# TRANSNATIONAL PRIVATE REGULATIONS FOR SUSTAINABLE PALM OIL IN INDONESIA[1]

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**Abstract**

This study serves as preliminary remarks for further investigating the global trade regulatory framework for the sustainable palm oil industry. Concerns over several key aspects are discussed, including market regulation, corporate governance, and contractual structure to ensure the quality of the self regulatory regime; the governance structure of RSPO as the private regulatory institution, the incentive structure of the private regulatory regime, and its impact on the formal legal system. The general assumption of the study is that, despite their voluntary nature, private standards have a trade protectionist effect that restrict market access, in addition to the notion that the dominant market player can influence market-driven regulation more easily. The study finds that RSPO serves as a complementary institution to advance the sustainable palm oil agenda. In the implementation, RSPO has shaped the development of Indonesia's national legislation, most notably in the establishment of the government-backed mandatory standard of ISPO. In this regard, RSPO must be viewed as a system connected with the existing national legal system, with which RSPO can co-exist, collaborate, or compete.

Keywords: global governance, private regulation, palm oil, RSPO, CSR

## A. INTRODUCTION

When the sustainability of a globally traded product/commodity is challenged, how does law cope with the issue? Nation states are entitled to set their own environmental standards according to their domestic preference, although within the limit of their international legal commitments. On the other hand, international law provides a particular set of rules regarding trade in goods and services under the auspices of the World Trade Organization (WTO) or other trade agreements. In addition to these regimes, in recent years the global community has witnessed the rise of "private regulations" (also referred to as "private standards" or "voluntary regulations") as voluntary rules set up by the market participants to govern the trading of specific commodities, encompassing both the international and national legal sphere. Experts have identified the extent to which private regulation affects the formal legal regime.[2] As noted by Wouters and Geraets, "some argue that private standards restrict market access and, although not legally binding, are de facto mandatory, as some standards are used across the board in certain sectors. Others maintain that private standards are better suited to adapt to consumer demands, and hence increase trading opportunities for developing country producers."[3]

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[2] See for example, Jan Wouters and Dylan Geraets, Private Food Standards and the World Trade Organization: Some Legal Considerations (March 2012), available at Available at SSRN: http://ssrn.com/abstract=2274812 or http://dx.doi.org/10.2139/ssrn.2274812.

This article focuses on the emergence of the global regime on sustainable palm oil, revolving around the institution of the Roundtable on Sustainable Palm Oil (RSPO). Palm oil is the world's most globally-traded vegetable oil commodity, hence it is important to understand how this hybrid regime affects world trade law in general. Palm oil issues lie at the intersection of some of the world's most pressing challenges. The correlations among issues, that are often contradictory, have created further complexities to cope with each respective challenge. Global food consumption, the renewable energy agenda, the threat of climate change and biodiversity loss, and poverty alleviation are some of the factors around which palm oil issues revolve, most importantly in the world's biggest producer of palm oil, Indonesia.

We begin by sketching some of the challenges in the palm oil industry, before framing them in the legal system and developing a legal framework. The increasing world population has triggered growing demand for food, with some provided by palm oil's derivative products such as cooking oil. At the same time, land expansion of palm estate has arguably shifted away the land use that is otherwise designated for more basic staples (in Southeast Asia this being paddy fields) or the original tropical forest.

The search for a cleaner and more sustainable energy source is the main driver of various countries' biofuel programs, of which palm oil is a leading alternative solution.[4] However, at the same time, some consider palm oil as being more the cause, rather than the solution, of global environmental degradation. The expansion of palm estate, especially in Indonesia and Malaysia, is believed to be the major cause of deforestation and forest degradation, worsening already-existing problems of biodiversity loss, ecosystem imbalance, and carbon dioxide emission.

Further, the palm oil industry in many ways provides new business opportunities and job alternatives, also for the people living in the surrounding estate. Success stories often depict small scale peasants turning into middle-class estate holders through partnership with large growers. However, the other side of the story is one that involves forced eviction of the local communities or forest-dependent people, often by military or police officials that arbitrarily backed the companies. Land use conflicts arising out of tenure uncertainty have triggered disputes among the state, forest custodians, mining concessionaries, landholders, estate growers, and those least protected - the local communities.[5] All of these problems are

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[3] *Id*.

[4] Based on the data presented by the palm oil industry association during the 2012 National Palm Oil Conference, the total production of Indonesia's Crude Palm Oil in 2013 reached 26 million tons, and around 3.3 million was allocated to the development of biodiesel.

[5] In 2010, Sawit Watch, an Indonesian-based NGO focusing on the social and environmental impact of palm oil, recorded more than 663 communities in conflict with more than 172 palm oil companies. Also in 2010, the Indonesian National Commission on Human Rights (Komnas HAM) received reports of around ten cases of palm oil-related conflicts in Kalimantan alone. The national land agency has registered some 3,500 on-going land conflicts related to oil palm plantations. See Marcus Colchester, et al, *Promised Land: Palm Oil and Land Acquisition in Indonesia: Implication for Local Communities and Indigenous Peoples,* (FPP, Sawit Watch, Huma, and World Agroforestery Center, 2006), p. 14.

attributed to weak governance and ineffective enforcement of the Indonesian legal system.[6] In the international market landscape, global competition for the vegetable oil market and biofuel are also believed to shape public discourses on palm oil. The European Union (EU) has been challenged for its alleged discriminatory practices excluding palm oil products to the benefit of the region's local industry. NGOs and industry insiders use mass media to influence public opinion in supporting their respective claims regarding the efficacy of palm oil.

That said, the main questions of the article are as follows.

1. How does RSPO play its role in the existing national governance system that is aimed to promote sustainable palm oil?
2. How does RSPO ensure its legitimacy and authority in the absence of a formal state-based legal system?
3. How does the RSPO interact, and co-exist, with the formal regulatory regimes, be they collaborative or competitive?

## B. THE STATE OF PALM ESTATE

Palm (*elaeis guineensis),* or *kelapa sawit,* is a native plant of West and Central Africa that was brought to South East Asia by the Dutch and the British during the colonial era. Crude palm oil (CPO) is traditionally used in manufactured food products (i.e. margarine), but recently crude palm kernel oil (CPKO) has also been used for cosmetics, health products, detergents, soaps, herbicides, and many agricultural chemicals.[7] The growing concern for renewable energy and the increased demand for food, particularly for meat, in emerging economies without sufficient food and feed production, such as India and China, has led to the creation of bio-diesel and bio-energy based on palm oil.[8] Compared to other major oil crops, palm oil has lower production costs and produces more oil from less land, which is the main reason for palm oil's dominance in the global vegetable oil market. The productivity of palm oil is around 4000-5000 kg/ha, far beyond rapeseed (1000 kg/ha), sunflower (800 kg/ha), or soybean (375 kg/ha). The basic value chain of palm oil consists of palm plantation (which produces fresh fruit bunches, or *tandan buah segar*), to be further processed in palm mills into CPO, CPKO, and palm kernel. The Indonesian government has created business policies to encourage 'industry down-streaming' so that local industry can focus on refinery and end-products.[9]

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[6] For in-depth discussion, see Colchester, et al, *Id*. The research highlights the following issues related to a weak legal system: contradictory laws, which fail to secure indigenous rights while encouraging land expropriation for commercial projects in the 'national interest'; an absence of regulations, as a result of which procedures for the recognition of the collective land rights of customary law communities are unclear; weak institutional capacity, both in the national land agencies and in the district bureaucracies, which makes recognition of customary rights difficult; and national and regional policies and spatial planning processes which favour the conversion of *ulayat* lands and forests into oil palm plantations to increase national and district revenues.

[7] For basic information regarding palm oil, see Douglas Sheil *et al*, "The impacts and opportunities of oil palm in Southeast Asia, What do we know and what do we need to know?" Center for International Forestry Research (CIFOR) Occasional Paper No. 51 (2009).

[8] See Wisnu Caroko *et al*, "Policy and Institutional Frameworks for the Development of Palm Oil-Based Biodiesel in Idndonesia", CIFOR Working Paper No. 62 (2011).

The increasing demand for palm oil is mostly driven by the rising global demand for food and renewable energy, both basically due to increase in population. FAO projects that the world population will rise from 6.9 billion people in 2010 to 8.3 billion in 2030 and 9.1 billion in 2050. Accordingly, demand for food will also increase, to take into account not only population growth but also the consequent demand for more nutritious food (as income rate per capita is increasing, such as in Asia) and demand for healthier and more environmentally friendly food (such as in Europe and the US).[10]

In this regard, palm oil plays a pivotal role in meeting the demand. It is the most produced and consumed of vegetable oils. This can be attributed to the fact that palm oil is also the most productive vegetable oil. The table below demonstrates that both global production and consumption of palm oil represent the highest of all vegetable oils in the world.

Table 1[11]
Top 4 global production of vegetable oils (million metric tons)

| Commodities | 2008/09 | 2009/10 | 2010/11 | 2011/2012 | Dec 2012/13 |
|---|---|---|---|---|---|
| **Palm** | 44.02 | 45.87 | 47.92 | 50.7 | 53.33 |
| **Soybean** | 35.88 | 38.82 | 41.29 | 42.4 | 43.18 |
| **Rapeseed** | 20.59 | 22.52 | 23.68 | 24.3 | 23.53 |
| **Sunflower seed** | 11.95 | 12.12 | 12.29 | 15.14 | 13.65 |

Table 2[12]
Top 4 global consumption of vegetable oils (million metric tons)

| Commodities | 2008/2009 | 2009/2010 | 2010/2011 | 2011/ | Dec 2011/12 |
|---|---|---|---|---|---|
| **Palm** | 42.71 | 44.9 | 46.91 | 48.76 | 52.03 |
| **Soybean** | 36.17 | 38.13 | 40.76 | 41.77 | 43.62 |

[9] One instrument to support industry down-streaming is by virtue of export tax to promote the export of processed CPO products, rather than CPO raw materials. See the Fiscal Policy Body, Ministry of Finance, "Restructuring Export Tax Policies for Palm Oil, CPO, and Derivative Products, [*Kebijakan Restrukturisasi Tarif Bea Keluar Kepala Sawit, CPO, dan Produk Turunannya*] (2010), in http://www.fiskal.depkeu.go.id/2010/adoku/2011%5Ckajian%5Cpkpn%5Ctarif_bea_keluar_atas_kelapa_sawit.pdf

[10] See Nikos Aleksandratos and Jelle Bruinsma, "World Agriculture Towards 2030/2050, the 2012 Revision", *FAO, ESA-Working Paper* No. 12-03 (2012). See p. 48: "the other major commodity group with very high consumption growth in the developing countries has been *vegetable oils.* The rapid growth in consumption, in combination with the high calorie content of oils and other oilcrop products, has been instrumental in bringing about the increases in apparent food consumption (kcal/person/day) of the developing countries that characterized the progress in food security achieved in the past. In the early 1970s, consumption of oilcrop products was 4.9 kg/person/year in oil equivalent; it is currently 10.1 kg. One out of every four calories added to the consumption of the developing countries over this period originated in this group of products. In the future, vegetable oils are likely to retain, and indeed strengthen, their primacy as major contributors to further increases in food consumption of the developing countries: they could provide 13 percent of total calories by 2050, up from 10 percent at present."

Further, in p. 85: "the oilcrops sector has been one of the most dynamic parts of world agriculture in recent decades. In the three decades to 2007 it grew at 4.3 percent p.a. (Table 3.6), compared with an average of 2.1 percent p.a. for all agriculture, including livestock (Table 3.1). A major driving force on the demand side for vegetable oils has been their use for non-food purposes. As noted (Chapter 2, Table 2.5), food demand in the developing countries has also been a fast growing item (4.1 percent p.a. since 1970). The strong growth of demand for protein products for animal feed was also a major supporting factor in the buoyancy of the oilcrops sector. The rapid growth of the oilcrops sector reflects, in addition to the growth of non-food industrial uses, the synergy of these fast rising components of the demand for food – food demand for oils favouring all edible oilcrops that had the potential for rapid expansion of production, e.g. the oil palm, and that for livestock products favouring oilcrops with high protein content oilmeals for feed, e.g. soybeans."

[11] USDA, "Oil Seeds: World Markets and Trade, Major Vegetable Oils: World Supply and Distribution (Commodity View)", (January 2013) in http://www.fas.usda.gov/oilseeds/Current/ (last access: 2 May 2014).

[12] Id.

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|---|---|---|---|---|---|
| **Rapeseed** | 20.3 | 22.59 | 23.54 | 23.74 | 23.79 |
| **Sunflower seed** | 10.68 | 11.59 | 11.55 | 13.02 | 13.43 |

Amidst the global market, Indonesia is one of the producing countries that reap the benefit of supply and demand. Presently, Indonesia is the world's top producer of palm oil after overtaking Malaysia in 2007. Together with Malaysia, Indonesia dominates more than 90 percent of the global palm oil production. The country is also a major consumer of palm oil. According to the USDA statistics as of January 2013, the consumption of palm oil products is dominated by India (8 million metric tons/mmt), Indonesia (7.870 mmt), China (6.300 mmt), and EU-27 (5.060 mmt), followed by other countries such as Malaysia, Pakistan, and Nigeria.[13] The table below shows the total production of CPO in Indonesia, *vis-à-vis* the global market.

Table 3[14]
Total production (in thousands metric tons)

| **CPO Production (thousands metric tons)** | **2008** | **2009** | **2010** | **2011** |
|---|---|---|---|---|
| **Indonesian CPO** | 17,539 | 19,324 | 21,958 | 22,058 |
| **World CPO** | 42,763 | 43,968 | 45,031 | 46,528 |
| **Indonesian CPO (%)** | 41.01% | 43.95% | 48.76% | 48.38% |

The dominance of Indonesia and Malaysia in the global palm oil market is expected to continue within the next two decades, while the potential for Indonesia to lead even more is higher because the country has yet to optimize the productivity level. The table below shows a projection of production of the two dominant palm oil producers in the world, Indonesia and Malaysia.[15] Another projection[16] shows a more moderate assumption with global projected production of 60 million tons in 2015 and 78 million tons in 2020, but it still reflects a vast rate of palm oil production in the world.

