

Effectively integrating human rights and gender equality into EU climate actions.

A case study of palm oil for
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HEINRICH BÖLL STIFTUNG
EUROPEAN UNION

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Abbreviations

AMAN	Aliansi Masyarakat Adat Nusantara (Indigenous Peoples' Alliance of the Archipelago)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CORSIA	Carbon Offsetting and Reduction Scheme for International Aviation
CPO	Crude palm oil
EU	European Union
GAR	Golden Agri-Resources
GHG	Greenhouse gas emissions
HRWG (of the RSPO)	Human Rights Working Group within the Roundtable on Sustainable Palm Oil
ICAO	International Civil Aviation Organization
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILUC	Indirect land use change
ISPO	Indonesia Sustainable Palm Oil
NAP (on Business and Human Rights)	Indonesia National Action Plan on Business and Human Rights
NDC	Nationally Determined Contribution
PTPN	Perkebunan Nusantara, Co, state-owned enterprise for palm oil plantation
RAN GRK	Indonesia National Action Plan on Green House Gas Emissions
REDD+	Reducing emissions from forest degradation and deforestation (Plus)
RSPO	Roundtable on Sustainable Palm Oil
SDGs	Sustainable Development Goals
UNFCCC	United Nations Framework Convention on Climate Change

¹. The views expressed in this publication are those of the authors and do not necessarily represent the views of the Heinrich Böll Foundation.

Executive summary

Indonesia is the world's largest palm oil producer and exporter. The industry contributes US\$20 billion per year to the country's total export foreign exchange earnings. The rapid development of Indonesia's palm oil industry, particularly over the last four decades, which to some extent has been 'development at all costs' has generated significant revenues for Indonesia's economy but simultaneously has caused massive environmental degradation.

Human rights violations in palm oil plantations are widely documented and are not given the attention they deserve. Conflicts associated with land acquisition on a massive scale have led to violence and criminalisation of local communities, including indigenous peoples; threats to community livelihoods; and stateless children. Labour-related breaches of human rights are also being committed in the palm oil sector, especially child labour. The industry fails to take into account the special needs of women and gender equality does not feature with any priority in relevant regulations and policies. The intersection between human rights and climate change solutions is critical; however there is little attention placed on this linkage by either Indonesia or the EU, despite the fact that the Paris Agreement is clear in its preamble that human rights are a central part of climate action.

Now, under the pretext of sustainable development and climate change mitigation and adaptation, owners of palm oil plantations have new reasons to increase their production for the purposes of so-called renewable energy and transport. It is highly likely that the palm oil biofuels industry will expand rapidly in a short space of time in order to feed the growing demand for biofuels, which will increase the risk of rights violations, including indigenous rights and women's rights. Measures to be applied through the aviation industry's Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) through the International Civil Aviation Organization (ICAO) will contribute to this growth significantly. This expansion and trend is reflected in Indonesian national policies, including through incentives and the provision of subsidies. All EU Member States have expressed their intention to participate in the ICAO scheme, which is global by nature.

There are a wide range of policy provisions both in Indonesia and in the EU that are of relevance to determining and analysing the way in which palm oil production is undertaken and the impacts on people. The most applicable law in Indonesia is the Plantations Law, which purports to provide some protection for indigenous peoples and local communities, however palm oil companies are often 'permitted'

to operate without proper legal requirements in place and this legislation is favourable to companies rather than people.

The Indonesian government has also been taking steps domestically to implement the Paris Agreement through its Nationally Determined Contribution, much of which relies on the land sector. Through these efforts, there is also much emphasis on renewable energy policies, with biofuels at the heart of the energy diversification efforts.

The Indonesian Sustainable Palm Oil (ISPO) policy and its sustainable plantation guidelines are in place, however this is coming under criticism for weak enforcement measures and ineffectiveness. It is estimated that around 1,400 palm oil companies are operating but not certified by the ISPO.

Some steps are being made to link the issues of human rights and business, including the palm oil industry. The voluntary Roundtable on Sustainable Palm Oil (RSPO) has established a Human Rights Working Group (HRWG), which links its work to the UN Guidelines on Business and Human Rights ('the Ruggie Principles'). Indonesia has now developed a National Action Plan (NAP) for Business and Human Rights, also premised on the Ruggie Principles. However, despite the HRWG's involvement with the RSPO, there is no provision for human rights included in the RSPO's conflict resolution policies, and the implementation of the NAP is going slowly and possibly failing due to a lack of political will and the voluntary nature of the process.

