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Certifying in Contested Spaces: Private Regulation in Indonesian Forestry and Palm Oil

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Abstract

Over recent years, systems of civil or private regulation have emerged across several commodity sectors in developing countries. This paper compares two regulatory systems applied to parallel food and forestry problems: the Forest Stewardship Council (FSC) and the Roundtable on Sustainable Palm Oil (RSPO). Analysing these regulatory approaches as attempts to extend procedural and distributional justice into contested forested and agricultural spaces, the paper examines the paradox that, despite successful advocacy campaigns using these regulatory standards, oil palm and timber estates and associated land conflicts continue to proliferate in Indonesia. These regulatory processes provide leverage within bounded spaces, yet they are limited by an incommensurability of values and interests that reflect underlying structural problems. At best these certification schemes provide limited learning tools. Addressing the underlying problems will require legal reforms, effective State engagement and supporting forms of accountability.

Introduction

On June 8 2011, Greenpeace launched 'Barbie, It's Over', an international campaign criticizing Mattel's use of Asia Pulp and Paper's (APP) products in its packaging. The campaign led to Mattel dropping APP products. Other campaigns against the pulp and paper behemoth led to the withdrawal of its Forest Stewardship Council certification. Transnational social movements also targeted Unilever, the world's largest buyer of palm oil, and Nestlé, the world's biggest food and beverage company, as well as HSBC, the International Finance Corporation and Disney Corporation. Such campaigns aim to ensure that production companies adhere to higher environmental and social standards. Paradoxically, despite the successful campaigns against lead firms utilising the standards of transnational regulatory processes, oil palm and timber estates continue to expand rapidly, generating extensive land-use conflicts.

The Forestry Stewardship Council (FSC) and the Roundtable on Sustainable Oil Palm (RSPO) may be seen as attempts to extend elements of procedural and distributional justice into forested and agricultural landscapes. However, according to their critics, they also accord with particular corporate agendas, public relations activities to diffuse criticism, and a controversial shift to decentralised-localised community-based negotiations guided by codes of conduct and legal innovations. While these aim to provide effective management of investments and 'win-win' solutions, from other

perspectives the 'win-win' scenario remains inadequate¹. As this paper will argue, this ambiguity is central to the promises and problems these systems embrace.

This paper is concerned with the question of the 'output legitimacy' of these two key transnational regulatory systems: how effectively are RSPO's and FSC's specific regulatory objectives achieved?²The underlying questions involve procedural and distributive justice, and recognition: to what degree has private regulatory processes ameliorated the problems of land-use rights in forest and agricultural lands thrown up by these booming industries? Are the schemes changing the way the benefits and burdens of these industries are distributed? Who is given respect and whose values and interests are valued?³

This paper advances four arguments. First, these regulatory processes can provide discursive power and leverage to NGOs and social movements seeking to negotiate a redistribution of the benefits and burdens associated with these boom industries. There is evidence that this is leading to improved outcomes within certain enclaves. Second, more generally, private regulatory processes lack structural power, and work in the absence of the 'social foundations of accountability' at the micro-level and in the absence of State enforcement capacities associated with hard law. These would be required to improve outcomes in a more encompassing way.⁴ Third, the paper finds a fundamental incommensurability of values, interests and concerns that reflects particular structural problems. To be sure these schemes build upon international agreements, norms and

laws. However, at the heart of the challenge of using voluntary regulatory mechanisms is the reality that State-based actors remain disinclined to implement existing state laws in thorough going way and otherwise support the normative concerns of developed world consumers, embedded in voluntary standards or domestic legal systems.⁵Fourth, given the particularly difficult implementation and legitimacy problems, civic or private regulation does not offer an encompassing solution outside limited contexts. At best, they provide a limited policy instrument – a learning tool.

This paper draws its conclusions from a review of grey literature, NGO advocacy campaigns, assessments of regulatory systems, interviews with key players, and attendance at several RSPO roundtables.⁶It contributes to the wider literature in three respects. First, few studies have compared the food sector with other sectors to contrast developments.⁷Therefore, this paper compares how two parallel global governance systems work in the same institutional context. Second, while many researchers have focused on environmental issues, less attention has been paid to determining the degree to which these regulatory approaches help to secure rights and better distributional outcomes for indigenous people and local smallholders.⁸Third, while researchers have continued to pay attention to upstream processes of regime formation and regulation of value chains, they have given insufficient consideration to the problem of whether these civil or private regulatory processes bridge the gap between high-sounding norms and the field-level micro-processes — rooted in a particular political economy — where outcomes emerge.

The article will consider some key conceptual issues, before analysing the RSPO's and FSC's objectives and the problems facing these regulatory approaches in Indonesia, and drawing conclusions.

Conceptual considerations

The paradox at the heart of the problem of 'output legitimacy' is that while 'effectiveness in achieving a given objective can serve as a source of legitimacy', there are typically 'no objective measures of the "effectiveness" of a private governance institution'.⁹

Effectiveness must remain contested. For example, the meaning of 'sustainability' remains open to controversy. Meanwhile certification schemes take a procedural solution: 'sustainability' entails meeting 'minimum and progress requirements capturing [key] social and environmental concerns'.¹⁰ This outcome is appropriate to 'pragmatic' or 'experimental' governance,¹¹ where actors constructing governance regimes develop 'framework goals and metrics for assessing their achievement'. In such processes, the concern is necessarily pragmatic: to what degree are the main environmental and social aspects of a particular food or forest governance issue covered by governance systems? How can a regulatory regime assess whether standards are being met?

Clearly these pragmatic discussions are shaped by political-economic dynamics. In other words, civic or private regulatory regimes can be understood in terms of context: how

have these regimes emerged and come to be seen as key responses to particular issues, and how do processes of uptake affect the possibilities and problems they pose? These governance systems are widely seen as responding to the need to rethink regulatory approaches to these problems. In pragmatic terms, as we will see, civic or private regulatory approaches are compromises between the agendas of corporate actors and social movements.¹²

As production, marketing and consumption have transformed local places under new forms of 'flexible capitalism' or 'flexible accumulation',¹³ NGOs and social movements have responded. Acknowledging the failure of place-based State regulatory regimes in developing contexts, they also recognise that large retailers and merchandisers have disproportionate power in globalised value chains, without direct ownership of upstream production processes within decentralised global-scale production and distribution networks.¹⁴ With this knowledge, NGOs and social movements have used consumer choices in product markets in developed contexts to impact on distant people and environments; pressuring lead firms to push value-laden certification processes up the value chain. For NGOs and social movements this has led to a flattering moment: repositioning them from social actors who, despite significant discursive power, were 'outside' State policy formulation processes, into salient players sitting across from powerful corporate actors.

Transnational corporations have likewise sought to influence international regulatory regimes, through a market-orientated, self-regulatory model of governance.¹⁵ The idea, variously articulated, was that corporations could agree with other stakeholders on the principles and guidelines to manage environmental and social problems, while minimizing the dependence on external State enforcement mechanisms that vary between locations and impose enormous transaction costs on transnational corporations¹⁶.

In theory, civic or private regulation accords with market-based approaches which mobilise incentives to favour environmentally or socially positive outcomes. The assumption has been that improved governance emerges through market processes, with minimal State enforcement, because producers will respond to environmental and social concerns as consumers come to value sustainability. Hence, the new agenda is often seen as a reflection of 'neo-liberal' ideology, particularly the decline in State control over business.¹⁷ Its emergence correlates with a shift in power and influence whereby private actors, who may previously to varying degrees have been subject to State restrictions, now impose their governance mechanisms upon food and forestry sectors. To be sure, it is also a collective-action response by business to international campaigns: by allowing corporations to be seen to be addressing critics' concerns, it may increase their ability to influence consumer and public relations and bestow competitive advantages on participating corporations. This helps companies with risk management: third party verification of sustainable practices serves as a defence against criticism.