Table 4
Projection of total production of Indonesia vs. Malaysia (in metric tons)

| **Year** | **Indonesia** | **Malaysia** |
|---|---|---|
| **2010** | 19,844,901 | 16,944,000 |
| **2011** | 22,897,000 | 17,793,000 |
| **2012** | 25,216,000 | 18,629,000 |
| **2013** | 27,783,000 | 19,505,000 |
| **2014** | 30,622,000 | 20,421,000 |
| **2015** | 33,764,000 | 21,381,000 |
| **2017** | 41,093,000 | 23,438,000 |
| **2019** | 50,075,000 | 25,693,000 |
| **2021** | 57,386,000 | 28,165,000 |
| **2023** | 61,815,000 | 30,875,000 |

[13] USDA, "Oil Seeds: World Markets and Trade, Palm Oil: World Supply and Distribution (Country View)", (January 2013) in http://www.fas.usda.gov/psdonline/psdreport.aspx?hidReportRetrievalName=BVS&hidReportRetrievalID=710&hidReportRetrievalTemplateID=8 (last access: 2 May 2014).

[14] See Edi Suhardi, "Indonesia as the Largest CSPO Producer: Continuous Commitment", presented in the RSPO Roundtable 10, 31 October 2012, Singapore.

[15] Suhadi, *Id.* Data taken from MoA, IPOB, MPOB, FAS USDA, Oilworld, InfoSAWIT Data Centre 2012.

[16] See M.R. Chandran, "Advancement and Significance of RSPO", presented in the RSPO Roundtable 10, 31 October 2012, Singapore.

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|---|---|---|
| **2025** | 66,620,000 | 33,845,000 |

The palm oil industry in Indonesia is characterized by the three major controllers of lands, namely: smallholders, state enterprises (the national plantation company, or PTPN), and private companies. As of 2012, Indonesia was home to more than 9 million hectares of palm estates, with around 4.7 million hectares held by the private sector, 3.8 million hectares held by smallholders, and 637.000 hectares managed by PTPN. Commentators often refer to this land control structure to demonstrate that the palm oil industry in Indonesia is not only dominated by major companies but also a source of livelihood for many smallholders. The size of lands managed by smallholders is projected to surpass those of the private sector by 2025, while lands managed by PTPN would not expand significantly.

The rise of smallholders is attributed to the well-established 'partnership scheme' in the Indonesian plantation law, whereby some portions of lands cultivated by private palm companies must be at the control of the surrounding local communities. In this scheme, the local communities become 'partnership smallholders', or a plasma-nucleus partnership that receives resources from the main company developing the land. Therefore, as the company grows, the number of smallholders will also grow. There are also 'independent smallholders', not associated with any partnership scheme with the palm plantation company, but who reside near an area where a major palm plantation company is established. The table below shows the current and projected area of palm estates in Indonesia.

Table 5
Development of palm oil plantation area in Indonesia (hectares)[17]

| Year | Smallholders | State enterprises | Private sector | Total |
|---|---|---|---|---|
| **1998** | 890,506 | 556,640 | 2,113,050 | **3,560,196** |
| **1999** | 1,041,046 | 576,999 | 2,283,757 | **3,901,802** |
| **2000** | 1,166,758 | 588,125 | 2,403,194 | **4,158,077** |
| **2001** | 1,561,031 | 609,947 | 2,542,457 | **4,713,435** |
| **2002** | 1,808,424 | 631,566 | 2,627,068 | **5,067,058** |
| **2003** | 1,854,394 | 662,803 | 2,766,360 | **5,283,557** |
| **2004** | 2,220,338 | 605,865 | 2,458,520 | **5,284,723** |
| **2005** | 2,356,895 | 529,854 | 2,567,068 | **5,453,817** |
| **2006** | 2,549,572 | 687,428 | 3,357,914 | **6,594,914** |
| **2007** | 2,752,172 | 606,248 | 3,408,416 | **6,766,836** |
| **2008** | 2,881,898 | 602,963 | 3,878,986 | **7,363,847** |
| **2009** | 3,013,973 | 608,580 | 3,885,470 | **7,508,023** |
| **2010** | 3,314,663 | 616,575 | 3,893,385 | **7,824,623** |
| **2011** | 3,620,000 | 637,000 | 4,652,000 | **8,909,000**[18] |
| **2012** | 3,801,000 | 643,000 | 4,792,000 | **9,236,000** |
| **2013** | 3,991,000 | 650,000 | 4,935,000 | **9,576,000** |
| **2015** | 4,400,000 | 663,000 | 5,236,000 | **10,299,000** |
| **2017** | 4,851,000 | 676,000 | 5,555,000 | **11,082,000** |
| **2019** | 5,348,000 | 690,000 | 5,893,000 | **11,931,000** |
| **2021** | 5,616,000 | 697,000 | 6,070,000 | **12,852,000** |

[17] DG of Estate, "Area and Production by Category of Producers, Palm Oil", http://ditjenbun.deptan.go.id/cigraph/index.php/viewstat/komoditiutama/8-Kelapa%20Sawit (last access: 2 May 2014).

[18] Suhadi, *Id.* Projection from data taken from MoA, IPOB, MPOB, FAS USDA, Oilworld, InfoSAWIT Data Centre 2012.

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|---|---|---|---|---|
| **2023** | 6,501,000 | 718,000 | 6,636,000 | **13,851,000** |
| **2025** | 7,167,000 | 732,000 | 7,037,000 | **14,936,000** |

The legacy of the Dutch colony established the region of Sumatera as the main producer of palm oil. The well-established areas include Riau, North Sumatera, and South Sumatera. Recently, the island of Borneo, or Kalimantan, has been the main destination for palm estate expansion. New players in the Industry have targeted the island for its availability of resources, although at the same time this is problematic considering Kalimantan is the heart of the tropical forest region and the center of the world's biodiversity.[19] Sumatera still retains the most developed infrastructures for the industry, with Riau and Dumai (North Sumatera) the two main ports for CPO export. The table below shows the size of palm estate locations within the Indonesian region. The availability of infrastructure is also reflected in the productivity of CPO in the region. The table below shows that Riau, North Sumatera, and South Sumatera (all located in the island of Sumatera) are the leading producers of CPO.

Table 6
Location of palm oil plantation in Indonesia[20]

| Location | Size | % to total plantation size |
|---|---|---|
| **Riau** | 1,801,210 | 22% |
| **Kalimantan Tengah** | 1,085,158 | 14% |
| **Sumatera Utara** | 1,057,769 | 13% |
| **Sumatera Selatan** | 737,191 | 9% |
| **Kalimantan Barat** | 545,805 | 7% |
| **Kalimantan Timur** | 494,983 | 6% |
| **Jambi** | 494,078 | 6% |
| **Others (below 480,000 ha each)** | 1,820,328 | 23% |

Table 7
CPO Production (metric tons) by province, 2010

| Location | Size | % to total plantation size |
|---|---|---|
| **Riau** | 6,064,391 | 31% |
| **Sumatera Utara** | 3,230,448 | 16% |
| **Sumatera Selatan** | 2,082,196 | 11% |
| **Kalimantan Tengah** | 1,717,494 | 9% |
| **Jambi** | 1,293,173 | 7% |
| **Kalimantan Barat** | 881,768 | 4% |
| **Sumatera Barat** | 852,042 | 4% |
| **Others (below 700,000 ha each)** | 3,638,459 | 18% |

The table below shows the comparison of production among smallholders, SOEs, and the private sector. If the projection materializes, Indonesia will keep gaining global market domination over palm oil. The economic interest of the industry will then also increase, hence the concern over sustainability.

Table 8
Development of palm oil production in Indonesia (tons)[21]

[19] For the history of palm plantation in Indonesia, see Sawit Watch, *Raja Limbung: Seabad Perjalanan Sawit di Indonesia*, (Sawit Watch/Tempo Institute, 2012).

[20] See DG of Estate, Ministry of Agriculture, Tree Crop Estate Statistics 2009-2011.

| Year | Smallholders | State enterprises | Private sector | Total |
|---|---|---|---|---|
| **1998** | 1,344,569 | 1,501,747 | 3,084,099 | **5,930,415** |
| **1999** | 1,547,811 | 1,468,949 | 3,438,830 | **6,455,590** |
| **2000** | 1,905,653 | 1,460,954 | 3,633,901 | **7,000,508** |
| **2001** | 2,798,032 | 1,519,289 | 4,079,151 | **8,396,472** |
| **2002** | 3,426,740 | 1,607,734 | 4,587,871 | **9,622,345** |
| **2003** | 3,517,324 | 1,750,651 | 5,172,859 | **10,440,834** |
| **2004** | 3,847,157 | 1,617,706 | 5,365,526 | **10,830,389** |
| **2005** | 4,500,769 | 1,449,254 | 5,911,592 | **11,861,615** |
| **2006** | 5,783,088 | 2,313,729 | 9,254,031 | **17,350,848** |
| **2007** | 6,358,389 | 2,117,035 | 9,189,301 | **17,664,725** |
| **2008** | 6,923,042 | 1,938,134 | 8,678,612 | **17,539,788** |
| **2009** | 7,247,979 | 1,961,813 | 9,431,089 | **18,640,881** |
| **2010** | 7,774,036 | 2,089,908 | 9,980,957 | **19,844,901** |
| **2011** | 9.045,000 | 2,124,000 | 11,728,000 | **22,897,000**[22] |
| **2012** | 10,084,000 | 2,194,000 | 12,938,000 | **25,216,000** |
| **2013** | 11,243,000 | 2,266,000 | 14,274,000 | **27,783,000** |
| **2014** | 12,535,000 | 2,340,000 | 15,747,000 | **30,622,000** |
| **2015** | 13,975,000 | 2,417,000 | 17,372,000 | **33,764,000** |
| **2017** | 17,371,000 | 2,579,000 | 21,142,000 | **41,093,000** |
| **2019** | 21,593,000 | 2,751,000 | 25,731,000 | **50,075,000** |
| **2021** | 25,277,000 | 2,870,000 | 29,238,000 | **57,386,000** |
| **2023** | 27,868,000 | 2,928,000 | 31,019,000 | **61,815,000** |
| **2025** | 30,725,000 | 2,987,000 | 32,908,000 | **66,620,000** |

One important issue in the global market for palm oil is the extent to which the Indonesian industry is dependent on the global market. More than 70 percent of palm oil produced in Indonesia is exported, while the rest is consumed domestically because Indonesia is also a major consumer of palm oil products. According to Indonesia's statistics bureau (NPS) and the Malaysian Palm Oil Board (MPOB),[23] the quantities of palm oil exported from Indonesia were 14.3 million tons in 2008 (with the value of 12,375 million US$), 16.8 million tons in 2009 (10,368 million US$), 16.3 million tons in 2010 (13,469 million US$), and 16.4 million tons in 2011 (17,261 million US$). As of 2011, palm oil products from Indonesia were exported to the following countries: India (30.5%), EU (13.6%), China (12.2%), Egypt (4.9%), US (0.2%), and the rest of the world (38.7%).[24]

The structure of the export market will shape the preference of the country to lean towards sustainability if the importing countries have a more marked preference for sustainable products. EU-27 is the self-proclaimed leader in sustainable products, and their policies will definitely affect the global market. However, two major markets, India and China, have yet to start the sustainability discourse, and therefore, it would be interesting to assess how this dynamic affects the structure of the global regulatory regime on palm oil.

Table 9
Indonesia's palm oil export and import statistics[25]

[21] DG of Estate, "Area and Production by Category of Producers, Palm Oil" http://ditjenbun.deptan.go.id/cigraph/index.php/viewstat/komoditiutama/8-Kelapa%20Sawit (last access: 2 May 2014).

[22] Projection made by Suhadi, *Id*.

[23] Hermanto Siregar, "Palm Oil Supply and Demand: Indonesian Perspectives and Competitiveness, Indonesian National Economic Council, The 8th Indonesian Palm Oil Conference and 2013 Price Outlook Bali, 30 November 2012.

