or field to the customer. Under the Kimberley Process agreement, the mandatory chain of custody ends at the point of import, and participation in the subsequent industry chain of warranties is voluntary. Therefore, smuggled conflict diamonds can enter legal trade at that point in the chain.

Another safeguard against smuggling is a legal prohibition on carrying large quantities of cash without proper documentation. This is common banking practice in Europe and

the United States, and would help to differentiate legitimate traders from smugglers.¹⁶⁶

Avoiding Conflicts With World Trade Organization (WTO) Obligations

The WTO’s treaties and rules present potential obstacles to enacting a certification system. The WTO’s stated objective is to prevent impediments to free trade, and because certification systems often have the effect of restricting trade based on how a product was made, they can give rise to claims that a specific system or regulation poses a barrier to free trade. A review of the WTO jurisprudence suggests that there may be circumstances in which a certification system could constitute a barrier to international trade in violation of a government’s WTO obligations. However, there are numerous exceptions that should accommodate various types of certification systems, and it should be possible to design systems so that they adequately conform to one of these acceptable exceptions in order to avoid conflicts with WTO obligations.

The Legal Obligations

The WTO obligations of most relevance are the General Agreement on Tariffs and Trade (GATT)¹⁶⁷ and the Agreement on Technical Barriers to Trade (TBT).¹⁶⁸ The GATT was created in 1947 to liberalize trade between nations. In 1994, the GATT was incorporated into the WTO, a larger agreement and a formal institution. The TBT was created in 1994 and is also a WTO agreement.

Although there are other agreements that may be relevant in the contexts of specific certification initiatives, e.g., the Agreement on Government Procurement, the General Agreement on Trade and Services, the Agreement on the Application of Sanitary and Phytosanitary Measures, these are beyond the scope of this Article.

GATT

The GATT is the broader of the two agreements, applying to a variety of government measures that restrict trade in goods. The main GATT rules are provided in Articles I, III, and XI. Article I contains the Most-Favored-Nation (MFN) provision, prohibiting any measures that discriminate between “like products” from different Member countries. Article III contains the National Treatment provision, prohibiting any measures that discriminate between foreign and domestic “like products.” Finally, Article XI prohibits any

166. *See id.* at 15.

167. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT]. Prior to the Final Act, the original GATT was applied through the Protocol of Provisional Application. Protocol of Provisional Application of the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A2051, 66 U.N.T.S. 308. The rules of the GATT now constitute the principal rules of a larger agreement and formal international institution, the World Trade Organization (WTO). General Agreement on Tariffs and Trade: Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Apr. 15, 1994), *reprinted in* LAW AND PRACTICE OF THE WORLD TRADE ORGANIZATION (Joseph F. Denny ed., 1996).

168. Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A [hereinafter TBT Agreement].

163. *See* U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, *supra* note 113, at 13.

164. *See id.* at 20-21.

165. *See id.* at 8.

quantitative restrictions, such as bans, quotas, or import licenses, on the import or export of “like products.”

The GATT also provides for certain exceptions to these rules. Article XX(b) permits measures “necessary to protect human, animal or plant life or health,” even if they are found to violate Articles I, III, or XI. “Necessary” in this context means that there are no reasonably available alternative methods that are less trade-restrictive.¹⁶⁹ In addition, Article XX(g) permits measures “relating to the conservation of exhaustible natural resources.” A measure “relating to” the conservation of exhaustible natural resources is one that is “primarily aimed at” conservation of those resources.¹⁷⁰

Even if a measure falls under one of these exceptions, the introductory clause (or chapeau) of Article XX provides that it cannot be applied in an arbitrary or unjustifiable way, or as a disguised restriction on trade. For example, in the *Shrimp/Turtle*¹⁷¹ case, the WTO Appellate Body found that the U.S. law banning the import of shrimp caught without turtle exclusion devices (TEDs) was implemented in an arbitrary and unjustifiable manner and was therefore inconsistent with the “chapeau.” In this case, the Appellate Body found several aspects of implementation to be problematic. First, because the U.S. law only allowed for certification on a country-by-country basis, based on the country’s laws, it would effectively ban the import of even shrimp caught with TEDs in a country that permitted the catching of shrimp without TEDs. In addition, the U.S. measure provided inadequate opportunities for foreign countries or shrimp fisherman to appeal U.S. government decisions on certification. Finally, the U.S. government had imposed this ban without attempting to negotiate a multilateral solution to protect sea turtles with countries subject to the embargo. These factors led the Appellate Body to conclude that the U.S. import ban was inconsistent with the WTO.

