

Private governance in the biofuel industry

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Private Governance in the Biofuel Industry

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Abstract

The boom of biofuel is placing enormous demands on existing cropping systems, with most crucial consequences in the agro-food sector. For instance, spurred by the increasing use of corn for ethanol, tortilla prices in Mexico suddenly tripled in early 2007. While the United Nations Special Rapporteur on the Right to Food Jean Ziegler is demanding an international five-year ban on producing biofuels to combat soaring food prices, the biofuel industry is responding with first initiatives of private governance and certification. The Roundtable on Sustainable Palm Oil and the Cramer Commission among others have formulated criteria on “sustainable” biofuel production and processing. The German Environmental Minister plans to impose compulsory blending of only certified biofuel with petrol available at German stations in the near future.

This paper explores the legitimacy of private governance and certification by biofuel industry, highlighting opportunities and challenges. There are three dominant lines of argumentation when it comes to legitimacy of private governance. (1) Most authors argue highly (or only) output-oriented (“de facto” legitimacy). In case of biofuel, this is problematic as long as no consensus has been established on what sustainable biofuel production is. (2) Deliberative democratic theories tell us that deficits of input-legitimacy can be balanced by the participation and inclusion of stakeholders (legitimacy through stakeholder inclusion). When analysing the Roundtable on Sustainable Palm Oil and the Cramer Commission, we find that both initiatives, in particular, fail to adequately include actors from the countries of production. (3) Finally, it is argued we need modalities for control and accountability in order to guarantee that the political output serves the common welfare (legitimacy through control and accountability). We will see that, again, the dominance of actors from the North is problematic because they cannot be held accountable by people in the South. Growing disaffection and lack of accountability are indicated by current hunger protests in the developing world.

Private Governance in the Biofuel Industry

Introduction

Biofuels are experiencing a tremendous boom these days, gaining support on the global energy market as a substitute for fossil energy. With oil prices over 100 US dollars per barrel, worries on the safety of nuclear energy and concerns about global warming boost the international demand for biofuel. Advancing knowledge and more efficient techniques make biofuel even more popular. Countries and producers see opportunities for new activities (see Geibler 2007; Lewandowski/Faaij 2006). Organisations such as the Food and Agriculture Organization (FAO) of the United Nations even consider bioenergy a key to the fight against hunger due to new investments and opportunities for agricultural development (FAO 2005).

However, biofuels are anything but panacea. Replacing 5.75% of Europe's fuels with biofuels by 2010, as Europe has pledged to do, or 15% of US gasoline use by 2017, as proposed by US President Bush, will place enormous demands on existing cropping systems. Vast amounts of land and water around the world are needed to produce crops that do not serve to nourish people but to keep US and EU transport systems running (Bringezu et al 2007; Hughes et al. 2007; SIWI 2007).

Since the Mexican "tortilla crisis" debates have become more intense (Geibler 2007, p. 5). Because of the energetic use of import maize, the price for maize meal increased and tortillas became suddenly three times more expensive in Mexico in early 2007. Beer prices in Germany ticked upwards partially due to the increased production of biofuels, and Italian pasta has become more expensive (SPIEGEL ONLINE 2007). Thus global competition of biofuel with food production has become obvious. The United Nations Special Rapporteur on the Right to Food Jean Ziegler is demanding an international five-year ban on producing biofuels to combat soaring food prices (Ziegler 2008, p. 22).

Other organisations such as the Rainforest Action Network or Organic Consumer Association criticise the rapid expansion of industrial agriculture that uses of agro-chemical and genetically modified organisms (GMOs). They blame the biofuel industry for repelling local communities and contributing to ecological destruction, deforestation and loss of biodiversity. The survival of orangutans, in particular, and other rainforest wildlife is seriously endangered by agricultural land development (UNEP 2007). Biofuel is booming despite such accusations. The biofuel industry and financial institutions in support of biofuel, however, respond to these demands with proposals for private governance. Among the most advanced initiatives are the Roundtable on Sustainable Palm Oil and the Cramer Commission (Geibler 2007, p. 5). While the Roundtable on Sustainable Palm Oil goes back to an informal meeting initiated by the World Wide Fund for Nature (WWF) with some multinational corporations, the Cramer Commission was launched by Jacqueline Cramer, the Dutch Environmental Minister.