[24] Siregar, *Id*.

| Year | Export | | Import | |
|---|---|---|---|---|
| | Volume (Tons) | Value (thousands US$) | Volume (Tons) | Value (thousands US$) |
| **1998** | 1,826,287 | 940,724 | 18,172 | 8,985 |
| **1999** | 3,896,830 | 1,462,217 | 2,857 | 1,547 |
| **2000** | 4,688,852 | 1,326,398 | 7,988 | 6,424 |
| **2001** | 5,485,144 | 1,227,165 | 5,115 | 2,524 |
| **2002** | 7,072,124 | 2,348,638 | 11,861 | 4,745 |
| **2003** | 7,046,303 | 2,719,304 | 5,606 | 3,267 |
| **2004** | 9,565,974 | 3,944,457 | 7,884 | 5,094 |
| **2005** | 11,418,987 | 4,344,303 | 14,067 | 8,366 |
| **2006** | 11,745,954 | 4,139,286 | 3,031 | 2,494 |
| **2007** | 13,210,742 | 8,866,445 | 4,661 | 7,036 |
| **2008** | 18,141,006 | 14,110,229 | 10,994 | 8,953 |
| **2009** | 21,151,127 | 11,605,431 | 24,484 | 16,822 |

## C. ECOLOGICAL DEBATE ON PALM OIL AND THE SIGNIFICANCE OF THE CLIMATE CHANGE DISCOURSE

### 1. Sustainability discourse

Deforestation and forest degradation in Indonesia are often attributed to the timber and palm oil industry. International Non-Governmental Organizations (NGOs) such as Greenpeace, WWF, or Friends of the Earth are frequent opponents of the palm oil industry due to its alleged negative impact on the environment. However, the complexities surrounding the issues complicate policy action or legal solutions to address the problem, ranging from uncertainty in law enforcement, weak land/forest tenure regimes, economic policies, regional autonomy, and illegal business activities. According to the 2011 official Forestry Statistics, there are more than 27 million hectares of critical forest area in Indonesia, comprising more than 22,025,581 hectares of critical area and 5,269,260 hectares of very critical area.[26] This size is of considerable significance compared to the general size of forest area in Indonesia. As of 2011, Indonesia has a legal forest area (established by ministerial decrees) of 131,279,115.98,[27] and more than 180 million hectares of forest land (both inside and outside the legal forest area).[28]

Table 10
Extent of Land Cover Inside and Outside Forest Area Based on the Interpretation of Satellite Image Landsat 7 ETM+ 2009/2010[29]

| Area | Forest Area | | | | | | | APL | Total | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Permanent Forest | | | | | HPK | Sum | | Sum | % |
| | KSA-KPA | HL | HPT | HP | Sum | | | | | |
| **A. Forest** | 15,926.2 | 24,806.3 | 18,979.2 | 20,631.3 | 80,343.1 | 10,612.1 | 90,955.2 | 8,632.1 | 99,587.3 | 53.0 |
| **-Primary Forest** | 11,000.8 | 15,309.9 | 7,173.9 | 7,204.7 | 40,689.4 | 4,826.7 | 45,516.0 | 928.4 | 46,444.4 | 24.7 |
| **-Secondary Forest** | 4,772.6 | 9,178.5 | 11,398.4 | 11,460.6 | 36,810.0 | 5,650.8 | 42,460.8 | 6,229.5 | 48,690.3 | 25.9 |
| **-Industrial Estate** | 152.7 | 318.0 | 407.0 | 1,966.0 | 2,843.7 | 134.7 | 2,978.4 | 1,474.2 | 4,452.6 | 2.4 |
| **B. Non Forest** | 4,160.1 | 6,769.7 | 3,360.8 | 16,092.9 | 30,383.5 | 12,123.6 | 42,507.1 | 45,664.5 | 88,171.5 | 46.9 |

[25] DG of Estate, Export and Import in Indonesia, Palm Oil, http://ditjenbun.deptan.go.id/cigraph/index.php/viewstat/exportimport/16-kelapa%20sawit (last access: 2 May 2014).
[26] Ministry of Forestry, 2011 Indonesian Forestry Statistics (July 2012).

[27] This area consists of Sanctuary Reserve Area (KSA) and Nature Conservation Area (KPA): 26,126,739.27; Protection Forest: 32,211,814.72; Limited Production Forest: 22,818,159.26; Production Forest: 34,142,045.73; Convertible Production Forest: 20,875,089.00. See 2011 Indonesian Forestry Statistics, *Id*.

[28] See 2011 Indonesian Forestry Statistics, *Id*.

[29] See 2011 Indonesian Forestry Statistics, *Id*.

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| **C. Data unavailable** | 7.3 | 19.0 | 3.8 | 12.1 | 42.3 | 9.2 | 51.5 | 30.6 | 82.1 | 0.0 |
| **Total** | **20,093.6** | **31,595.1** | **22,343.8** | **36,736.4** | **110,768.8** | **22,744.9** | **133,513.8** | **54,327.2** | **187,840.9** | **100** |

The recent discourse regarding the contribution of the forestry sector to global climate change has brought scrutiny to bear on the global palm oil industry. Indonesia, although not a country obliged to mandatorily reduce its emissions pursuant to the Kyoto Protocol (although the second commitment phase of 2013-2020 has not entered into force yet), has made a commitment to join the global effort against climate change.[30] This is due to the fact that Indonesia is one of the world's largest emitters, if land use (forestry-based) is taken into account.[31] In general, deforestation and forest degradation in tropical forests lead to major losses of carbon sink on a major scale, and consequently, contribute to global warming and climate change. Drought, flood, harvesting failure, and water shortage are often exemplified as the direct impacts of climate change.[32] Indonesia was an active player in the creation of the REDD (Reduction Emission from Deforestation and Forest Degradation, now REDD+)[33] regime during the 2007 UN Framework Convention on Climate Change Conference of Parties (COP) in Bali, Indonesia, and since then it has proclaimed itself a relatively key actor in the demonstration and implementation of this global regime.[34]

The impact of the REDD+ program on the palm oil industry is significant. Different research has analysed the impact of palm oil plantation on GHG and how palm-related initiatives can contribute positively to the world's carbon stock.[35] Following the REDD+ project, Indonesia signed a Letter of Intent (LoI) with the Government of Norway in 2010 to ensure the protection and preservation of Indonesia's forest. The LoI has been implemented

[30] "We are devising an energy mix policy including LULUCF (Land Use, Land Use Change, and Forestry)) that will reduce our emissions by 26 percent by 2020 from BAU (Business As Usual). With International support we are confident that we can reduce emissions by as much as 41 percent. We will change the status of our forest from that of a net emitter sector to a net sink sector by 2030," declared Indonesian President Susilo Bambang Yudhoyono during the G-20 Leaders Summit 2009, at Pittsburgh, USA. President Yudhono made the same remark during the UNFCCC 15th COP in Copenhagen, December 2009.

[31] See the study prepared by Peace, DFID, and World Bank, "Indonesia and Climate Charge: Current Status and Policies" (2007).

[32] Purnomo, *Id*.

[33] REDD+ stands for Reduction of emission from deforestation and forest degradation (plus). The term denotes the distinction between deforestation (conversion of forest to another land use) and forest degradation (the decrease of quality of forest). The term "+" refers to forest conservation, sustainable management of forests and enhancement of forest carbon stocks.

[34] The idea of incorporating REDD into the international climate agreement has started since the conclusion of the Kyoto Protocol in 2002. In 2005, in COP-11 there was also talk of forest-based GHG reduction. A historic moment was reached in COP-13 in Bali where reducing emission from deforestation and forest degradation was incorporated into the Bali Action Plan. During COP-15 in Copenhagen, leaders agree to the "Copenhagen Accord", in which it is stated that, "We recognize the crucial role of reducing emission from deforestation and forest degradation and the need to enhance removals of greenhouse gas emission by forests and agree on the need to provide positive incentives to such actions through the immediate establishment of a mechanism including REDD-plus…" The REDD+ mechanism is expected to be incorporated into the post Kyoto climate framework, but Indonesia has taken up a *preemptive* role by initiating several demonstration activities. According to the data of the Ministry of Forestry, there are 44 demonstration activities currently being undertaken in Indonesia. See http://www.redd-indonesia.org/ for further details.

[35] For example, see Harja, D., Khasanah, N., Agus, F., van Noordwijk, M, "Oil palm plantation carbon stock calculator" World Agroforestry Centre ICRAF-SEA Regional Programme and Indonesian Soil Research Institute (2012). See also Laurence D. Chase, "The Palm GHG Calculator: The RSPO greenhouse gas calculator for oil palm products, Beta-version", The Roundtable for Sustainable Palm Oil – RSPO. Kuala Lumpur, Malaysia (2012).

in Presidential Instruction No. 10/2011 regarding moratorium/temporary suspension of new business licenses in primary forest and peat land. The Ministry of Forestry, as a follow up, has issued several 'indicative maps' (referred to as *Peta Indikatif Penundaan Izin Baru*, or PIPIB) as a reference to indicate areas where the moratorium/temporary suspension is applicable.[36] The palm oil industry sent mixed signals regarding this policy. While some key players seem to support this policy, others have expressed their strong objection.[37] GAPKI, Indonesia's palm oil association, has on several occasions criticized Indonesia's moratorium decision for its failure to incorporate the interest of the palm oil industry.[38] On the other hand, the government has accused GAPKI of channeling the interest of few minority members that happen to be under investigation for environmental violation. The government also claims that major palm oil companies that have been conducting their business legally support this policy.[39]

The intersection between forest policy and climate change concern brings the term High Conversation Value (HCV) forest to the heart of the discourse. Previously used in the context of forest certification,[40] HCV forest is basically forest that holds certain ecological and social values that are worth conserving, including biodiversity significance and the impact to the surrounding community. HCV is not directly incorporated into Indonesian laws, although some provisions concerning environmental impact assessment (EIA, or "AMDAL" in the Indonesian term) and in environmental laws can be applicable.[41] With regard to the palm oil industry, many HCV areas are found within APL, and then granted to companies for estate development. Permen 2/1999 on *Izin Lokasi,* Permen on IUP, or Permen 40/1996 on HGU regulate the obligation to protect public interest, but there is again no clear reference to HCV.[42] Given its absence in the Indonesian legislation, an HCV area can be located within *izin lokasi*, IUP, or HGU granted to a palm plantation company; in other words there is no direct obligation to set aside an HCV area from palm plantation development. On the other hand, if a company decides not to develop HCV for conservation purposes, there is a possibility that such an area is taken back by the government for neglecting the 'idle' lands.[43] Therefore at present, there is a discussion to commercially utilize HCV areas.[44]

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[36] The PIPIB is revised from time to time, following public input and the gathering of more data on the field. By 2012, PIPIB has been reviewed three times.

[37] See the discussion (please summarise the discussion) Daniel Mudiyarso et al, "Indonesia's Forest Moratorium, a Stepping Stone to Better Forest Governance", CIFOR Working Paper No. 76 (2011).

[38] Purnomo, *Id*.

[39] Purnomo, *Id*.

[40] The HCVF concept was initially developed by the Forest Stewardship Council (FSC) and first published in 1999. Under Principle 9 for FSC certification, forest managers are required to identify any High Conservation Values (HCVs) that occur within their individual forest management units, to manage them in order to maintain or enhance the values identified, and to monitor the success of this management.

[41] RSPO, Report of the 3rd Meeting of the RSPO, Ad Hoc Working
Progress Review and Coordination Meeting Hotel Santika, Botany Square, Bogor, 16th February 2011.

[42] RSPO, *Id*.

Another climate related concern related to the palm oil industry is the development of palm estate in peat areas, either located inside or outside the forest area. Peat land is also considered a major source of carbon sink to cope with the threat of global warming.[45] Rosdiana Soeharto, the chairman of the Indonesian palm oil commission (IPOC) stated that the development of oil palm plantations in peat areas is about 2.5% from a total of 20.94 million hectares.[46] The development of palm estate on peat land in Indonesia is not prohibited, rather regulated.[47] With the issuance of the moratorium/temporary suspension policy, there is no longer expansion of palm estate on peat land. However, once this moratorium period is over, considering the regulation on palm estate over peat land still prevails, estate development on this area can continue. The palm oil industry, meanwhile, has issued scientific studies to argue that palm estate on a peat land is in fact not commercially and technically feasible. Therefore, any allegation concerning the destruction of peat land caused by palm estate expansion is simply erroneous. In a journal published by the Malaysian Palm Oil Commission, Lane quotes studies to highlight that palm planters have understood the negative effect of developing a palm estate over peat land. Palm planters actually avoid peat lands because it would entail extra cost for drainage and nutrient deficiencies of peat soils.[48] In this case, the proponent of palm oil argues that, "the oil-palm industry was not the main perpetrator of peat land deforestation."[49]

The final discourse regarding palm oil and deforestation comes from the emerging importance of palm oil as the source of bio-fuel, once hailed as one solution to reduce fossil fuel dependence. The European Union (EU) is a leading region that promotes the use of biofuels and other renewable fuels for transport. Under the Directive 2003/30/EC, the EU sought to reach a 5.75% share of renewable energy in the transport sector by 2010. Consequently, this goal is further advanced by the Directive 2009/28/EC on the promotion of the use of energy from renewable sources, popularly known as the EU Renewable Energy Directive ("EU RED**"**), rising to a minimum 10% in every Member State in 2020. The EU RED adopts 'sustainability criteria', as set out in Article 17, 18, and 19 of the Directive in order to

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[43] This is regulated under Government Regulation No. 11/2010 on Idle Land.

[44] See RSPO discussion, *supra*, note 62.

[45] See in CIFOR analysis prepared by Caroko et al, in *supra*, note 8.

[46] Rosediana Suharto , "Sustainable Palm Oil Development in Indonesia" (2011), in www.soci.org/News/~/.../Paml%20**Oil**%20Mar%2009/**Suharto**.ashx (last access: 2 May 2014).

[47] Palm plantation in peatlands is governed in the ministry of agriculture regulation 14/Permentan/PL.110/2/2009 on the cultivation of palm plantation in peat land.

[48] See Lee Lane, "Climate talks, REDD, and Palm Oil: flights from reality," 3 *Journal of Oil Palm & The Environment* (2012), 9-15, quoting Lian Pin Koh et al, "Remotely sensed evidence of tropical peatland conversion to oil palm," Proc. Natl. Acad. Sci. USA 108:5127-5132, ed. Paul R. Ehrlich, Stanford University (February 2011): 3. The research argues, "our results suggest that almost 90% of oil-palm development, before the early 2000s, had occurred on nonpeat areas, and that only 6% of total peatlands within our study region had been planted with oil palm... These findings imply that, from a regional perspective, the oil-palm industry was not the main perpetrator of peatland deforestation." Foong Kheong Yew, Kalyana Sundram, and Yusof Basiron, "Estimation of GHG Emissions from Peat Used for Agriculture with Special Reference to Oil Palm," Journal of Oil Palm & the Environment,1:17-25 (February 2010): 18.

