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**DO COMMODITY CERTIFICATION SYSTEMS UPHOLD INDIGENOUS
PEOPLES' RIGHTS?
LESSONS FROM THE ROUNDTABLE ON SUSTAINABLE PALM OIL AND
FOREST STEWARDSHIP COUNCIL**

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Do commodity certification systems uphold indigenous peoples' rights? Lessons from the Roundtable on Sustainable Palm Oil and Forest Stewardship Council

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Abstract:

Governments' failure to adequately regulate natural resource use to protect environmental values and human rights has led to the development of 'voluntary' certification systems for several commodities. Two systems that have paid most attention to indigenous peoples' rights are the Forest Stewardship Council and the Roundtable on Sustainable Palm Oil. This article briefly reviews the effectiveness of these two schemes to uphold indigenous peoples' rights with respect to: the certification standards adopted, especially on land and consent; indigenous peoples' participation in scheme governance and standard-setting; the accountability of scheme members to affected indigenous peoples; mechanisms to provide redress for violations of rights; and the barriers or incentives for indigenous producers to market certified products.

Certification standards have responded to the evolution of internationally accepted rights of indigenous peoples and pioneered the adoption of Free, Prior and Informed Consent. On the ground, results are more equivocal. Schemes differ in the extent they include indigenous peoples in governance and standard-setting. FSC has a body to ensure indigenous engagement. RSPO has few indigenous members. Both have accountability procedures but their effectiveness is contested. Gaining redress through the grievance procedures has been difficult, although some cases show remedy is possible. Overall, the politics of scheme governance and economies of scale mean large companies dominate markets for certified products, despite concerted efforts to simplify procedures to certify small producers.

Certification schemes seek to go beyond the law but are not above the law and have to operate within national legal frameworks that diminish indigenous rights. Consequently, they cannot fully uphold or remedy rights violations. Ultimately, national legal reforms are necessary to secure indigenous rights. Meanwhile, certification systems provide some, albeit compromised, protection of rights and scope for redress of violations. To maximise their effectiveness, they need to be more rigorous in upholding their own standards.

Keywords: Certification, indigenous peoples, RSPO, FSC, land rights, consent

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Introduction

International awareness of the way State-led development causes unacceptable damage to tropical rainforests and undermines the rights of indigenous peoples grew dramatically during the 1980s (Myers 1985; Caufield 1986). Early campaigns, of what are now known as transnational advocacy networks (Keck & Sikkink 1998), included exposure of the social and environmental destruction being underwritten by international financial institutions, like the World Bank, and United Nations (UN) agencies, such as road-building in the Amazon, dams in India and transmigration in Indonesia (Rich 1985; Kalpavriksh 1985; Colchester 1986). Meanwhile, global campaigns against the relentless logging of South East Asian forests by corporations, at the expense of local communities and indigenous peoples, exposed the collusion between State bureaucracies and private companies driven by the global timber trade (Hong 1986; Colchester 1989; Nectoux & Kuroda 1989; SAM 1990; Dauvergne 1997).

It was the dream of conservation bodies and environmental NGOs that, just as international laws had been agreed to establish binding standards upholding human rights and banning slavery and genocide, so international legal agreements could be crafted to prohibit the worst excesses of trade and investment. Key expressions of this growing global awareness were the concept of 'sustainable development' (Brundtland 1987) and the UN Conference on Environment and Development in 1992, at which nations signed the Convention on Biological Diversity and the Framework Convention on Climate Change (Grubb et al 1993).

Parallel to these developments, by the mid-1980s, the UN Centre for Trade and Development had accepted that environmental sustainability considerations should be taken into account in international commodity trades. Provisions to this effect were written into the inter-governmental agreement setting up the

International Tropical Timber Organisation (ITTO) in 1983 (Hpay 1985). During the late-1980s, ITTO thus became an active forum at which civil society groups called for regulation of the tropical timber trade and pressed for the adoption of standards not just to restrain overharvesting of timbers but also to insist on legality and respect for indigenous peoples' rights (Colchester 1990).

However, producer countries, led by Malaysia, strongly resisted efforts to prohibit trade in illegal timbers, demand respect for indigenous peoples' rights, and assure sustainable livelihoods for forest peoples. They even blocked pilot schemes to assess the practicality of labelling timbers as to their site or country of origin, so allowing them to be traced through the supply chain (FoE & WRM 1992; Gale 1998).

Moreover, aware that it was unfair to single out tropical timbers, when equally egregious environmental and social problems were associated with logging in boreal and temperate forests, NGOs built up international campaigns to target boreal forest logging (Dudley, JeanRenaud & Sullivan 1995) and later sought to expand the mandate of the ITTO to include temperate and boreal timbers, a position welcomed by tropical timber-producing nations but rejected by northern governments (Mankin 1998).