Indeed, the cases of palm oil and timber production raise particular transnational problems. Global production networks encompass various spatial, temporal and jurisdictional scales. Impacts and benefits are distributed asymmetrically, as the causes and consequences of commodity production are decoupled. This lack of symmetry raises particular distributional and procedural justice questions regarding how benefits and burdens are distributed. It also corresponds to shifts in the relative power of different actors over procedural processes, and the way regulatory regimes are created and implemented.

As we will see, this problem is reflected in the considerable distance between the normative world of private regulatory regimes — such as RSPO and FSC — and the contested spaces wherein they function. A report to the UN Special Rapporteur on Indigenous Issues asserted that economic growth strategies involving development of large-scale monoculture plantations entailed rampant expropriation of land. Industry expansion occurred alongside ‘failures on the part of States to recognise indigenous peoples’ land rights; the persistence of discriminatory laws and policies; the failure to enforce or implement laws; the expropriation of lands in the name of development; the allotment of sacred and cultural sites to individuals and/or failure to recognise and respect indigenous peoples’ control of their territories.¹⁸¹⁹ It is within such contested spaces that, as we will now discuss, the FSC and RSPO certification schemes operate.

Civic regulation of forestry and the Forest Stewardship Council (FSC) in Indonesia

The FSC is sometimes seen as an institution that acts as a mediator between social movements and producers, to verify that forests are 'sustainably' managed. This mediating role emerged from the particular way social movements and corporate actors in the forest sector converged to set up the FSC's innovative three-chamber governance system. With FSC designed to represent different stakeholders' interests equitably, there is a perception that corporate interests do not dominate FSC decision-making.²⁰ While FSC's primary focus is environmental, it also has social foundations, the NGOs and civil society organisations involved managed to have a set of principles and criteria adopted broadly in line with international law and widely promulgated concepts (see Table 1).²¹

In accordance with FSC's principle 2, certification under the FSC requires that there are no conflicting rights over a forest being assessed and that there are mechanisms in place to resolve conflicts (Colchester et al 2003). In other words, indigenous peoples and local communities need to have legally established and long term tenure and use rights in the forest from which certified timber is to be extracted. Further, according to principle 3, indigenous groups need to have their right to own use and manage their land, territories and resources recognized and respected (Colchester et al. 2003). This requires that 'indigenous peoples shall control forest management on their lands and territories unless they delegate control with free, prior and informed consent to other agencies ([Colchester & MacKay, 2004](#)).

Table 1: Comparing the FSC and RSPO

	FSC	RSPO
Board structure	Board designed to represent stakeholders' interests equitably with social, environmental and economic chambers	Only one chamber voting structure
Key functions	Set guidelines for sustainable management, accrediting and auditing of third party certification agencies, overseeing third part verification, ensuring a secure chain of custody to guarantee supply from certified sources.	
International law	Established prior to UNDRIP, the UN Declaration on the Rights of Indigenous Peoples, but in line with its key principles.	Principles and criteria broadly in line with international law regarding indigenous people (ILO convention No 169 and INDRIP)
Rights	Principle 2: legal and customary rights of indigenous peoples to own, use and manage their lands, territories and resources to be recognised and respected by the timber concession holder in the forest from which certified timber is to be extracted.	Principle 2: right to use the land to be demonstrated; land free of legitimate contestation by local communities with demonstrable rights; Use of the land for oil palm does not diminish the legal/customary rights of other users without FPIC
Distributional justice	Principle 3: Forest management operations to maintain or enhance the long-term social and economic wellbeing of forest workers and local communities.	Principle 6: Responsible consideration of employees and of individuals and communities affected by growers and mills
'Free, prior and informed consent' (FPIC)	Provides for a process of recognizing the existence of the rights of indigenous groups and mutually agreed processes for negotiation and for delegation of control to third parties.	Principle 7: No new plantings to be established on local peoples' land without FPIC; Local people to be compensated for any agreed land acquisitions and relinquishment of rights, subject to their FPIC & negotiated agreements.
Extent of certification	2011: FSC certified 1 million of 63 million hectares of production forest	2011: 16 of 435 members of the association of Indonesian oil palm companies hold RSPO certification for some aspect of operations

In parallel with widely promulgated concepts of 'free, prior and informed consent'

(FPIC), FSC sets out a process of recognizing the existence and rights of indigenous

groups together with mutually agreed processes for negotiation. FPIC is considered as providing both a mechanism and a process that allows indigenous peoples to take their own, independent and collective decisions, exercising rights over land and resources, to self-determination. and to cultural integrity (Tan et al. 2010).

The question of indigenous rights in Indonesian forestry is vexed.²² Despite social movements pushing legal reform in this area, the Indonesian legislative has yet to grant any substantial concessions: the situation remains one of ‘conceptual inconsistency and conflicting rules’.²³ Many of the rights assumed in these laws remain implicit, with few effective procedures to secure them.²⁴ According to the widely accepted legal maxim *lex specialis derogat legi generali*, specialized sets of rules gain priority over general law, ensuring that abstract conceptions of rights tend to be overruled by specific sets of regulations pertaining to its domain of activity.²⁵ While several laws mention communal rights (*hak ulayat*), there are few effective procedures to secure such rights. With approximately 130 million hectares mapped as state ‘forestry estate’, *lex specialis* tends to be found in the Ministry of Forestry’s implementing regulations. Under the forestry law, the ministry of forestry has authority to grant exploitation rights in extensive areas, and villagers can only obtain limited use or management rights through licenses issued by the Ministry.

Thus, where secure rights are absent or insufficiently enforced, free, prior and informed consent set out in FSC principles and criteria becomes the ‘central safeguard’ for

communities.²⁶²⁷ There are also other critical problems facing local ‘indigenous’ or ‘customary’ institutions. Following decades of State legal and administrative practices that worked to occlude customary institutions, there is limited external acceptance of their authority in decision-making vis-à-vis more powerful institutions.

This is especially the case where there are large numbers of ‘non-indigenous’ in-migrants who resist the exclusionary implications of privileging ‘indigenous’ rights and institutions. In many cases, the local institutions that once governed customary rights (such as can be identified) may no longer be robust. In other cases, in the absence of effective mechanisms to hold local leadership downwardly accountable, outside investors can manipulate indigenous leadership to obtain favorable decisions. These experiences are consistent with other cases where FPIC mechanisms and processes have faced obstacles. These include the provision of incomplete and or biased information, the subversion of traditional institutions, such as by creating fake councils that grant consent, the implementation of decision making processes in the absence of venues for community members to process information and deliberate on their concerns effectively, outright fraud in the procurement of signatures indicating consent, and other instances involving the engineering of consent through manipulation (Tan et al. 2010).