[49] Lane, *Id*.

ensure that the biofuel mandate does not adversely impact the environment, thus generating a clear and net GHG saving without negative impact on biodiversity and land use. EU RED basically directs the member countries to install technical regulations and standards, pursuant to which failure to meet such standards will cause producers to be disqualified for excise-tax exemption and the efforts will not be accounted to the mandatory national targets. Pursuant to Art. 17 (2), with regards to GHG, the saving of any new entity of biofuels entering into the EU market should be at least 35% to qualify for the tax treatment and target. Measures to ensure the compliance of this sustainability criterion are monitored by virtue of corporate reporting on the sourcing of biofuels, bilateral and multilateral agreements, and voluntary national and international certification schemes. Some experts however argue that the option to set out 35% GHG saving is chosen arbitrarily, without sound scientific justification. Erixon, for example, states that the 35% threshold is established to ensure that domestic rapeseed oil, a major source of biofuel in Europe, will qualify with a small margin; meanwhile the default GHG saving of palm oil biodiesel and soybean biodiesel will not pass the threshold.[50] The stipulation of default values for palm oil in accordance with the EU RED is also challenged by the default values for carbon reduction that arguably benefit only the European domestic rape seed producer.[51] These issues have led to allegations that the EU RED is designed as a means of unjustified protectionism whose underlying purpose is actually to protect EU industry interests rather than environmental protection. Palm oil companies have challenged this directive and, on several occasions, some states have considered bringing a complaint within the context of the WTO dispute settlement mechanism.[52]

From all of these diverse perspectives, the impact of the palm oil industry on the environment, especially with regard to deforestation and forest degradation, is a complex one that involves political, economic, and legal considerations. This complexity may lead to the emergence of a hybrid legal market that promotes a more global market for sustainable palm oil.

2. Forest governance as the cause of deforestation and forest degradation

The history of forest governance in Indonesia dates back to the colonial era, most notably the Forest Law 1865 (*Boswet*) and the Agrarian Law 1870 (*Agrarische Wet*).[53] However, the most relevant starting point for discussion of the forest legal regime is Forest Law 5/1967, issued following the ascent of the New Order regime. Since then, Indonesia has embarked on the journey of massive timber exploitation by virtue of the forest concession

[50] Fredrik Erixon, "Green Protectionism in the European Union: How Europe's Biofuel Policy and the Renewable Energy Directive Violates WTO Commitment" , ECIPE Occasional Paper 1/2009.

[51] Gernot Pehlnet and Cristoph Vietze, "Recalculating Default Values for Palm Oil" *Jena Economic Research Paper* # 2011 – 037.

[52] See for example "Argentina lodges new WTO complaint on EU biodiesel policies", http://www.ictsd.org/bridges-news/bridges/news/argentina-lodges-new-wto-complaint-on-eu-biodiesel-policies.

[53] See Lisman Sumardjani, *Konflik sosial kehutanan: mencari pemahaman untuk penyelesaian terbaik*, Working Group on Forest Land Tenure (Indonesia) (2007), in chapter "Sejarah Kehutanan".

system (*Hak Pengusahaan Hutan*, HPH).[54] An important feature of New Order forest governance is the control of forest concession in the hands of politically-connected business groups, be it in logging, plywood, or industrial timber (*Hutan Tanaman Industri*, HTI).[55] Following the 1998 political reform, a new era of regional autonomy began as a form of local demand to grab the country's wealth from the timber industry.[56] The Forest Law 41/1999 and the Regional Autonomy 21/1999 serve as the legal foundation of the new policy. Arguably this even led to further damage of forest area because decentralization policy was not equipped with strong law enforcement and monitoring.[57] This also began the period of expansion of palm estate, as the price of timber declined, and palm oil began to be one of the sought-after commodities in the global market. Therefore, historically, palm estate expansion is the latest source of substantial deforestation and forest degradation. Earlier stages of forest management in Indonesia show that HPH (the forest concession system) and illegal logging are two of the major causes of deforestation in Indonesia, following the decision to accelerate the timber industry and open up the international market in the 1970s. Some experts also suggest that within the last 20 years, palm estate expansion in the mineral area has made the least contribution to carbon emission in Indonesia, after forest fires and illegal logging.[58] However, a satellite analysis made in 1997-1998 demonstrates that the cause of forest fires was in fact attributed to HTI and land clearing for palm oil.[59]

Data concerning deforestation and forest degradation varies depending on the reference to which analysis is made. First of all, in any discussion concerning forest management and governance in Indonesia, there is a need to make a clear distinction as to what constitutes "forest", especially from a legal perspective. An area which is by nature a forest is not necessarily a forest from the statutory point of view. On the other hand, the government, via the Ministry of Forestry, is granted the authority to establish an area as a legal "Forest Area", although that area may not necessarily be a forest in technical terms, or it may not cover the entire technical forest area. In short, one must make a distinction between the technical "forest" and the legal "forest area".

According to the prevailing law, forest area is any particular area determined by the government ("gazetted") to be permanent forest.[60] By becoming a forest area, such a plot is

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[54] Wahjudi Wardojo and Nur Masripatin, "Trends in Indonesian Forest Policy" *Policy Trend Repor*t, 2002,: 11-21

[55] See Christopher M. Barr, "Timber Concession Reform: Questioning the Sustainable Logging Paradigm" in C.J. Colfer and I.P Resosudarmo, *Which way forward? People, forests, and policymaking in Indonesia* (2001) p. 191-220 See also Christopher M. Barr, "Bob Hasan, the Rise of Apkindo, and the Shifting Dynamics of Control in Indonesia's Timber Sector", *Indonesia*, Vol. 65, (April 1998), p. 1-36.

[56] See in general Christopher Barr *et al*, eds., Decentralization of Forest Administration in Indonesia, (CIFOR, 2006). See also Maharani Hapsari, The Political Economy of Forest Governance in Post-Suharto Indonesia", in Hirotsune Kimura *et al*, eds., *Limits of Good Governance in Developing Countries*, (UGM Press, 2011), p.103-137.

[57] See Barr, *Id*.

[58] Agus Purnomo, "Menjaga Hutan Kita: Pro Kontra Kebijakan Moratorium Hutan dan Gambut" (2012).

[59] Purnomo, *Id*.

entitled to a legal status, along with its clear boundary demarcation. As also noted by the government, the aim of such designation is to maintain and secure the social, ecological, and economic value of the area. In practice, the designation of forest area by the Ministry of Forestry has never been easy due to uncertain land boundaries, local rights, unclear tenure, and forest conversion. In 1983, the central government finalized a participatory project to initiate data gathering on Indonesian forests, namely Forest Land Use by Consensus (*Tata Guna Hutan Kesepakatan*, TGHK).[61] Since then, the designation of forest area by the Ministry is carried out by integrating and harmonizing TGHK and the respective regional spatial planning, especially to integrate the status of forest area and non-forest area that falls into the category of APL (see definition below). Some forest areas are still not yet designated as forest area because the central government (through TGHK) and the regional government (through regional spatial planning) are yet to agree on the exact demarcation line.[62]

A legal forest area consists of "conservation forest" (comprising nature reserve areas, *kawasan suaka alam* (KSA) and nature conservation areas, *kawasan pelestarian area* (KPA)),[63] "protected forest" (*hutan lindung*, or HL),[64] and "production forest" (*hutan produksi*, or HP, with part considered as limited production forest, *hutan produksi terbatas*, or HPT, and convertible production forest, *hutan produksi konversi*, or HPK)[65]. As mentioned earlier, it is very common that an area technically considered as forest may not be designated as "forest area" by the Ministry of Forestry. These areas then fall under the authority of the regional governments, under the nomenclature "area for other purpose" (*area penggunaan lain*, or APL).[66] APL can also be from a previous forest area then excluded by the Ministry because it did not meet technical forest requirements any longer due to deforestation/forest degradation. According to the data released by the Presidential Special Staff on Climate Change, most of the palm estates in Indonesia are located within APL forest, which means the areas are not legally recognized as forest. Some of the palm estates are located in degraded forests, i.e. previously exploited by timber companies or due to agrarian conflicts, and therefore, such

[60] Pursuant to Law 41/1999, a forest area [*Kawasan Hutan*] is a particular area designated [*ditunjuk*] and or gazetted [*ditetapkan*] by the Government to be maintained as permanent forest [*Hutan Tetap*]. Pursuant to the recent decision of the Constitutional Court, Constitutional Court decision No. 45/PUU-IX/2011, all forest area must be gazetted, and therefore a designation alone is not sufficient. This means, determining a forest area requires more coordination among governmental agencies to detail the specific demarcation.

[61] The TGHK was established in 1983 by the Department of Forestry and agreed to by all provincial governments and other sectors.

[62] Under Indonesian law, (for example, the concept of matching, or *paduserasi*, pursuant to ministry of forestry regulation No. P.50/Menhut-II/2009, *paduserasi* between TGHK and regional spatial planning is a harmonization initiative of forest zone and APL to reach an agreed upon designation of forest area and APL.

[63] Pursuant to Law 41/1999 (Art 1.3), "Forest is forest area with typical characteristics with main function to conserve bio-diversity and ecosystem thereof."

[64] Pursuant to Law 41/1999 (Art. 1.8), "Protected Forest is a forest area with main function to protect life buffer systems to arrange water management, prevent flood, erosion, prevent brine water intrusion and maintain land fertility."

[65] Pursuant to Law 41/1999 (Art. 1.7), "Production Forest is forest area with main function to yield forest products. Production forest is classified as permanent production forest, limited production forest, and convertible production forest."

[66] Pursuant to ministry of forestry regulation No. P.50/Menhut-II/2009, APL is an area that is not within the legal forest area (although naturally it may fall under the classification of forest".

areas were opted out from the formal legal forest area. Such areas were then considered as APL, and consequently they are also available for palm estate development.[67]

Table 11
Deforestation rate in Indonesia (in million hectares)[68]

| Deforestation rate | 1990-1996 | 1996-2000 | 2000-2003 | 2003-2006 | 2006-2009 | 2009-2012 |
|---|---|---|---|---|---|---|
| **Total** | 1.87 | 3.51 | 1.08 | 1.17 | 0.83 | 0.45 |
| **In Forest Land** | 1.37 | 2.83 | 0.78 | 0.76 | 0.61 | 0.32 |
| **Outside Forest Land** | 0.5 | 0.68 | 0.3 | 0.41 | 0.22 | 0.13 |

Table 12
Deforestation Rate Inside and Outside Forest Area by Province for the Period of 2009/2010 (ha/year)[69]

| Area | Forest Area | | | | | | | APL | Total |
|---|---|---|---|---|---|---|---|---|---|
| | Permanent Forest | | | | | HPK | Sum | | |
| | KSA-KPA | HL | HPT | HP | Sum | | | | |
| **A. Primary Forest** | 2,253.5 | 4,500.1 | 1,213.0 | 8,414.9 | 16,381.5 | 1,526.0 | 17,907.4 | 2,598.6 | 20,506.0 |
| **B. Secondary Forest** | 22,355.6 | 59,676.5 | 104,425.5 | 217,077.2 | 403,534.9 | 122,835.2 | 526,370.1 | 205,685.2 | 732,055.3 |
| **C. Other Forest** | 727.1 | 3,152.9 | 23,869.5 | 30,952.3 | 58,701.8 | 7,396.7 | 66,098.4 | 13,467.1 | 79,565.6 |
| **TOTAL** | **25,336.2** | **67,329.5** | **129,508.0** | **256,444.4** | **478,618.1** | **131,757.8** | **610,375.9** | **221,751.0** | **832,126.9** |

Forest conversion is one of the causes of deforestation. Based on the 2011 Forestry Statistics from 2007-2011, forest conversion for the purpose of agriculture/plantation based on ministerial decree is ranked top in terms of size, with 5,253,774.75 hectares, although not all is related to palm estate development.[70] Forest conversion from transmigration in 2006-2011 caused more than 1.5 million hectares of deforestation (with 959,746.56 hectares approved for conversion and 606,451.75 hectares have obtained principle license). [71] Meanwhile, forest conversion for other purposes (mining or non-mining) within the same period covers 97.874.71 hectares and for temporary use (known as *izin pinjam pakai kawasan hutan*) for mining and non-mining covers 41,940.42 hectares.[72]

From the legal/administrative law perspective, the mismatch between forest area on paper and the factual forest creates the complexities surrounding palm-estate-based-deforestation and forest degradation. As mentioned earlier, APL areas are not within the authority of the forestry ministry because they are not legally forest. Local leaders, i.e. regent

[67] Purnomo, *Id*.

[68] Ministry of Forestry, 2012, in Purnomo, *Id*.

[69] Pursuant to "*Data digital Hasil Penafsiran citra Landsat 7 ETM+ liputan tahun 2005/2006 dan 2009/2010, Direktorat Inventarisasi dan Pemantauan Sumber Daya Hutan (Data Hasil Pencermatan per Desember 2011). Data digital kawasan hutan dan perairan berdasarkan SK Penunjukan Kawasan Hutan dan Perairan, TGHK serta mutasi kawasan hutan per Desember 2010, Direktorat Pengukuhan dan Penatagunaan Kawasan Hutan*". See 2011 Indonesian Forestry Statistics, *Id*.

[70] See 2011 Indonesian Forestry Statistics, *Id*.

[71] See 2011 Indonesian Forestry Statistics, *Id*.

[72] See 2011 Indonesian Forestry Statistics, *Id*.

or governor, have the authority to issue a 'location permit' for a company that wishes to develop palm estate within that area. The location permit is simply an initial approval to survey the area for potential business projects, including palm estate development; it is not a title for land nor a right to conduct business. The prospective company must then survey the area to detect a potential area for commercial development, as well as assess potential overlapping claims, i.e. with local community, other palm estate, mining activities, transmigration, etc. Upon assessment, the prospective business will then apply to the ministry of agriculture, directorate general of estate, to obtain the plantation business license (*izin usaha perkebunan*, or IUP). IUP grants the holder the right to cultivate the land for plantation purposes, i.e. palm estate, but it does not give the right to own the land/hold the land title. The IUP holder must apply for cultivation right (*hak guna usaha*, or HGU) to the national land agency to finally secure its right. With regard to tenure uncertainty, there is still disagreement as to when exactly a company can start developing the land: after obtaining *izin lokasi*, IUP, or HGU.[73] The granting of IUP or HGU itself is also subject to potential conflict because without clear designation of APL areas, the authorities can grant these licenses/rights over ecologically significant areas.