By the early 1990s, it was already clear to NGOs involved in ITTO that their efforts to transform the timber trade through inter-governmental agreements and regulatory reform were unlikely to be successful, even though they had raised awareness of the human rights and social dimensions of the global forest crisis (Humphrys 2008). It was this realisation that gave rise to the initiative to set up the Forest Stewardship Council (FSC), which was formally inaugurated through an international conference held in Toronto in 1993. Through open membership to CSOs, individuals and companies, FSC set out to agree:

a 'multi-stakeholder' system of governance and consensus-based decision-making; adoption of voluntary standards for forest stewardship and timber trading; mechanisms for independent assessment; accreditation of certification bodies and; mechanisms to ensure transparency, accountability and redress (Elliott 2000). This initiative, which purposefully excluded government representatives, was later copied by similar schemes to certify the responsible or sustainable production of marine resources, palm oil, soy, biofuels, beef, sugar, cotton, shrimp and agricultural produce in general (Chao, Colchester & Jiwan 2012).

Indigenous rights in FSC and RSPO standards

At the time FSC came into being, many participating NGOs envisioned a radical change in forestry practice through a switch from the large-scale, timber-dominated industry that was destroying forests and abusing rights to small-scale, community-based production systems that would accommodate multiple landscape values and be based on social justice (WRM 1989; 1992; Dudley, Jeanrenaud & Sullivan 1995).

This vision provided impetus for the inclusion of indigenous peoples' rights in the FSC's early standard-setting process,¹ which actually began before the Toronto meeting. By this time, through the procedures of the UN and International Labour Organisation (ILO), a concerted movement of indigenous peoples and supportive organisations had already spent well over a decade pushing for the adoption of international norms respecting indigenous peoples' rights, based on recognition of the right of all peoples to self-determination (Falk 1988; Hanum 1990; Niezen 2003; Manela 2007).

One early, albeit partial, expression of this push was ILO's revised Convention 169 on

Tribal and Indigenous Peoples, adopted in 1989 (Colchester 1989; MacKay 2003). This was followed by the adoption, in 1993, by UN Human Rights Commission of the draft UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Although, it was to be a further 14 years before the revised UNDRIP was endorsed by the UN General Assembly, the draft shaped international discourse about indigenous peoples and strongly influenced human rights jurisprudence at the UN treaty bodies (MacKay 2005, 2006, 2009, 2011, 2013, 2105) and regional human rights systems (MacKay 2001; Braun & Mulvagh 2003; FPP 2009).

It has thus been clearly established under international law that indigenous peoples enjoy collective rights, as peoples, to: self-determination; survival; subsistence; sovereignty over natural resources; self-governance; self-representation; self-identification; ownership and control of the territories, lands and resources they have traditionally owned, occupied or otherwise used; exercise of their customary law; and control of their intellectual property and cultural heritage. No developments should be carried out on their lands, or measures passed which may affect their rights, without their 'Free, Prior and Informed Consent' (FPIC).

Drawing on these emerging principles of international law, FSC's first Principles and Criteria (P&C) thus required operators to recognise indigenous peoples' customary rights to own, control and manage their lands and forests, and required that both operations by others on their lands, and compensation for the application of their traditional knowledge in management, be subject to the 'free and informed consent' of the peoples' concerned (FSC 1994). Building on lessons learned, these requirements were gradually strengthened. In 2006, FSC issued Guidance on how provisions related to indigenous peoples' rights should be affirmed in national interpretations (FSC 2006). Later iterations of the Generic P&C

1 The early meetings setting up FSC did not actually include Indigenous Peoples directly.

made it clearer that operators should not just recognise and respect indigenous peoples' rights but should demonstrably identify and uphold them (FSC 2012). FSC also developed FPIC Guidelines (FSC 2013), which are now in the process of being reviewed.

As the FSC standard has evolved, in parallel to changes in international law, FSC has also sought to ensure that the standard requirement for the legality of all operations takes into account these advances by requiring compliance with relevant nationally ratified treaties and conventions. The standard also recognises that compliance with specific P&C 'may require compliance with international law even when the conventions have not been ratified nationally' (FSC 2012:4). However, an attempt by FSC's Board to ensure compliance with relevant ILO Conventions and thus the requirement that 'the legal and customary rights of indigenous peoples be legally recognised and respected' (FSC 2002) was considered impractical and was not incorporated into later iterations of the P&C. A major shortcoming of FSC P&C is that they do not require FPIC prior to the issuance of concessions over IP lands, only prior to management (FSC 2012).

