



**ANNUAL CONFERENCE ON  
LAND AND POVERTY**

**AGRICULTURAL COMMODITIES THAT  
RESPECT LAND RIGHTS AND FOOD SECURITY  
HOW TO INCLUDE LAND GOVERNANCE ISSUES IN  
SUSTAINABLE COMMODITY STANDARDS?**

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## **Abstract**

The paper explores the present and potential contribution of sustainable commodity standards to securing land rights. Based on the “Ruggie framework”, it develops the argument that private sector companies do have clear responsibilities for respecting land rights, not only companies directly involved in investment and production but also companies in the supply chain. Sustainable commodity standards can be an important trigger that strengthens private sector’s responsibility for land related issues. Two case-histories, one on oil palm in Indonesia and one on plantation forestry in Uganda point at the strengths and weaknesses of that trigger. They show that the contribution of certification itself is modest, but that conflicts developing after certification create much momentum for addressing land rights issues. They illustrate the overwhelming importance of bottom-up grievance procedures (Ruggie’s third pillar). Grievance processes in the context of the commodity roundtables (RSPO and FSC) and IFC have created the stage on which the land-related criteria in the standards have evolved from dead text into living realities. It is concluded that to be really effective, sustainable commodity initiatives should actively involve governments into implementing their standards. The article is concluded with recommendations on practical cooperation between sustainable commodity standard organizations and financial sector initiatives.

## **Keywords:**

land rights, food security, private sector, sustainable commodity standards, roundtables, certification, supply chains

## **About the Author**

Dr. Reinier de Man (1948) was trained in chemistry and holds a PhD in social science. After working at several Dutch universities, he started his career as an international consultant for sustainable business development. His specializes in organizing sustainable commodity supply chains, mainly for agricultural commodities such as timber, palm oil, soy and cotton. For WWF, Unilever and partners, he set up the Roundtable on Sustainable Palm Oil (RSPO). Since 2010, he has been working on land related issues in agricultural commodity standards, mainly for SDC, Berne (Switzerland).

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## **How is the Increasing Demand for Agricultural Commodities related to Land Rights and Food Security Issues?**

Demand for agricultural commodities is growing. Not only is there a substantial increase in the demand for food crops (directly and indirectly via demand for feed), also the demand for fiber (e.g. pulp & paper, cotton, etc.) and bio-fuels is steadily increasing. Increasing demand calls both for increase of productivity and for opening up new areas for agriculture. Major possibilities for agricultural expansion can be found in sub-Saharan Africa, South America and South East Asia (Deininger et al., 2011; Deininger 2012).

However, rapid expansion of agriculture is not without risks. Not only may such a development threaten natural habitats (such as the world's last natural forest areas), it can easily lead to violations of formal or informal rights of communities traditionally dependent on the land. It may cause serious food security issues when communities lose the land on which they depend for their food. Increasing interest in land for agricultural investment may stimulate land speculation by players who are not primarily interested in developing agriculture but in short term profits only. Investments in (land for) agriculture can only be sustainable if they take place in a well-regulated institutional framework, which, among other things, guarantees formal and informal land rights.

Especially in food insecure regions, such a framework should prevent that investments in agriculture increase food insecurity. Whether the investments are in food crops or bio-fuels does not make any difference. The investment must not worsen the local food situation.

## **What are the Private Sector's Responsibilities for Land Rights and Food Security?**

### **Private Sector Responsibility for Respecting Land Rights and Food Security**

Securing human rights is the duty of the State, whereas private sector companies have the responsibility to respect such rights. In the context of his work for the Human Rights Council, John Ruggie (2008) distinguishes three core principles: "The State duty to protect against human right abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective remedies. The three principles form a complementary whole in that each supports the others in achieving sustainable progress." (Ruggie, 2008: p. 1)

Land rights and food security are universal human rights. The Business Leaders Initiative on Human Rights links 'land rights' to the 'Right of Liberty of Movement and Freedom to Choose Residence' and 'access to food' to 'The Right to an Adequate Standard of Living, including adequate food, clothing and housing' (BLIHR, 2009)

Therefore it is the private sector's responsibility to respect both land rights and food security when developing and operating projects for producing agricultural commodities. What can be meant by 'private sector' here? In principle, all corporate players who have a substantial impact on the development and the operation of the mentioned projects bear at least some degree of responsibility. Two groups of players can be distinguished:

- Financial players who invest in the development of agriculture in various ways (investing in land, farms, etc.). These may be banks, pension funds, private equity funds, etc.
- Players in the commodity supply chain from commodity producers, through traders until food manufacturers and supermarket chain (or bio-fuel producers and energy companies).