## D. DEVISING A SUSTAINABLE MARKET FOR SUSTAINABLE PALM OIL

The last part of the previous section discusses the weakness of Indonesia's national governance. This leads to the need for a complementary system (at the international level) to support the existing one. An initiative to promote the global sustainable palm oil market is relatively new compared to other industries, as in the case of the timber market that is pioneered by the Forest Stewardship Council (FSC). Other similar standards also include cotton (Better Cotton Initiative), the Fairtrade label, and the Common Code for Coffee Community. In the palm oil industry the idea has emerged since the beginning of preliminary discussions in 2001, and it was further explored in 2002 by the World Wide Fund (WWF) with the palm oil industry (Aarhus United UK Ltd, Migros, Malaysian Palm Oil Association and Unilever together). Records show that after a series of meetings in 2002, the Roundtable of Sustainable Palm Oil (RSPO) was launched and inaugurated by the then-top producer of palm oil, Kuala Lumpur, Malaysia on 21-22 August 2003. Key agreement reached at the meeting was the adoption of a non-legally-binding expression to support the RSPO, as a non-state, market-driven, private, global regulatory regime that promotes sustainable palm oil. On 8 April 2004, RSPO was established legally as an association with its seat in Zurich, Switzerland, with daily activities run from its secretariat in Kuala Lumpur, Malaysia.[74]

RSPO members are a combination of palm oil growers, processors and traders, consumer goods manufacturers, environmental NGOs, social NGOs, financiers (banks & investors), and retailers. This diversity of members reflects the multi-stakeholder approach

[73] The three licenses are governed under different regulations, namely: Permen 2/1999 for location permit, Permen 26/2007 for plantation business license, or Permen 40/1996 for cultivation land title.

[74] See RSPO History in http://www.rspo.org/en/history (last access: 2 May 2014).

that has become more popular as a mode of global governance. There are basically two by-products of RSPO: sustainable certification and trademark. Certification is addressed more to supply chain members (grower-trader/processor-manufacturer-retailer) while trademark is addressed to consumers. Products with RSPO trademarks are currently marketed globally, especially in Europe and the US.[75]

RSPO ideally transforms the market by setting out the basic standards (known as Principles and Criterion, or P&C), and engaging private certification bodies to accredit a company's compliance towards such P&C. No government/state actions, or national laws, are involved within the process; although in 2008 the RSPO adopted the 'National Interpretations' to translate P&C into each country's specific laws and policies. Also in 2008, the first certified sustainable palm oil (CSPO) was issued and reached the port of Rotterdam, the Netherlands. Gradually the RSPO has started to expand its activities to cover a broader range of issues. In 2009, RSPO supply chain certification was launched, and by 2010, RSPO had started giving certification for smallholders while designing a voluntary certification scheme to comply with the EU RED requirements. By 2011, RSPO launched its own trademark as a signal of the use of CSPO, while the production area reached one million hectares and five million tons. By the end of 2012, there were 43 growers and 191 palm oil mills certified by the RSPO. In the supply chain certification, also by the end of 2012, there were 220 companies and 566 facilities certified by the RSPO.[76]

The principles and criteria (P&C) as set out by the RSPO is shown in the table below.

Table 13
P&C of RSPO

| No | Principles | Criteria |
|---|---|---|
| 1 | Commitment to transparency | Criterion 1.1 Oil palm growers and millers provide adequate information to other stakeholders on environmental, social and legal issues relevant to RSPO Criteria, in appropriate languages & forms to allow for effective participation in decision making. |
| | | Criterion 1.2 Management documents are publicly available, except where this is prevented by commercial confidentiality or where disclosure of information would result in negative environmental or social outcomes. |
| 2 | Compliance with all applicable laws and regulations | Criterion 2.1 There is compliance with all applicable local, national and ratified international laws and regulations. |
| | | Criterion 2.2 The right to use the land can be demonstrated, and is not legitimately contested by local communities with demonstrable rights. |
| | | Criterion 2.3 Use of the land for oil palm does not diminish the legal rights, or customary rights, of other users, without their free, prior and informed consent. |
| 3 | Commitment to long term economic and financial viability | Criterion 3.1 There is an implemented management plan that aims to achieve long-term economic and financial viability. |
| 4 | Use of appropriate best practices by growers and millers | Criterion 4.1 Operating procedures are appropriately documented and consistently implemented and monitored. |
| | | Criterion 4.2 Practices maintain soil fertility at, or where possible improve soil fertility to, a level that ensures optimal and sustained yield. |

[75] See general info on RSPO certification in http://www.rspo.org/en/why_rspo_certification (last access: 2 May 2014).

[76] See RSPO milestone in http://www.rspo.org/en/milestones (last access: 2 May 2014).

| | | |
|---|---|---|
| | | Criterion 4.3 Practices minimize and control erosion and degradation of soils. |
| | | Criterion 4.4 Practices maintain the quality and availability of surface and ground water. |
| | | Criterion 4.5 Pests, diseases, weeds and invasive introduced species are effectively managed using appropriate Integrated Pest Management (IPM) techniques. |
| | | Criterion 4.6 Agrochemicals are used in a way that does not endanger health or the environment. There is no prophylactic use of pesticides, except in specific situations identified in national Best Practice guidelines. Where agrochemicals are used that are categorized as World Health Organisation Type 1A or 1B, or are listed by the Stockholm or Rotterdam Conventions, growers are actively seeking to identify alternatives, and this is documented. |
| | | Criterion 4.7 An occupational health and safety plan is documented, effectively communicated and implemented. |
| | | Criterion 4.8 All staff, workers, smallholders and contractors are appropriately trained. |
| **5** | Environmental responsibility and conservation of natural resources and biodiversity | Criterion 5.1 Aspects of plantation and mill management, including replanting, that have environmental impacts are identified, and plans to mitigate the negative impacts and promote the positive ones are made, implemented and monitored, to demonstrate continuous Improvement. |
| | | Criterion 5.2 The status of rare, threatened or endangered species and high conservation value habitats, if any, that exist in the plantation or that could be affected by plantation or mill management, shall be identified and their conservation taken into account in management plans and operations. |
| | | Criterion 5.3 Waste is reduced, recycled, re-used and disposed of in an environmentally and socially responsible manner. |
| | | Criterion 5.4 Efficiency of energy use and use of renewable energy is maximized. |
| | | Criterion 5.5 Use of fire for waste disposal and for preparing land for replanting is avoided except in specific situations, as identified in the ASEAN |
| | | Criterion 5.6 Plans to reduce pollution and emissions, including greenhouse gases, are developed, implemented and monitored. |
| **6** | Responsible consideration of employees and of individuals and communities affected by growers and mills | Criterion 6.1 Aspects of plantation and mill management, including replanting, that have social impacts are identified in a participatory way, and plans to mitigate the negative impacts positive ones are made, implemented and monitored, to demonstrate continuous improvement. |
| | | Criterion 6.2 There are open and transparent methods for communication and consultation between growers and/or millers, local communities and other affected or interested parties. |
| | | Criterion 6.3 There is a mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all parties. |
| | | Criterion 6.4 Any negotiations concerning compensation for loss of legal or customary rights are dealt with through a documented system that enables indigenous peoples, local communities and other stakeholders to express their views through their own representative institutions. |
| | | Criterion 6.5 Pay and conditions for employees and for employees of contractors always meet at least legal or industry minimum standards and are sufficient to provide decent living wages. |
| | | Criterion 6.6 The employer respects the right of all personnel to form and join trade unions of their choice and to bargain collectively. Where the right to freedom of association and collective bargaining are restricted under law, the employer facilitates parallel means of independent and free association and bargaining for all such personnel. |
| | | Criterion 6.7 Children are not employed or exploited. Work by children is acceptable on family farms, under adult supervision, and when not interfering with education programmes. Children are not exposed to hazardous working conditions. |
| | | Criterion 6.8 Any form of discrimination based on race, caste, national origin, religion, disability, gender, sexual orientation, union membership, political affiliation, or age, is prohibited. |
| | | Criterion 6.9 A policy to prevent sexual harassment and all other forms of violence against women and to protect their reproductive rights is developed and applied. |
| | | Criterion 6.10 Growers and mills deal fairly and transparently with smallholders and other local businesses. |
| | | Criterion 6.11 Growers and millers contribute to |

| | | |
|---|---|---|
| | | local sustainable development wherever appropriate. |
| **7** | Responsible development of new plantings | Criterion 7.1 A comprehensive and participatory independent social and environmental impact assessment is undertaken prior to establishing new plantings or operations, or expanding existing ones, and the results incorporated into planning, management and operations. |
| | | Criterion 7.2 Soil surveys and topographic information are used for site planning in the establishment of new plantings, and the results are incorporated into plans and operations. |
| | | Criterion 7.3 New plantings since November 2005, have not replaced primary forest or any area required to maintain or enhance one or more High Conservation Values. |
| | | Criterion 7.4 Extensive planting on steep terrain, and/or on marginal and fragile soils, is avoided. |
| | | Criterion 7.5 No new plantings are established on local peoples' land without their free, prior and informed consent, dealt with through a documented system that enables indigenous peoples, local communities and other stakeholders to express their views through their own representative institutions. |
| | | Criterion 7.6 Local people are compensated for any agreed land acquisitions and relinquishment of rights, subject to their free, prior and informed consent and negotiated agreements. |
| | | Criterion 7.7 Use of fire in the preparation of new plantings is avoided other than in specific situations, as identified in the ASEAN guidelines or other regional best practice. |
| **8** | Commitment to continuous improvement in key areas of activity | Criterion 8.1 Growers and millers regularly monitor and review their activities and develop and implement action plans that allow demonstrable continuous improvement in key operations. |

RSPO creates a new global market of sustainable palm oil. The tables below show the production area and capacity of CSPO in the world. Despite heavy challenges for failing to meet sustainability standards, Indonesia is in fact the world leader of CSPO, both in terms of area (48% of the total production surface) and capacity (47%), ahead of Malaysia.

Table 14
CSPO Production Area (2012)

| Countries | Area (hectares) | Percentage |
|---|---|---|
| **Indonesia** | 708,872 | 48% |
| **Malaysia** | 669,311 | 45% |
| **Papua New Guinea** | 48,042 | 3% |
| **Brazil** | 33,272 | 2% |
| **Ivory Coast** | 8,661 | 1% |

Table 16
CSPO Production Capacity (2012)

| Countries | Area (hectares) | Percentage |
|---|---|---|
| **Indonesia** | 3,367,468 | 47% |
| **Malaysia** | 3,167,848 | 44% |
| **Papua New Guinea** | 415,319 | 6% |
| **Brazil** | 125,792 | 2% |
| **Solomon Islands** | 31,592 | 1% |

Being the market leader of CSPO, and also certified sustainable palm kernel oil (CSPKO), Indonesia is expected to continue its dominance in the global market. The fact that Indonesia's palm oil productivity is lower than that of Malaysia's means there is a great possibility that Indonesia's growth rate of the sustainable market will also be higher than that of Malaysia's. The table below provides more detailed comparison of Indonesia's involvement within the RSPO agenda.

Table 16

Total area of certified sustainable palm oil (in hectares)

| CPO Production (thousands metric ton) | 2008 | 2009 | 2010 | 2011 | 2012 (Oct) |
|---|---|---|---|---|---|
| **RSPO area CSPO** | 106,384 | 264,952 | 644,816 | 1,130,969 | 1,302,206 |
| **Indonesian area CSPO** | 0 | 66,792 | 208,448 | 463,969 | 628,962 |
| **Indonesian CSPO (%)** | 0 | 25.21% | 32.33% | 41.02% | 48,30% |

Table 17
Total production of certified sustainable palm oil (in metric tons)

| CPO Production (thousands metric ton) | 2008 | 2009 | 2010 | 2011 | 2012 (Oct) |
|---|---|---|---|---|---|
| **World CSPO (MT)** | 619,012 | 1,473,912 | 3,522,207 | 5,573,202 | 6,432,103 |
| **Indonesian CSPO (MT)** | 0 | 403,474 | 984,046 | 2,245,375 | 3,059,537 |
| **Indonesian CSPO (%)** | 0 | 27.37% | 27.94% | 41.02% | 47.57% |

Table 18
Total production of certified sustainable palm kernel oil (in metric tons)

| CPO Production (thousands metric ton) | 2008 | 2009 | 2010 | 2011 | 2012 (Oct) |
|---|---|---|---|---|---|
| **World CSPKO (MT)** | 154,335 | 338,740 | 803,999 | 1,296,448 | 1,468,694 |
| **Indonesian CSPKO (MT)** | 0 | 93,746 | 218,143 | 517,733 | 690,253 |
| **Indonesian CSPKO (%)** | 0 | 27.67% | 27.13% | 39.93% | 47.00% |

As Indonesia keeps improving its productivity by virtue of more sustainable practices, RSPO is projected to become more accepted among the growers. That said, the withdrawal of major growers from Indonesia may affect the projection of Indonesia's growth.[77]

Table 19
Projection of CSPO area in Indonesia (in hectares)

| Year | Total area | CSPO Area | % CSPO area to total area | Growth assumption |
|---|---|---|---|---|
| **2010** | 8,385,000 | 208,448 | 2.49% | 1.64% |
| **2011** | 8,909,000 | 463,969 | 5.21% | 2.72% |
| **2012** | 9,236,000 | 682,000 | 7.39% | 2.18% |
| **2013** | 9,576,000 | 916,000 | 9.57% | 2.18% |
| **2014** | 10,299,000 | 1,167,000 | 11.75% | 2.18% |
| **2015** | 11,082,000 | 1,434,000 | 13.93% | 2.18% |
| **2017** | 11,931,000 | 2,027,000 | 18.29% | 2.18% |
| **2019** | 12,852,000 | 2,702,000 | 22.65% | 2.18% |
| **2021** | 13,851,000 | 3,471,000 | 27.01% | 2.18% |
| **2023** | 14,936,000 | 4,345,000 | 31.37% | 2.18% |
| **2025** | 9,236,000 | 4,825,000 | 35.73% | 2.18% |

Table 20
Projection of CSPO production in Indonesia (in metric tons)

| Year | Total production | CSPO production | % CSPO production to total production |
|---|---|---|---|
| **2010** | 20,800,000 | 984,046 | 4.73% |
| **2011** | 22,897,000 | 2,245,375 | 9.80% |
| **2012** | 25,216,000 | 3,451,000 | 13.68% |
| **2013** | 27,783,000 | 4,880,000 | 17,56% |
| **2014** | 30,622,000 | 6,567,000 | 21.44% |
| **2015** | 33,764,000 | 8,551,000 | 25.32% |
| **2017** | 41,093,000 | 13,595,000 | 33.08% |
| **2019** | 50,075,000 | 20,453,000 | 40.84% |
| **2021** | 57,386,000 | 27,892,000 | 48.60% |
| **2023** | 61,815,000 | 34,842,000 | 56.36% |
| **2025** | 66,620,000 | 42,720,000 | 64.12% |

[77] For the withdrawal of GAPKI, see *infra*, note 79.