Members' concerns, about the environmental impacts of forestry operations, have also strengthened standards in ways that provide additional protection of communities' and indigenous peoples' rights. In 1996, FSC adopted requirements for operators to identify, and then maintain or enhance, High Conservation Values (HCV), which include areas crucial for environmental services, meeting basic needs, and cultural identity, all of which need to be identified through participatory engagement with communities (Brown et al. 2013).

RSPO, which was set up in 2004, benefited greatly from FSC's decade of experience with certification and many of the requirements in the FSC standard were adopted into RSPO P&C (RSPO 2005). However, from the point of view

of indigenous peoples, the palm oil sector differs in some important ways from forestry. In most countries, palm oil operations are applied in the agricultural sector, not in areas designated as forests and subject to forestry laws. Natural forest logging, at least in many tropical forests and where done in accordance with forestry laws, only results in the selective extraction of timbers from forests. Although seriously disruptive of local livelihoods and welfare, some indigenous peoples find they can accommodate these impacts without major adjustments to their ways of life. By contrast, oil palm estates, like timber plantations, require large-scale conversion of lands and forests to industrial monocrops and accord long-term tenures or permanent ownership to the operators. Such dramatic transformations of land use require major changes in communities' ways of making a living and imply permanent cultural changes. The land laws usually have the effect of legally extinguishing prior rights in land or convert customary lands into individually-owned properties, subject to the vagaries of land markets.

To try to accommodate this reality in ways consistent with international human rights law, from the outset RSPO P&C include provisions for just land acquisition, as well as requiring recognition of legality including relevant international laws, customary rights to lands, self-representation and recognition of FPIC. RSPO P&C prohibits any land acquisition without FPIC and any clearance of HCVs, after 2005. From the outset, RSPO P&C had clear indicators requiring operators to engage with indigenous peoples and local communities to carry out participatory mapping in order to establish the extent of customary rights prior to agreements about acquiring lands (RSPO 2005, 2013). RSPO also evolved a Guide to FPIC in 2008 (FPP 2008), which was revised in 2015 (RSPO 2015).

From Principles to Practice

How effective have these standards been in changing the way businesses deal with indigenous peoples? Experience has been very mixed. In the case of FSC and the Saami, a traditionally reindeer-herding people of Scandinavia, after protracted negotiations, large-scale timber corporations in Sweden agreed not only to allow Saami herds seasonal access to their management units but also that at least 10% of forests should be retained as old growth, to ensure reindeer could browse pendent lichens during harsh winters (Johansson 1998). However, medium- and small-scale timber operators, who control some 50% of Swedish forests, rejected such standards, fell out with FSC and even successfully prosecuted the Saami in the courts for trespass (Colchester, Sirait & Wijardjo 2003).

In Canada, the experience has also been somewhat positive. Due to the indigenous peoples' strong regional and national organisations and capacity to engage with FSC, (sub-)national interpretations have clearly upheld indigenous peoples' rights (Collier 2002; FSC-BC 2002; Colchester, Sirait & Wijardjo 2003). The standards have taken pains to clarify how the FSC standard applies in the context of Canadian laws and have ensured that, by and large, FSC-certified operations do take some additional measures to recognise indigenous peoples' rights and give them a voice in forest management decisions.

In 2014, FSC launched a new initiative in Canada to strengthen Aboriginal Peoples' rights. As Brad Young, Executive Director of the National Aboriginal Forestry Association, noted: "Free, prior and informed consent is seen as one of the key principles of international human rights law to protect our people from destruction of our lives, culture and livelihood. FSC is the only forest certification system to implement and rigorously apply free, prior and informed consent to their forest management

standards" (FSC 2014). The same year, certification bodies suspended an FSC certificate of Resolute, one of Canada's leading timber companies, which was in conflict with the Grand Council of the Cree in northern Quebec, for persistently failing to comply with P&C requirements (Greenpeace 2014).

By contrast, Indonesia has been a problematic test case for FSC, which has struggled to adjust its system to national realities. One detailed review, carried out for FSC in 2003, found that Indonesian national policies and laws, in effect, denied indigenous peoples' rights to control and manage their customary lands and forests, be represented through their own institutions, exercise their customary law and reject timber operations on their lands. Despite the fact that only 10% of forests had been formally gazetted, the Government assumed all forests (covering some 70% of the national territory) were State Forest Areas void of rights. About half this area had been, arguably illegally, leased out to loggers, without any consultation with indigenous peoples let alone their consent. The study showed that some of these timber operations had been FSC-certified, without the development of a national interpretation and even where communities' rights had been ignored in the hand-out of concessions. It revealed that forest gazettement had not been done, and consent procedures had not been complied with. However, companies were nevertheless being certified and required to comply with consent requirements merely as 'Corrective Action Requests', placing communities in a very weak position to insist on changes to operations in ways that gave them real control over their lands and forests (Colchester, Sirait & Wijardjo 2003).