A critical issue for FSC has been the asymmetrical power of the large timber retailers, particularly the 50 major forest product companies.²⁸ Large retailers have a significant interest in FSC: with its logo becoming a key tool for marketing, FSC has sometimes come

under significant pressure to deliver large volumes of timber. Initially, when unable to meet demand, FSC responded with a fast-growth strategy that attempted to certify large areas of forest — with Indonesia as a high potential supplier. This led to large numbers of certifiers competing to offer their services to forest managers. According to NGO critics, certifiers offered to conduct minimum services, lowering standards to win contracts and satisfy funders' expectations.²⁹ As this rush occurred in Indonesia, forest certification processes became subject to protests and contestation. In 2001, WALHI and 144 NGOs called for moratorium because the certification process was unable to meet FSC principles 2 and 3. Five out of six state forestry companies (*PerumPerhutani*) who had originally obtained certification under the Rainforest Alliance Smartwood lost their certification (Colchester et al 2003: 11).

Analysts have noted that buyers have been reluctant to pay premiums for FSC-certified wood, because end-consumers are unwilling to pay more.³⁰ FSC's programs have also been criticised for focusing overly on the conditions and impact of forest production, rather than the benefits to producers. In this view, FSC benefits the best-managed and most powerful participants, and appeases consumer demand rather than benefiting producers.³¹ Indeed, following the problems with large producers, Indonesian organizations focused on certification in forests under community-based forest management.³² However, these initiatives faced several problems: areas under community management in Indonesia are severely limited due to lack of state recognition, and lack of buyer interest in paying premiums has restricted that this type of certification to small enclaves.

In an attempt to widen the use of FSC certification, certifiers turned again to certifying large-scale producers. Once more, NGO campaigns followed, focused on pulp and paper producers. In 2007 it was alleged that FSC-certified company Asia Pulp and Paper (APP) was engaged in large-scale deforestation in Indonesia, and 'engaged in forest practices' non-compliant with FSC rules. The controversy 'threatened to undermine the credibility of [FSC's] labeling scheme'. To protect its name and logo, FSC revoked APP's certification, and in 2011 it also suspended certification of APRIL, another major paper company operating in Indonesia, 'based on evidence of forest destruction and ongoing conflicts with local communities'. Following these disputes, areas of certified forest shrank dramatically. At the peak, FSC certified up to 2.7 million hectares (still less than 2% of Indonesia's forested areas). In 2011, FSC certified only one million hectares, leaving it rather marginal to forest outcomes.³³

NGO investigations into one controversial FSC-certified concession in East Kalimantan alleged that certifiers had granted certification despite shortcomings. The forest licence-holder had yet to define and recognise local tenurial rights within the concession area granted by forestry authorities. The certifier granted a FSC certification for a two-year period, even while the company made efforts to meet this requirement. Structural disadvantages worked against villagers demanding rights in accordance with FSC standards:

‘Community members had very divided views about the logging operations but were reluctant to challenge such a powerful operator given the weakness of their rights in law, local government recognition of the company, and their lack of access to alternative employment or means of generating cash incomes.’³⁴

In an investigation of a second controversial case, NGOs argued that a concessionaire:

‘Had not recognised indigenous land rights, had not carried out negotiations with the indigenous peoples, and was in dispute with several communities ... over access to their lands. Community leaders who were resisting company operations on community lands had been arrested and jailed. In April 2006, however, Smartwood issued an FSC certificate for the operation.’³⁵

The use of certification processes to support indigenous rights remained contentious.

Civic regulation may support improvements without changes to policies. Critics argue

that this legitimatises bad policies, by demonstrating that certification does not require

policy changes before sustainability is achieved.³⁶ Moreover, the lack of State-based legal

tenure rights in communities places customary land owners in a position of weakness vis-

à-vis concessionaires. As companies already have a robust legal status for their

exploitation rights, they can reject the effective veto right of indigenous groups granted

by FSC principles. In the absence of secure community rights, companies are prepared to

negotiate over benefit sharing, and communities tend to settle for what they can get. In

this context, certifiers can further weaken the position of those claiming customary

rights, unless they withdraw certification on the grounds that community rights to FPIC had been violated.

While FSC certification can alter the processes whereby concessionaires obtain access to forest resources, certification has not yet shifted the social, political, economic and legal mechanisms which shape outcomes. Where lead firms need to invest in FSC processes and mechanisms to maintain access to benefits locked up in the forests, the application of FSC administrative practice and procedures can increase their ability to obtain benefits without providing institutionalised rights. In other words, similar to other participatory mechanisms, it may marginally improve distributional outcomes without producing ‘enabling environments’ that provide the social resources required —from coalitions of NGOs, civil society and pro-reform State actors —for effective collective action and accountability.³⁷ Changing underlying structural constraints that render customary institutions marginal and without formal legitimacy would also be required to ameliorate the problem. It is perhaps arguable that FSC may have set a benchmark for good practice in relation to community rights. In the meantime, despite promise, certification continues to be mired in controversy. Now we turn to the case of oil palm.

Civic Regulation and Oil Palm: the RSPO in Indonesia

Oil palm cultivation has led to improved livelihoods for many framers within smallholder development schemes.³⁸ However, despite various policy revisions, reports indicate continuing widespread land conflicts and human rights abuses.³⁹ These include conflicts

over land purchases and compensation processes deemed to be unfair and non-transparent; allegations that plantations have misled or manipulated participating smallholders by, for instance, failing to return smallholder 'plasma' scheme entitlements, providing unfair land and benefit sharing arrangements, unfair pricing, and high and unjust debt arrangements. Smallholders have also signed up to schemes without being fully informed of the arrangements, such as that participation in the scheme involves permanent surrender of land rights.⁴⁰ Claims continue to circulate that conflict is increasing; in 2010 Colchester reported that the Indonesian land agency (BPN) recognised 3,500 palm oil related land conflicts between companies and communities in Indonesia.⁴¹

Oil palm companies and investors have responded by, among other things, developing the RSPO. As several observers note, RSPO principles and criteria look good on paper, providing strong standards against which companies producing certified oil palm would be audited under an accredited process. These standards focus both on environmental and social issues. Once again, after long negotiations, NGOs and social movements succeeded in getting FPIC included in RSPO principles (See Table 1).

Thus, RSPO principle 2 includes the requirement of 'compliance with all applicable local, national and ratified international laws and regulations', holding that 'use of the land for oil palm' should not 'diminish the legal rights, or customary rights, of other users, without their free, prior and informed consent'. Other principles that new plantings

‘established on local peoples’ land’ requires their free, prior and informed consent, that local people are compensated for any agreed land acquisitions and relinquishment of rights’, negotiated agreements and fair compensation, as well as some grievance mechanisms(RSPO 2005).

Although set up to incorporate a range of stakeholders, critics argue that RSPO is dominated by industry (see Table 1). With just 7% of its members hailing from conservation and development NGOs and social movements, oil-palm producers, traders and marketers make up the majority of the membership as well as forming the majority of the organization’s Executive Board. The RSPO lacks the three chamber voting structure that enables the FSC to be seen as independent of powerful corporate interests. Critics claim that it insufficiently represents smallholders, who tend to be relegated to the back seats of plenary sessions of RSPO annual meetings, while the real decisions are made by the Executive Board behind closed doors.