Finally, to provide more details on the status of certification of sustainable palm oil within the context of RSPO, the statistics below demonstrate the development of the certification initiative from 2008 to 2012.

Table 21
Certification statistics as of July 2012

| CERTIFICATION INFORMATION | | 2008 | 2009 | 2010 | 2011 | 2012 total | Jul 2012 | 2008-2012 total |
|---|---|---|---|---|---|---|---|---|
| **Certification** | **No of SCC companies** | n/a | n/a | n/a | n/a | 45 | 6 | 183 |
| | **No of SCC facilities** | n/a | n/a | n/a | n/a | 103 | 8 | 378 |
| | **No of grower certified** | 5 | 5 | 9 | 10 | 5 | 0 | 34 |
| | **No of palm mills certified** | 16 | 18 | 43 | 58 | 23 | 4 | 158 |
| **Production** | **Production area (ha)** | 106,384 | 264,952 | 644,816 | 1,130,969 | - | 1,302,998 | > to date |
| **Annual production capacity** | **FFB (mt)** | 2,151,916 | 5,709,784 | 16,066,742 | 26,680,440 | - | 29,349,738 | > to date |
| | **CSPO (mt)** | 619,012 | 1,473,912 | 3,522,207 | 5,573,202 | - | 6,300,062 | > to date |
| | **CSPK (mt)** | 154,335 | 338,740 | 803,999 | 1,296,488 | - | 1,468,194 | > to date |
| **Supply** | **CSPO (mt)** | 163,364 | 1,357,511 | 2,773,567 | 4,798,512 | 3,568,124 | 545,864 | 12,661,078 |
| | **CSPK (mt)** | 41,811 | 321,322 | 640,316 | 1,111,918 | 828,513 | 127,296 | 2,943,959 |
| **Sales** | **CSPO sales through SG, MB** | 0 | 98,044 | 438,515 | 831,010 | 469,877 | 67,341 | 1,837,446 |
| | **CSPO sales through B&C** | 4,452 | 245,813 | 842,619 | 1,659,516 | 1,464,459 | 123,648 | 4,216,859 |
| | **CSPKO sales through B&C** | 3,520 | 6,636 | 82,464 | 269,665 | 161,049 | 4,595 | 523,334 |
| | Total CSPO sales | 4,452 | 343,857 | 1,281,134 | 2,490,526 | 1,934,336 | 190,989 | 6,045,305 |
| **Uptake** | CSPO sales/supply (mt) | 2.7% | 25.3% | 46.2% | 52.0% | 54.2% | 35.0% | |

## E. NORMATIVE DISCOURSE IN THE TRANSNATIONAL SUSTAINABLE PALM OIL REGULATION

Having discussed the present context of the global palm oil industry and its environmental impact, the research turns into the question of legitimacy and authority of the system, in the absence of a formal state authority. Which norms and values do various actors within the palm oil industry refer to in order to legitimize and authorize the activities within the transnational palm oil legal regime? How is the contestation between different values played out?

In general there is a trend towards sustainable production of foods. There are more than 400 sustainability standards competing for adopters, consumers and public attention. According to von Hagen, Manning, and Reinecke, each standard has different weightings, varies in terms of reach, and also has major differences regarding the scope of the offering of certified commodities and products.[78] In this respect, "the diverse sustainability initiatives are evidently involved in a competition as to which criteria a standard needs to fulfill in order to effectively promote sustainability", which then puts more emphasis on the legitimacy (and the trustworthiness of the standard).[79] As such, we provide two major normative issues central to the palm oil regulatory discourse: representation and effectiveness.

### 1. Representation

[78] Oliver von Hagen, Stephan Manning, and Juliane Reinecke, "Sustainable Sourcing in the Food Industry: Global Challenges and Practices," Moderne Ernaehrung Heute, Official Journal of the Food Chemistry Institute of the Association of the German Confectionery Industry, Vol. 4, p. 1-9, October 2010.

[79] *Id.*

In late September 2011, the Indonesian Palm Oil Association, GAPKI, announced its membership withdrawal from the voluntary-based, transnational, private green certification regime of the RSPO. GAPKI prefers the mandatory-based, domestic, state regulatory system of the Indonesian Sustainable Palm Oil (ISPO) formally enacted by Indonesia, the world's largest producer of CPO. In an interview following this decision, GAPKI's lead official criticized the RSPO for being 'too much in favor of NGOs and palm oil consumers.'[80] GAPKI also claimed that the premium of having RSPO certification does not cover the cost of the Fcertification process in the first place. GAPKI further argued that RSPO certification has imposed burdens unaffordable for small and medium companies.[81] While some question the motive of this move,[82] many major companies are still members of the RSPO, and plan to comply with both standards. The Indonesian Sustainable Palm Oil (ISPO) is a mandatory standardization system, enacted by virtue of ministerial regulation, which contains compulsory audit and administrative sanction for non-compliance.

This anecdote represents one key discourse that exists in any model of global governance, multi-stakeholder, institution: representation. If the members of such institutions consider that their interests are not represented properly, it will undermine the decision-making process and they may opt for withdrawal from the institution. The real reason for GAPKI's withdrawal, for instance, is arguably because they consider that RSPO has been dominated by the consumer side (processors, traders, manufacturers, environmental NGOs) and does not side with the interest of the growers.

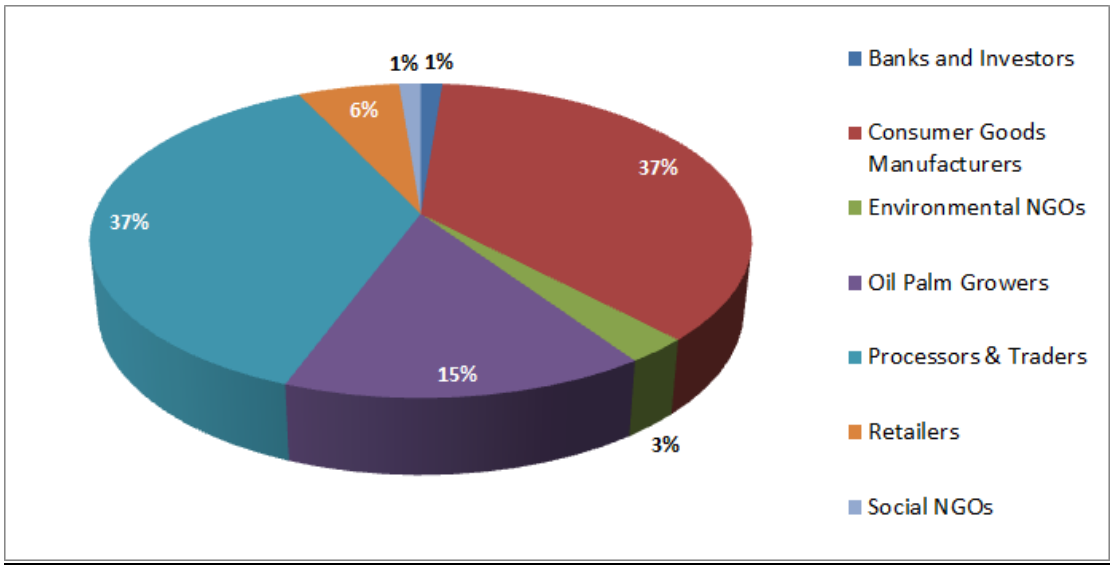
As of January 2013, RSPO had 1166 members, which consisted of 809 ordinary members, 250 supply chain associates, and 107 affiliate members. RSPO members are dominated by processors and traders (37%) and consumer goods manufacturers (37%), and only 15% represents the growers. Meanwhile, most of the negative campaigns are addressed to growers, making them cornered in RSPO's decision-making process. The table below shows the composition of RSPO members as of January 2013.

Table 23
Composition of RSPO members by group

[80] 'Gapki quits RSPO' http://www.agroasianews.com/commodities/palm-oil/11/10/03/gapki-quits-rspo (last access: 2 May 2014).

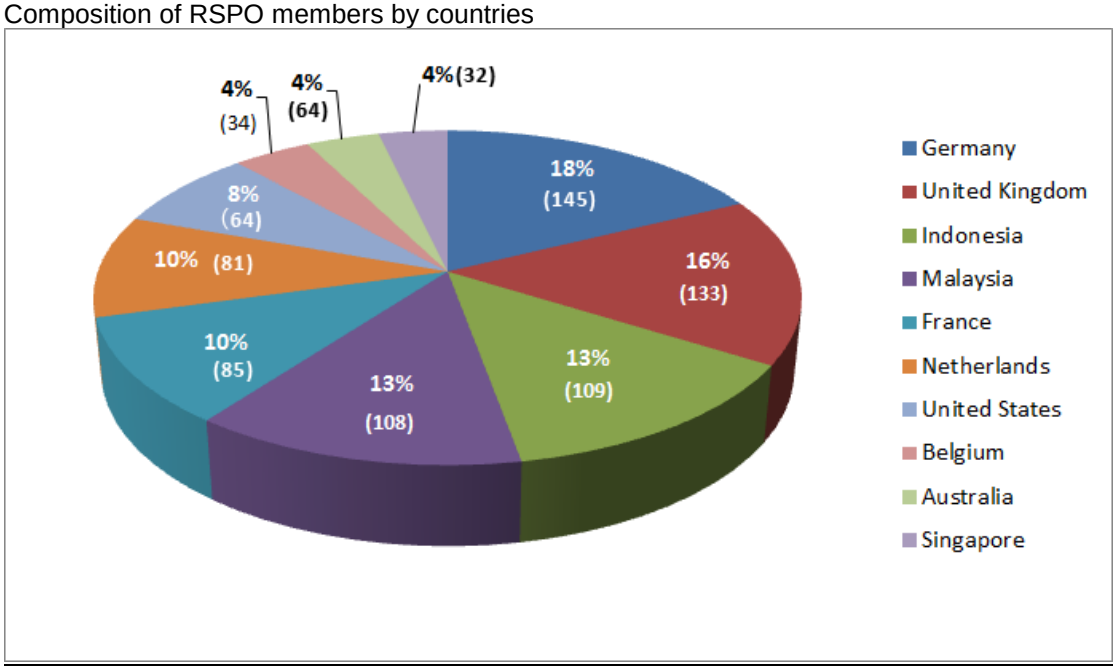
[81] 'Indonesia Develops Rival Sustainable Palm Oil Scheme' http://www.kbrikualalumpur.org/web/index.php?option=com_content&view=article&id=879:indonesia-develops-rival-sustainable-palm-oil-scheme&catid=57:news&Itemid=180 (last access: 2 May 2014).

[82] 'Going beyond the law to spur sustainable palm oil', http://www.thejakartapost.com/news/2011/11/24/going-beyond-law-spur-sustainable-palm-oil.html (last access: 2 May 2014).




The conflict regarding RSPO membership also reflects the north-south debate, between 'developed countries' and 'developing countries'. Developed countries arguably have higher income per capita to afford higher prices for a more sustainable product, a luxury that does not necessarily exist in the developing countries. Whether or not this notion is true, is a subject of another investigation. However, from the composition of the membership alone, Indonesia and Malaysia, two major producers of palm oil, only account for 26% - 13% each - of the RSPO membership. The remaining members come from developed-consumer countries, such as Germany (18%), United Kingdom (16%), France (10%), the Netherlands (10%), and many more as depicted in this following table.

Table 24
Composition of RSPO members by countries




Another argument often used to highlight the north-south debate is the fact that all

major buyers of CSPO come from developed-consumer countries, namely Switzerland, the UK, US, Sweden, Netherlands, and Belgium. For example, the market for CSPO is dominated by Unilever, a Swiss-based Dutch company that takes more than 80% of the CSPO market.

