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The Legitimacy of Biofuel Certification

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Introduction

Biofuels have been celebrated as an alternative to fossil fuels for their contribution to combating climate change. Recent developments, however, have shown that gaining energy from biomass may not be sustainable due to interference with global food supply. For example, replacing 5.75% of Europe's fuels with biofuels by 2010, as the European Union has pledged to do, will place enormous demands on existing cropping systems. Up to 12.5% of the world's corn production is already estimated to be processed to bioenergy (Zeddies 2007). Arguably there is potential for large scale biofuel production to impact food supplies, food prices and food scarcity. The UN (2007) report on biofuels warns about the environmental and food security dangers of the current massive biofuel developments. UN Special Rapporteur on the Right to Food Jean Ziegler, therefore, calls biofuels a "crime against humanity". In 2008, when food prices were dramatically soaring, he demanded an international five-year ban on producing biofuels (Ziegler 2008). At the same time, the shift from food to biofuel production affects farmers around the world. Specially, food certification systems have tended to strengthen retail power at the expense of farmers in developing countries (Bingen and Busch 2006; Busch 2000; Humphrey 2008). Such discrimination and marginalization of, especially, small farmers and subsequently an increase in economic inequality might result from illegitimate systems creating certification standards, and is ultimately linked to the question how certification as a private governance tool can be legitimated.

Biofuel certification is often seen as an institutional arrangement that could counter negative externalities, such as soaring food prices (Geibler 2007; Lewandowski and Faaij 2006; Mol 2007; Stupak et al. 2007). Voluntary certification schemes have been proposed by national state authorities in cooperation with major stakeholders (such as the Cramer Commission in the Netherlands; the Low Carbon Vehicle Partnership in the UK and the National Ethanol Vehicle Coalition in the USA). Other initiatives have been initiated by non-state actors themselves (such as the Roundtable on Sustainable Palm Oil or the Roundtable on Sustainable Soy). A global integrated biofuel network is emerging, and these initiatives aim for global process standards. This makes biofuel governance an illustrative case for international relations and agri-food research.

The primary certification schemes for biofuels that are currently in place fall within private governance. Private governance is not just influenced, but 'created', by non-state actors. Private standards are of a voluntary nature, i.e. not enforced by state authorities. However,

national state authorities often facilitate their creation. The two studies analyzed in this article represent the different cases of privately initiated versus publicly initiated certification systems: the Roundtable on Sustainable Palm Oil (RSPO) and the Cramer Commission. These two cases serve well for the study of biofuel governance because they are more advanced than other initiatives in the field and included the formulation of a set of rules at an early stage (2004 and 2006). Both initiatives lack participation of actors from the South, which is argued decreases their legitimacy. In the publicly initiated Cramer Commission, however, representation was more balanced among civil society and businesses, resulting in more concrete and challenging standards for the biofuel industry. The two case studies offer a better understanding of opportunities and challenges which the legitimacy of private governance of biofuel production face. Moreover, the article contributes to an understanding of how private governance in general can be more legitimate.

1. Fuel versus food

Biofuels are fuels derived from plant matter, e.g., sugarcane, palm or soybean, and other renewable feedstock. The most widely used transport biofuels are ethanol and biodiesel, with ethanol accounting for more than 90 percent of global biofuel production. Global production of ethanol has doubled since 2000, while production of biodiesel, starting from a much smaller base, has expanded nearly threefold (Hunt et al. 2006, see chart 1). The biofuel market makes now about 3% of global gasoline consumption, and is predicted to share about 10% of the world fuel use for transport by 2025 (McNeely 2008). Still, less than 10% of global biofuels production is internationally traded. But there is an important expansion in global trade: the European Union, the United States, and Japan which are key consumers will not have the domestic capacity to meet internal demand (McNeely 2008). Fuel derived from the entire US corn crop, with existing technologies, would meet only 15% of domestic light-duty vehicle needs (Hunt et al. 2006). Hence, developed countries are increasingly importing biomass from developing countries in order to process it to fuel.

- chart 1 about here -

Brazil, which is the second largest bio-ethanol producer after the USA, is already preparing its industry for large-scale export. A number of other developing countries also plan to increase the production of biofuels. There are several reasons behind this development: Energy gained from biomass is considered a sustainable alternative to energies based on limited fossil resources. Fossil-fuel importing countries (most notably the US and the EU) see biofuels as a way to become more independent from unstable fossil-fuel-producing and exporting regions (notably Russia, the Middle East and Venezuela) and thus increase their national energy security. Moreover, biofuels provide a new market for agricultural commodities. For instance, Malaysia and Indonesia, which already are the largest producers of palm oil, are gearing up biodiesel production with an eye on the growing European market (Hunt et al. 2006; Mol 2007).

Meanwhile, many countries have begun to experience the negative consequences of the biofuel boom. China, for instance, curtailed biofuel ambitions because large stockpiles of grain that existed in 1999, when the rapid expansion of ethanol production began, are nearly gone (Hunt et al. 2006). When soaring food prices caused hunger protests around the world in the first half of 2008, biofuels were blamed to raise crop prices (Mol 2007; UN 2007; Ziegler 2008). The biofuel boom caused speculation on food stocks resulting in soaring prices. This way, the transition from fossil fuel to current generation biofuels has intensified problems of world hunger. In addition to social vulnerabilities, NGOs such as the Rainforest Action Network or Organic Consumer Association broached the environmental issue: deforestation (of rain forest, in particular) and a decrease in biodiversity, monocropping, land degradation and water pollution.