Companies are also making pledges to go deforestation-free, and the New York Declaration on Forests was a global milestone in this context. Major global traders of palm oil have adopted zero deforestation policies covering about 60% of global trade, including Wilmar International, Golden Agri-Resources (GAR) and Cargill. Financial institutions such as HSBC, Rabobank, and BNP Paribas have all adopted 'no burn policies'. Transparency and accountability related to these pledges will be a major challenge and questions related to participation, tracking, independent monitoring and independent verification remain largely unanswered, despite efforts by non-governmental organisations.

Sustainability measures of this nature, however, are not without their own social challenges. Readiness of smallholder farmers, due to requirements to implement the higher environmental standards, is expensive and difficult to achieve. The ILO Just Transition Guidelines seek to guide this transition toward sustainable palm oil through social dialogue, social protection and rights-based approaches. The provision of financial support from the EU for such measures could go a long way in Indonesia.

The EU has an important role concerning sustainable palm oil in Indonesia because of the extent to which demand for products containing palm oil requires their export to Europe, coupled with the commitment of the European aviation industry to biofuels. In this regard, the EU has developed policies and a roadmap toward sustainable energy that progressively seeks decarbonisation pathways. However, EU biofuels policies do not adequately prevent social impacts arising from strong demand for land in order to meet the demand for biofuels. This deficiency may create indirect exposure to human rights violations in Indonesia that may come from the expanding palm oil biofuels industry, for example through the aviation industry, especially if European airlines are major



purchasers of palm oil-based biofuels. The EU should be taking a strong position in the ICAO process and requiring that only deforestation-free biofuels should be allowed.

This situation should be taken seriously, especially where the dominant national law – namely the Plantations Law in Indonesia – favours companies over communities; the ISPO has only certified a small portion of companies operating; the RSPO is only voluntary; and there are significant known human rights violations already occurring within the industry.

Positive steps are, however, being taken. In April 2017, the European Parliament voted to call on the EU to phase out the use of palm oil in biofuels by 2020 and adopted the Palm Oil and Deforestation of Rainforests Report. Members of the European Parliament noted that EU demand requires the use of about one million hectares of tropical soils and identifies that self-regulation is not enough to stop deforestation, and points to the thin standards and weak enforcement capacities. This resolution builds on the Amsterdam Declaration (2015) of which the EU and its Member States take

note and supports the private-sector-driven commitment to 100% sustainable palm oil in Europe by 2020.

The response from Indonesia to the European Parliament report has come from both government and the palm oil industry itself. It has been perceived as a potential threat to the palm oil industry and tensions have emerged between the EU and Indonesia around the subject, with some alleging a 'trade war'. It will be important to maintain focus on new developments related to social and environmental certification and law enforcement through the ISPO and the free trade negotiations to fully understand the impact of the recent developments at the EU level.



Introduction

Indonesia is the world's largest palm oil producer and exporter. The country dominates nearly 60% of the palm oil market, with the EU being one of the top consumers, together with China and India. In 2016 the total area of palm oil plantations in Indonesia reached 11.9 million ha, 4.7 million of which are managed by smallholder farmers². Resulting palm oil production in the same year reached 37 million tonnes. Most of the production of palm oil and its derivatives are intended for the export market, amounting to 28.4 million tonnes with a value of US\$16.95 billion or equivalent to Rp228.8 trillion³. According to the Ministry of Industry, the palm oil industry contributes US\$20 billion per year to the country's total export foreign exchange earnings and provides work for approximately 5.3 million people in Indonesia⁴.

Palm oil as a commodity is said to have a very strategic value to support national development in Indonesia⁵. Palm oil plantations are considered to be prime movers of agribusiness development from upstream to downstream; providers of substantial employment; and a source of income for farmers. It is a commodity that has a large role in generating foreign exchange, and through protectionist rules to ensure continued profit, despite environmental and social costs, which are considered as 'externalities'.

The rapid development of Indonesia's palm oil industry, particularly over the last four decades, has generated significant revenues for Indonesia's economy but simultaneously has caused massive environmental degradation. Allocated land for palm oil has increased 35% from 7.4 million ha in 2008 to 10 million ha in 2013, with an average increase of 520,000 ha per year. In short, an area the size of Bali is converted from forest to palm oil each year in Indonesia.⁶ In 2015 there were 2.55 million ha of forest fires, much of which was associated with land clearing for plantations, which released 1.1 gigatonnes of Co2 emissions from peat and biomass emissions and caused massive health issues and around 100,000 premature deaths⁷.