Table 25
Top 10 major suppliers and buyers of CSPO certificates, Greenpalm (B&C)
Registered CSPO certificates owners & certificates redeemed, as of 31 Dec 2011

| Supplier | Origin | No of certf'c issued | Buyer | Origin | No of certf'c issued |
|---|---|---|---|---|---|
| **Sime Darby Futures Trading Sdn Bhd** | MAS | 1,274,033 | **Unilever Supply Chain Company AG** | SWZ | 1,415,015 |
| **Wilmar Trading Pte Ltd** | SIN | 689,826 | **Kraft Foods International** | UK | 125,960 |
| **PT PP London Sumatera Indonesia** | INA | 404,084 | **J&J Consumer Companies** | USA | 101,142 |
| **Inter Continental Oils and Fats Pte Lted** | SIN | 360,838 | **Nestle SA** | SWZ | 85,334 |
| **United Plantations Berhad** | MAS | 347,774 | **IKEA Supply** | SWD | 60,000 |
| **SA SIPEF NV** | BEL | 324,525 | **Kellogg Company** | USA | 41,081 |
| **KL Keppong Berhad** | MAS | 186,544 | **Premier Foods Group** | UK | 39,407 |
| **Cargill-Hindoli (Smallholders)** | INA | 176,571 | **AAK UK Ltd** | UK | 33,593 |
| **Cargill-Hindoli** | INA | 168,222 | **Friesland Campina** | NED | 27,825 |
| **PT Indosawit Subur** | INA | 144,126 | **Vendemortele** | BEL | 25,050 |
| **Top 10 – subtotal** | | **4,076,543** | **Top 10 - subtotal** | | **1,979,033** |
| **All suppliers, total 27 companies** | | **4,727,790** | **All buyers, total 222 companies** | | **2,496,482** |

Therefore, one may argue that both rule-making of the RSPO, and market-demand of sustainable palm oil, are concentrated in the hands of limited parties that can dictate and influence the course of the governance in accordance with their interests. As noted by Arcuri, "private food safety standards are widely adopted by retailers with dominant positions in the market and, while voluntary in practice, can become *de facto* mandatory. Compliance with these standards imposes costs on small producers from developing countries, which could result in them being driven out of the market; hence, it is understandable that concerns are raised on their trade restrictive potential."[83]

2. Effectiveness

Discourse on the effectiveness of RSPO can be assessed from the market perspective and the effectiveness of its conflict resolution.

From the market perspective, despite the growing portion of CSPO in the global market led by the EU and the US, leading major importer/consumer countries India and China have yet to show serious interest in purchasing CSPO/CSPKO. As such, there is still not enough demand to support the supply of CSPO/CSPKO that can meet the supply, and provide the premium price of a sustainable product. One main factor guaranteeing a successful certified sustainable product is the premium price it provides compared to the normal product. In this case, it is rational for growers to expect a higher price for their certified

[83] Alessandra Arcuri, "The TBT Agreement and Private Standards" in Michael Trebilcock and Tracey Epps, eds., Research Handbook on the TBT Agreement (Edward Elgar Publishing, 2013).

CPO products because they indeed incur more costs to ensure the sustainability and certification/monitoring. However, due to still low demand, the price of CSPO has not reached the desired goal, and there is only a limited financial benefit from selling a certified CPO.

From the effectiveness of conflict resolution, RSPO is expected to positively contribute to resolving open conflicts among environmental NGOs and palm oil growers that have used a public platform, i.e. mass media and scientific publication, to justify each other's position. "Trial by the press" is not certainly a preferred method within the rule of law, yet formal legal action has not been entirely effective because often the problem is in the lack of legal certainty. RSPO in this regard facilitates a non-legally binding forum to resolve problems among RSPO members, including between social/environmental NGOs attacking growers and other companies in the palm oil supply chain. The structure of the RSPO complaint system and dispute settlement facility resembles more of an international mediation system, rather than an arbitration-like dispute settlement body. As of December 2012, there were 31 complaints lodged, with four cases successfully resolved.[84] From this number alone, one may argue that the limited number of cases brought to the RSPO complaint mechanism and dispute settlement facility is evidence of lack of an adequate system to attract potential complainants to use RSPO as a means of dispute resolution.

However, the benchmark of effectiveness may not be assessed in that simple, quantitative sense. Take for example the case of the open dispute between Greenpeace, an international NGO, and Golden Agri Resources (GAR), the holding company of PT. Sinar Mas Agro Resources and Technology (SMART) Tbk, a publicly listed company in Indonesia, one of the biggest palm oil growers in the world. It has come to public attention that Greenpeace has launched a zealous public negative attack against GAR's, or SMART's business practices that allegedly cause major deforestation in Indonesia, leading to withdrawal of Sinar Mas' major buyer.[85] After a series of public campaigns, on July 2010, Greenpeace filed a complaint to the RSPO regarding the allegation. As stated in the RSPO complaint tracker, Greenpeace claimed that GAR is not an RSPO member and cannot give a public impression that it and all of its subsidiaries (including SMART and PT. Ivo Mas Tunggal) are in the process of obtaining RSPO certification. Dealing with this complaint, GAR indeed became an RSPO member by April 2011 and declared a commitment to comply with the sustainability standards. Further pursuant to this, since then GAR has submitted the Historical HCV Assessment Report and Peat Mitigation Plan to RSPO in May 2011 and a revised HCV remediation and peat mitigation plan was submitted to RSPO on 14 June 2012.[86] Things turned around further as Greenpeace and GAR, along with the Forest Trust – another leading

[84] See RSPO Complaint tracker in http://www.rspo.org/en/status_of_complaint (last access: 2 May 2014).

[85] See Greenpeace's public campaign against GAR/Sinarmas in "Sinar Mas remains a notorious forest destroyer, its own audit shows", http://www.greenpeace.org/international/en/news/Blogs/climate/sinar-mas-remains-a-notorious-forest-destroye/blog/26141/?accept=af2476b996b929fc94e9fb55d6245249 ; "Sinar Mas' Palm Operation Exposed", http://www.greenpeace.org/usa/en/news-and-blogs/news/a-defining-moment-for-the-palm/ ; "Nestle Quits Sinarmas after Greenpeace Campaign", http://www.environmentalleader.com/2010/05/18/nestle-quits-sinar-mas-after-greenpeace-campaign/ (last access: 2 May 2014).

[86] See RSPO Complaint tracker in http://www.rspo.org/en/status_of_complaint (last access: 2 May 2014).

environmental NGO, announced a collaboration in July 2012 to conduct a joint HCV forest study, setting the first step towards partnership.

## F. FRAMING THE ISSUE FOR ASSESSING THE PRIVATE REGULATORY REGIME

### 1. Context

We have provided the overview of the palm oil industry, the significance of the Indonesian market, and the emergence of a market-driven transnational regulatory regime governing the global industry. There are still unresolved issues as to the future of this legal regime, mostly revolving around the normative discourse of legitimacy and effectiveness. Future research must be devoted to clarifying this problem, investigating how the regime can work from a rational-economic perspective.

*First of all*, there is a need to further understand the governance structure of the private regulation, as the underlying rationale of the regime. Although the regime is non-legally binding, legal intervention is indeed necessary to support the regime. A market regulation, for example, is essential to ensure delivery of information regarding the environmental performance. In this case, the law must aim at preventing 'green-washing', a popular term coined to describe dishonest claims regarding a company's environmental performance.[87] A stakeholder-oriented corporate governance structure further must be clarified to resolve the tension in company objectives between shareholder's profit maximization and stakeholder's value creation. The contractual relationship among the parties involved in the supply chain (from grower to processor to trader to consumer goods manufacturer) requires further investigation.

*Secondly*, the legal consequences of a private standard-setting institution, such as the RSPO are still minimal in the debate regarding sustainable palm oil, with much focus still given to the technical issue of environmental sustainability and the commercial issue of market prospects. In this respect, future research coverage must include regulation concerning the decision-making process, the selection of methodology assessment, the role of the auditor as the private regulatory enforcer (including its independence and liability for its audit product)[88], and also the structure of its complaint process and/or dispute resolution mechanism.

*Thirdly*, it is also important to note that private regulations such as RSPO do not work in isolation. The practice of private standards, including in the timber, cotton, soybean, sugarcane industry, etc. also demonstrate that their interactions with formal laws are the key to understanding how they operate concretely. However, as they are transnational in nature, the interactions involve formal laws from different countries, be it from the exporting or

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[87] For allegation of 'green-washing', see Greenpeace, "Illegal Forest Clearing and RSPO Greenwash: Case Studies of Sinar Mas", http://www.greenpeace.org.uk/files/pdfs/forests/sinarmasRSPOgreenwash.pdf See RSPO Complaint tracker in http://www.rspo.org/en/status_of_complaint (last access: 2 May 2014).

[88] There has been a challenge regarding the independence of RSPO's auditor. See http://www.robinwood.de/uploads/media/Statement_Robin_Wood See RSPO Complaint tracker in http://www.rspo.org/en/status_of_complaint (last access: 2 May 2014).

importing countries. For example, from the importing country perspective, they may enact laws regarding market entry, such as the EU RED. RSPO is currently developing an RSPO-RED scheme to comply with the certification. There is a question regarding the credibility of such laws, i.e. whether the scheme is set to advance trade protectionist policy objectives.[89] From the exporter country perspective, similar problems exist. Indonesia, for example, develops the ISPO as a mandatory certification scheme. This regime is also challenged for allegedly serving only a particular industry's interest. The impact that a private regulatory regime brings to the legal system of a developing country also has raised concern from an academic and policy perspective.

*Fourthly*, a legal-economic analysis will explore the issue of the cost structure of the regulation. Rule of Law is basically a public good normally provided by the state, financed by tax because it is the state's responsibility. When the supply of a law is provided by a non-state entity, the issue of financial viability becomes crucial. The expectation of having premium price for the product is the basic economic incentive for providing such non-state regulation. However, an additional funding mechanism is worth exploring, i.e. in the form of a tax incentive, state subsidy, or other novel funding mechanisms such as REDD or the global climate fund within the context of climate change.

There is a need to develop a basic framework of analysis for answering all of those problems presented above.

2. Framework of analysis (with certain comparison to the timber industry)

The basic tenet of private regulation is the advancement of an efficient system. Social norms are set up, monitored, and enforced by parties involved in the regulated activity, as opposed to the state as an external entity. From the perspective of norm setting, parties involved in the business themselves, which possess more information about the character of the industry, formulate the rules. From the perspective of monitoring and enforcement, private regulations have their own specific methods to ensure compliance, without having to resort to the state, from attack on reputation ('naming and shaming') to exclusion from the market ('black list') to boycott by sophisticated buyers/consumers.

In reality, the existence of private regulations is not as simple as the economic model suggests. The often-transnational character of the regulations is frequently confronted with the formal domestic lawmaking process and state constitutionalism. This may raise the issue of accountability and legitimacy of the making and enforcement of the global private norms. NGOs, corporations, scientific communities, and other non-state actors carry and transfer knowledge beyond borders, frequently with their own private agenda, almost without obstacle. There has been concern over, for instance, unfair business practices and unreasonable trade protectionism created by private regulations.[90] There is also challenge to the emerging role of

[89] See Erixon, *Id*., discussing Europe's green protectionism.
[90] See Erixon, *Id*., discussing Europe's green protectionism.

global NGOs and multinational corporations from a domestic rule of law perspective. We briefly describe these challenges as follows.

*a. Challenges regarding co-existence with formal legal system*

In many events, private regulation by regulated organizations is combined with state law to create a model of 'co-regulation'. Bartle and Vass categorize the form of co-regulation into: 'Co-operative' (co-operation between regulator and regulated on the operation of statutory regulation); 'Delegated' (the delegation of the implementation of statutory duties by a public authority to self-regulatory bodies); 'devolved' (the devolution of statutory powers to self-regulatory bodies, i.e., the specification of self-regulatory schemes in statute); 'facilitated' (self-regulation explicitly supported by the state in some way but where the scheme itself is not backed by statute); and 'tacit' (little explicit state support, but its implicit role can be influential).[91] Specific to the context of global governance, Cashore develops a matrix to explain the complete spectrum as follows.[92]

Table 25
Alternative authorities in global governance

| Feature | Nonstate Market-Driven Governance | Share Public/Private Governance | Traditional international governance |
|---|---|---|---|
| **Location of authority** | Diffuse: producers and consumers along the supply chain (audience/ market players); nonstate institution as location, interpreter, implementer of rules. | Some delegation possible (e.g. *de facto* granting authority to technical experts), but sovereign governments remain ultimate authority (explicit or implicit). Transfer of authority is rare. | Sovereign governments. Some delegation to institutions is possible, e.g. to interpret rules. Transfer of authority is rare. |
| **Source of authority** | Shifting international norms enabling markets, economic incentives, acceptance of program by supply and demand side audiences. | State sovereignty and consent (deep structure of international system). Possibly legalisation or constitutionalisation. | State sovereignty and consent (deep structure of international system). Possibly legalisation or constitutionalisation. |
| **Role of government** | Interested player, potential facilitator or debilitator. | Shares policy-making authority. | Has policy-making authority. |

In Sinclair's view, the combination of state law-private regulation is inevitable regulatory practice, and there is no dichotomy between command-and-control and the self-regulatory approach, because most successful private regulation exists 'in the shadow of the law.'[93] This 'dormant' role of mandatory and state-backed regulation means that, in the event of a realistic threat of irreversibility, there is always the state power to resolve the problem

[91] Bartle and Vass (add first names and pages), 'Self Regulation and the Regulatory State', http://www.bath.ac.uk/management/cri/pubpdf/Research_Reports/17_Bartle_Vass.pdf

[92] Benjamin Cashore, 'Legitimacy and Privatization of Environmental Governance: How Non-State Market-Driven Governance Systems Gain Rule-Making Authority' (2002) 14 *Governance; an International Journal of Policy Administration and Institution* 52: 503-529.