Certification schemes are beginning to be established as a proposed solution to such problems. The agri-food governance literature shows that private standards and certification schemes are predominantly driven by the need of companies to control reputational risk (Bingen and Busch 2007; Humphrey 2008). Meanwhile, costs are shifted along the value chain with major consequences for food – and, assumable, biofuel - production systems in developing countries. New certification systems pose challenges for farmers, processors and exporters downstream the value chain.

While initially farmers, co-operatives and individual processors were the main players in the local biofuel regions, the market developed during the last decade and the trend is now definitely towards large companies and conglomerates (of major agribusiness such as Cargill and Archer Daniels for the global grain trade, conventional oil companies such as Shell, and auto manufacturer companies such as Daimler–Chrysler and Volkswagen) (Hunt et al. 2006: 75; Mol 2007). Already, Archer Daniels Midland produces about one quarter of the ethanol in the US and is the second-largest biodiesel producer in Europe (Hunt et al. 2006: 67). As shown for the agri-food sector, these large, private companies know how to set standards in a way that strengthens their power and, hence, furthers this trend towards concentration. Therefore the question of the legitimacy of biofuel certification needs to be discussed: Who is legitimated to set standards for whom?

2. Private Governance: Between Effectiveness and Legitimacy

Biofuel certification schemes have been proposed by national state authorities in cooperation with major stakeholders and also by individual stakeholders. The Roundtable on Sustainable Palm Oil (RSPO) is an example of a voluntary certification scheme proposed by stakeholders from the palm oil industry. In this article, it will be compared with the Cramer Commission which was initiated and chaired by a national state authority, the Dutch Environmental Minister Jacqueline Cramer. Both initiatives published a set of criteria for sustainable palm oil or biomass production at a very early stage (see table 1 and 2). Thus both were pioneers in the field of biofuel governance and therefore suggest themselves for the study of the legitimacy of biofuel governance.

- table 1 and 2 about here –

Proponents of such private governance mechanisms base their arguments on the assumption that, in a globalised world, conventional regulation by the nation-state faces new constraints. Many problems such as the negative effects of biofuel production and associated processes are not able to be solved by unilateralist action. Cause-and-effect chains are highly complex, and controversial interdependences exist. Therefore, the regulative arena has been opened to “new” non-state actors and their financial capital and knowledge capacities (Rosenau 1992; Messner and Nuscheler 2003).

As key consumer countries will not have the domestic capacity to meet targets set by national or European authorities, state activities (such as the EU target of replacing 5.75% of the fuels with biofuels by 2010) are externalizing production abroad. This could be leading to the negative consequences of biofuel production discussed above, especially if domestic regulation in producing countries is missing or failing to prevent negative impacts. In the long run, such failures can have global impact; for example deforestation and loss of rainforest leading to a decline of carbon sinks and enhanced global warming.

Intergovernmental approaches have thus far failed to solve the problem and there is no relevant global body. Civil society campaigns have revealed a basic demand for regulative action, and private governance initiatives have begun to fill this regulative gap. Proponents of private governance argue that the necessity of solving certain problems can be considered more important than the process leading there (Witte and Reinicke 2005; Messner and Nuscheler 2003). While focusing on effectiveness (e.g. avoiding negative effects of biofuel production), aspects of legitimacy have been neglected by many authors (e.g. Rechkemmer and Schmidt 2006, p. 67-68). However, only state actors have the authority to prescribe behavior of others, and legitimacy is not simply transferable from state to non-state actors. Private governance, i.e. non-state actors prescribing behavior (e.g. how to produce biofuel), demands new sources of legitimacy which will be discussed in the following.

2.1. Legitimizing Private Governance

Legitimacy deals with normative aspects of how to reason authority, who or what gives authority and why authority is accepted by someone or not (Beisheim 2004; Cutler 2002; Scharpf 1999). Legitimacy can be defined as

“a shared expectation among actors in an arrangement of asymmetric power such that the actions of those who rule are accepted voluntarily by those who are ruled because the latter are convinced that the actions of the former conform to pre-established norms. Put simply, legitimacy converts power into authority – Macht into Herrschaft – and, thereby, establishes simultaneously an obligation to obey and a right to rule (Schmitter 2001, p. 2)”.

According to democratic conceptions, those who obey are those who rule. Rousseau speaks of the authority of the people for the people – “par le peuple pour le peuple”. Analytically,

Scharpf (1999, among others) distinguishes between the authority of the people, the input-oriented perspective of legitimacy, and the authority for the people, the output-oriented perspective of legitimacy. The output-legitimacy accords to the effectiveness of political measures. Legitimacy is thus composed by a fair process, today based on fundamental democratic norms (input legitimacy), and an effective and equitable performance delivery (output legitimacy) (Brozus at al. 2003; Scharpf 1999).

According to liberal theory, only state actors are authorized to prescribe behavior to others because only they can be held accountable through the political institutions – in democratic systems this holds true for elected representatives. The transfer of national competencies to an international, intergovernmental organization ignited a debate on the legitimacy beyond the nation-state (Scharpf 1999; Steffek 2003; Zürn 1998).