The RSPO provides training and guidance to companies regarding how they should meet required standards. Under a Certification Protocol, companies are obliged to endorse a code of conduct, commit to working towards RSPO principles and criteria, and uphold RSPO standards. However, even though they cannot utilise the RSPO logo, producers and processors can currently become RSPO members without going through the certification process. The RSPO has developed this arrangement to ensure widespread subscription to the RSPO. However, critics argue that it raises questions of legitimacy

and credibility.⁴²In 2011 only a small minority of the members of the association – just 16 Indonesian oil palm companies– in the GAPKI association had RSPO certification.⁴³

Indonesia's central government also delegated key responsibilities for plantation permits and licensing to the district governments. This delegation of responsibility for smallholder-plantation arrangements to sub-national State actors has entailed particular risks, given the strong economic pressures for development, weak demand to meet international requirements at the local level, and weak regulatory environments and governance systems at this level generally.⁴⁴ For instance, at district level, regulations generally fail to grant *de jure* recognition of customary or vernacular systems of land tenure.⁴⁵ However, they do provide for processes of 'freeing' up land and forming production-sharing arrangements, according to direct negotiations between plantations and participating communities under district regulations. With arrangements overseeing micro-level processes to be sorted out by district level State agencies, and with at best limited monitoring and control from the centre, district State-based actors have enormous local discretionary power. Further, given the political and economic investments which plantations commonly make in district politics, the district agencies overseeing negotiating processes (characterised by asymmetries in information, capacity and power) have few incentives for thorough-going implementation of rules and regulations. State-based actors may even have conflicts of interest, where investments are made in local electoral politics by outside financiers, or where State-owned oil palm companies are involved. In contrast, the RSPO has a limited budget and is yet to develop an effective

capacity to monitor members, including certified producers at this level. Indeed, according to one report, ‘there is no independent verification of the documentation that companies submit to the RSPO, and the documentation is not publically released. Nor has the RSPO made it clear how it will enforce its own standards’.⁴⁶

While ‘certified sustainable palm oil’ (CSPO) has been available since 2008, market demand is still emerging. Even in Europe, CSPO is currently less than 5% of total consumption.⁴⁷ A 2011 report noted that even in western countries —that had applied pressure for palm oil to be certified as sustainable — the market for ‘certified sustainable palm oil’ (CSPO) has yet to develop fully. Producers claimed that in 2011, less than 50% of the five million tonnes of CSPO had been taken up, at a premium of only 60 US cents above non-certified palm oil. The largest markets for palm oil are China and India, where social movement pressures for sustainability remains weak. Meanwhile CSPO is estimated to be 8–15% more expensive.⁴⁸

RSPO faces the issue of working across complex production networks involving mills, financial investors and downstream buyers. Smaller processors and traders remain uncertified, while smaller producers and independent smallholders ‘risk missing market opportunities if they do not improve production practices to meet stringent certification requirements’.⁴⁹ The question remains how will smallholder group certification schemes be implemented, and will smaller independent producers and mills want to invest in

certification? Consequently, it remains unclear whether RSPO will outgrow FSC, which covers around 5–6% of global forests.

RSPO has established a dispute resolution facility that aims to address the widespread land conflicts between RSPO members and local landowners. In 2010, ‘so many complaints have been filed about faulty certificates and alleged violations of the Code of Conduct that the RSPO’s subcommittee set up to deal with these submissions have been overwhelmed’.⁵⁰ Meanwhile NGO campaigns assert that noncompliance with RSPO standards by RSPO members remains widespread.

In 2008, allegations coalesced around Wilmar, a Singapore-based agribusiness group with over 500,000 hectares of oil palm plantations in Malaysia and Indonesia. Wilmar, which occupies a seat on the RSPO board, claimed it was producing sustainable palm oil ‘traceable for the entire production process and chain’.⁵¹ However, an NGO investigation demonstrated pervasive abuses by Wilmar. This included land conversion without the free, prior and informed consent of landowners, and ‘fraudulent and poorly managed land transfers leading to community protests, police reprisals, beatings, arrests and imprisonments’ (alternet.org, 2010). POMI, a coalition of NGOs, formed to push the Wilmar case further. As the International Finance Corporation had investments in Wilmar, a complaint was filed to the IFC’s Compliance Advisor Ombudsman (CAO). The NGOs filing the complaint asked the CAO to call IFC to account for not meeting the Bank’s own Performance Standards. The CAO concluded that ‘a narrow interpretation of

environmental and social risks' had led to 'project mis-categorization and limited due diligence on the part of IFC'.⁵² In making its investments, IFC had paid 'inadequate attention to civil society monitoring reports and concerns about continuing social, environmental and economic problems in the oil palm industry in Indonesia', concluding that the IFC's approach was 'counter-productive to IFC's mission of reducing poverty and improving lives' (alternet.org, 2010). In response the president of the World Bank imposed a one year moratorium on World Bank Group investments in oil palm pending the development of an appropriate policy that addressed the issues raised by this case.

The controversy pressured Wilmar in enter negotiations with affected communities, mediated by the CAO. Wilmar eventually instigated new procedures to ensure RSPO compliance. The company also agreed to compensate two communities for damages, pay for acquired land, and hand back areas. In two cases, Wilmar increased the proportion of lands allocated to smallholders and agreed to consider lands used by the company to be leased land that would be handed back on lease termination.⁵³

Although IFC and Wilmar were both RSPO members, the NGO coalition took the case to the CAO rather than RSPO. As the CAO audit report noted: 'Wilmar's stated support of RSPO principles cannot substitute the application of IFC's policies, procedures, and standards. The IFC's Performance Standards are more comprehensive, and provide safeguards in areas that the RSPO principles do not address. RSPO had no established

independent verification process in operation to verify performance on the ground at the time of the investments.’⁵⁴

Greenpeace had also launched a campaign against Sinar Mas, Indonesia’s largest producer of palm oil, and its buyer, Unilever. This was followed by campaigns against Kit Kat (a Nestlé product), Kraft and some European grocery chains. RSPO’s procedures had again been bypassed. With Unilever, Nestle and other companies choosing ‘to act directly on complaints from NGOs’ rather than going through RSPO, which had lost credibility.⁵⁵

These campaigns produced results. For instance, one of the targets of the campaign announced a forest policy prohibiting conversion of peat land with over 35 tonnes of carbon per hectare, and requiring free, prior informed consent (FPIC) when interacting with local communities. However in 2011, GAPKI, the association of Indonesian oil palm companies, withdrew from the RSPO. Annoyed by attacks against Indonesian producers and alleging ‘discrimination and thinly veiled protectionism’, Indonesian companies argued that RSPO was ‘dominated by NGOs, consuming multinationals, traders and intermediaries with growers having just four seats, the same as NGOs in a council of 18.’ They had been led to believe that RSPO would provide a competitive edge, but were ‘now finding out that the premium for certified palm oil is so low that it is not even covering certification costs’.⁵⁶ They decided to implement their own standards for certification under the Indonesian Sustainable Palm Oil (ISPO) system. While RSPO certification cost around \$20–\$25 per hectare, ISPO certification would be much cheaper.

Although ISPO standards would be compulsory, within Indonesia they would be weaker, requiring only compliance with existing Indonesian laws, which to date have rarely protected land rights and environmental values.⁵⁷

While critics may dismiss the ISPO for weakening RSPO standards, there may be compelling reasons for local company concerns with RSPO. In other value chains, certification practices often require small producers to integrate their activities within more vertically-integrated supply networks. Exporter consolidation has gone hand in hand with upstream integration and enhanced purchaser power in buyer-driven supply chains. The concern is that multinational-led chains might either sideline local buyers and exporters, and that increased costs of compliance would be passed on to farmers.⁵⁸ However it remains to be seen whether companies opting out of the RSPO will suffer from lack access to the metropolitan markets that are demanding certification.