Despite a historic Constitutional Court judgment in 2012 which recognised that, where indigenous peoples' territories overlap forests, these should not be considered State Forest Areas, and despite official recognition that some 50 million people in 33,000 administrative

villages inhabit forests, on the ground there has been very little done to formally recognise communities' rights (Colchester, Anderson & Chao 2014). Yet, almost half a million hectares of Indonesian forests have been FSC certified, many overlapping communities' customary lands. A recent study by the Corruption Eradication Commission reveals that about 80% of timber production in Indonesia dodges formal oversight by the forestry administration (KPK 2015).

Interim findings from field tests of FPIC compliance show that in practice FSC certificate holders are not required to recognise the full extent of indigenous peoples' customary rights and often only obtain partial community consents prior to timber extraction. The procedure is thus not fully upholding indigenous rights (Linthorpe, van der Vlist & Auger-Schwartzberg 2015).

Whereas FSC's scope potentially applies to the management of all forests worldwide, RSPO's application is shaped by the fact that 85% of globally traded palm oil is produced in just two countries, Malaysia and Indonesia. Yet, despite this, processes to define national interpretations in Malaysia and especially Indonesia have done little to engage with national indigenous peoples' organisations and have been deficient in clarifying how RSPO P&C as voluntary standards can be applied in ways that conform with, and yet go beyond, the limitations of national law. Thus in Malaysia, where State laws only weakly recognise indigenous peoples' customary rights (Nicholas 2000; Doolittle 2004; Bulan 2012), companies continue to insist that land development in accordance with national laws is all that is required to comply with RSPO P&C.

In Indonesia, despite adoption of the Generic RSPO P&C in 2005, their review and adoption with little change in 2007 and then a national interpretation in 2008, so few companies had adhered to the basic requirements of the P&C

by 2012 that the RSPO had to set up a special compensation regime to allow companies to retrospectively make remedy for areas of critical biodiversity (HCV1-3) cleared without a prior HCV assessment. In 2015, RSPO agreed a procedure whereby these companies should also compensate communities, including indigenous peoples, for any clearance of HCVs 4-6 between 2005 and 2014 (RSPO 2015).

Since 2006, detailed NGO legal and field research in Indonesia showed that the government procedure for allocating leases of land to palm oil plantations had the effect of permanently extinguishing indigenous peoples' rights to their lands, yet most indigenous communities agreeing to compensation payments from oil palm companies thought they were accepting companies to temporarily occupy their lands (Colchester et al 2006). The national interpretation adopted two years later incorporated no measures to address this major loophole. Asked why companies did not inform communities during land acquisition that this would have the effect of permanently extinguishing their rights, a company employee responded: 'Oh, but they'd never sign if we told them that!' (Anonymous planter in West Kalimantan to author 2009)

A wide-ranging review by NGOs of 17 different palm oil developments in Philippines, Thailand, Malaysia, Indonesia, Democratic Republic of Congo, Cameroon and Liberia showed that even prominent RSPO member companies are failing to adhere to the RSPO P&C with respect to indigenous peoples (Colchester & Chao 2013; see also Colchester & Chao 2012). The studies detailed how land grabs continue, communities are not being enabled to represent themselves through institutions of their own choosing, crucial information is not being shared, participatory mapping is not being carried out and, where compensation is being paid, lands are being acquired from individuals, ignoring collective rights and customary systems of land tenure and transfer. Underlying these

problems is the fact that governments hand out concessions, and companies accept them, without regard to indigenous peoples' rights to their lands and FPIC (more recent studies show this problem recurring in Colombia (EIA 2015), Peru (FPP 2015a), and Liberia (FPP 2015b; SDI 2016; SesDev 2016)). Despite the clear requirements of RSPO P&C to respect indigenous peoples' rights, land-grabbing based on imposed concessions remains the norm.

All this raises the question, why are FSC and RSPO certifying continuing violations of indigenous peoples' rights? This requires a more detailed answer than can be accommodated here but points to a major weakness in both systems: companies directly pay the Certification Bodies (CBs), which audit their operations (Counsell & Lorass 2002), yet CBs have enormous discretion in interpreting the standards and are weakly accountable (EIA 2015).

Certifying small producers

If the original vision of many NGOs engaging in the FSC was to shift forestry in favour of community management, they have been disappointed. It became clear early on that community-based operations needed a lot of technical and financial assistance to demonstrate reasonable levels of forest management and compliance with FSC's quite onerous requirements (e.g. Stocks & Hartshorn 1993). Even though real environmental and social gains could be demonstrated through community management (e.g. Snook 2005), the initial and then recurrent costs of compliance and paying for audits were hard for small enterprises to bear. Although FSC's earliest certificates were for community forestry operations, for multiple reasons - economies of scale, company domination of national interpretations, the importance attached by FSC's board to reaching production targets by area and volume, as well as the obstacles to community compliance - already by 2000 90% of FSC certified forests were run by companies, individuals and

public bodies, not communities (Thornber & Markopoulos 2000; Robinson & Brown 2002; Counsell & Lorass 2002).