Financial players have the responsibility to make sure that their investments are not contributing to the violation of land rights or to food insecurity. Apart from IFC Performance Standard 5 (IFC, 2012) and the World Bank's Operational Policy on Involuntary Resettlement OP 4.12 (see Kiene, 2010), various financial sector initiatives were developed recently and a number of initiatives are still under development. They have been described elsewhere.

### **Supply Chain Responsibility for Respecting Land Rights and Food Security**

This paper focuses on the private players' responsibilities in the supply chain. Sustainable agriculture and forestry became a supply chain issue during the 1990s when consumers required guarantees on

ecological issues such as pesticide use or deforestation. In the same period social issues came up in manufacturing supply chains, such as child labor and workers' rights in the textile industry. Especially well-known brands became vulnerable to criticism on the ecological and social impacts of processes and raw materials in their supply chains.

Supply chain companies assumed co-responsibility for the sustainability of their raw materials. They started to build sustainability requirements into their sourcing requirements, often based on detailed social and ecological standards, auditing and certification procedures. Early Examples are FSC for forestry and forest products and the SA8000 standard for social compliance (SAI, 2008; De Man, 2010). In the meantime, a multitude of ecological and social standards have emerged. A number of international sustainability standards for agricultural commodities (palm oil, soya, sugar, etc.) are based on a multi-stakeholder 'roundtable' model, with representation of both private sector supply chain interests and civil society organizations. Although sustainable commodity standards started by focusing on ecological aspects, they gradually evolved into standard systems with increasing attention to social issues. Apart from health, safety and labor issues, most standards now contain criteria on land rights (See De Man, 2010 for an overview of roundtables and standards).

## **How do Sustainable Commodity Standards take Land Issues into Account?**

As the rights to access, to use or to acquire land titles are regulated by national law, sustainability standards for commodities generally contain criteria that require the private sector player to obey local law and to document legal and customary rights related to the land that is used for producing the commodity. Most standards refer to criteria for ‘land rights’ in general and to the ‘rights of indigenous people’ in particular. A third element, still absent in most standards, is related to ‘food security’ issues.

- Land rights

As a rule, the criteria require a clear proof of land rights involved. Moreover, they expect the private sector company to document and to respect any existing legal or customary rights. Procedures for conflict resolutions should be in place. FSC principle (FSC, 2002) no. 2 on “Tenure and use rights and responsibilities” mentions the “clear evidence of long-term forest use rights to the land” (2.1.), “legal and customary tenure of local communities” (2.2.) and “appropriate mechanisms ... to resolve disputes over tenure”. It is difficult to obtain an FSC certificate in case of substantial conflicts: “Disputes of substantial magnitude involving a significant number of interests will normally disqualify an operation from being certified”. RSPO (RSPO, 2007), in its criteria 2.2 and 2.3, RTRS in its criterion 1.2 and RSB in Principle 12 (RTRS, 2009; RSB, 2010) are basically formulating the same requirements. Most standards contain a phrase about ‘free, prior and informed consent’, such as RSB’s criterion 12b: “Free, Prior, and Informed Consent shall form the basis for all negotiated agreements for any compensation, acquisition, or voluntary relinquishment of rights by land users or owners for biofuel operations.”

In RSPO’s certification system, organizations with more than one management unit may only certify individual units if the other units do not show serious problems on important issues.

One of them is ‘significant land conflicts’:

“Organizations with more than one management unit and/or that have a controlling holding in more than one autonomous company will be permitted to certify individual management units and/or subsidiary companies only if there are not significant land conflicts, no replacement of primary forest or any containing HCVs (high conservation values) since November 2005, no labor disputes that are not being resolved

through an agreed process and no evidence of non-compliance with law in any of the non-certified holdings”.

Conflict over land in non-certified holdings thus may become a serious barrier for certification in other holdings.

- Indigenous People

The rights (and claims) of indigenous people is obviously an important issue in these supply chain initiatives with supply chains sourcing from countries and regions where there may be considerable lack of clarity and high levels of conflict about the rights of indigenous (or: migrated) people. Some initiatives (such as BCI: BCI, 2009) only state that the law should be obeyed. Other standards are more specific. FSC principle no. 2 states that “the legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.” This is then specified in a number of more specific criteria. RSPO has a clause on respecting “the legal rights, or customary rights, of other users”, whereas RTRS (RTRS, 2010) calls for “a comprehensive, participatory and documented community rights assessment” in case of a dispute on these issues. Bonsucro (on sugar cane, see Bonsucro, 2010) links its criteria for land rights to ILO convention 117 (on social policy) and 169 (on indigenous and tribal peoples), including “Respect and safeguard rights to lands and natural resources traditionally occupied and used; respect for customs of inheritance; no forced removals; compensation for loss and injury”

- Food Security

The bio-fuels standard developed by RSB is the first commodity standard to explicitly contain criteria for food security impacts. RSB’s Principle 6 (“Biofuel operations shall ensure the human right to adequate food and improve food security in food insecure regions”) leads to two criteria, the first requiring that negative effects on local food security are mitigated, whereas the second criterion requires an improvement of the situation in food insecure regions (RSB, 2010).