The aim of this article is to analyse their legitimacy, and highlight opportunities and challenges of private governance in the biofuel industry. The initiatives are based on a very pragmatic, output-oriented understanding of legitimacy: negative effects of biofuel production should be avoided. As no consensus has been established on sustainability criteria for biofuel

production yet, this source of legitimacy is however more than questionable. Moreover, in particular, the RSPO faces major criticism from civil society, and both initiatives lack participation of actors from the South.

1. Private Governance: Between Effectiveness and Legitimacy

Debates on global governance and new steering concepts are based 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 solvable 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 capacities in terms of financial capital and knowledge (Rosenau 1992; Messner/Nuscheler 2003).

Concerning biofuel, state activities such as US and EU subsidies are causing problems to a large extent. Without subsidies biofuel production would not yet be lucrative. Negative impacts are more visible abroad than domestically. For instance, oil palm can only be cultivated in tropical areas of Asia, Africa and South America. Domestic regulation in producing countries is missing or failing to prevent negative impacts, such as deforestation and soaring food prices. In the long run, the whole world will be affected by these failures; in particular, loss of rainforest implies decline of carbon sinks and enhances global warming. Intergovernmental approaches have been failing so far, and a world government which could take care of these issues is missing. At the same time, civil society organisations reveal a basic demand for regulative action, and private governance initiatives have stepped into this regulative gap. The necessity of solving certain problems is considered more important than the process leading there (Witte/Reinicke 2005; Messner/Nuscheler 2003). While focussing on effectiveness (e.g. avoiding negative effects of biofuel production), aspects of legitimacy have been blanked out by many or not considered relevant (Rechkemmer/Schmidt 2006, p. 67-68). Legitimacy is however not simply transferable from state to non-state actors. Still, only state actors have the authority to prescribe behaviour of others. Private governance, i.e. non-state actors prescribing behaviour (e.g. how to produce biofuel), therefore demands new sources of legitimacy which will be discussed in the following.

1.2. Legitimacy Bearings of 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, p. 327; Cutler 2002, p. 27; 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, p. 16, among others) distinguishes between the authority of the people, the output-oriented perspective of legitimacy, and the authority for the people, the input-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 et al. 2003, p. 27; Scharpf 1999, p. 16; Scharpf 2000, p. 349).

According to liberal theory, only state actors are authorised to prescribe behaviour 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 organisation ignited a debate on the legitimacy beyond the nation-state (Scharpf 1999; Steffek 2003, p. 252; Zürn 1998).

Non-state actors are not foreseen by state-centred concepts of international relations which only know sovereign territorial nation-states and their representatives (Messner/Nuscheler 2003; Willets 2006). 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/Nye 2003, p. 398; Strange 1996, p. 44). For instance, EU and US “internal” subsidies 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/Reinicke 2005; Rechkemmer/Schmidt 2006, p. 67-68), 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 (for biofuel, for instance), 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/Nye 2003, p. 386; Majone 1999, p. 3, 22; Scharpf 1999, p. 16).

In democratic theory, legitimacy being derived from the output alone needs to be considered with scepticism. Scharpf (2000, p. 349) denotes non-majoritarian legitimacy concepts such as

technical expertise or juridical authority as “indirect” or “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 (see also Haufler 2003, p. 252).

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 (Deutscher Bundestag 2002, p. 441; Habermas 1998; Nanz/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 through participation is described with the term of “throughput-legitimacy” (Dingwert 2004, p. 86). 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/Steffek 2005, p. 80; Pattberg 2004, p. 160).

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 a clear asymmetry 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 (Fuchs 2006, p. 7). 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, p. 34; Hirsch 2001, p. 21; Kahler/Lake 2003, p. 427).

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, p. 62) 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/Lake 2003, p. 10; Keohane/Nye 2003, p. 389).

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 (Cutler

2002, p. 32; Keohane/Nye 2003, p. 388; Majone 1999, p. 9). When analysing 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.