Measures restricting nonproduct related process or production methods (PPM),¹⁷² such as the U.S. ban in *Shrimp/Turtle*, have often raised controversy over their WTO-consistency. In the early 1990s, the GATT panel disfavored measures restricting nonproduct related PPMs, as evidenced by its decision in the first *Tuna/Dolphin*¹⁷³

case. This case arose from the U.S. ban on tuna from countries that allowed tuna harvesting methods inconsistent with U.S. “dolphin-safe” fishing regulations. The panel found that this PPM-based measure was a quantitative restriction in violation of the GATT Article XI, and could not be justified as “necessary” under the Article XX conservation exception. Although this decision was never adopted by the GATT panel, it pointed to the difficulties countries could face in enacting PPM-based certification measures for public policy purposes. However, in the *Shrimp/Turtle*¹⁷⁴ case, the WTO Appellate Body effectively reversed the conceptual basis of the *Tuna/Dolphin* decision. In this case, the Appellate Body indicated that under GATT Article XX(g), countries could use nonproduct-related PPM-based measures in order to pursue environmental objectives, so long as they are consistent with the Article XX “chapeau.” Here, the Appellate Body found that the U.S. shrimp embargo violated the Article XX “chapeau” because it was applied in an arbitrary and discriminatory manner, as discussed above. Nonetheless, this was a landmark decision in establishing that PPM-based measures could in fact be WTO-consistent in certain circumstances. This was subsequently confirmed in the *Shrimp/Turtle* implementation review panel decision,¹⁷⁵ in which the WTO panel and Appellate Body found that revised U.S. shrimp import restrictions (which are PPM-based but treat the countries involved more fairly) do not violate WTO obligations.

Finally, Article XXI of the GATT allows Members to take measures “necessary” to protect their essential security interests or to act in pursuance of their U.N. peace and security obligations. Article XXI embodies the concept of national sovereignty, respecting the right of nations to protect themselves from external threats. For this reason, Article XXI is written broadly and allows nations greater latitude than the general exceptions under Article XX.¹⁷⁶ Legislative history indicates that drafters intentionally separated the Article XXI security exception from the general exceptions under Article XX, which, unlike the security exception, are subject to the anti-discrimination requirement of the Article XX “chapeau.”¹⁷⁷ This provision has rarely been invoked, but arguably constitutes a strong authority to justify a country’s certification system, particularly if created through multilateral negotiations and to control armed conflict.

169. See GATT Panel Report on Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.), ¶ 75. In determining whether a more GATT-consistent approach is reasonably available, it is necessary to consider the “vitality” or importance of the policy objective and the extent to which an alternative measure would contribute to achieving this objective. See WTO Appellate Body Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, ¶ 172 (Mar. 12, 2001).

170. United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, at 18 (Apr. 29, 1996).

171. WTO Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Nov. 8, 1998) [hereinafter *Shrimp/Turtle*].

172. PPM-based measures are those that discriminate between products based on how they are produced. Nonproduct-related PPMs are those that do not affect the product’s physical or other identifiable characteristics. For example, as discussed in the context of the *Shrimp/Turtle* case, the method of harvesting shrimp does not impact the actual physical composition of the shrimp itself. Therefore, the U.S. import ban on shrimp harvested from countries that do not require the use of TEDs would constitute a nonproduct-related PPM-based measure.

173. GATT, United States—Restrictions on Imports of Tuna, DS21/R, Sept. 3, 1991, B.I.S.D. (39th Supp.) (unadopted). There were two

Tuna/Dolphin cases. In the first case, known as “*Tuna/Dolphin I*,” Mexico requested a GATT panel in 1991 to challenge U.S. export restrictions on Mexican tuna under the U.S. Marine Mammal Protection Act. In the second case, known as “*Tuna/Dolphin II*,” the European Union lodged a complaint in the GATT panel, leading to a second panel report on the issue. For a detailed discussion of GATT case law on PPMs, see INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT AND CENTRE FOR INTERNATIONAL ENVIRONMENTAL LAW, THE STATE OF TRADE LAW AND THE ENVIRONMENT: KEY ISSUES FOR THE NEXT DECADE 8-23 (2003), available at <http://www.iisd.org/trade/pubs.htm> (last visited Apr. 23, 2003).