FSC pioneered numerous measures to encourage the certification of community forestry. It pooled lessons through a Social Working Group, it actively recruited members for the Social Chamber, and in 1998 it established a system for Group Certification, whereby small-scale producers could group together to be certified, thereby reducing transaction costs. Within four years FSC could boast certification of 1 m ha. of community forests in 7,500 operations in 23 countries (Colchester, Apte, Laforge, Mandondo & Pathak 2003). In 2004, FSC also adopted a simplified set of requirements to make it easier to certify Small and Low-Intensity Managed Forests [SLIMF] (FSC 2004). Despite all these efforts, community forests comprise a declining proportion of FSC certifications. By 2016, although FSC certified community forests now cover over 4 m ha., they make up only 2.16% of the total 187 m ha. of FSC certified forests (FSC 2016). By comparison, the Rights and Resources Initiative estimates that about 15% of forests worldwide are currently under communities' and indigenous peoples' ownership and / or management.¹

Again learning from the FSC experience, in RSPO, in 2005 NGOs took the initiative to pass a membership resolution setting up the RSPO Task Force on Smallholders with the aims of pooling lessons, directly involving smallholders, adjusting the P&C to accommodate their realities, and developing mechanisms for scheme and group certification. Initial surveys showed that between 10 and 30 % of palm oil production was coming from smallholdings (Vermeulen & Goad 2006). A survey by NGO members of RSPO identified major problems faced by Indonesian smallholders in getting fair prices for their land, labour and palm fruits.

¹ <http://www.rightsandresources.org/en/resources/tenure-data/tenure-data-tool/>

Indonesian smallholders also noted that they lacked an autonomous organisation to represent their interests and set about creating SPKS (*Serikat Petani Kecil Sawit* – Union of Oil Palm Smallholders) (Colchester & Jiwan 2006), which now has active chapters in several provinces around Indonesia.

Meanwhile the Task Force developed simplified standards for the certification of Scheme Smallholders (ie those contractually bound to specific mills), adopted in 2009, and for the group certification of independent smallholders (ie those free to choose to which mills they sell fruits), adopted in 2010 (Colchester 2011). The Task Force also called for the setting up of a special fund to help smallholders to get organised, improve productivity and get certified. By 2014, RSPO's Smallholder Support Fund (RSPO 2014), which is allocated a percentage of RSPO's gross revenues, already had assets of approximately US\$6 million (RSPO 2014), a sum which increases annually, as income currently exceeds expenditure.

Like FSC and despite these efforts, RSPO has struggled to get smallholders certified. It was only in 2015 – after 5 years of delays – that RSPO agreed a simplified procedure for independent smallholders to carry out HCV assessments in existing plantings. An equivalent procedure is still lacking for new plantings. Clearly, certifying competing independent growers has not been a high priority for an organisation dominated by large corporations. Consequently, although by February 2016, RSPO had certified 2.8 m ha. producing 13.3 m tonnes of Certified Sustainable Palm Oil (CSPO) (RSPO 2016a), comprising an estimated 21% of globally traded palm oil (RSPO 2016b), only about 12% of this CSPO comes from certified smallholder schemes, contractually linked to large estates and mills. Less than 0.4% CSPO comes from group certifications of independent smallholders (Julia Majaj pers. comm. 2 March 2016).

Despite good intentions and valiant efforts by some, certification acts as a barrier to smallholder access to markets and favours large-scale producers, thus skewing markets in favour of large businesses.

Participation in scheme governance and standard setting

One aim of multi-stakeholder processes is to ensure the direct involvement of affected parties so they can have a say in decision-making based on 'balanced' representation. The assumption is questionable, not least because it gives equivalent voice to very diverse players, thus elevating, for example, distant retail companies and investors to the same status as rights-holders, such as indigenous peoples, who under international law are the ones who should actually control the lands and forests in contention. The risk is that these processes, may not only disguise existing power inequalities but also exacerbate them by reinforcing mainstream discourses, disqualifying alternatives and excluding alternative ways of achieving sustainable development (Cheyns & Riisgaard 2014; Cheyns 2014).