1.2. How to evaluate legitimacy of private governance

Private governance reflects a fundamental shift from an input- towards an enhanced output-oriented understanding of legitimacy (Majone 1999; Witte/Reinicke 2005). Initiatives such as the Roundtable on Sustainable Palm Oil and the Cramer Commission aim to contribute to solving specific problems, such as ending rainforest clearing. 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/Schmidt 2006, p. 67-68). An informed consensus is assumed on the “solution” or result (Dobner 2007). This line of argumentation can be described as “de facto”-legitimacy.

In the literature on new forms of (global) governance, 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 (Habermas 1998; Nanz/Steffek 2005; Steffek 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/Nye 2003). Elsewhere I derived these three conditions for the legitimacy of private governance circumstantially and broke them down to analytical questions (Partzsch 2007, p. 101-105). In the following, I use this framework to examine the Roundtable on Sustainable Palm Oil 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 analysing initiatives of private governance and certification.

2. Roundtable on Sustainable Palm Oil

Palm oil is the world's second largest oil crop after soy oil. Over 28 million tons of palm oil are produced each year. The increasing demand results in pressures on the expansion to eco-sensitive areas. 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 fulfil 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 programme, 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 programme, for instance, does not imply any concrete replanting requirements (principle 3). When RSPO members oblige to fulfil 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 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/Faaij 2006). 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 currently discusses 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.

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, disadvantage and 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 countries of production are on the grievance panel. Thus the RSPO is dominated by the private sector and actors from the North while conflicts exist between members and local actors from the countries of production. For instance, 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.

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 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.

2. 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. 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 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 (ILO), 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 subsidise only certified biomass/biofuel.

“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 programmes (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 analysed 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 1).

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 those countries producing (developing and newly industrialised countries) and those countries mainly consuming (EU und US) the biomass and these asymmetries are not perpetuated but aggravated by the composition of the Cramer Commission (formulating criteria for worldwide production). 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” 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.

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 organisation 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 stakeholders’ 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 1: Evaluation the legitimacy of Roundtable on Sustainable Palm Oil (RSPO) and 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
Legitimacy through stakeholders’ 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

Conclusion

The biofuel industry has recently prompted protests from many groups through its increasing attempts to establish private governance regimes for regulation. The Roundtable on Sustainable Palm Oil and the Cramer Commission are initial responses to the negative effects of biofuel production. Both aim to set up a certification system, one for palm oil, one for biomass flows in general. The Cramer criteria are still at the stage of recommendations. It is not clear yet who is supposed to finance, prepare and monitor their realisation and which consequences would follow bad practice. In comparison, the RSPO system has already been established to a large extent: palm oil is already certified as “sustainable”. Not all negative effects are avoided by such certification, though.

In regard to the legitimacy, we have seen that both private governance initiatives 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 areas of forest (leakage effect). Civil society criticizes that although in such cases a plantation indirectly causes further deforestation it can be certified as “sustainable” by the RSPO. As private governance by the biofuel industry cannot implement an unambiguously consensual output, none of the existing initiatives can be considered “de facto” legitimated.

The RSPO principles, criteria and indicators were formulated in a benign manner by and towards 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 fail to adequately include stakeholders' participation from the affected producing countries. The Cramer Commission is very much state-driven while the RSPO was initiated by non-state actors and mostly encompasses the private sector. Moreover, the RSPO faces strong opposition from civil society groups which do not participate. Consequently the RSPO cannot and the Cramer Commission can only partly refer to legitimacy through stakeholder inclusion.

In terms of control and accountability, the RSPO has distinctly assigned responsibility to its General Assembly and Executive Board and even set up an impressive grievance system. These institutions are however "private" in a 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 by practice when recommendations formulated so far turn into action. In any case, both initiatives made a remarkable advance in defining sustainability criteria. The fact that allocation of subsidies will depend on certification in the near future gives an idea of their agenda setting power. The certification systems' impact will not be "private" anymore. Aspects of legitimacy should thus not be faded-out when referring to these agendas.

Private governance in biofuel industry offers opportunities in terms recommendations from stakeholders. While 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 producing countries and adverse groups of civil society in order to balance interests. If the inclusion of actors from the South fails, private governance of global scope cannot be considered as legitimate as long as no general consensus has been established, in particular, as there is no guaranteed control and accountability. Private authority by the North is unlikely to be accepted by people in the South. Ongoing hunger protests around the world and demands for ban on producing biofuels indicate the inadmissibility.

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