Discussion

The first argument advanced here is that these regulatory processes have provided discursive power and leverage. In both cases, social movements and NGOs have made strategic use of the gap between standards and actual practices, by illustrating where suppliers — the lead firms in northern markets — have imported products that can be shown to violate FSC or RSPO standards. On several occasions, this has generated a crisis for a company's reputation or the certification system itself. In this way, coalitions working transnationally have developed capacities to discipline abuses connected to lead

firms. In areas where the certification systems are applied, these systems support negotiations with companies, improving the bargaining power of specific communities and enabling grievances to be addressed. In some cases this has led to a redistribution of benefits towards local communities, requiring companies to obtain free, prior and informed consent, or pay royalties for locally-extracted resources. These systems can therefore provide recognition of stakeholders' rights, and a capacity to have their concerns heard. As in fair trade, enclaves of coproduction emerge where coordinated joint efforts between companies, NGOs and/or State actors come together — as developmental interventions — to generate relatively inclusive smallholder outcomes. While improvements occur in these enclaves, they tend to be limited re-calibrations of access to resources and benefits within bounded spaces.

Second, I have found that private regulatory processes lack structural power, and work in the absence of 'social foundations of accountability' at the micro-level that would be required to improve outcomes more broadly. The public accountability needed for better outcomes emerges when social and State-based actors who support such accountability obtain sufficient leverage over those who oppose it. This occurs only after iterative cycles of conflict and coalition-building between State and societal actors.⁵⁹ While the elaboration of a private regulatory program and its implementation through certification under a private auditing system is an important first step, more is required.

Companies may work to placate key local stakeholders, or obtain consent through gift-giving, promises of infrastructure, provision of social works and services, or integration of stakeholders into a company's economic activities. Consequently, the increase in leverage and re-distribution of benefits seen in some cases does not necessarily convert into rights. Even where such benefits are offered selectively to those who successfully claim indigenous rights, this can lead to splits in communities between those who benefit and those who lose out. In this sense, the application of civic regulation as pragmatic, iterative frameworks does not necessarily work to support the ability of local communities to act collectively. It can work into a process that extends the extraction of resources without conferring effective forms of redress or recognition on groups claiming resource rights.⁶⁰ Indeed, despite investigations finding violations of civic or private regulatory systems, both industries are expanding rapidly, with plans to develop a further seven million and nine million hectares of oil palm and timber estates respectively.⁶¹

A body of literature suggests that democratic and participatory decision-making procedures are key conditions for social justice. The argument here is that poor outcomes typically emerge from institutionalised exclusion, a culture of misrecognition; where the rights of the poor remains 'invisible', rural landowners remain effectively excluded. Consequently, the articulation of rights frames 'the possibilities for making claims'.⁶² This underpins the advocacy of reforms that seek to overcome the insecurity of indigenous tenure and, by facilitating Free, Prior and Informed Consent (FPIC), provide participatory decision-making procedures. However, as studies worldwide suggest, rights are

embedded in complex legal, political and economic structures — often shaped by corporate influence — which shape the way indigenous rights are taken up. Although the insertion of indignity into private regulatory frameworks is a notable achievement, in many cases this may alter the terrain of struggle without guaranteeing better outcomes for smallholders.⁶³ Consequently, approaches which focus on recognizing indigenous rights alone will be inadequate.

The third argument then is that civic or private regulation offers at best a limited solution — providing a learning tool in a narrow set of contexts. While certification standards can provide a means to pressure producers who can be associated with poor behaviour, this is no substitute for comprehensive reforms enacted and implemented by powerful State actors. While paradoxically the State no longer seems to be the primary actor or locus of power in determining how voluntary or civic regulatory practices are conceived or implemented, the State remains critical to ensuring better outcomes; indeed, compliance with State regulations is a sine-qua-non for private regulatory systems. The literature on private regulatory systems suggests that firms are more likely to accept civic regulation where public regulatory standards are already relatively stringent.⁶⁴ Civil or private regulations are ‘softlaw’ systems; lacking the enforcement mechanisms of ‘hard law’, compliance depends on voluntary participation by firms, in addition to peer pressure and reputation. Analysts argue that soft law works to complement rather than substitute for hard law. Problems derived from dysfunctional State governance systems cannot readily be transcended. Civic regulatory processes tend to be effective only when State

regulatory systems are already working well.⁶⁵Consequently, lack of State engagement and the fragmentation of decision-making and enforcement — when decentralization is combined with civic regulation — remain critical problems.⁶⁶

Indeed, as policy studies suggest, effective policy requires a package of policy instruments working cohesively to achieve policy objectives. In both food and forestry there are occasional innovations in State policy; yet there remains insufficient coherence, capacity and interest in State agencies to ensure a comprehensive set of reforms working towards these aims. Civic regulatory processes are unlikely to work on their own: consistent legal principles need to be embedded in public policies, involving government and public institutions to ratchet-up standards. Addressing the poor protection of local landowners under Indonesian law remains a critical first step for policy reform.⁶⁷

More generally, firms are more likely to accept civic regulation where supply-demand factors support certification. The demand for certification depends upon a range of factors, including the importance of exports to northern markets, the extent to which firms and NGOs from the north have a presence, the risks of State regulation, and the likelihood of targeted campaigns against a brand.⁶⁸

Supply-side factors will support certification where there is a higher ‘degree of industry concentration, the presence of capable administrative’ agencies, ‘favorable treatment by regulatory authorities, and the availability of stakeholder groups capable of increasing the

legitimacy of the regulatory process'.⁶⁹This observation is highly relevant. In the case of FSC, the timber sector remains diverse, with more than fifty major buyers working across transnational value chains. Further, due to definitional issues, FSC can only be applied in areas cleared before 1994. This, together with cases brought against the pulp and paper companies, means that FSC is rigorous to the extent that it excludes most of Indonesia's booming plantation sector. Although some advocate changing FSC standards to increase uptake, FSC is likely to remain a niche market, served by only a small part of the business of the 50 large international timber traders. As supply-demand factors and existing regulatory standards are weak, FSC would need to weaken standards to achieve widespread adoption in Indonesia. In contrast, the oil palm industry is concentrated both geographically and in terms of the small number of large-scale international traders involved, suggesting that supply factors would support certification. However, the absence of regulatory authorities either capable of or willing to enact or implement regulatory requirements tends to be decisive.

The prospects for certification schemes — and the strategy of targeting lead brands — addressing these problems are circumscribed. Pulp and paper companies who have lost their FSC status remain in business. FSC-certified timber remains a small part of wider markets. As only 17% of oil palm goes to Europe, the demand for CPSO is clearly limited; the vast majority is sold into markets where there is as yet no demand for CPSO. There is some discussion of the need for large traders and buyers to certify across their complete supply chains, such as a few multinational buyers now do. This could reflect increasing

demand for certified-sustainable products, where Indonesian-sourced products will be competing in international markets with products from countries more serious about sustainability criteria. Yet to date, large traders have only begun to apply certification to their own production; they have avoided putting due diligence requirements on the majority of the crude palm oil derived from trade with small producers. Oil palm bought from local producers remains outside the private regulatory process. Companies which certify across their supply chains would be at a disadvantage vis-à-vis traders into China and India if such certification became obligatory.