Human rights violations in palm oil plantations are also ongoing and are not given the attention they deserve, often overshadowed by the argument that the industry is necessary for economic growth and



Photo by Rainforest Action Network

efficiency. Conflicts associated with land acquisition on a massive scale have led to violence and the criminalisation of local communities, including indigenous peoples; threats to community livelihoods; and stateless children. Labour-related breaches of human rights are also being committed in the palm oil sector, especially child labour⁸.

Nevertheless, the world has grown increasingly aware of issues related to sustainability, including in the context of palm oil, which put people, profit, and the planet on a more equal footing. The UN has now established the 2030 Agenda for Sustainable Development, which sets out 17 main goals that should be achieved within this timeframe. All 17 of these goals are applicable to the palm oil industry, but it is more closely linked to goals 2, 3, 6, 14, 16 and 17⁹, and in particular to goals 12, 13 and 15¹⁰. This serves to illustrate just how serious the palm oil issue is and why it is vital that problems are identified and resolved and that a satisfactory long-term solution should be found, both in Indonesia and in the policies of trading partners such as EU countries.

Now, under the pretext of sustainable development and climate change mitigation and adaptation, owners of palm oil plantations have new reasons to increase their production for the purposes of so-called renewable energy and transport. The EU market, for example, imports 23% of its biofuel resources from palm oil, most of which comes from Indonesia. Meanwhile, domestic demand for

2. Arif, J. *Petani Mandiri (Independent Peasant)*, Lembar Fakta Kemajuan 1/6 (Progress Fact Sheet), Institute Penelitian Inovasi Bumi, p. 1.

3. Bill of Indonesia Sustainable Palm Plantation year 2016

4. Fernandez, M.G. (May 31, 2017) *Pengusaha Tekankan PP 57/2016 Bisa Ganggu Iklim Usaha*, Bisnis Indonesia. Retrieved on July 17, 2017 from: <http://industri.bisnis.com/read/20170531/99/658261/pp-no.572016-berpotensi-ganggu-industri-sawit-dan-pulp>

5. Suharto et.al. (2016). *Studi Bersama Persamaan dan Perbedaan Sistem Sertifikasi ISPO dan RSPO*, p. 5. Jakarta: Sekretariat Komisi Indonesia Sustainable Palm Oil.

6. Ibid.

7. Burrows, L. (December 19, 2016) Smoke from 2015 Indonesian fires may have caused 100,000 premature deaths, Harvard John A. Paulson School of Engineering and Applied Sciences. Retrieved on January 15, 2017 from: <https://www.seas.harvard.edu/news/2016/09/smoke-from-2015-indonesian-fires-may-have-caused-100000-premature-deaths>

8. Jiwan, N. (2013). *The Political Ecology of the Indonesian Palm Oil Industry: A Critical Analysis*. In Pye, O. (Ed.), *The Palm Oil Controversy in Southeast*

Asia: A Transnational Perspective. iBooks. Retrieved from: <https://itunes.apple.com/au/book/palm-oil-controversy-in-southeast-asia-transnational/id794302655?mt=11>.

9. Goal 2: End hunger, achieve food security and improved nutrition and promote sustainable agriculture; Goal 3: Ensure healthy lives and promote well-being for all at all ages; Goal 6: Ensure availability and sustainable management of water and sanitation for all; Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development; Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels; Goal 17: Strengthen the means of implementation and revitalize the global partnership for sustainable development

10. Goal 12: Ensure sustainable consumption and production patterns; Goal 13: Take urgent action to combat climate change and its impacts; Goal 15: Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss

palm oil for biofuels is expected to continue to increase in Indonesia due to the targets put in place by the Ministry of Energy and Mineral Resources, which stipulates the policy of 20% biodiesel (B20) being blended with non-subsidized diesel fuel for the transportation and industrial sectors. Furthermore, power plant sectors are required to blend 30% (B30) of biodiesel¹¹. The aviation industry is also expected to seek very significant amounts of biofuels in coming years, with estimates that this industry alone will require around 285 million tonnes per year by 2050¹², whilst disputed estimates suggest up to 100m gallons (3.2 million tonnes) of biofuels for aviation may be able to be currently produced per year¹³.

The European Parliament's recent resolution relating to palm oil and biofuels has highlighted the sustainability challenges associated with the expanding biofuel and palm oil industry, including potential for human rights violations. This non-binding resolution has been perceived by the Indonesian government as a potential threat to the palm oil industry¹⁴ and has taken the industry by surprise. The Indonesian government is strongly supporting the industry, warning of trade disruptions related to products going from Indonesia to the EU¹⁵, and tensions have mounted insofar as new free trade agreement negotiations are concerned¹⁶.