Non-state actors are not foreseen by state-centered concepts of international relations which only know sovereign territorial nation-states and their representatives (Messner and Nuscheler 2003). Non-state actors are automatically regarded as illegitimate from this view point (per definition). When asking for criteria of non-state actors' legitimacy, we thus dissociate from classic understandings of international relations solely understood as inter-state relations. Private governance is a (new) mode of steering transnational processes that reflects a new relation between state, market and society which cannot strictly be seen as separated spheres, anymore. The same is true for the dichotomy between internal and external politics which appreciably overlap (Keohane and Nye 2003; Strange 1996). For instance, EU and US "internal" targets for biofuels have major impacts abroad (soaring food prices, rainforest clearing etc.).

Private governance is mostly understood to be legitimate because of the output (Witte and Reinicke 2005; Rechkemmer and Schmidt 2006), in the current context for example, the achievement of ending rainforest clearance for palm oil production. According to this pragmatic, output-oriented understanding of legitimacy, political decisions are legitimate if and because they effectively support the common welfare. Consensus is assumed on what needs to be done in order to solve a commonly perceived problem (Dobner 2007). Legitimacy is derived from the fact that these problems necessitate a collective solution, i.e. they can neither be solved by a single nation-state or within an intergovernmental setting nor by the market or volunteer actions of civil society alone. As this may be the case, private forms of governance beyond the nation-state integrating non-state actors are argued to be justified and "de facto" legitimated by their output (Keohane and Nye 2003; Majone 1999; Scharpf 1999).

In democratic theory, legitimacy being derived from the output alone needs to be considered with skepticism. Scharpf (2000, p. 349) denotes non-majoritarian legitimacy concepts such as technical expertise or juridical authority as an "indirect" or a "weak" form of legitimacy. Steffek (2003, p. 257) warns that political results are only accepted if they follow certain objectives and principles generally acquired. Material compensations can help to guarantee acceptance but they do not inherit the prestige of considered binding.

Deliberative democratic theories tell us that deficits of input-legitimacy can be balanced by the participation and inclusion of affected groups, the so called stakeholders (Dryzek 2000; Nanz and Steffek 2005). Participation in this sense is essential to “good governance” (e.g. European Commission 2001). The involvement of affected target groups replaces to a certain extent the elected representatives in the process of decision making. This form of legitimacy though participation is described with the term of “throughput-legitimacy” (Take 2009). Throughput-legitimacy is part of the input-legitimacy, following Scharpf, in as far as the process leading to a political result (output) refers to sources of legitimacy “par le peuple” (input). Therefore, in a way, this legitimacy replaces legitimacy through classic decisions by majority (Nanz and Steffek 2005).

The question of which groups are “affected” in a particular policy field, i.e. how stakeholder categories are defined and how specific stakeholders are chosen for participation, is the central challenge for legitimacy through participation or stakeholder inclusion. There is no guarantee for representative stakeholder participation. For instance, in private food governance, we observe power asymmetries between participation of retail companies and the rest of the product chain, between North and South, and between representatives of business and of civil society interests (Busch 2000; Fuchs 2006). While state representatives in a democratic setting are the result of general elections, the stakeholder representatives from the private sector and civil society are nominated or offer their participation in private governance through vastly more informal structures (Brozus et al. 2003; Kahler and Lake 2003).

The shift from input-legitimacy “par le peuple” to throughput-legitimacy by stakeholders also changes mechanisms of accountability. According to a democratic understanding, all power emanates from the people. Rousseau (1998 according to 1757) defines the nation or the people as sovereign which appoints the government. The government is thus accountable to the people. The latter exerts political control over the ruling authority by electing the parliament and the government. On this note, the government is the agent and the people are the principal. Political accountability can thus be defined as the central back coupling between those who rule (agents) and those who are ruled (principles) (Kahler and Lake 2003; Keohane and Nye 2003).

New throughput-legitimated private governance initiatives do not underlie any democratic control, because stakeholders are not appointed by the sovereign. The stakeholders are not elected but usually selected by the executive authority. Therefore, they suffer from a deficit of input-legitimacy following the understanding of Rousseau and Scharpf respectively. We hence need to find new adequate mechanisms of (legitimacy through) control and accountability for new steering governance modes incorporating non-state actors (e.g. grievance panel; naming and shaming) (Cutler 2002; Keohane and Nye 2003; Majone 1999). When analyzing private governance initiatives, we should ask for mechanisms of control and accountability which can improve their legitimacy. In the following, criteria for evaluating will be acuminated.

2.2. How to evaluate the Legitimacy of Private Governance

Private governance reflects a fundamental shift from an input- towards an enhanced output-oriented understanding of legitimacy (Majone 1999; Witte and Reinicke 2005). Initiatives such as the Roundtable on Sustainable Palm Oil and the Cramer Commission aim to contribute to solving specific problems, such as negative externalities of biofuel production (soaring food prices, deforestation, land degradation, water pollution etc.). The fact that certain problems get solved is considered more important than the modalities how this happens, e.g. if by state or non-state actors, if by public or private means (Rechkemmer and Schmidt 2006). An informed consensus is assumed on the “solution” or result (Dobner 2007), or a “social system” in which ex post acceptance of “the good fight” will be achieved (Bernstein and Cashore 2007). This line of argumentation can be described as “de facto”-legitimacy.

In the literature on private forms of (global) governance, including certification, two other lines of argumentation can be identified: legitimacy through stakeholder inclusion (throughput-legitimacy) and through control and accountability. Legitimacy through stakeholder inclusion refers to the process (input) generating a political decision (output). While de facto-legitimacy assumes a “neutral” or commonly agreed “best” solution, those who argue for stakeholder inclusion assume that an output varies always depending on those participating in the decision-making process (Dryzek 2000; Nanz and Steffek 2005). This perspective accords with findings from agri-food standards literature which shows the ways in which the construction of standards is bound up in the construction of power. Standards tend to strengthen retailers structural power at the expense of farmers, processors and exporters downstream the value chain (Busch 2000; Humphrey 2008; Reardon et al. 2003).