Nonetheless, with demand for products certified as sustainable increasing, progress may still occur. Social actors can exert pressure to hold the State accountable, and they can build 'coalitions to oversee and contest the translation of legal obligations into lived realities' within domestic constituencies.⁷⁰ Such coalitions may also build transnational institutional frameworks to support rights and discipline firms. In this way, it is possible that engagement with civic regulatory processes can gradually support the iterative cycles that create the required forms of accountability. States and inter-governmental organizations can foster conditions for effective private governance and poverty alleviation while developing localised forms of accountability. Lastly, external pressure that raises scrutiny and awareness, and financial incentives from donors, may assist greatly in implementing reforms and realising a more inclusive future

Conclusion

This paper has set out to assess to what extent the RSPO and IFC private regulatory schemes have ameliorated the problems of poorly protected rights in forest and agricultural lands, and the unjust distribution of burdens and benefits associated with these sectors. If we consider certification as pragmatic, experimentalist forms of governance, we should not expect an ultimate resolution to the question of effectiveness. As Zeilten (2011)⁷¹ notes, these systems ‘systematically provoke doubt about their own assumptions and practices; treat all solutions as incomplete and corrigible; and produce an ongoing, reciprocal readjustment of ends and means through learning from disciplined comparison of local efforts to advance general goals’. From this iterative perspective, it is hardly surprising that certification in Indonesia’s contested spaces provides particularly difficult legitimacy problems, with contradictory implications.

The final argument concerns the problem of incommensurability. Local State-based actors responsible for implementing legal regimes are entrenched in remote agricultural frontiers. Here the application of legal regimes will necessarily be adjusted to bring them in line with regional power structures and interests. Localized *de facto* institutional arrangements correspond to particular political settlements — ‘the political compromises between powerful groups in society that set the context for institutional and other policies’.⁷² Private regulation confronts the same problems as formal legal regimes and governance agendas: it attempts to institutionalise an order that provides for a

distribution of benefits that is not in line with local constellations of power and interest. Thus, too often, thorough-going enforcement is unrealistic. In short, the logic of local political settlements expressed in local institutions will usually be incompatible with the concerns and interests of private regulatory arrangements developed elsewhere — especially when these reflect post-materialist concerns. For instance, as consumers of biofuels and consumer products containing palm oil wish to use a ‘sustainable’ product, the EU’s regulatory requirements focus on developing sustainability criteria that reflect these concerns.⁷³ In contrast, State-based actors in these agrarian contexts wish to maximize economic development and support powerful local businesses central to the local political settlement.

This incommensurability points to a structural dilemma at the heart of the social movement-corporate compromise mentioned earlier. With increased global integration of retailing, and reduced numbers of suppliers within more integrated global production networks, the purchasing power of global food retailers has grown, allowing corporate actors and their NGO interlocutors to write post-materialist values into certification schemes. The increased structural, discursive and instrumental power at the buyer end of transnational value chains does not correspond with power upstream at the production end. In parallel, local companies and State-based actors have correspondingly less power over the normative standards that emerge from multi-stakeholder processes and roundtables. This incommensurability becomes explicit in the chasm between certification norms on paper and the contested spaces where certification is meant to

occur. It is hardly surprising then that powerful local actors defect to parallel private regulatory initiatives that are less threatening to local political settlements – such as that developed by the ISPO. Alternatively, in-country companies try to opt out of these schemes altogether. Thus, despite rhetoric to the contrary, these certification processes still struggle with the problem of accommodating different scale-related interests. Beyond the difficulties of developing and implementing certification in a coherent way, the challenges of asymmetry, incommensurability, and structure endure.

¹J Franco and J Borras, 'From Threat to Opportunity? Problems with the Idea of a "Code of Conduct" for Land Grabbing', *Yale Human Rights and Development Law Journal*.2010; IFAD 2009.

²D Fuchs, AKalfagianni, J Clapp and L Busch, 'Introduction to Symposium on Private Agrifood Governance: Values, Shortcomings and Strategies', *Agriculture and Human Values*, 28(3), 2011, pp 335-344.

³G Walker, *Environmental Justice. Concepts, Evidence and Politics*, Routledge, 2012.

⁴J A Fox, *Accountability Politics*, Oxford University Press, 2007; N, Gunningham, *Environment Law, Regulation and Governance: Shifting Architectures*. *J Environmental Law* (2009) 21 (2): 179-212.

⁵ 'Incommensurability' here refers to the way in which two or more abstract values stand in relation to one another where no positive comparative evaluative judgment can be said to be 'true'. Social practices and institutions are often seen as playing the in resolving value conflicts by providing resources for practical reason, (Stanford Encyclopedia of Philosophy, 'Incommensurable Values', 2007).

⁶Thanks to Carol Warren, Adriaan Bedner, Patrick Anderson, Marcus Colchester, and Piers Gillespie for their assistance during the course of this study.

⁷D Fuchs, AKalfagianni, J Clapp and L Busch, 'Introduction to Symposium on Private Agrifood Governance: Values, Shortcomings and Strategies', *Agriculture and Human Values*, 28(3), 2011, pp 335-344.

⁸ A notable exception here is the work of Marcus Colchester.

⁹D Fuchs, AKalfagianni, J Clapp and L Busch, 'Introduction to Symposium on Private Agrifood Governance: Values, Shortcomings and Strategies', *Agriculture and Human Values*, 28(3), 2011, pp 335-344.

¹⁰C Neil, '*Fairtrade Certification: Linking Sustainable Production and Consumption*', n.d.

¹¹J Zeitlin, 'Pragmatic Transnationalism: Governance across Borders in the Global Economy', *Socio-Economic Review*, 9, 2011, pp 187-206.

¹²Observers find this compromise most notably in the emergence of the FSC. The FSC is often seen as an attempt by social movements and NGOs to obtain a political lever outside the state sector and to transmit more stringent regulatory standards to forestry in developing countries (Vogel 2008). At the same time, following mass consumer movements against tropical deforestation, elements of the forestry industry also wished to develop a new private regulatory system to respond to key criticisms (Taylor 2005).

¹³D Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change*, Massachusetts, Blackwell, 1989.

¹⁴G Gereffi, J Humphrey and T Sturgeon, 'The Governance of Global Value Chains', *Review of International Political Economy*, 12, 2005, pp 78-104.

¹⁵ For recent discussions of new forms of valuation and markets for nature, as answers to environmental and social crises, see Fairhead et al. (2012); and Arsel and Buscher (2012). J Fairhead, M Leach and I Scoones, 'Green Grabbing: A New Appropriation of Nature?' *Journal of Peasant Studies*, 39(2), 2012, pp 237-261; A Arsel and B Buscher, 'NatureTM Inc.: Changes and Continuities in Neoliberal Conservation and Market-based Environmental Policy', *Development and Change*, 43(1), 2012, pp 53-78.

¹⁶Dingwerth, K. "North-South parity in global governance: the affirmative procedures of the Forest Stewardship Council." *Global Governance* (14): 2008, 53-71.

¹⁷D Vogel, 'Private Global Business Regulation', *Annual Review of Political Science*, 11, 2008, pp 261-82.

¹⁸In Indonesia the World Bank estimates that less than 40% of all land holdings are formally titled (Colchester 2010, p.8). Forestry department figures state that 33,000 villages remain within or on the edges of state 'forest estate' (Mangkusubroto 2011). Here village property rights remain 'illegal', contested and conflicted. Allocation of exploitation licenses here can lead to a process of land alienation: for land under informal or customary tenure – but subject to the state jurisdiction due to its formal status as 'empty, idle or marginal land' – can be allocated to a concessionaire.

¹⁹V Tauli-Corpuz and P Tamang, 'Oil Palm and Other Commercial Tree Plantations, Monocropping and the Impacts on Indigenous Peoples' Land Tenure and Resources Management Systems and Livelihoods, The Report of the Special Rapporteur of the UN Permanent Forum on Indigenous Issues, *Permanent Forum on Indigenous Issues Sixth Session*, New York, 2007.