174. *Shrimp/Turtle*, *supra* note 171.

175. GATT Panel Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, June 15, 2001, WT/DS58/RW; WTO Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, Oct. 22, 2001, WT/DS58/AB/RW.

176. See Price, *supra* note 3, at 20.

177. See *id.*

Agreement on TBT

The TBT Agreement emerged as a response to the increased use of technical standards, such as import restrictions on the size, quality, and labeling of products, as nontariff barriers to trade. The TBT Agreement regulates the use of both mandatory “technical regulations” imposed by governments, and voluntary “standards,” including standards imposed by NGOs.

Technical regulations are permitted under the TBT Agreement as long as they meet the MFN and National Treatment requirements¹⁷⁸ and are not more trade-restrictive than necessary to fulfill a “legitimate” objective, such as protection of human health or safety, plant or animal life or health, or the environment.¹⁷⁹ Government labeling requirements, for example, are permitted under the TBT Agreement as necessary to fulfill the legitimate objective of protecting human health and safety.¹⁸⁰

Although government eco-labeling requirements are generally considered legitimate “technical regulations” under the TBT Agreement, potential trade disputes can arise with respect to eco-labeling requirements based on nonproduct-related PPMs. Some have argued that the most favored nation and national treatment provisions of the TBT Agreement prohibit labeling requirements that distinguish between “like products” based on their PPMs. Many developing countries, in particular, have resisted PPM-based labeling requirements because such labels could limit their market access based upon the environmental or social standards of developed countries.¹⁸¹ The United States has also strongly criticized the European Union’s development of mandatory labeling requirements for genetically engineered food as impermissible PPM-based measures under the TBT Agreement.¹⁸² At the same time, such PPM-based labeling requirements have been widely used by the United States and others,¹⁸³ and have not yet been subjected to WTO challenge.¹⁸⁴ However, WTO members have recognized the need to further study the issue of environmental labeling under the WTO rules.¹⁸⁵

178. TBT Agreement, *supra* note 168, art. 2.1.

179. *Id.* art. 2.2.

180. See Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, 26 ENVTL. L. 841, 859 (1996) (citing Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, GATT Doc. L/6286, B.I.S.D. (35th Supp.) 98 (adopted Mar. 22, 1988)) (indicating that the TBT Agreement defines “technical regulation” to include a document which “may include or deal exclusively with . . . labeling requirements”).

181. HARRISON INSTITUTE FOR PUBLIC LAW/CONSUMER’S CHOICE COUNCIL, BRIEFING PAPER: RECENT DEVELOPMENTS CONCERNING TRADE RULES AND PRIVATE LABELING AND CERTIFICATION PROGRAMS 4 (2002), available at <http://www.consumerscouncil.org> (last visited Apr. 13, 2003).

182. See *id.* at 6.

183. See, e.g., 16 U.S.C. §1385 (U.S. labeling requirements for “dolphin-safe” tuna).

184. See HARRISON INSTITUTE, *supra* note 181, at 3 (noting that WTO dispute settlement panel has not yet addressed this issue).

185. The Declaration from the WTO Ministerial Conference in Doha, Qatar, instructed the Committee on Trade and Environment to study the issue of environmental labeling to determine whether there is a need to clarify their status under WTO rules. See Consumer Choice Council, *Trans Atlantic Consumer Dialogue, Briefing Paper and Recommendations on Product Labels and Trade Rules*, at http://www.consumerscouncil.org/trade/tacd_0103.html (last visited Apr. 22, 2003).