Those who argue for legitimacy through control and accountability do not deny this fact. However, they turn to the output and modalities for control and accountability in order to guarantee that the political output serves the common welfare, including the possibility to retake decisions (Cutler 2002; Keohane and Nye 2003). Elsewhere I derived these three conditions for the legitimacy of private governance circumstantially and broke them down to analytical questions (Partzsch 2007). In the following, I use this framework to examine the Roundtable on Sustainable Palm Oil (RSPO) and the Cramer Commission. The fact of one or all of these conditions being fulfilled (or not) does not necessarily generate legitimacy. In practice, actions of those who rule must be accepted voluntarily by those who are ruled, as defined above. Accordingly, this set of conditions can only serve as a guideline for analyzing initiatives of private governance and certification.

3. Roundtable on Sustainable Palm Oil

The Roundtable on Sustainable Palm Oil (RSPO) was founded in Switzerland in 2004 as a result of an informal meeting initiated by the WWF two years earlier with Aarhus United UK Ltd, Golden Hope Plantations Berhad, Migros, Malaysian Palm Oil Association, Sainsbury's and Unilever. The Statutes state that “RSPO's objectives are to promote the growth and use of

sustainable palm oil through co-operation within the supply chain and open dialogue with its stakeholders” (RSPO 2004a, p. 1). Members have agreed to fulfill eight core principles which are further divided into criteria and indicators (RSPO 2007):

Principle 1: Commitment to transparency

RSPO members must provide adequate information on environmental, social and legal issues relevant RSPO criteria (except where this is prevented by commercial confidentiality).

Principle 2: Compliance with applicable laws and regulations

RSPO member have to comply with all applicable local, national and international legal provisions and regulations. The land rights of local communities with demonstrable [sic!] rights should not be contested.

Principle 3: Commitment to long-term economic and financial viability

A management plan that aims to achieve long-term economic and financial viability, and annual replanting program, projected for a minimum of 5 years, with yearly review are required.

Principle 4: Use of appropriate best practices by growers and millers

Operating procedures are documented, implemented and monitored. Soil, water and biodiversity should be protected and where possible improved through management and monitoring plans, appropriate techniques and trained staff. Agrochemicals should be used according to standards set by the World Health Organisation and Stockholm and Rotterdam Conventions.

Principle 5: Environmental responsibility and conservation of natural resources and biodiversity

Aspects of plantation and mill management that have environmental impacts, including aspects of biodiversity, waste management, energy, fire use and greenhouse gas emissions, are assessed and monitored. Information should be collated that includes both the planted area itself and relevant wider landscape-level considerations. Where the identification of impacts requires changes in current practices in order to mitigate negative effects, timetables for change should be developed.

Principle 6: Responsible consideration of employees and of individuals and communities affected by growers and mills

Social impacts are identified in a participatory way, and plans to mitigate the negative impacts and promote the positive ones are made, implemented and monitored to demonstrate continuous improvement. Participation in this context requires affected parties being able to express their views. There are open and transparent methods for communication and consultation between growers and/or millers, local communities and other affected or interested parties. Documented systems are established for dealing with complaints and grievances and with compensation for loss of legal or customary rights. The employer respects the right of all personnel to form and join trade unions of their choice and to bargain

collectively. Children are not employed or exploited. Any form of discrimination based on race, caste, national origin, religion, disability, gender, sexual orientation, union membership, political affiliation, or age, is prohibited.

Principle 7: Responsible development of new plantings

A comprehensive and participatory independent social and environmental impact assessment on new plantings is undertaken, including soil surveys, topographic information and local peoples' agreement and compensation. The results are incorporated into plans and operations. New plantings since November 2005, have not replaced primary forest or any area required to maintain or enhance one or more High Conservation Values.

Principle 8: Commitment to continuous improvement in key areas of activity

Growers and millers regularly monitor and review their activities and develop and implement action plans that allow demonstrable continuous improvement in key operations.

In summary, the principles cover a wide range of issues. These are sometimes well specified, for instance, regarding employees' rights and allowance of trade unions (principle 6). Sometimes they are only vague and displayable. The requirement of an annual replanting program, for instance, does not imply any concrete replanting requirements (principle 3). When RSPO members oblige to fulfill the criteria, they basically commit their own particular activities in the field of palm oil to a comprehensive monitoring. In the following the legitimacy of the RSPO will be evaluated according to the conditions defined above (see table 3).

3.1. "De facto" Legitimacy

The RSPO criteria define "sustainable" palm oil but are far from being consensus. Various approaches to evaluate the "sustainability" of biomass production exist and compete with each other (see Geibler 2007; Lewandowski and Faaij 2006, Stupak et al. 2007). Civil society groups not participating in RSPO such as Friends of the Earth (FoE) groups and La Soja Mata warn that the criteria are flawed and not strict enough. For instance, FoE groups demand an abdication of the use of pesticides and other chemicals on "sustainable" plantations (FoE 2007b). They blame the palm oil industry for not being sustainable at all and pursuing deforestation and greenwash (FoE 2007b): If a plantation is on land cleared before 2005, it could be classed as sustainable by the RSPO, even if the manner in which the deforestation happened was illegal and created land rights conflicts. The same holds true for a company that pushes other farming activities (food or biofuel) into previously unfilled areas of forest (principle 7). When the RSPO presented proposals to label sustainable palm oil, FoE groups staged an installation of "screaming tree stumps outside the meeting in Brussels, representing the current environmental violations caused by producing palm oil" (FoE 2007b).