Be that as it may, FSC set out from the start to balance decision-making by creating diverse chambers of members from economic, environmental and social sectors with the aim that no one chamber could dominate another. Indigenous peoples found themselves pigeon-holed as members of the 'social' chamber, to which they objected, noting that their interests in forests are social, environmental and economic. When this issue came to the fore, as Canada began its process of developing national interpretations, it was resolved that indigenous peoples should occupy a fourth chamber, a measure that led to the relatively successful outcomes in Canada, as noted above. At the international level, after several years of negotiation, FSC was persuaded by indigenous peoples, in 2013, to adopt a Permanent Indigenous Peoples' Commission, in direct

communication with FSC Secretariat and Board.¹

However, such practices are far from general in FSC. In Malaysia, for example, indigenous peoples have struggled to be heard in FSC-sponsored processes and have opted to leave when, for example, they were prevented from even discussing the way the gazettement of forests as Permanent Forest Estate led to the extinguishment of indigenous rights (and see Yong 2002).

RSPO has also encountered serious challenges to the inclusion of indigenous peoples in decision-making. Given that few indigenous peoples are traditionally engaged in the global palm oil trade,² they have not mobilised to join RSPO and only get embroiled in its procedures when they find RSPO member companies have secured concessions to establish plantations on their ancestral lands. The result is that, with only a few exceptions, indigenous peoples' interests have been projected into RSPO via intermediary organisations not by the peoples themselves.

This reality places RSPO in a quandary. Indigenous peoples and local communities are not members of RSPO, do not participate in its governance system (with the partial exception of smallholders, some of whom are indigenous), yet are indubitably 'primary stakeholders' in terms of land. Moreover, as noted below, the majority of complaints against RSPO members derive from land disputes.

In 2014, the RSPO Board sought to remedy this glaring gap by commissioning a review of the potential to reach out to indigenous peoples and local communities through intermediary organisations, such as NGOs, trades unions,

religious bodies and others. However, although a detailed survey was carried out and an action plan developed and agreed by the Board (FPP 2014), RSPO delayed acting on the proposal for over 18 months. It remains to be seen if RSPO can match FSC in improving indigenous peoples' participation in scheme governance.

Accountability and Redress

It is a norm of human rights law that violation of a human right gives rise to a right of reparation for victims of that violation. Such remedy can take the form of restitution, compensation, rehabilitation, satisfaction and / or guarantees of non-repetition. The UN Guiding Principles on Business and Human Rights encourage companies to use non-judicial mechanisms to complement state-based judicial processes and note that such systems should be: accessible, predictable, equitable, transparent, and provide for continuous learning and dialogue. Importantly, they should also be 'rights-compliant', meaning they should ensure outcomes and remedies accord with internationally-recognised human rights (Jonas 2014).

Both FSC and RSPO have adopted procedures which allow parties to file complaints and seek redress but the extent to which these non-judicial procedures satisfy human rights requirements is contested. The main aim of their procedures is dispute resolution rather than to remedy human rights abuse.

FSC has two main levels for complaints. Complainants are expected to first address their grievances through the CB assessing company performance and then, if not satisfied, to Accreditation Services International, which reviews CB performance. These complaints are not listed on either FSC or ASI websites. There is widespread dissatisfaction among indigenous peoples about this process and the perceived failure of FSC to uphold community rights transparently (van der Vlist & Richert

1 FSC also has a permanent staff member, Social Policy Manager, charged with communicating with communities. RSPO lacks any such post.

2 A partial exception is Nigeria where palm oil trading commenced in the pre-colonial era (Robinson, Gallagher & Denny 1965)

2014). Some complaints do get escalated as challenges to companies' continued membership ('association') of FSC and these are listed on the FSC website. Relatively few such complaints concern violation of the rights of indigenous peoples and none has been filed by indigenous peoples themselves. In the case of the plantation company Bosques Cautin, in Chile, the company was accused by Agrupacion de Ingenieros Forestales para el Bosque Nativo of making racist remarks towards the Mapuche indigenous people of the area. FSC took the case very seriously and required the company to apologise. This case is still ongoing (FSC 2016). In another case, Greenpeace International alleged a series of non-compliances by the logging company SODEFOR in the Democratic Republic of Congo, including violations of human rights and traditional rights. Although the Complaints Panel upheld core elements of the case and the certificate remained suspended, the Panel could reach no conclusion on the allegation of human rights abuse as there was insufficient evidence (FSC CP 2012). The case highlights the problem that such non-judicial processes face: they often lack the resources to undertake field verification.

An instructive case where field verification did take place, concerns another complaint by Greenpeace International against the logging company Danzer and the actions of its subsidiary operation, SIFORCO, in the Democratic Republic of Congo. The company was required to undertake remedial actions to compensate the Yaliskia communities for losses. In this case, FSC asked Forest Peoples Programme (FPP) to undertake a field investigation to check if the company had fulfilled the remedial requirements. FPP found that several promised clinics and schools had not been completed and identified weaknesses in the manual on avoiding community conflicts, developed by the company to avoid recurrence. Underlying this weak performance were non-compliances in mapping community lands and ensuring operations were subject to FPIC.