In contrast to mandatory government technical regulations, “standards” are defined under the TBT Agreement as voluntary, approved by a “recognized body,” and intended for common and repeated use.¹⁸⁶ The TBT permits the use of such standards. The use of an international standard is presumed to be consistent with the TBT Agreement.¹⁸⁷ If an NGO issues the standard, governments are required to take reasonable measures to ensure that the NGO complies with the Code of Good Practice for the Preparation, Adoption, and Application of Standards (Code of Good Practice).¹⁸⁸ The Code of Good Practice requires that standards not create unnecessary obstacles to trade,¹⁸⁹ that they be based upon relevant international standards where possible,¹⁹⁰ and that they not duplicate or overlap with standards issued by other bodies.¹⁹¹

Application to Certification Systems

Voluntary Nongovernmental Certification Systems

A voluntary, nonbinding certification system developed by nongovernmental actors, which does not depend on government participation, would not likely raise any WTO concerns. An example of such a system would be the FSC timber certification system, which was developed by NGOs and relies solely on private, market-based incentives, with no government enforcement. FSC certification has avoided WTO conflicts due to its voluntary, nongovernmental nature.

Voluntary, nongovernmental certification systems do not raise GATT issues because they are developed and implemented by NGOs, and only governments are required to comply with GATT. They are also unlikely to raise TBT issues, which would arise only if the NGO-issued certification standards amounted to “standards” within the meaning of the TBT, i.e., approved by a “recognized body” and for common and repeated use. “Recognized body” is not defined in the agreement, but probably would include large international bodies like the ISO. Where such “standards” are involved, governments are required to “take such reasonable measures as may be available” to ensure that the NGOs in their territories implementing this standard observed the TBT Code of Good Practice.¹⁹² Even if the TBT would apply standards set by smaller nongovernmental certification bodies—such as the FSC—it is unlikely that there would be any formal trade challenge against such a certification system, as it would be highly controversial politically.¹⁹³ Moreover, no such certification system has sufficient economic impact to justify the expenditure a WTO Member would need to make in order to bring such a challenge.¹⁹⁴ In addition, in the United States, any attempt to compel private certification organizations to comply with the TBT Code of

186. TBT Agreement, *supra* note 168, Annex 1.

187. See Wold, *supra* note 180, at 865 (citing TBT Agreement, *supra* note 168, art 2.5).

188. TBT Agreement, *supra* note 168, Annex 3.

189. *Id.* ¶ E.

190. *Id.* ¶ F.

191. *Id.* ¶ H.

192. *Id.*

193. See HARRISON INSTITUTE, *supra* note 181, at 5-6.

194. See *id.*

Good Practice would arguably be subject to the restraints imposed by the First Amendment of the U.S. Constitution, as product labels constitute a protected form of speech.¹⁹⁵

Government Involvement in Certification System

Government involvement in a certification system makes it more susceptible to claims of WTO conflicts; but depending on the design of the system, such conflicts are far from insurmountable.

As seen in *Shrimp/Turtle* and *Tuna/Dolphin I*, if a government participates in setting the standards for certification or provides incentives or sanctions to give effect to a certification system, e.g., an import ban, tax or regulatory relief, government procurement requirements, this arguably could be found to violate GATT Articles I, III, or XI. However, if not applied in an arbitrary and unjustifiable manner, these standards could be justified under Article XX(b) if their objectives are to protect human, animal or plant life or health and there were no reasonably available less trade-restrictive measure; or under Article XX(g) if primarily aimed at conservation of natural resources. The *Shrimp/Turtle* decision confirms that even mandatory, government-imposed, non-product-related, PPM-based measures can be WTO-consistent, although such measures may face closer scrutiny under the Article XX “chapeau.”

Government bans or embargoes on noncertified goods may also face closer scrutiny than less trade-restrictive measures, such as eco-labeling requirements. Eco-labeling requirements, such as the U.S. labeling program for “dolphin-safe” tuna,¹⁹⁶ have been widely used and generally raised fewer WTO concerns. However, government eco-labeling requirements are certainly not immune from claims of WTO-inconsistency. For example, several tropical timber-exporting countries threatened to challenge the Austrian government’s mandatory labeling requirement for tropical timber, which completely excluded temperate timber from its purview.¹⁹⁷ As a result of this opposition, Austria ultimately withdrew the measure, which would likely have been found to be a disguised restriction on trade. Therefore, like any other government-imposed certification measure, eco-labeling requirements that are blatantly discriminatory and protectionist will run the risk of violating the GATT Article XX “chapeau.” Also, as discussed earlier, PPM-based labeling requirements have given rise to trade disputes under the TBT Agreement, such as the U.S. opposition to labeling requirements for genetically engineered food and many developing countries’ opposition to PPM-based labeling requirements generally. Because no country

has yet challenged such measures under the TBT Agreement, their status under the WTO regime is unclear. However, labeling requirements will likely remain easier to justify than more restrictive measures, such as all-out import bans.