However, there are also civil society groups in support of the RSPO, such as the WWF which started the initiative. RSPO is composed of ordinary members in seven different sectors: oil palm growers; palm oil processors and/or traders; consumer goods manufacturers; retailers;

banks and investors; environmental/nature conservation NGOs; social/developmental NGOs (RSPO 2004a). Non-membership or exit from the RSPO could bear high costs for anyone in the palm oil chain: If the RSPO certification system is successful, access to subsidies and even markets could be hampered for members of these groups being no RSPO members. For instance, the German government is discussing the sustainability of admixed proportion of biofuels and, in this respect, an amendment of the renewable energy law: only certified palm oil should be inserted in future (BMU 2008). Thus constraints to join the RSPO exist while there is no general consensus on what makes palm oil production “sustainable”. Such consensus would however be essential for the condition of “de facto” legitimacy which can therefore not be considered as fulfilled.

3.2. Legitimacy through Stakeholder Inclusion

Any stakeholders or knowledge holders can request membership in the RSPO (RSPO 2004a, p. 2). The admission request must be addressed to the Executive Board. The Executive Board manages all activities. It is comprised of sixteen members and designated by the General Assembly which consists of all members (RSPO 2004a, p. 3). The Executive Board can reject any admission request without having to inform the candidate of the reasons motivating such decision (RSPO 2004a, p. 2). If accepted, members have to agree to a minimum duration of their membership for a two-year period and an annual fee of 2000 euros (RSPO 2004a, p. 1, 2, 4). These conditions, of course, advantage large companies and retailers and disadvantage or exclude small farmers and civil society actors, especially, from developing countries where incomes are low. Although the decisions within RSPO are taken either by consensus or at the majority of the votes of the ordinary members present (RSPO 2004a, p. 4), these conditions apply only to members, and some stakeholder are not involved or even oppose the RSPO such as FoE (FoE 2007a/b).

Other NGOs and, in particular, WWF and Oxfam are very engaged members and, among other things, permanent members of the grievance panel. Yet, both have their headquarters in Switzerland and the U.K. respectively while no NGOs from the developing countries of production are on the grievance panel. While the RSPO is dominated by the private sector and actors from the North, conflicts exist between members and local actors from the developing countries of production. Hunger protests and demands for a ban on biofuel production indicate conflicting interests of civil society in the South (FAS 2008). Moreover, RSPO member Wilmar, the world’s largest producer of palm oil, is accused of systematic illegal burning of forests to clear land for plantations by Indonesian authorities (FoE 2007a). The company’s palm oil is however still certified as “sustainable”. This circumstance illustrates how the north-driven RSPO certification in practice contradicts local legislation and its enforcement in the South (in a way contradicting the RSPO own principles). In consequence, the RSPO cannot be considered legitimized through stakeholder inclusion.

3.3. Legitimacy through Control and Accountability

Even though the RSPO could not win opponents to biofuel industry for participation, it established mechanisms of control and accountability within its structures. First, the General Assembly is able to retake unanimously any decision. Second, with the grievance panel the RSPO provides a platform – even for non-members – to address complaints against all RSPO members. “The purpose of the Grievance Panel is to preside and deliberate on grievances that are brought to RSPO and provided detailed recommendations for resolution that would be fine-tuned and adopted by one or both (or more) parties involved in any conflict” (RSPO 2004b, p. 1). However, this process is neither involving state actors nor embedded in any legal system. There is hence neither conceptual guarantee nor empirical proof yet that the grievance system works in reality. Some non-state actors such as FoE groups (non-members) evaluate practices of RSPO member companies, and publish results. It is up to future developments, in how far these results will be taken into account, for example, in the allocation of subsidies.

In summary, the RSPO relies on principles that are arrived at by consensus, at best, among its members. A general consensus or commonly agreed “best” solution on what “sustainable” palm oil is has not been established; i.e. “de facto” legitimacy is not possible. The members are mainly from the private sector and from the North while some civil society actors explicitly oppose the RSPO; i.e. no inclusion of all relevant stakeholder groups. Mechanisms for control and accountability exist, in particular, the grievance panel although we do not know yet how effectively it works and if practices of “unsustainable” palm oil production will be tracked and prevented. Overall, only the condition for legitimacy through control and accountability can be considered partly fulfilled.

4. Cramer Commission

While the Roundtable on Sustainable Palm Oil has been initiated by non-state actors, the “Cramer Commission” (Project Group Sustainable Production of Biomass) was started by a group of six Dutch ministers that promote energy transition in the Netherlands and chaired by Jacqueline Cramer, the Dutch Environmental Minister. They invited a wide range of stakeholders to formulate criteria for sustainable biomass production and processing. However, the initiative can be considered “private governance” as it is settled outside the legal system of the Netherlands; the parliament is not involved in the creation of rules, for instance. The Commission’s results were planned to be used for the allocation of subsidies to biofuel industry (Cramer Commission 2006, p. 5). Targeting biomass flows in more general, especially, non-food applicants their scope was much broader than the RSPO focus on palm oil. Also unlike the RSPO, the Commission’s assignment was limited to the period from January 2006 until February 2007 (Cramer Commission 2007, p. 2).