[93] Darren Sinclair, "Self-regulation versus command and control? Beyond false dichotomies" *Law & Policy* 19 (4) (1997), 529–559. See also J. Mendeloff, 'Overcoming Barriers to Better Regulation' 18 *Law and Social Inquiry* 711 (1993); R. Johnstone, 'Putting the Regulated Back into Regulation' 26 J. of Law and Society 378 (1999); J. Braithwaite and P. Drahos, *Global Business Regulation* (Oxford: Oxford University Press, 2001).

when private regulations fail. [94] Gunningham and Sinclair further envisage a combination of state laws and private rules to enhance the effectiveness and efficiency of the regulatory objective, exemplified by the combination of voluntarism and self-regulation on the one hand, and command and control regulation on the other hand. According to them, 'voluntarism will complement most forms of command and control regulation, particularly where levels of environmental performance "beyond compliance" are desired. In the case of performance-based command and control regulation, a minimum performance benchmark is established, with voluntary based measures encouraging firms to achieve additional improvements.'[95] Meanwhile, Abbott and Snidal label the role that states and formal international organizations can play, in relation to transnational regulatory governance, as 'orchestrators of the international regulatory system'. 'If states and IGOs expanded "directive" and especially "facilitative" orchestration of the Transnational New Governance system, they could strengthen high-quality private regulatory standards, improve the international regulatory system, and better achieve their own regulatory goals.'[96] We concur with the idea to put private regulations in a wider context of responsive regulatory strategy. It is a three-dimensional, comprehensive approach to paint a big picture of regulatory objectives and strategies to achieve them.

Private regulations do not exist in a vacuum, but rather they form interactions, be they collaborative or competitive, with the state formal regulatory regimes. The establishment of ISPO is an example of how transnational-based RSPO ignites, and thus corresponds with Indonesia's national legislation. On the other hand, the interaction of private standards to the WTO is also intriguing. Arcuri questions the extent to which WTO legal framework can address the trade-related problems created by the emergence and operation of private standards. In this matter, "the TBT Agreement, and more generally WTO law, can only inadequately address the trade-related problems of private standards, insofar as these problems are a consequence of non-competitive markets. Food safety standards, which today are of primary concern to developing countries, are problematic because food markets are highly concentrated and retailers retain the most power. The WTO is not a global competition authority, and lacks specific regulatory powers in the field of competition law."[97]

*b. Challenges regarding potential regulatory competition/cooperation*

As economic globalization and the corresponding internationalization increase, NGOs and international institutions play significant roles to address the negative impact of

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[94] Peter Van Gossum, Bas Arts, and Kris Verheyen, '"Smart regulation": Can policy instrument design solve forest policy aims of expansion and sustainability in Flanders and the Netherlands?' *Forest Policy and Economics*, Vol. 16, March 2012: 23–34.

[95] Niel Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy,* (Oxford: Clarendon Press, 1998);

[96] Kenneth W. Abbott & Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit', *Vanderbilt Journal of Transnational Law* (Vol. 42, no. 2, March 2009).

[97] Arcuri, *Id*.

globalization on environmental, social, and labor standards.[98] According to Vogel, increased market integration could lead to increased environmental and social production standards, but only when active environmental and other groups specifically pressure governments to put such wording in rules governing increased market transactions.[99] Scott describes this phenomenon as "changes in the nature of state intervention have been accompanied also by fundamental challenges to traditional conceptions of the centrality of the nation state as regards its dominance of key resources (notably taxation and capacities for coercion) and for the maintenance of the rule of law and democracy, as transnational and non-state power have assumed greater significance."[100]

As such, Bernstein and Cashore stress the need for legitimacy, both at the international and domestic level. At the international level, the scheme (institutions, norms, rules) must be in line with the accepted norms and governance institutions. Meanwhile, legitimacy needs also to exist at the domestic level because 'targeted firms also operate within domestic regulatory and competitive environments, with their own implicit and explicit norms of behavior that set the boundaries of what relevant audiences would be willing to accept as appropriate.'[101] In this regard, the relevant domestic audiences must accept the notion that a non-state form of governance is an appropriate mechanism for addressing global environmental problems, which such audiences evaluate the most legitimate systems.[102] This problem persists because there is an inevitable political struggle over which non-governmental certification program gets the right to create sustainable forest management rules.

Among various industries, the forest/timber industry is arguably the most advanced in term of regulatory innovation. While most self-regulations are initiated by industry/trade associations, in the forest business private regulations are led by NGOs by virtue of the international certification scheme. Transnational NGOs led by the World Wide Fund for Nature (WWF), eventually created the international Forest Stewardship Council (FSC) program. The FSC created ten "principles" and several detailed "criteria" that covering a wide range of issues, including tenure and resource use rights, community relations, workers' rights, environmental impact, management plans, monitoring and conservation of old growth forests, and plantation management FSC also mandated the establishment of national or

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[98] Suzanne Berger, and Ronald Dore, *eds*. 1996. *National Diversity and Global Capitalism.* Ithaca: Cornell University Press. See also Bernstein, Steven, and Benjamin Cashore, 'Globalization, Four Paths of Internationalization and Domestic Policy Change: The Case of Eco-forestry in British Columbia, Canada', *Canadian Journal of Political Science* 33 (1) (2000):67-99.

[99] David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy, (*Cambridge, MA: Harvard Univ. Press, 1995).

[100] Collin Scott, "Regulatory Governance and the Challenge of Constitutionalism". In Dawn Oliver, Tony Prosser, and Richard Rawlings, *The Regulatory State; Constitutional Implications*, (Oxford Univ. Press, 2010).

[101] Bernstein and Cashore, 'Nonstate Global Governance: Is Forest Certification a Forest Convention?' in John Kirton and Michael Trebilcock (eds*.) Hard Choices, Soft Law: Combining Trade, Environment, and Social Cohesion in Global Governance,* (Aldershot: Ashgate Press). 2004.

[102] Bernstein and Cashore, *Id*.

regional working groups to develop specific standards for their regions based on the broad principles and criteria.[103] This dual concept of industry-led vs. NGO-led self regulations create distinctions that define each nature and character, as laid down in the matrix below.

Table 27
Conception of forest sector NSMD certification governance systems[104]

| | NGO-led | Industry-led |
|---|---|---|
| **Who participates in rule-making** | Environmental and social interests participate with business interests | Business-led |
| **Rule-substantive** | Non-discretionary | Discretionary-flexible |
| **Rule-procedure** | To facilitate implementation of substantive rules | End in itself (belief that procedural rules by themselves will result in decreased environmental impact) |
| **Policy-scope** | Broad (includes rules on labor and indigenous rights and wide ranging environmental impacts) | Narrower (forestry management rules and continual improvement) |

This dual model arguably creates competition between each other. The problem of competition among certification standards is not limited to Indonesia. Cashore, Auld, and Newsome show that in North America and Europe there is also competition between the internationally acclaimed Forest Stewardship Council (FSC), mostly supported by environmental NGOs, and its domestic rival scheme, created by timber companies and forest landowners.[105] These include the American Forest and Paper Association's Sustainable Forestry Initiative (SFI), the Canadian Sustainable Forestry Certification Coalition, and the Pan European Forest Certification (PEFC) system. In a different study, Cashore, Auld, and Newsome run an empirical study to assess support for/against certifications. Relevant to forest certification organized by the international Forest Stewardship Council (FSC), forest companies and landowners respond to the programs in various ways. Some are committed to pursuing detailed standards, while others call for more flexible standards created to compete with FSC.[106] Forest companies' and landowners' decisions to support a certain certification program are constrained and influenced by a complex group of factors. *First*, foreign market dependence, in which higher reliance on foreign markets implies more support for the international FSC program, because international buyers can make, often controversially, demand for FSC certified wood without high political exposure. *Second*, when forest management practices are considered a 'problem', FSC is more likely supported 'as a way to expedite problem resolution and avoid controversy, or as a way to gain 'social license'. *Third*, the problem of land ownership/land tenure issues may impact reception to FSC, because this creates high transaction costs and low economies of scale.

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[103] Forest Stewardship Council, 1999.

[104] Benjamin Cashore, 'Legitimacy and Privatization of Environmental Governance: How Non-State Market-Driven Governance Systems Gain Rule-Making Authority'(2002) 14 *Governance; an International Journal of Policy Administration and Institution* 52: 503-529. See also, Cashore, Auld, Newsome, Governing Through Markets, Forest Certification and the Emergence of Non-State Authority, (Yale Univ. Press, 2004).

[105] Cashore, Auld, and Newsome, Forest certification (eco-labeling) programs and their policy- making authority: explaining divergence among North American and European case studies, *Forest Policy and Economics* 5 (2003) 225-247

[106] Cashore, Auld, and Newsome, *Id.*

*c. Challenges regarding the implementation in developing countries*

Despite the growing awareness, the role of private regulations in developing countries receives relatively little attention in the relevant legal scholarship, or in the wider context of market based instruments. Braithwaite also discussed the idea of applying responsive regulation in developing countries.[107] He argues that 'responsive regulation conducted by regulatory networks of governmental and non-governmental actors allows for networking around capacity deficits. NGOs play a vital role in this kind of regulation. By utilizing NGOs and local social pressure, developing countries might develop a ''regulatory society'' model, bypassing the regulatory state.'[108] When a regulator fails to enforce a regulation because of lack of capacity of resources, it can resort to its network partner to render regulatory assistance. As opposed to escalating to more interventionist sanctions, and therefore more costly measures, a regulator can engage network partners to escalate pressure on the regulated firm. 'A weak developing country regulator can enroll (and be enrolled by) both transnational and village networks, private and other public sector organizations, NGOs, professions, creatively disparate types of network partners.' For example, when a government does not have the capacity to evaluate the sustainability of the palm oil industry, it can engage an internationally acknowledged environmental auditing firm to provide the assessment. In order to reduce unsustainable practices, the regulator can cooperate with banks not to provide lending to firms that do not meet certain sustainability criteria.[109]

Espach's study focuses on the concrete application of private regulations in developing countries by comparing those of Brazil and Argentina in the area of forestry and chemical regulations. The study shows that, as opposed to the impact that private regulations have had in developed countries, developing countries' governments have little influence over program effectiveness or local legitimacy. On the other hand, despite the transnational drive of developed consumer countries, the effectiveness of private regulations depends on the capacities and strategies of local administrative institutions and advocacy networks. As with legitimacy and accountability, an incentive to achieve market credibility drives 'international convergence across different program types toward open, democratic participatory and procedural norms.'[110]

The combination of formal laws and private regulations receives stronger support with the growing interest in the REDD+ (Reduction of Emissions from Deforestation and Forest Degradation). Long, for instance, suggests a combined application of non-state networks and public international legal order to enhance the effectiveness of the REDD+ regime through co-

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[107] Braithwaite, 'Responsive Regulation and Developing Economies', *World Development* Vol. 34, No. 5, pp. 884–898, 2006.

[108] Braithwaite, 'Responsive Regulation and Developing Economies', *Id*.

[109] Braithwaite, 'The Essence of Responsive Regulation, Fasken Lecture', (2011) vol. 44, no. 3, pp. 475-520.

[110] Ralph Espach, 'Does Private Regulations Work in Developing Countries? Private Environmental Regulatory Programs in the Argentine and Brazilian Chemical and Forestry Industries' http://mba.tuck.dartmouth.edu/mechanisms/pages/Papers/Espach_paper_11.16.pdf

benefits with forest certification and a public-private financing arrangement.[111] He proposes a formal integration of public and private global governance through co benefits of REDD+ and certification that is necessary to promote both 'compliance with global environmental goals and sensitivity to local and national circumstances and priorities'. Long also addresses the problem of legitimacy and accountability, in which he argues that 'by employing non-state bodies for implementation and certification, supranational regimes will create an additional — and perhaps more responsive — channel of communication between local constituencies and global decision makers.' In research conducted by Rae, Gunther, and Godden,[112] the authors also acknowledge the importance of incorporating the REDD+ scheme with the prevailing timber certification arrangements. They argue that, 'timber certification provides an important forerunner to REDD+ and offers both synergies with and lessons for REDD+ activities. The emergence of certification schemes tailored to REDD+ programs reflects the voluntary carbon market's attempts to bridge the intersection between REDD+ governance and the delivery of co-benefits to forest dependent communities.' They further note the element of independence in the private certification scheme, especially in the verification method to consumers, as opposed to formal laws that might be biased towards a certain state interest.[113]

In short, all of these issues provide a framework of analysis from which further analysis of sustainable palm oil regulation can be developed. At this stage, there are still many academic issues left unresolved. Further research is necessary to answer how these issues are relevant in the academic context.

## G. CONCLUSION

This study serves as preliminary guidelines for further investigating the global trade regulatory framework for the sustainable palm oil industry. RSPO serves as a complementary institution to advance the sustainable palm oil agenda. In the implementation, RSPO has shaped the development of Indonesia's national legislation, most notably in the establishment of the government-backed mandatory standard of ISPO. In this regard, RSPO must be viewed as a system connected with the existing national legal system, with which RSPO can co-exist, collaborate, or compete. Further, normative issues of legitimacy (through representation) and effectiveness are always at the center of the debate. This is especially evident given that the systems, similar to other food-sourcing sustainability standards, will be always differing in position between the upstream (grower) and the downstream (retailer). This creates legal issues if RSPO functions as an instrument of trade restriction, not by virtue of legal barriers (non-tariff barriers), but instead by exerting the dominant position of its members (market participants slash private regulators) over unilateral rule-making and rule-implementation not based on international standards. Unfortunately, WTO is not an

[111] Andrew Long, 'Global Climate Governance to Enhance Biodiversity and Well Being: Integrating Non State Networks and Public International Law in Tropical Forests' *Environmental Law*, Vol. 41, No. 1, p. 95, 2011.

[112] Rae, Gunther, Godden, 'Governing Tropical Forests: REDD+, Certification, and Local Forest Outcomes in Malaysia', MqJICEL (2011) Vol 7(2).

[113] Rae, Gunther, Godden, *Id*.

international competition authority that can address this issue, nor have its Members entrusted it with private standard supervision and discipline enforcement. This leaves room for further research and intergovernmental cooperation on the future of transnational trade governance.

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