This raises the question of whether the Kimberley Process certification system for diamonds—a governmental ban on trade of noncertified diamonds—is consistent with the WTO rules. In particular, the system’s ban on diamond trading with nonparticipating countries could be viewed as a violation of GATT Article XI’s prohibition against quantitative restrictions. However, measures taken pursuant to the Kimberley Process could arguably be justified under the GATT Article XXI security exception, as such measures would enhance the implementation of the U.N. Security Council resolutions on limiting the trade in conflict diamonds, are designed to promote peace and security through multilateral cooperation, and are thus consistent with the intent of the exception.¹⁹⁸

Multilateral Environmental Agreements

There are a number of multilateral environmental agreements (MEAs) that specifically and intentionally restrict trade. CITES,¹⁹⁹ for example, specifically confers various degrees of trade regulation on listed species. On its face, CITES appears inconsistent with the GATT, as the GATT prohibits discrimination between “like products” while CITES does allow discrimination between like animal and plant products if one originates in an area where the species is threatened and the other does not. Another example is the Montreal Protocol,²⁰⁰ which requires signatories to ban exports and imports of controlled substances from non-Parties (although they can continue to trade in such products among themselves). This trade discrimination against non-Parties could be viewed as inconsistent with the MFN principle. Similarly, the Basel Convention²⁰¹ prohibits trade in hazard-

195. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking down federal ban on disclosure of alcohol content on beer labels). In this case, the U.S. Supreme Court found that the product labels at issue constituted a form of protected “commercial speech.” However, certification labels, such as those specifying the environmental impacts of a product, may be treated as “political speech,” which has traditionally been afforded an even higher level of protection under the First Amendment. Whether treated as commercial or political speech, certification labels would likely be entitled to some level of protection from government regulation.

196. 16 U.S.C. §1385. Unlike the earlier all-out ban on imports of nondolphin-safe tuna, which the GATT panel had struck down, this program simply requires tuna producers to provide information that could affect consumer choices, but does not mandate particular harvesting practices for imported tuna.

197. See TED Case Studies, *Austrian Timber Export Ban*, at <http://www.american.edu/TED/AUSTRIA.HTM> (last visited Jan. 28, 2003).

198. See ICTSD, *WTO Goods Council Approves Kimberley Process Waiver*, BRIDGES WKLY. TRADE NEWS DIG., Feb. 27, 2003, available at <http://www.ictsd.org/weekly/03-02-27/story3.htm> (last visited Apr. 25, 2003) (indicating that some countries considered GATT Article XXI to provide an exemption for measures taken pursuant to the Kimberley Process). For examples of U.N. resolutions on limiting the trade in conflict diamonds, see, e.g., Environmental News Service, *U.N. Backs Scheme to Block Blood Diamond Trade* (Apr. 15, 2003), at <http://www.ens-news.com/ens/apr2003/2003-04-15-01.asp> (last visited Apr. 22, 2003) (U.N. General Assembly resolution in support of the Kimberley Process, noting that it could help to ensure effective implementation of prior U.N. Security Council resolutions); Press Release, U.N. Security Council, *Security Council Expresses Strong Support for “Kimberley Process” Aimed at Halting Illicit Diamond Trade Used to Fuel Conflicts*, Release No. 7648 (Jan. 28, 2003), at <http://www.un.org/News/Press/docs/2003/sc7648.doc.htm> (last visited Apr. 25, 2003) (Security Council Resolution 1459 expressing strong support for the Kimberley Process Certification Scheme); Res. 1459, G.A. Res. 55/56, U.N. GAOR, 55th Sess., U.N. Doc. A/RES/55/56 (2001) (U.N. General Assembly resolution calling on the international community to give “urgent and careful consideration to devising effective and pragmatic measures to address the problem of conflict diamonds”).

199. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

200. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 10, 100th Cong., 1st Sess. 1 (1987), 26 I.L.M. 1541.

201. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, S. Treaty Doc. No. 5, 102d Cong., 1st Sess. (1991) 28 I.L.M. 649.

ous waste from developed to developing countries, which could appear inconsistent with GATT's prohibition against quantitative restrictions such as bans.²⁰²

No country has yet challenged a trade-restrictive measure of an MEA as being incompatible or inconsistent with the WTO.²⁰³ This is because MEAs are multilateral treaties equivalent in status and importance with the GATT. In fact, more countries are participants to certain MEAs, such as CITES, than are Members of the WTO.²⁰⁴ Therefore, in the case of any alleged incompatibilities between the GATT and an MEA, it is not clear which (if either) set of obligations would prevail. This determination would need to be made on a case-by-case basis, taking into account the subject matter of the treaties and of the dispute, the existence or absence of conflict clauses in the affected treaties, and customary rules of treaty succession and treaty interpretation embodied in the Vienna Convention on the Law of Treaties.²⁰⁵ The relationship of the WTO to MEAs is a complex one, and is still unsettled under international law.

Some fear that the tension between MEAs and the free-trade goals of the WTO may increase in the near future as the use of trade restrictions in MEAs becomes more prevalent and trade rules become more stringent.²⁰⁶ They have therefore argued that MEAs should be explicitly recognized within the WTO trade regime.²⁰⁷

Summary on Compliance With WTO Obligations

A voluntary certification system that is developed and implemented by an NGO or NGOs is unlikely to come into conflict with the WTO. However, where a government participates in a certification system by setting standards or providing incentives or enforcement measures, a certification system can become more susceptible to WTO conflicts. Because such involvement could arguably pose a trade restriction, a government might need to justify it under a WTO exception. There are numerous such exceptions, including: GATT Article XX(b) for measures necessary to protect human, animal, or plant life and health; Article XX(g) for measures relating to the conservation of natural resources; or GATT Article XXI for measures necessary to protect essential security interests or U.N. obligations. All of these measures, even those based on PPMs, can be justified if they are not implemented in an arbitrary and unjustifiable manner. In addition, for government labeling requirements, TBT Article 2.2. provides an exception for technical regulations necessary to fulfill a legitimate government objective, such as protection of health and the environment.

202. Wold, *supra* note 180, at 849. Other MEAs that rely on trade measures to achieve their goals or as an enforcement mechanism include the Convention on Biological Diversity, and the U.N. Framework on Climate Change. *Id.* at 845.

203. *Id.* at 843. See also Friends of the Earth, Int'l, *Multilateral Environmental Agreements*, at <http://www.foei.org/trade/activistguide/meas.htm> (last visited Dec. 20, 2002).

204. 161 countries are parties to CITES, while 146 countries are Members of the WTO. See <http://www.cites.org/eng/parties/index.shtml> (last visited Apr. 22, 2003) (for CITES participants); http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 22, 2003) (for WTO members).

205. See E-mail correspondence from William Carroll Muffett, Director of International Programs, Defenders of Wildlife (Apr. 2, 2003) (on file with author).

206. See, e.g., Wold, *supra* note 180, at 847.

207. *Id.*

A government's participation in a certification system can likely be crafted in a way that will be WTO-justified under these exceptions. The WTO regime is likely to uphold government participation in certification systems that are transparent; fair; provide adequate notice and opportunity to appeal certification decisions; based on strong environmental, health, or security justifications; rely on a closely correlated means of achieving the justification; and are supported by international agreement in the form of an MEA, U.N. conventions or sanctions, or a U.N.-backed process. The more closely a certification system conforms to these guidelines, the less likely it is to conflict with WTO obligations.

Conclusion

This Article illustrates how certification systems can be used to promote good governance. Some, such as the Kimberley Process certification system for diamonds, are designed to advance governance directly by cutting off a major source of revenue for armed conflict, and thus promoting peace and stability. Others produce governance benefits indirectly as byproducts of certification systems geared toward environmental or social sustainability goals. For example, certification systems that seek to improve environmental or social sustainability—such as the FSC's certification of timber, Transfair's certification of fair trade coffee, or CST's ecotourism certification—often ameliorate the causes of economic and social strife that can give rise to conflict, thus promoting peace indirectly.