Criteria and indicators for the sustainable production of biomass were formulated and devised for two phases 2007-2010 and 2011-2020 (Cramer Commission 2006, p. 6-7). The criteria for 2007 are minimum requirements which are supposed to be tested in three pilot projects (Cramer Commission 2006, p. 2, 6) while the criteria for 2011 and beyond prescribe active

measures of protection. They were classified into six themes (Cramer Commission 2006/2007):

1) *Greenhouse gas balance*: The minimum requirement is 30% emission reduction for 2007 and 50% emission reduction for 2011 (and 70% emission reduction at the long run), compared with current fossil reference.

2) *Competition with food, local energy supply, medicines and building materials* should be avoided or decreased through minimum requirements which are supposed to be generated by obligatory reporting from the period 2007-2010.

3) *Biodiversity*: Plantations must not be located in or in the immediate vicinity of ‘gazetted protected areas’ (areas protected by the government) or areas of ‘High Conservation Value’. Again, minimum requirements are developed on the basis of obligatory reporting from the period 2007-2010.

4) *Economic prosperity*: In cases where social and/or economic problems are to be expected by biomass production reporting is required according to the Economic Performance Indicators, as expressed in the Global Reporting Initiative (which is another multi-stakeholder institution).

5) *Social well-being*: Compliance is required with the International Labour Organisation, the Universal Declaration of Human Rights and the Business Principles for Countering Bribery of the OECD. Obligatory reporting is required from 2007 on, and minimum requirements are planned for 2011. Active contributions are expected “in co-operation with the local community”.

6) *The Environment*: Compliance is required with international conventions, EU regulations as well as local and national legislation and regulations on waste management, use of agro-chemicals (including fertilizer), prevention of erosion and soil exhaustion and active improvement of the quality and quantity of surface and ground water. Reporting is required on erosion and soil exhaustion, and on quality and quantity of surface and ground water (2007-2011). For 2011, again, minimum requirements are planned on the basis of reporting.

These criteria are formulated by the Cramer Commission to pave the way for a broader certification system for biomass production and processing such as the system run by the RSPO (limited to palm oil). The Commission, at first, envisages a certification based on track-and-trace system in which the traceability of biomass is guaranteed (Cramer Commission 2006, p. 18-19) but later preferences changed to a system of negotiable certificates (book and claim) as the latter could be introduced more rapidly (Cramer Commission 2007, p. 32-33). The aim is to certify “sustainable” biomass production around the world, and, potentially, to subsidize only certified biomass/biofuel.

4.1. “De facto” Legitimacy

The Cramer Commission is highly output oriented: “[I]t is of importance that the Dutch government together with other EU countries should take the initiative in the setting up of national and/or worldwide monitoring programmes to be able to recognize negative effects [of biomass production and processing] in time” (Cramer Commission 2006, p. 23). A consensus on the formulated criteria to be minimum requirements is assumed not only among the project group “consisting of representatives of the private sector, social organizations, financial institutions and the government” (Cramer Commission 2006, p. 1) but, beyond, among all stakeholders and general society.

On the one hand, the Cramer criteria are considered as non-binding advice or “recommendations” (Cramer Commission 2007, p. ii, iv). These formulations show that the Commission’s members were aware of their “private governance” status. On the other hand, the Dutch government plans to use these criteria for the allocation of subsidies and plans to take the lead in setting up national and/or worldwide programs (Cramer Commission 2006, p. 4, 5). Thus, strong incentives exist for stakeholders to participate. Exit costs could be high for biofuel industry. However, the criteria formulated so far encompass only demands for reporting; there is no impact “on the ground” yet. “De facto” legitimacy can only be analyzed to a limited extent. So far, as consensus on minimum requirements is only found among (non-representative) members, the “de facto” legitimacy is not fulfilled (see table 3).

4.2. Legitimacy through Stakeholder Inclusion

The Cramer Commission encompasses a large number and variety of actors. State actors, in particular the Dutch ministers’ group, are in the driver’s seat. As an independent chairperson the Dutch environmental minister Jacqueline Cramer has directed the process. She invited other ministers and non-state actors from the private sector (biofuel industry, financial sector) and civil society to participate (Cramer Commission 2007, p. i). Which particular stakeholders have been involved and consulted is made transparent in reports published on the internet (Cramer Commission 2006, Appendix 4). As among state actors, there is also a Dutch bias among non-state actors. Special expert input was delivered by Dutch private consultancies (Ecofys, CE) and Utrecht University (Cramer Commission 2006, p. ii). Large multinational corporations such as Unilever, Shell and Exxon Mobile (Wilmar did not participate), and firms which specialize in biofuel business such as the BioX Group participated. On the part of civil society, the Dutch sections of Oxfam and WWF and even FoE participated among others.

Different opinions between industry and civil society representatives have become evident in the Commission’s work. For instance, with respect to genetically modified organisms (GMOs), three quarter of the NGOs argued for including this aspect while only a tenth of the companies did so (Cramer Commission 2006, p. 26). In general, NGOs advocated for a stricter framework than state actors and participants from the biofuel industry (Cramer Commission 2006, p. 27). However, the results were also accepted as minimum requirements by the Commission members from civil society.