## Can Commodity Standards secure Land Rights?

### General

Standards for sustainable commodities, such as FSC, RSPO, RTRS, etc., do take land rights into account. By incorporating these standards into their sourcing strategies, food and bio-fuels companies are showing that they take responsibility, in the sense of the Ruggie framework, for respecting land rights. They do not only take responsibility for their own behavior but also for influencing the behavior of their suppliers or the suppliers of their suppliers. In this way, supply chain players can exert positive influence on the human rights situation, including the land rights situation, in the production countries. By asking for FSC certified timber, for RSPO certified palm oil or RTRS certified soya, companies in the supply chain can have a beneficial effect on the land rights situation in the production regions. By do they really? Are the criteria for compliance clear enough? Do the auditing and certification processes really uncover cases of non-compliance? Do the local communities really see the benefits of certification?

Such questions cannot be answered by studying the principles, criteria and certification systems only. The answers can be provided by analyzing how standard systems and their associated certification systems work in practice. Most sustainable commodity standards are still in an early development phase and have not yet built up sufficient practical experience with applying land rights criteria. There are two exceptions: FSC (founded in 1993), the most established sustainable commodity standard in the world, and RSPO (operational since 2004), the first international roundtable-based sustainability standard for an agricultural commodity, show sufficient practical experience with land issues in certification. No systematic study has been carried out yet. Only anecdotic evidence is available. But this evidence is suggesting that the land related criteria in the FSC and RSPO certification procedures do trigger positive change, eventually leading to benefits for local communities.

The case studies available show that the trigger is generally not immediate but works more slowly. In an ideal situation, certification would discover a situation of non-compliance and then force the applicant to correct the situation before the certificate can be granted. Case study material suggests that this is not yet the usual process. Problems often arise after the certificate has been granted and when the certificate is contested by communities or by civil society organizations that act on their behalf. The main cause seems to be the complex character of land claims and the problem to objectively check claims against rights, especially when good land registration systems are not present. Moreo-

ver, it may be dangerous for local communities to speak too openly about their land claims. In such situations, civil society organizations help local communities to contest a certificate already granted. The battleground is then moving towards the grievance procedure of the sustainable standard organization.

### **The Case Studies**

Two cases illustrate this typical process: the IOI case for RSPO (oil palm, Malaysia and Indonesia) and the NFC case for FSC (plantation forestry, Uganda). The following reservations have to be made:

1. The case studies presented below have been written on the basis of publicly available information, supplemented by some informal information from people involved. Much of this information is colored by organizational interests and ideologies and does not necessarily allow for a balanced analysis.
2. There has not been any possibility to thoroughly test this information and the conclusions based upon it. They are plausible hypotheses at best.
3. The only purpose of this study is to gain better understanding of the contribution of grievance processes, as offered by multi-stakeholder sustainable commodity initiatives, to the resolution of land conflicts and to the strengthening of institutional capacity in the countries concerned.
4. It is not the purpose of this study to interfere with current grievance cases or to contribute to finding solutions for particular problems. This is the task for the participants in the ongoing mediation processes and legal cases.
5. None of the organizations that play major roles in the case-studies (notably RSPO, FSC, IFC, IOI, NFC, Friends of the Earth and Oxfam) have been formally consulted when writing this study. They do not bear any responsibility for either the facts presented or the conclusions suggested.

### **Case 1: RSPO – The IOI Case (2010-2011)**

RSPO certification was recently criticized in several cases. Land issues – both biodiversity and land rights – played a central role. Pressure on companies in the supply chain and on investors was the dominant trigger. For example, Greenpeace’s report “How Unilever Palm Oil Suppliers are Burning up Borneo” (2008) revealed serious non-compliance issues at, among others, the PT Smart company, which has resulted in an RSPO grievance case. In an earlier case (the Wilmar company, see CAO, 2009), it was not so much RSPO but rather the CAO (see also the Uganda case) who played a central role as a result of complaints from community groups against IFC’s investment in Wilmar’s plantations. The 2011 Oxfam report (Zagema, 2011), uses the PT Mas / Sime Darby case as an example of ‘land grabs’ by RSPO certified companies. This article focuses on the recent IOI case.