Several certification systems include good governance measures in their standards for certification. For example, the Principles and Criteria of both the MSC and FSC require certified entities to comply with national and international law, thus creating incentives for the legal use of natural resources. Similarly, the FSC's chain of custody certification tracks wood products from forest to consumer, fostering transparency and potentially reducing illegal timber harvesting. Other examples of good governance measures found in various certification systems include public complaint mechanisms, which seek to increase access to justice for affected communities; and provisions for public participation, consultation with local communities, and access to information. Finally, certification can promote investment in economic and human development by increasing government tax revenues available for investment, protecting legitimate industry, and directly requiring measures to promote economic and social well-being as a condition for certification.

However, the full value of these potential benefits is not often realized. Whether or not certification yields governance benefits depends on a multiplicity of factors, including the design and structure of the certification system and the capacity of Parties involved to participate in and implement the system. This Article has documented various factors that can undermine the effectiveness of certification systems, including:

- (1) relaxing of standards, for example through conditional certification or percentage-based labeling;
- (2) a lack of mandatory, independent, third-party verification in many certification systems;
- (3) perverse financial incentives that may compromise the independence of certifiers, even where

certification systems require independent third-party verification (for example, competition among certifiers for certification fees, or conflicts of interest created by allowing certifiers to provide consultancy services);

(4) a lack of monitoring over time to ensure continued compliance, particularly if standards have changed over time;

(5) failure to monitor at all points in the chain of custody, which can allow resources to be “laundered” through intermediary countries;

(6) ineffective oversight of accredited certifiers by certification bodies, resulting in certification assessments that do not conform to the certification body’s standards;

(7) a lack of meaningful public involvement in designing and implementing the certification system, which can result in certification systems that do not effectively meet the needs of communities and thus lack community support;

(8) absence of technical, personnel, and financial capacity to effectively participate in or administer the certification system;

(9) corruption, in cases where governments are involved in the implementation of certification systems; and

(10) actual or potential conflicts with the WTO trade rules.

Notwithstanding these challenges, many of the imperfect certification systems discussed in this report have yielded positive governance benefits. For example, evidence suggests that following the implementation of Sierra Leone’s certification system, more diamonds are being traded in legal channels and more export tax revenue from diamonds has flowed to the government. Certification may also have played a role in bringing an end to Angola’s diamond-fueled civil war. The FSC certification system, through its national working groups, seems to have enhanced public participation in forestry decision-making in countries with otherwise poor forestry governance. Coffee certification by Transfair USA has increased the prices that farmers receive for their coffee. ISO 14001 has promoted community consultation in some instances.

Although these examples are anecdotal, they provide concrete illustrations of how certification systems can and have promoted good governance. While there have been relatively few attempts to date to document and quantify these benefits, there have been several efforts to assess the environmental, social, and economic benefits of certification. This Article points to the need for further in-depth research to measure and document the governance benefits of certification.

This Article has also identified some safeguards that can be built into certification systems to enhance their effectiveness. Safeguards can be implemented at various levels of a certification system, including:

Standard-Setting:

(1) developing clear, specific, performance-based standards, rather than systems-based standards or standards based on general principles, making it easier to identify noncompliance;

(2) relying on conditional certification only sparingly—and when used, engaging in adequate monitoring to ensure conditions are complied with within a reasonable period of time;

(3) simplifying standards where necessary to allow small-scale producers to participate in the certification system (for example, through processes such as the FSC’s umbrella systems for small-scale forestry operations);

(4) adopting standards that require chain of custody certification from production to consumer, in order to minimize opportunities for smuggled products to enter legal trade; and

(5) relying on standards developed and implemented by NGOs, or where governments are involved, developing standards that are fair, transparent and supported by multilateral processes, in order to avoid WTO challenges.

Certification Assessment and Accreditation:

(1) requiring independent third-party certification assessment;

(2) requiring public review of certification decisions and providing effective public complaint mechanisms in order to enhance transparency and legitimacy of certification assessments; and

(3) increasing oversight by the certification body of its accredited certifiers through, for example, unannounced inspections, review of certification assessments and removal of accreditation in cases of noncompliance.