<http://www.un.org/esa/socdev/unpfii/documents/6session.crp6>

²⁰W Laurance, L P Koh, R Butler, N S Sodhi, C J A Bradshaw, J D Neidel, H Consunji and J Mateo-Vega, 'Improving the Performance of the Roundtable on Sustainable Palm Oil for Nature Conservation', *Conservation Biology*, 24(2), 2010, pp 377-381.

²¹ Key International norms are set out in treaties and laws relevant to indigenous people, including the International Labour Organization's convention No 169 as well as the UN Declaration on the Rights of Indigenous Peoples.

²²Indonesia has also voted to support the UN Declaration of the Rights of Indigenous Peoples that requires states to obtain FPIC before any development occurs on land subject to indigenous rights. Further, the national government has ratified the Convention on Biological Diversity and the Convention for the Elimination of All Forms of Racial Discrimination (Colchester & MacKay, 2004). Yet, the application of the term 'indigenous' remaining highly contested in a multi-ethnic Indonesia.

²³A Bedner and S Van Huis, The return of the native in Indonesian law, *Indigenous communities in Indonesian legislation Bijdragen tot de Taal-, Land- en Volkenkunde (BKI)* 164-2/3 (2008):165-193

²⁴Government agencies would need to invest considerable political capital in applying existing procedures, something that is rarely achieved. With approximately 130 million hectares mapped as state 'forestry estate', *lexspecialis* tends to be found in the Ministry of Forestry's implementing regulations. Under the forestry law, the ministry of forestry has authority to grant exploitation rights in extensive areas, and villagers can only obtain limited use or management rights.

²⁵Gillespie, P (2010) *Politics, Power and Participation: A Political Economy of Oil Palm in the Sanggau District of West Kalimantan*. PhD Dissertation, Australian National University. The maxim holds that a law governing a specific subject matter overrides a law that only governs general matters. In other words, earlier specific legislation should have validity over more general legislation that is enacted after it. The problem is that this is not absolutely true. Indonesian law is not integrated and acts may (mis)use this maxim so that rules in special statutes dismiss other rules that should be taken into account or indeed, according to the hierarchy of laws, (if applied correctly) should invalidate the specific rule. In addition there is the issue of sectoral 'silos', where sectoral laws are not at all integrated or arranged in a clear hierarchical fashion. So there is a lack of clarity about relations between different areas of law in practice, providing actors with ample opportunity for shopping for the most suitable set of rules.

²⁶ FPIC provides for a platform or point of contact for interactions and negotiations across the gulf between customary, vernacular, socially embedded systems of land management and 'modern' legal systems (Colchester et al. 2003 p9; Colchester & MacKay 2004, p. 8). However, the ability of local people to exercise FPIC is limited by a legacy of repression, institutional and legal obstacles. These include the limited legal vehicles available for exercising such rights; legislation that does not provide communities a say in licensing and permitting processes; a lack of access to the law; and the absence of effective mechanisms for resolving disputes. While forest authorities do need to consult with local communities under forestry procedures for demarcating and gazetting forest boundaries, the general practice is for Forest Authorities to hand out exploitation permits after gaining consent from district government (Colchester & Ferrar 2007; McCarthy, 2008). Consequently, the application of FSC principles 2 & 3 remains particularly difficult. If the legally binding negotiated agreements required for FSC certification are to be obtained,

Colchester and MacKay (2004) argue that this may be achieved through notaries, something the legal system does not expect.

²⁷M Colchester and M F Ferrar, *'Making FPIC – Free, Prior and Informed Consent – Work: Challenges and Prospects for Indigenous Peoples*, Moreton-in-Marsh, Forest Peoples Programme, 2007.

²⁸P L Taylor, 'In the Market but not of it: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change', *World Development*, 33(1), 2005, pp 129-147.

²⁹M Colchester, M Sirait and B Wijardjo, 'The Application of FSC Principles 2 & 3 in Indonesia: Obstacles and Possibilities', Jakarta, WALHI and AMAN, 2003.

³⁰In contrast to Fair Trade schemes, FSC offers no consistent price premium for participating producers. FSC certification has provided a price premium on timber that has varied depending on the client. Generally the premium has been estimated at around 15-20%. However, this premium disappeared with the economic downturn (Molnar et al. 2011). Indigenous and community group operations face significant barriers to certification due to organizational inefficiencies, lack of commercialization expertise, and the difficulties they face satisfying buyers demands for species specifications and volumes (Taylor, 2004).

³¹Taylor, P. L. "In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as Market-Based Social Change." *World Development* 33(1), 2005: 129–147.

³²Forest Watch Indonesia, *'Certification Rift in Indonesia'*, 2006. Some two decades ago a group of NGOs developed the Indonesian Ecolabelling Standard, known as Lembaga Ekolabel Indonesia (LEI), and its criteria and indicators were agreed to by industry and the government. LEI was heavily criticised during its early years for the leniency of its standards. Since then LEI's systems and standards have been continuously improved, especially after FSC and LEI developed a Joint Certification Protocol (JCP), and LEI helped FSC to develop national standards. However, LEI has continued to be subject to criticisms, for example, after it awarded sustainable plantation forest certification to Riau Andalan Pulp and Paper (RAPP), whose operations were seen as associated with poor public participation, tenurial conflicts and insufficient FPIC, and allegations of illegally-sourced supply.

³³S Schonhardt, 'Debate over Forest Certification speaks of Change, Challenges', 14 July 2011, retrieved 1 February 2012.

³⁴M Colchester and M F Ferrar, *'Making FPIC – Free, Prior and Informed Consent – Work: Challenges and Prospects for Indigenous Peoples*, Moreton-in-Marsh, Forest Peoples Programme, 2007.

³⁵Ibid.

³⁶S Schonhardt, 'Debate over Forest Certification speaks of Change, Challenges', 14 July 2011, retrieved 1 February 2012.

³⁷J A Fox, *Accountability Politics*, Oxford University Press, 2007, p 140.

³⁸See Rist, L., L. Feintrenie, et al. (2010). "The livelihood impacts of oil palm: smallholders in Indonesia" *Biodiversity and Conservation* 19(4): 1572-9710; J F McCarthy, 'Processes of Inclusion and Adverse Incorporation: Oil Palm and Agrarian Change in Sumatra, Indonesia', *Journal of Peasant Studies*, 37(4), 2010, pp 821-850.

³⁹To understand this, we need to briefly consider the trajectory of oil palm related development policy. Up to 1998 the Indonesian state pursued a type of industrial policy that involved a public-private quid-pro-quo. The state induced plantation investors to follow a specific model, offering 'free' land for estate development. In return, estates developed state subsidized areas for tied or 'plasma' smallholders around their core or 'nucleus' areas. For their part, 'plasma' smallholders were required to sell their fruit directly to the 'core' plantation as a condition for obtaining credit. In this way the policy granted the estates a high degree of control over smallholder suppliers under monopsonistic arrangements. While development occurred on land often subject to local property rights, under many of the earlier schemes very few indigenous landholders were recognized or included. However, under later schemes indigenous landowners provided land to the 'core' estate in return for access to productive oil palm plots and agricultural inputs and extension. In either case, in areas developed for the plantation estate, oil palm development involved the effective extinguishment of customary land rights in the estate area because such land would need to be placed under a state concession license (HGU) before it could be developed. Following the Asian Financial Crisis, the Indonesian state liberalized large areas of the economy, and the state effectively withdrew from underwriting these schemes. Under the new 'partnership' policy, plantations would still need to include smallholders. However, instead of the obligatory 70:30 land split of the earlier PIR and KKPA schemes in favour of participating smallholders, now estates could develop with a recommended minimum 20:80 split in favour of the plantations. Over the decades extensive conflicts emerged around these oil palm developments. These include conflicts over land purchases and compensation processes deemed to be unfair and lacking in transparency, allegations that plantations have misled or manipulated participating smallholders by, for instance, failing to return smallholder 'plasma' scheme entitlements, providing unfair land and benefit sharing arrangements, unfair pricing, high and unjust debt arrangements. Alternatively, many smallholders signed up to schemes without being fully informed of the arrangements, such as that participation in the scheme would involve the permanent surrender of rights over their customary lands (Zen et al. 2008; Sirait 2009). NGOs claim that the level of conflict is growing during the era of decentralized-localized community based negotiations (Pontianak Post 2011).