### **NGO Reports (2010)**

In 2010, two reports with criticism on IOI’s alleged lack of sustainability in the oil palm business were published. In March, Friends of the Earth (2010) provided a bleak picture of IOI’s operations in West Kalimantan, Indonesia. Headlines in the report were: “No approved Environmental Impact Assessment”, “Fraudulent Statements”, “Unauthorized Plantation Development”, “Encroachment on Peat Land”, “Fires on IOI Concessions in Ketapang” and “Land Conflicts in the Making” (Friends of the Earth, 2010: 4-5). In November, a similar report on IOI Pelita’s operations in Sarawak Malaysia was published by an organization called “Grassroots” (Grassroots, 2010). It reported many deficiencies in IOI Pelita’s behavior, including: “Land cleared in the disputed area that was done without consultation with communities through neither a Social Impact Assessment nor the conduct of High Conservation Value assessments.” (Grassroots, 2010). The report concluded that IOI Pelita had breached at least two RSPO rules: RSPO Code of Conduct 2.3 (Members will commit to open and transparent engagement with interested parties, and actively seek resolution of conflict) and RSPO Certification System Requirement 4.2.4c on non-certified holdings as quoted above.

### **Grievance: Letter and Decision (2011)**

Basing themselves on these two reports, a number of NGOs, including Friends of the Earth, Malaysian and Indonesian NGOs, filed their grievance against the IOI Corporation on March 21, 2011. The letter stated: “These reports show that IOI Corporation is knowingly doing business *literally without licences to operate* in Sarawak (Malaysia) and Ketapang district (Indonesia). The main argument in the letter was entirely based on RSPO’s rules on Partial Certification. It mentioned “evident non-compliances with several requirements of RSPO Certification System article 4.2.4.”

When on March 30, 2011, the RSPO Grievance Panel discussed the complaints, it concluded that indeed IOI had breached not only the Certification Systems article 4.2.4c, but also RSPO's code of conduct 2.3: "Members will commit open and transparent engagement with interested parties, and actively seek resolution of conflict."

Following RSPO's procedures (RSPO, 2010), IOI's ongoing certification processes were suspended by April 4 2011 and IOI was given 28 days to propose solutions to the issues addressed.

#### **Proposal by IOI, Reaction by RSPO (2011)**

As could be expected, IOI denied many of the claims made by the organizations who filed the grievance and did not agree with many of the findings in the underlying NGO reports (IOI's letter to RSPO, April 29, 2011). They gave a detailed overview of the long history of the land dispute between IOI and the Kenyah natives, which dates back from years before IOI's entry into the plantation. IOI did not agree that they had violated Clause 2.3 of the Code of Conduct and communicated that they were ready to continue an open exchange with the community involved, for which they had formulated a Solution Plan: "Following the roadmap agreed between all parties involved in December 2010 to continue to engage the natives community which is affected by these claims with a view of arriving at an amicable settlement with a period of three months from the date hereof." IOI asked that their suspension status be reviewed. "The said suspension was predicated upon complaints made against IOI, which have yet to be verified or proven." This is not what RSPO did. RSPO decided to extend the original timeline by another 21 days, to May 25, 2011. This time was needed to study and discuss IOI's solution plan in detail.

#### **The Situation Today (2012)**

On May 25, 2011, RSPO concluded: "There has been considerable progress in the past 21 days with regard to interaction between involved parties. ... The RSPO is working closely together with IOI towards a clear and responsible roadmap to address the issues related to this grievance. However, this necessitates some additional time beyond the stipulated deadline of 25<sup>th</sup> May 2011."

As a direct reaction to RSPO's decision of May 25, Friends of the Earth and partners reacted furiously in an open letter to RSPO, starting with "With disbelief and outrage we have taken notice of RSPO's announcement about 'considerable progress in the last 21 days ...' ..." and ending with "We call again on the RSPO to take more decisive action to hold IOI Corporation to account, including a suspension of all RSPO certificates for IOI's estates and mills, until the grievance issues are indeed solved."

RSPO did not suspend IOI's existing certificates, as some NGOs had wished, but nevertheless its final decision was tough on IOI.

It kept new certification suspended awaiting for the outcomes of a mediation processes between IOI and the local communities in Sarawak, which started in September 2011. The mediator has recently submitted an interim report, his findings and recommendations for next steps will be published by RSPO on its website. By now (April 2012) IOI's new certifications have been suspended for 12 months already.

## **Case 2: FSC – The Uganda Case**

### **The New Forests Company**

The case of the New Forests Company's investment in plantation forestry in Uganda is similar to the IOI history. Not only did the land rights issues associated with those investments create high levels of attention. The fact that these plantations had received the FSC certificate intensified the debate and increased the pressure on finding an acceptable solution. Another important factor was that the part of the investment was provided by the World Bank's private sector company, the International Finance Company (IFC).