Danzer was required to take further actions to bring itself into compliance. Although Danzer sold SIFORCO, it agreed to a further field investigation by FPP both of SIFORCO and its newly acquired operation in the Republic of Congo, to the north. This time FPP found that compensatory buildings had been constructed and the manual had been revised to align with FSC requirements, including with respect to lands and FPIC (Nelson & Kipalu 2014).

In 2014, Global Witness filed a complaint against the Vietnam Rubber Group (which had FSC certified operations in Vietnam) for serious violations of community rights in its operations in North East Laos. FSC upheld the complaint, finding VRG had indeed taken land without due compensation, without FPIC, and required the company 'to fully compensate stakeholders that were inadequately compensated for their losses, to ensure that all companies have carried through an environmental impact assessment and to make additional significant long term contributions to the conservation of key biodiversity areas or protected areas negatively affected by the conversion activities.' VRG has been dissociated from FSC until it undertakes these actions (FSC 2016c).

RSPO started to receive complaints about violations by members in 2006 but only formally established a functioning Complaints Panel in 2010. It has since been inundated by increasing numbers of complaints, a majority of which relate to land disputes with indigenous peoples. In Malaysia, where customary law is recognised as a source of rights, hundreds of cases of land disputes have been filed in the courts. By contrast, in Indonesia, despite the fact that there are some 4,000 land disputes registered by the National Land Bureau, very few cases have been taken to the courts as laws do not uphold indigenous peoples' rights and judiciary lacks independence (BPN 2012). Consequently, with the support of NGOs, numerous complaints have been filed with the RSPO Complaints Panel against RSPO member companies (Colchester

2010). By January 2016, RSPO has registered 56 complaints filed with RSPO since 2010, two thirds of which pertain to Indonesia and 41% being about violations of FPIC (RSPO 2016).

Like FSC, the strong emphasis of RSPO CP has been to encourage dialogue and dispute resolution, and some complainants contend this has been at the expense of making judgments about the merits of the complaints (Lomax 2014; Jonas 2014). RSPO has also adopted a Dispute Settlement Facility which seeks to provide mutually agreed mediators to help sort out conflicts between communities and companies. In addition, several cases have been addressed through the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation, a member of RSPO.

Two additional requirements of RSPO do render member companies more accountable. The first is the New Plantings Procedure, adopted in 2010, by which companies post on RSPO's website audited summaries of their Social and Environmental Impact Assessments, HCV Assessments and (ongoing) FPIC procedure 30 days before any land clearance. This gives communities a slim chance to challenge companies before their lands are cleared. RSPO procedures also make any certification of a company's operation conditional on there not being major problems with any of the same corporate group's other majority-owned operations. The measure is meant to prevent companies 'greenwashing' their profile by having a single, model operation disguise wider non-compliances.

Overall, there has been a great deal of frustration among communities and NGOs with RSPO's procedures. Complaints Panel procedures have been tardy, unclear and un-transparent while decisions have been inconsistent and have not upheld the RSPO standard (Lomax 2014; Jonas 2014). From the point of view of communities, the complaints process is complicated & bureaucratic and

only accessible with the support of local or international NGOs. Yet, there have been gains, as some Complaints Panel decisions and CAO procedures have upheld complaints. Some communities have got their lands back. Some have secured agreed compensation for losses and damages. Additional areas have been set aside for livelihoods and conservation. Benefit-sharing, infrastructural provisions and smallholdings have been increased in some places. And sometimes interim gains are also valued such as: the temporary freezing of land clearance; formal recognition of the legitimacy of community concerns; increased publicity, making community concerns more visible; getting the company to the negotiating table with communities and their advisors; and improvements in companies' standard operating procedures (Lomax 2014).

Since the critical review of the complaints panel procedure (Jonas 2014) and the endorsement of the report's main recommendations by RSPO Board of Governors, there are a few signs that RSPO's complaints system is becoming more independent, better resourced and more agile, transparent and professional. In March and May 2015, in response to a detailed complaint by FPP showing that Indonesia's largest palm oil company, Golden Agri-Resources (GAR), was taking land without proper FPIC, the RSPO Complaints Panel concluded that GAR was in violation of RSPO P&C (FPP 2015c) and ordered GAR to halt clearing or acquiring any land until the complaint had been addressed (FPP 2015d). The ruling applies to 18 of GAR's concessions totalling some 300,000 ha. GAR is now engaged in a long drawn out process to make remedy to the affected indigenous peoples and local communities. On the other hand, a weak ruling on the case of Golden Veroleum Limited in Liberia (FPP 2016a) and long delays in reaching a judgment about the way Wilmar International acquired a lease over Minangkabau lands in West Sumatra after the community had expressly asked the company not to (FPP 2016b), are examples of the

continuing frustration communities experience in getting redress through the RSPO Complaints Panel (RSPO 2016c).