⁴⁰M Sirait, 'Indigenous Peoples and Oil Palm Plantation Expansion in West Kalimantan, Indonesia, The Hague, Cordaid/Memisa, 2009.

⁴¹M Colchester, *Land Acquisition, Human Rights Violations and Indigenous Peoples on the Palm Oil Frontier*, London, Forest Peoples Programme and ILC, 2010.

⁴²W Laurance, L P Koh, R Butler, N S Sodhi, C J A Bradshaw, J D Neidel, H Consunji and J Mateo-Vega, 'Improving the Performance of the Roundtable on Sustainable Palm Oil for Nature Conservation', *Conservation Biology*, 24(2), 2010, pp 377-381.

⁴³F M Baskoro and M AAzhari, 'Gabki Rejects World Standards, Says Indonesia Must Set Pace, *The Jakarta Globe (Jakarta)*, 9 October 2011.

⁴⁴J F McCarthy, P Gillespie and Z Zen, 'Swimming Upstream: Learning Indonesian Production Networks in "Globalised" Palm Oil Production', *World Development*, 40(3), 2012.

⁴⁵M Sirait, 'Indigenous Peoples and Oil Palm Plantation Expansion in West Kalimantan, Indonesia, The Hague, CordaidMemisa, 2009.

⁴⁶altnet.org 'How the Palm Oil Trades cause a Food Chain of Destruction', May 24 2010.

⁴⁷C H Teoh, 'Key Sustainability Issues in the Palm Oil Sector: A Discussion Paper for Multi-Stakeholders Consultations' (commissioned by the World Bank Group), World Bank and IFC, 2010.

⁴⁸W Laurance, L P Koh, R Butler, N S Sodhi, C J A Bradshaw, J D Neidel, H Consunji and J Mateo-Vega, 'Improving the Performance of the Roundtable on Sustainable Palm Oil for Nature Conservation', *Conservation Biology*, 24(2), 2010, pp 377-381.

⁴⁹C H Teoh, 'Key Sustainability Issues in the Palm Oil Sector: A Discussion Paper for Multi-Stakeholders Consultations' (commissioned by the World Bank Group), World Bank and IFC, 2010, p 35.

⁵⁰M Colchester, *Land Acquisition, Human Rights Violations and Indigenous Peoples on the Palm Oil Frontier*, London, Forest Peoples Programme and ILC, 2010.

⁵¹altnet.org 'How the Palm Oil Trades cause a Food Chain of Destruction', May 24 2010.

⁵³Ibid.

⁵⁴Compliance Advisor/Ombudsman (CAO), 'The Compliance Advisor Ombudsman Audit of IFC Investments in Wilmar Trading'.Office of the Compliance Advisor/Ombudsman, 2009, p 24.http://www.bothends.org/uploaded_files/1CAO_Audit_Report_IFC.pdf.

⁵⁵C H Teoh, 'Key Sustainability Issues in the Palm Oil Sector: A Discussion Paper for Multi-Stakeholders Consultations' (commissioned by the World Bank Group), World Bank and IFC, 2010, p 24.

⁵⁶P Gunasegaran, 'The Beginning of the End for RSPO?' *The Star*, 8 October 2011.

⁵⁷GAPKI has also expressed concern that Indonesian oil palm is not accepted under EU renewable energy directive nor under the Renewable Food Standard of the US, arguing that these amount to non tariff trade barriers. For further discussion, see L German and G Schoneveld, 'Social Sustainability of EU-approved Voluntary Schemes for Biofuels: Implications for Rural Livelihoods', *Working Paper 75*, CIFOR, Bogor, Indonesia, 2011.

⁵⁸J Neilson, 'Global Private Regulation and Value-Chain Restructuring in Indonesian Smallholder Coffee Systems', *World Development*, 36(9), 2008, pp 1607-1622.

⁵⁹J A Fox, *Accountability Politics*, Oxford University Press, 2007, p 13.

⁶⁰Cf S Sawyer and E T Gomex, 'Transnational Governmentality and Resource Extraction; Indigenous Peoples, Multinational Corporations, Multilateral Institutions and the State, UNRISD, 2008.

⁶¹USDA, 'Indonesia: Rising Global Demand Fuels Palm Oil Expansion, Commodity Intelligence Report, USDA Foreign Agricultural Service, 2010.

<http://www.pecad.fas.usda.gov/highlights/2010/10/Indonesia/>; K Obidzinski and A Dermawan, 'Smallholder Timber Plantation Development in Indonesia: What is Preventing Progress?' *International Forestry Review*, 12(4), 2010, pp 339-348.

⁶²P Newell and J Wheeler, 'Rights, Resources and the Politics of Accountability: An Introduction', *Rights, Resources and the Politics of Accountability*, in P Newell and J Wheeler (eds), London, Zed Books, 2006, p 28.

⁶³S Sawyer and E T Gomex, 'Transnational Governmentality and Resource Extraction; Indigenous Peoples, Multinational Corporations, Multilateral Institutions and the State, UNRISD, 2008, p 3.

⁶⁴D Vogel, 'Private Global Business Regulation', *Annual Review of Political Science*, 11, 2008, pp 261-82.

⁶⁵ Ibid.

⁶⁶Z Zen, J McCarthy and P Gillespie, 'Linking Pro-Poor Development Agricultural Policy and Oil Palm Cultivation Governance Arrangements for Landowners in Outer Island Indonesia, *The Australia Indonesia Governance Research Partnership (AIGRP)*, 2008.

http://www.aigrp.anu.edu.au/docs/projects/1018/mccarthy_brief.pdf

⁶⁷See Gillespie, P (2011) How does legislation affect oil palm smallholders in the Sanggau district of Kalimantan, Indonesia. *Australasian Journal of Natural Resources Law and Policy* 14(1)

⁶⁸D Vogel, 'Private Global Business Regulation', *Annual Review of Political Science*, 11, 2008, pp 261-82.

⁶⁹Ibid.

⁷⁰P Newell and J Wheeler, 'Rights, Resources and the Politics of Accountability: An Introduction', *Rights, Resources and the Politics of Accountability*, in P Newell and J Wheeler (eds), London, Zed Books, 2006, p 16.

⁷¹J Zeitlin, 'Pragmatic Transnationalism: Governance across Borders in the Global Economy', *Socio-Economic Review*, 9, 2011, p 188.

⁷²M H Khan, *Political Settlements and the Governance of Growth-Enhancing Institutions*, School of Oriental and African Studies, University of London, 2010, p 4.

⁷³O Pye, 'The Biofuel Connection – Transnational Activism and the Palm Oil Boom', *The Journal of Peasant Studies*, 37(4), 2010, pp 851-874.