In 2005, the Ugandan New Forests Company (operational from 2005), owned by UK based NFC Uganda UK Ltd, was granted a 50-year license to grow pine and eucalyptus forests in three Ugandan districts. Apart from the revenues from timber production, the company expected to earn considerable income from trading carbon credits under the UN Clean Development Mechanism (CDM). The New Forests Company presents itself as a modern ecologically and socially responsible company.

The *ecoprofiles.com* website, for example, reports (on the basis of 2008 information) that the company is "protecting the remaining natural forests ... and regenerating those forests that have been destroyed by encroachers" and is "providing employment and development to rural communities where unemployment levels are very high", whilst "meeting Uganda's national development priorities for investment in agro-industry, poverty alleviation and rural development." See also SGS Qualifor, 2009.

Investments into the New Forests Company were made by the HSBC, the European Investment Bank and the Agri-Vie Agribusiness Fund. In 2010, the IFC made an equity investment of 7 million USD\$ into this fund.

### **FSC Certification (2009)**

Early application for FSC certification was made under pressure of HSBC, one of NFC's major investors: "The company intended to apply for certification only when it is ready to enter the harvesting stage. However, a large financial institution made a significant investment into the company that provides it with financial stability subject to the company obtaining FSC certification for its operations. This necessitated an earlier application for certification than originally planned" (SGS Qualifor 2009: 9; Zagema, 2011: 35).

The New Forests Company's plantations in Uganda received the FSC certificate on May 25, 2009 for an area of 12,607 ha in Namwasa and Kirinya. Certifier SGS did not register any non-conformity with respect to ownership and use rights. On Namwasa and Kirinya, SGS concludes: "In the case of Namwasa, being a Central Forest Reserve, local people have customary rights . . . . These rights are respected by the company. . . . In the case of Kirinya, local communities have no rights, as this is private land". (SGS Qualifor, 2009: 10).

The report adds that "Land encroachment is a particularly sensitive subject in Uganda with many instances of encroachment and conflict between land managers and local communities. Some of the neighbouring farmers at Kirinya have established cultivated fields in the wetlands on the plantations that have led to conflict with the company – this practice has now been stopped. A significant land encroachment dispute exists on Namwasa . . . . The company is aware of the sensitivities and intends handling all interaction with local people with great circumspection"(ibidem: 11).

Applying FSC's criteria 2.1, 2.2 and 2.3 (land tenure/use rights, customary tenure / use rights, dispute over tenure and use rights), the certifier concluded that there could indeed be concerns with compliance to criterion 2.3 in the Namwasa case. After further inspection, however, the certification report concluded: "The company has followed a peaceful means and acted responsibly to resolve the issue of encroachment and currently there are no tenure and/or use rights disputes that are of substantial magnitude to affect the activities of the company." (ibidem: 24).

### **The Oxfam Report (September 2011)**

In September 2011, Oxfam published its report on "land grabs" (Zagama, 2011). It contained elaborate case studies on South Sudan, Uganda, Indonesia, Honduras and Guatemala. The Uganda chapter with a detailed case study of NFC's FSC certified forest plantations presented a picture completely different from SGS's positive findings. The central message was that more than twenty thousand people had been evicted from their homes and land in Kiboga district, and nearby Mubende district, to make way for UK-based New Forests Company (NFC) plantations.

Oxfam criticized NFC for blindly accepting the Ugandan National Forestry Authority's (NFA) interpretation of so-called illegal encroachment: "The Ugandan National Forestry Authority (NFA) granted licences over the plantation areas to NFC in 2005 and authorised the removal of the former residents, which took place by February 2010 in Mubende and between 2006 and July 2010 in Kiboga. The NFA says that the people living there were illegal encroachers on forest land and that their evictions were justified." (Zagama, 2011: 15). Oxfam pointed out that many more people than NFA and

NFC want to believe did have legitimate use rights and that some cases are still in the courts. The report presented evidence that there has been much more resistance and violence than official reports suggest.

Oxfam could not understand why the NFC operations in Uganda had received the FSC certificate. All evidence seemed to suggest that Principle 2 had been seriously violated: “The basis for this assessment is not clear to Oxfam and, in view of the pending court cases involving over 20,000 claimants and the communities’ reports that no compensation was provided for losses of property and livelihoods, Oxfam does not see how FSC Principles 2 and 4 have been adhered to.” Oxfam concluded: “Oxfam has serious concerns regarding the FSC certification process”.