While interests between industry and NGOs were balanced within the Commission, this is not the case for the North-South divide. The Commission lacks members from the South although the reach of the criteria developed is meant to be “universal” (Cramer Commission 2006, p. 4). Thus, interests of people from the South as well as (business) interests from outside the field of biofuels are not represented in the Commission. Power asymmetries exist between developing countries producing and key consumer countries (US, EU and Japan) of biofuels, and these asymmetries are not perpetuated but aggravated by the composition of the Cramer Commission. Thus, on the one hand, the Cramer Commission (or the Dutch ministers) comes forward and, this way, jumps at the chance to overcome regulative deficits. On the other hand, this advancement goes past actors from affected developing producing countries. While civil society and business were represented in a balanced way, the Commission lacks participants from the South. Thus, the condition for legitimacy through inclusion of stakeholders is only partly fulfilled.

4.3. Legitimacy through Control and Accountability

The Cramer Commission repeatedly points to the fact that the proposed sustainability criteria must be integrated into political and policy frameworks at the national, European and global level (Cramer Commission 2006, p. iii). Such integration would allow for control and accountability. Meanwhile, the Commission itself is dominated by state actors from the Dutch government while no parliamentarians or state actors from the European or global level are involved. It can be argued that NGOs (and business) somehow take over the role of parliament as a counterpart to government within the Commission; i.e. there is a system of check and balances. However, the Dutch bias still causes a problem because the Dutch government can only be held accountable by the Dutch voters. Nevertheless, the Commission’s work is made very transparent and could theoretically be challenged by any organization or country opposing it.

In summary, the group of Dutch ministers made a concerted effort in appointing a Commission to formulate criteria that give way to a future worldwide certification system for the “sustainable” production and processing of biomass. A consensus was assumed on the formulated criteria to be minimum requirements. This “consensus” has not been established beyond the Commission, though. Thus the condition of “de facto” legitimacy cannot be fulfilled. However, conditions of legitimacy through stakeholder inclusion and through control and accountability are, at least, partly fulfilled: Civil society and business’ interests were represented equally although the Commission was dominated by Dutch actors. Besides no mechanisms for control and accountability have been established while, however, the Commission’s advance is made transparent and can be challenged by any affected actor.

- table 3 about here –

5. Conclusion

Certification schemes are beginning to be established as a proposed solution to negative externalities of biofuel production such as soaring food prices, deforestation and a decrease in biodiversity. The agri-food literature shows that certification schemes tend to be driven by retail interests at the expense of farmers, processors and exporters in developing countries. Such findings are ultimately linked to questions of legitimacy. I have analyzed the legitimacy of the completely privately initiated RSPO and of the publicly initiated Cramer Commission. Both initiatives aim to set up a certification scheme, one for palm oil and the other for biomass flows in more general, especially, non-food applicants such as transport in particular. The privately RSPO scheme is much more advanced and already well established: palm oil is certified as “sustainable” by now. Yet, this analysis suggests that the Cramer Commission has actually done more to foster legitimacy by balancing state, business and civil society interests (see table 3). In conclusion, I would like to compare the two initiatives’ legitimacy in more detail along the three conditions of my analytical framework (“de facto” legitimacy, legitimacy through stakeholder inclusion, and legitimacy through control and accountability):

1) The publicly initiated Cramer Commission as much as the privately initiated RSPO are highly output-oriented. “De facto” legitimacy assumes a consensus on what needs to be done, in case of biomass production, for example, ending rainforest clearance. There is no general consensus though on what makes biomass or palm oil production (and processing) sustainable. This is most obvious for GMOs: views are divided and both initiatives have not agreed on a position (support or ban) on the use of GMOs in “sustainable” farming. A further illustration is the case of RSPO certified plantations pushing other farming activities into previously unfilled forest areas (leakage effect). Civil society criticizes that even though a plantation indirectly causes further deforestation, it can be certified as “sustainable” by the RSPO. As private governance by the biofuel stakeholders cannot implement an unambiguously consensual output, none of the existing initiatives can be considered “de facto” legitimated. Thus “de facto” legitimacy is not only a weak form of legitimacy; in the case of biofuel production, it is currently impossible to legitimate an initiative only based on the output.

2) In terms of legitimacy through stakeholder inclusion, the publicly initiated Cramer Commission put emphasis on a balanced representation of business and civil society groups whereas the RSPO faces strong opposition from civil society groups which do not participate in the palm oil certification process. However, major business and civil society stakeholders participate in both initiatives – a fact that underlines the emergence of a global biofuel network. The RSPO principles, criteria and indicators were formulated in a way that favored the biofuel industry, for example, excluding GMOs. The Cramer criteria are more concrete in some aspects, such as the requirement of 30% greenhouse gas emission reductions (while still at the stage of being tested though). Both initiatives however fail to ensure adequate stakeholder participation from affected developing countries. Thus power asymmetries between key consumer countries (EU and US) and developing countries of production are

enhanced by these initiatives of private governance. Consequently the RSPO cannot and the Cramer Commission can only partly refer to legitimacy through stakeholder inclusion.

3) In terms of control and accountability, the privately initiated RSPO has distinctly assigned responsibility to its General Assembly and Executive Board and even set up an impressive grievance system. However, these mechanisms are “private” in the sense that there is no legal suability (outsiders can turn to them but have no enforcement guarantee). The Cramer Commission’s legitimacy will still be challenged as soon as the recommendations formulated so far are put into action and have impact on the ground. As the Cramer criteria do not evolve from the conventional legislative procedure of the Netherlands, they also cannot be changed or retaken by the Dutch parliament or enforced by the Dutch judiciary. While there is no legal accountability, both initiatives however significantly advance the definition of sustainable production criteria. The fact that the allocation of subsidies will depend on certification in the near future gives an idea of their agenda setting power. The certification schemes’ impact will not be “private” anymore. Aspects of legitimacy should thus not be faded-out; modalities for control and accountability need to be established in order to guarantee that the political output serves the common welfare.