These examples show that the RSPO and FSC complaints procedures still have a long way to go before they can be considered fully compatible with UN requirements.

Ways forward

In the end, the acquisition of [Indian] land in North America is a story of power, of the displacement of the weak by the strong; but it was a more subtle and complex kind of power than would have been necessary to seize land by force. It was the power to supplant Indian legal systems with the English legal system, the power to have land disputes decided by English officials using English law rather than Indian officials using Indian law. The threat of physical force was always present, but most of the time it could be kept out of view, because most of the time it was not needed.

Stuart Banner, 2005, *How the Indians Lost their Land*:82-83

Systems to improve the way resources are produced and traded through voluntary standards and certification have been adopted because inter-governmental processes have resisted binding, global obligations. Yet, although certification systems seek to go voluntarily beyond the limitations of national law, they are not above the law and have to be framed by national laws. Therein lies the dilemma for indigenous peoples. They want certification systems and companies to respect their rights based on their own customs and laws, but the companies being certified are authorised to use indigenous peoples' lands and

forests based on hegemonic legal systems that deny or diminish these rights.

FPIC is advocated as an adaptable process that can help equalise these relations by seeking to shift the locus of decision-making from companies and governments to indigenous peoples, based on their own norms and systems of representation and in accordance with customary law (Doyle 2015). Inter-cultural commercial relations inevitably require some compromise - the creation of 'Middle Ground' (White 1991; Colchester & MacKay 2004). An acceptance of legal pluralism can further help engender equitable, intercultural engagement (Colchester & Chao 2013). However, once FPIC gets articulated and adjudicated through soft law P&C and non-judicial complaints procedures, the autonomy of indigenous peoples becomes heavily constrained and only with the greatest resolve and with strong NGO support are positive outcomes possible (Afrizal 2015). Moreover, such resolve is all too easily subverted by bribery and skulduggery (Colchester & Chao 2013; Foster 2015).

The experience of indigenous peoples in FSC and RSPO is by no means wholly negative but it is compromised, not just by multi-stakeholder standard-setting and external audits, but also by the wider normative frameworks in which they are embedded. Ineluctably, conflict resolution mechanisms, such as the IFC's CAO and the RSPO and FSC Complaints Panels, require indigenous peoples' to seek settlement within normative systems that are not their own, with the result that solutions are made that may, at best, mitigate rather than fully resolve conflicts (Balaton-Chrimes & Haines 2015).¹

The fundamental problem is that forestry, land and plantation laws deny indigenous peoples'

¹ In their insightful analysis of IFC CAO, Balaton-Chrimes & Haines describe such processes as 'depoliticising development' but to my eye such procedures are highly political exactly because they impose 'a subtle kind of power' over indigenous peoples' lands.

rights to own, control and manage their lands and forests. Instead national laws tend to treat indigenous peoples' territories as State lands and State forests and give preferential access to corporations. States use their power to enforce these arrangements when indigenous peoples resist.

For example, after long delays, RSPO upheld a complaint that RSPO member IOI Group's subsidiary IOI-Pelita had taken over customary lands in Sarawak without consent and ruled IOI must provide remedy to affected Dayak communities in line with P&C, despite a High Court ruling that formally these rights had been extinguished when the disputed area was designated a protected forest before being de-gazetted and licensed to IOI (Colchester, Jalong & Wong 2013). However, notwithstanding, RSPO has been unable to oblige IOI to make such remedy and conflict resolution is now being mediated by local government. While the details of the negotiations are confidential to the parties, it is known that the offers are not based on recognition of the indigenous peoples' rights, as the government insists these were extinguished.

Another example comes from Wilmar subsidiary, PT Asiatic Persada, which had taken over indigenous lands in Jambi, Indonesia, without consent or compensation. After a long-running dispute and efforts by CAO to mediate a solution, Wilmar called in the local mobile police brigade, who drove the indigenous peoples off their lands at gun point, while PT AP operatives bulldozed their houses into the nearby creeks (Colchester et al 2011). After further complaints and during mediation by CAO, Wilmar then sold off the concession. The situation remains unresolved, yet Wilmar remains a certified member of RSPO.

Ultimately, these kinds of abuses can be ended only by national legal reforms which uphold indigenous peoples' rights and end the colonial concession system designed to facilitate the

take-over of native lands by foreign companies (Birmingham & Martin 1985; Stoler 1985; Pourtier 1989; Bryant 1997; Li 2015a, 2015b). In the meantime, indigenous peoples may decide that certification systems are better than nothing (Lomax 2014). Even so, more can be done. Certification schemes should better enforce their standards and penalise members for violations. They should also ensure more direct indigenous participation in all their activities.

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