### **FSC’s Reaction (October 2011)**

The Oxfam report had a wide resonance in the press and the internet. It did not only feed the debate on ‘land grabs’, it also fueled the debate on the value of sustainable commodity certification and especially on FSC’s weaknesses. FSC had to investigate the allegations of violations of certification requirements to protect its own reputation. In October 2011, not long after Oxfam’s publication, FSC made a public statement, saying: “FSC takes the findings of the Oxfam report very seriously and is committed to ensuring that Principle 2 requiring demonstrated land tenure and use rights, as well as other relevant principles and criteria, are upheld. FSC has filed an official complaint with SGS Qualifor in order to ensure that any contradictions with FSC’s Principles and Criteria are investigated with the utmost rigor.”(FSC, 2011; full complaint text in Henman-Weir 2011: 4) Evidently, FSC’s decision was welcomed by Oxfam (Oxfam, 2011a). FSC asked SGS to investigate Oxfam’s allegations of violations of certification requirements, especially with regard to Principle 2.

In November, SGS responded to FSC. The report produced for that purpose (Henman-Weir, 2011) denied all allegations made by Oxfam: “The outcome of this investigation was that it was reiterated that the New Forest Company (NFC) were not in breach of Criteria 2.2, 2.3 and 4.5 as suggested by FSC, based on the Oxfam reports about ‘land grabs’ that were recently sensationalized.”

During this discussion two centrally important questions came up: were the people living on the land illegal encroachers or belonging to communities with legal rights? What were the needs and possibilities for financially compensating these people?. FSC’s complaint (“breach of Criterion 4.5”) stated: “It seems that an appropriate mechanism was not employed to provide fair compensation for the damage and loss of livelihoods of local people”. SGS reacted by referring to the Uganda government’s policy by which it was forbidden to offer compensation to encroachers: “NFC was not in-

volved in evicting people and was forbidden to offer compensation to the encroachers.” (ibidem: 8; see also NFC, 2011).

Subsequently, in December 2011, Oxfam repeated their own findings and dismissed SGS’s report entirely: “We believe this investigation has been superficial and that SGS has not taken proper account of the significant weight of testimony from the affected communities ... .” (Oxfam, 2011b). The contradictions between SGS’s and Oxfam’s finding raised many questions. Therefore FSC asked their accreditation body ASI to investigate the case: “FSC is engaging ASI to perform a thorough, independent investigation which will evaluate both parties’ evidence against first-hand interviews and research.” (FSC 2011b).

As the certification bodies are responsible for issuing FSC certificates and the certification body SGS did not find support for the allegations in the complaint, NFC’s certificate has not been suspended and remains valid.

### **IFC’s Reactions**

When Oxfam produced their report (September 2011), IFC reacted only a few days later: “The Oxfam report raises issues that IFC takes very seriously. IFC is committed to ensuring New Forests Company undertakes an independent and transparent review. NFC is drafting a terms of reference that IFC and other stakeholders will validate before the review gets underway. ... NFC is an investee company of the Agri-Vie Agribusiness Fund in which IFC made an equity investment in 2010.” Information about IFC’s internal evaluation process is not public.

It will be as difficult for IFC as for FSC to base a clear conclusion on the many contradictory information elements available. An important issue for IFC is certainly the compensation issue in Performance Standard 5: “When displacement cannot be avoided, the client will offer displaced communities and persons compensation for loss of assets at full replacement cost and other assistance to help them improve or restore their standards of living or livelihoods” (IFC, 2012: 37). If NFC’s allegation that such compensation was forbidden by the Uganda government is correct, can it then be concluded that NFC was not in a position to comply to the IFC standard or the similar FSC requirement (FSC criterion 4.5)?

### **The CAO procedure**

In December 2011, two Ugandan communities, who allegedly lost their land in forced evictions, filed a complaint with CAO, the World Bank’s Compliance Advisor / Ombudsman. In January 2012, the CAO, started his independent investigation into these complaints: “The CAO found the complaint

eligible for further assessment in January 2012. An Ombudsman team is in touch with the relevant stakeholders to explore options for a collaborative solution of the issues raised in the complaint.” (CAO, 2011a and 2011b). FSC did not want to interfere with the CAO process and therefore asked ASI to put its investigation on hold (FSC, 2012). FSC will decide on further steps once the Ombudsman’s report is released.

### **Planting Suspended**

On January 12, 2012, the New Forest Company announced the suspension of new plantings and blamed the Oxfam campaign, not only for a loss of investments, but also for a loss of jobs. In their press statement of January 9, 2012, the company explained that the suspension of planting was a direct result of investors withdrawing their investments from the company. “This resulted from the negative publicity caused by an Oxfam report released September which attacked the eviction of illegal squatters by the Ugandan government from NFC’s plantations.” NFC’s CEO Julian Ozanne: “Having planted millions of trees every year for the past six years and led the creation of a modern Ugandan forestry industry, we are very sad to have to suspend planting and lay off workers, forcing people back into poverty.”