What scholars and policy makers can learn from the two cases analyzed in this article: Private governance of biofuel production offers opportunities in terms of recommendations from stakeholders. As there is no consensus on what makes biomass flows sustainable though, actors’ recommendation need to be considered as partial. A major challenge is to integrate actors from developing countries and adverse groups of civil society in order to balance interests. Again, the Cramer Commission, which was started by state actors, was more successful in balancing state, business and civil society interests than the private sector dominated RSPO. The Dutch government took a lead in agenda-setting due to pressures from Dutch civil society. As national authorities the Dutch ministers are however limited in the scope of their activities. If the inclusion of actors from the South fails, private governance of global scope cannot be considered as legitimate (legitimacy through stakeholder inclusion) as long as no general consensus has been established (“de facto” legitimacy), and as there also is no guaranteed control and accountability (legitimacy through control and accountability). Private authority by the North is unlikely to be accepted by people in the South. Findings from the agri-food certification literature tend to be valid for biofuel certification too: Certification schemes are predominantly driven by the need of companies to control reputational risk while the position, power and security of some of the most vulnerable actors is not likely to change for the better.

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Chart 1; source: http://www.eeb.cornell.edu/howarth/SCOPEBiofuels_home.html, Accessed 9 March 2009

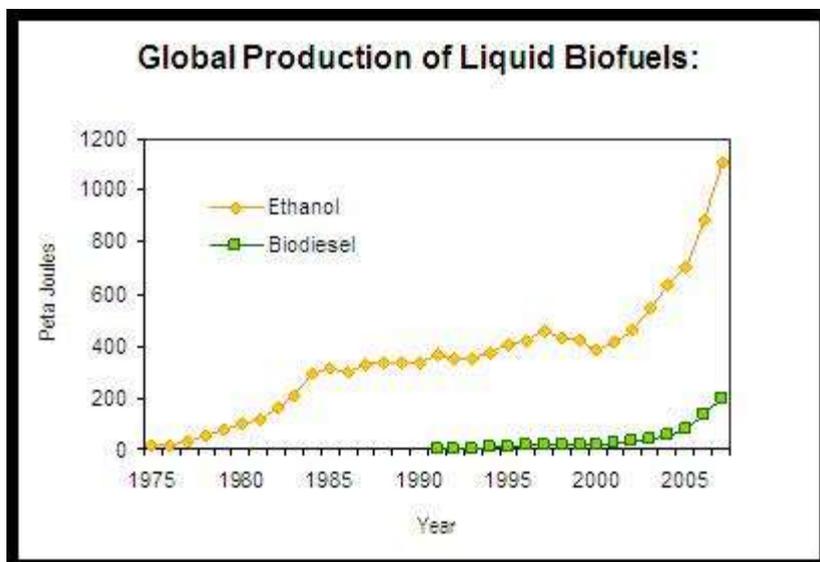


Table 1: Principles of the Roundtable on Sustainable Palm Oil

| | |
|--------------------|--|
| <i>Principle 1</i> | <i>Commitment to transparency</i> |
| <i>Principle 2</i> | <i>Compliance with applicable laws and regulations</i> |
| <i>Principle 3</i> | <i>Commitment to long-term economic and financial viability</i> |
| <i>Principle 4</i> | <i>Use of appropriate best practices by growers and millers</i> |
| <i>Principle 5</i> | <i>Environmental responsibility and conservation of natural resources and biodiversity</i> |
| <i>Principle 6</i> | <i>Responsible consideration of employees and of individuals and communities affected by growers and mills</i> |
| <i>Principle 7</i> | <i>Responsible development of new plantings</i> |
| <i>Principle 8</i> | <i>Commitment to continuous improvement in key areas of activity</i> |

Table 2: Criteria of the Cramer Commission

| | |
|----------------|---|
| <i>Theme 1</i> | <i>Greenhouse gas balance</i> |
| <i>Theme 2</i> | <i>Competition with food, local energy supply, medicines and building</i> |

| | |
|----------------|----------------------------|
| | <i>materials</i> |
| <i>Theme 3</i> | <i>Biodiversity</i> |
| <i>Theme 4</i> | <i>Economic prosperity</i> |
| <i>Theme 5</i> | <i>Social well-being</i> |
| <i>Theme 6</i> | <i>The Environment</i> |

Table 3: Evaluating the legitimacy of the Roundtable on Sustainable Palm Oil (RSPO) and the Cramer Commission

| Private governance initiative/ Condition for legitimacy | Roundtable on Sustainable Development | Cramer Commission |
|--|---|--|
| De facto legitimacy | Not fulfilled: No consensus on “sustainable” palm oil production | Not fulfilled: Consensus on minimum requirements only among members |
| Stakeholder inclusion | Not fulfilled: Dominance of private sector from the North; parts of civil society actors in explicit opposition | Partly fulfilled: Balance of state, industry and civil society interests with Dutch/North bias |
| Control and accountability | Partly fulfilled: Grievance panel (without legal consequences) | Partly fulfilled: Transparent recommendations |