Compliance-Monitoring and Enforcement:

(1) requiring independent, third-party compliance-monitoring;

(2) where national governments are involved in administration of certification standards;

(3) conducting international review missions to ensure effective implementation and providing technical and financial assistance for implementation if needed;

(4) ensuring compliance-monitoring over time, particularly if standards have been updated;

(5) using technological innovations, such as diamond bar coding, to limit the risks of corruption and tampering in the chain of custody;

(6) creating incentives for the public to assist in compliance-monitoring, such as Sierra Leone’s system of compensating persons and communities responsible for confiscation of conflict diamonds; and

(7) issuing credible sanctions for noncompliance, such as removal of benefits, e.g., a certification seal, public disclosure of breach, remedial measures, e.g., product recall or reparation of environmental damages, or expulsion from an industry association.

Capacity-Building:

(1) building the technical and financial capacity of local communities and small-scale producers to facilitate their ability to participate in the certification system; and

(2) educating consumers to enable them to identify “greenwash” and effectively select among competing certification systems.

Existing social, political, and economic realities may, however, often make it difficult or impossible to implement these safeguards and recommendations. Moreover, certification continues to face the problem of consumer confusion over competing certification systems. As certification systems continue to proliferate and multiply, it is increasingly difficult for consumers to make sense of them. There is no guarantee that the certification systems with the most effective standards—in environmental, human rights, or governance terms—will “win” in the minds of consumers. Rather, as certification systems compete for legitimacy amongst each other, there is a danger that the one that dominates may not in fact be the most protective, but just the one that, for example, receives the best marketing and publicity. This risk is particularly high where the certification system is financed, supported, and implemented by the industry it seeks to regulate.

Given the limitations of certification identified above, how effective a tool is it for advancing governance goals? It is certainly not a market-based panacea for all of the world’s governance woes. Rather, it is one of several tools in the toolbox, which, if used appropriately in the right situations, can be extremely effective. Whether certification is appropriate and desirable in a given situation should be determined in conjunction with those most closely impacted by the decision—the local community. For example, the Environmental Law Institute (ELI) and the Peruvian Environmental Law Society (SPDA) are currently working with local communities in the Andes to explore the option of creating a certification system for mining operations in the region. In this process, ELI and SPDA are also helping the communities to examine other means of preventing the potentially destructive impacts of mining, such as by strengthening and participating in environmental impact assessment procedures, negotiating impact-benefit agreements with mining companies, or asserting their constitutional or legislative rights to be consulted regarding mining development

in their communities. This approach recognized that certification is not always the best tool to meet community needs—and should be specifically assessed for its usefulness and acceptability in a given context.

Certification may also be more vulnerable when it relies on government for its implementation. Government-implemented certification systems are less likely to succeed in times of serious political crises or upheaval, or where there is endemic corruption and cronyism in the government. In such situations, government-implemented certification can promote rather than inhibit fraud, smuggling and corruption by creating opportunities for government officials seeking to line their pockets. Therefore, where the ability of government to implement a certification system is severely compromised by political realities, other options may be more effective. For example, independent third-party certification that relies on accredited, accountable, nongovernmental certifiers may be able to avoid the corruption problems associated with government-implemented systems. Alternatively, more blunt instruments than certification—such as trade embargos, industrywide consumer boycotts, international criminal sanctions, or travel bans for country leaders—may be more appropriate in specific instances. For example, under the U.N.-imposed trade sanctions, although Angola and Sierra Leone were permitted to continue selling government-certified diamonds, Liberia was subject to a total embargo on all diamond sales.

In conclusion, where certification is contextually appropriate, it can be an extremely powerful tool, one that is precise and targeted, pinpointing the illegitimate trade without hurting legitimate industry; one that can generate industry support by providing valuable economic incentives; and one that can harness the massive force of material consumption to improve the environment, human rights, and governance around the world. Still, certification has yet to realize its full potential for promoting good governance. By drawing on the experiences and outcomes of existing certification systems, this report has sought to illustrate some of the safeguards and methodologies that can help enhance the effectiveness of certification systems and bring them closer to achieving their ultimate goals.