Oxfam responded by saying that they were “disappointed to hear of the job losses” and that “withdrawing investment is not a solution to the issues we have highlighted. We think that existing investors should engage with the company to put things right.” (nyudri.org website, January 24, 2012).

Apparently, the company must first go through the CAO mediation process and await the final FSC decision before it can start any new development, which will not be before 2013.

## **Tentative Conclusions from the Case Studies**

The two cases described in some detail above suggest a number of conclusions that should be refined on the basis of a more elaborate set of case-studies.

### **1. Land Issues Become Prominent (long) after Certification**

Often land issues do not become visible during the certification process itself, but become prominent long after certification. In many cases, certifiers do not discover the land rights or land use issues during the certification or do not value them to be serious enough to question compliance or to require action on the part of the company. Reasons may be, among other things: the complex character of land rights issues (which makes it difficult to assess legitimate rights without thorough study), the communities' lack of freedom to express land rights, and conflicts between requirements in the sustainable commodity standard and factual government policy. Land issues then develop in the form of conflicts over the legitimacy of certificates.

### **2. Certificates Multiply Reputation Risks**

As soon as an existing certificate is being contested, for example by community representatives or civil society organizations acting on their behalf, not only the company's reputation is in danger, also the reputation of the certification system itself is at stake. The (alleged) non-conformity then not only creates severe reputation risks to the company whose certificate is being questioned but also to all other companies who rely on the certificate for protecting their reputation. This may lead to a threat that the reputation problem of one company is transferred to all colleague companies who rely on the same standard and certification system, unless the certification organization takes drastic measures to prevent this risk from spreading. The most immediate measure is to withhold or to suspend the company's certificate and/or to stop ongoing certification work. Companies that rely on the certificate for protecting their reputation, without really being in control, may discover that, once things go wrong, being certified multiplies their risks, not only reputation risks but also the resulting business risks. Even when it is eventually concluded that there was no serious compliance problem, the company's reputation may already be damaged.

### **3. Access to Remedies strengthens Land Rights and Land Use Issues in Commodity Standards**

The cases described here and other cases available show that access to remedies in the form of appropriate bottom-up recourse processes (grievance procedures and related mediation processes) provides the main mechanism for the communities to make criteria on land rights and land use issues

more than just a piece of paper. This is clearly demonstrated by the role of the CAO in IFC and the grievance mechanisms in FSC (FSC, 2009) and RSPO, for example.

Once affected communities (and organizations on their behalf) start questioning existing certificates, the grievance processes help to move land issues higher onto the agendas of the standard owning organizations (roundtables) and to increase the probability that these issues will be taken more seriously. The downside to this is that the procedures followed may include cumbersome mediation processes that cost much time without guaranteeing favorable outcomes. Companies may therefore even become reluctant to have their operations certified.

#### **4. Land Rights and Land Use Conflicts call for strengthening Certification and Accreditation**

Evidently, it would be much better if land rights and land use issues are discovered during the certification process instead of coming up only after certification. This would limit reputation risks both to the companies involved and to the standard owning organization (roundtable). In some of the recent ‘land grab’ cases, the certifiers may have lacked competence or may not have been sufficiently aware of the land issues in a particular country or region. A risk may arise when certifiers do not manage to keep sufficient distance from government agencies or government officials and do not sufficiently allow for non-government views to be included in their assessments. Better accreditation procedures for certifiers may be the appropriate answer. It is not in the interest of companies to receive certificates too easily with the risk to be subject to complex and long lasting land conflicts later.

#### **5. Land Rights and Land Use Issues with Commodity Standards Create Pressure on Public Governance**

Available experience with land rights and land use criteria in sustainable commodity standards points at one major issue: companies are held responsible for issues over which they have only limited control. Securing land rights is the duty of public institutions. Companies acquiring rights to use agricultural land, forest land or other land on which they develop their business, are dependent on government and its institutions.

When government policy, or its factual enforcement, is contradictory to the private sector’s obligations as formulated in a commodity or financial standard, non-compliance can be the result. Without the presence of functioning government institutions that register and observe land rights, compliance to land-related criteria in commodity standards is difficult.

This has motivated the standard-owning roundtables and major certified companies to create pressure on national and regional governments to improve their public governance structures. Although this

appears to be a slow process, present compliance problems with land rights and land use criteria in commodity standards do trigger positive change in government structures and policies.

## **Recommendations: How can the Contribution of Commodity Standards to Securing Land Rights be Enhanced?**

From the limited experience with existing sustainable commodity standards, it may be concluded that the land rights and land use related criteria in those standards do trigger positive change, eventually leading to improving the situation of the communities affected. They are certainly not an alternative to public policy and public institutions but they contribute to strengthening them. And there are still a possibilities to enhance their future contribution.

### **Recommendation 1:**

#### **Learn from success and failure of past and ongoing grievance mechanisms on land related issues**

Current experience (especially in IFC, FSC and RSPO) shows that grievance processes play an crucial role in creating accountability for respecting formal and informal land rights and in strengthening certification on those issues. The lessons learned are of utmost importance to other existing standards and standards being developed. The following tasks can be identified:

- A systematic evaluation of the grievance procedures in the practices of FSC, RSPO and other relevant certification standards by independent experts;
- Evaluation of the recourse mechanisms that have developed around IFC performance standards and World Bank policies, especially related to land right aspects of investments in agricultural commodities (such as palm oil).
- Identification of best practices.
- Recommendation on minimum requirements for grievance procedures and governance structures and procedures for implementing them, which could become part of common procedural standards such as defined by ISEAL (2010), especially Credibility Principle 11 on “Complaints and Appeals”.

### **Recommendation 2.**

#### **Build up partnerships between sustainable commodity initiatives, responsible investment initiatives and national governments for creating transparency about land transactions**

Compliance to land-related criteria in sustainable commodity and responsible investment standards is tricky as it does not only depend on the certified company’s own motivation and own behavior but also on the quality of institutions and public governance in the production/investment country or region. Some argue that land-related issues are not suitable to be tackled by certification, as their reso-

lution requires the interplay between many stakeholders, including government, and cannot be easily attributed to the behavior of the certified company only. Others argue that weak public governance is the actual *raison d'être* of private sector driven standards and certification systems. In any case, there is a strong need for activating governments to create an enabling environment for better compliance to the land rights paragraphs in the commodity standards. If that does not happen, there seem to be two unattractive alternatives: either the land related criteria in commodity standards will be narrowed to only those criteria that companies can easily fulfill within their own influence sphere, or companies will become reluctant to be certified to a standard that tends to create land rights related risks instead of reducing them.

There is a strong need for active cooperation on land and land rights issues between the standard owning organizations (roundtables) and (regional and national) governments, for example cooperation on oil palm between RSPO and the governments of South-East Asian and South American countries, on forestry between FSC and the governments in timber producing African countries, on soya between RTRS and South American countries, and on sugar between Bonsucro and the governments of cane sugar producing countries where land rights are an issue.

### **Recommendation 3:**

#### **Share land rights and land use principles across commodity standards and financial standards**

Land rights issues do not primarily depend on specific crops. Therefore it does not make sense to reinvent the wheel for new crop specific standards. Not unlike the situation with social compliance (common ILO conventions: De Man, 2010), common principles for land rights can easily be developed, based not only on criteria in existing commodity standards (FSC, RSPO and others) but also on standards used in the financial sector (IFC/World Bank/FAO and Private Sector Initiatives, such as Equator Principles (2006) and PRI(2006)). Intellectually, developing a common set of principles on land rights to be used by many different certification systems is relatively easy, as the principles and criteria in existing systems are rather similar. It will be more difficult to decide on the owner of these common land principles. One should be careful, however, not to spend too much effort on this task, as the real bottleneck for securing land rights, as the available case-histories show, is not the content of the principles and criteria, but the difficulties of implementing and certifying them.

#### **Recommendation 4:**

#### **Design and Implement a Global Mechanism for Transparency about Land Transactions and about Land Rights**

There is a risk that future initiatives regarding land and land rights lack coordination. Initiatives on land transparency (as developed in the financial sector) may be developed in settings that do not sufficiently communicate with roundtables for commodity standards. Roundtables among themselves may insufficiently exchange their experience with implementing and certifying land related criteria. Initiatives developed by the private sector may be insufficiently known in public sector or civil society dominated contexts.

After implementing the tasks suggested by the first three recommendations described above, it may be worthwhile to create an organisation that provides a global coordination mechanism for dealing with land rights and transparency about land transactions, similar to EITI in the extractive sector (EITI, 2009). Similarly to the EITI, members will be governments, private sector organisations and civil society organisations.

Suggestions for a Land Transparency Initiative have been made before at several occasions, especially in the context of the Voluntary Guidelines on the Responsible Governance of Tenure of Land (...), led by the Committee on World Food Security (CFS, 2012) and in the context of the Principles for Responsible Agricultural Investments (so-called RAI-Principles, see World Bank et al. 2010). There are strong arguments to take the practical experience produced in the context of sustainable commodity initiatives and initiatives of the financial sector seriously when developing the Land Transparency Initiative further. Otherwise, there is a risk that valuable time will be lost on discussions, without sufficient private sector participation, about principles instead of working on practical solutions for problems that require effective and timely action.

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