Based on the experience of the non-governmental organisation Sawit Watch and research since 1998, problems associated with palm oil production in Indonesia can be categorised under the following twelve areas:

- Land acquisition
- Lack of security for indigenous peoples
- Lack of free, prior and informed consent
- The controlling power of the State: limiting "eminent domain"
- Land disputes and human rights abuses
- Lack of enforcement capacity and weak governance
- Vulnerable groups: women, bonded labour and children
- High conservation values problems: identification, management and protection
- Absence of rule of law
- Problems facing small holders
- Food sovereignty
- Many palm oil operations still allow slavery-like practices (worst labour conditions)

11. Singgih, Viriya P. (February 4, 2017) Biodiesel on High Demand as Indonesia Turns to Cleaner Fuel. *The Jakarta Post*. Retrieved on July 17, 2017 from <http://www.thejakartapost.com/news/2017/02/04/biodiesel-on-high-demand-as-indonesia-turns-to-cleaner-fuel.html>

12. Ernsting, A. (October 6, 2017) Aviation biofuels: How ICAO and industry plans for 'sustainable alternative aviation fuels' could lead to planes flying on palm oil. Retrieved from: <http://www.biofuelwatch.org.uk/wp-content/uploads/Aviation-biofuels-report.pdf>

13. Ibid.

14. Sukmana, Yoga (11 April 2017). CPO "dijegal" Uni Eropa, Bos Sinar Mas

Ingin Negara Produsen Sawit Bersatu. Kompas. Retrieved on July 15, 2017 from: <http://ekonomi.kompas.com/read/2017/04/11/163830126/cpo.dijegal.uni.eropa.bos.sinar.mas.ingin.negara.produsen.sawit.bersatu>

15. Sipalan, J. (November 22, 2017). *Malaysia, Indonesia say EU palm resolution will affect millions*. Retrieved from: <https://www.reuters.com/article/us-indonesia-malaysia-palmoil/malaysia-indonesia-say-eu-palm-resolution-will-affect-millions-idUSKBN1DM107>

16. Sukmana, Yoga (April 4, 2017). Ini Tudingan Parlemen Uni Eropa Soal CPO yang Bikin Pemerintah Panas. *Kompas.com*. Retrieved on July 14, 2017 from: <http://ekonomi.kompas.com/read/2017/04/11/194306326/ini.tudingan.parlemen.uni.eropa.soal.cpo.yang.bikin.pemerintah.panas>

Policy Context

Environmental Policy

There is a wide range of policy provisions both in Indonesia and in the EU that are of relevance to determining and analysing the way in which palm oil production is undertaken. At the international level, there are of course the SDGs and the Paris Climate Agreement as well as other international conventions. The European Union also has its own resolutions, along with the EU Biofuel Cap and voluntary initiatives that relate to the corporate sector, such as the Principles of Responsible Investment and the Roundtable on Sustainable Palm Oil (RSPO).

At the national level in Indonesia¹⁷ there is legislation related to plantations¹⁸, reducing greenhouse gases¹⁹ and the Certified Palm Oil Fund²⁰ as well as the Indonesian Sustainable Palm Oil Initiative (ISPO). In order to implement the SDGs and the Paris Agreement, a Presidential Regulation²¹ and new laws²² have been put in place. Thus, Indonesia has agreed to contribute to keeping the global average temperature rise to below 2 or 1.5 degrees C and is now taking steps to implement its Nationally Determined Contribution (NDC), however a recent publication indicates that Indonesia is not on track to achieve its own climate targets²³.

The Plantations Law

The most applicable law related to palm oil is the Plantations Law²⁴. This law is an amendment to the previous law, which was changed following a finding by the Indonesian Constitutional Court that the law could be used to criminalize indigenous peoples and communities. The Plantations Law now purports to provide some protections for indigenous peoples and local communities. For example, it requires that:

"In case the land needed for plantation business is the customary land of a customary law community, the plantation business shall conduct consultations with the customary law community holding the rights to the customary land to obtain approval on the land transfer and the compensation for that²⁵."

This regulation also stipulates that the competent authority is prohibited from issuing plantation business permits on the customary land of customary law communities. The plantation business permit will only be issued when the company has obtained an environmental permit and has shown compliance with the spatial and regional plans and shown conformity with the plantation plan. The environmental permit can only be obtained by submitting an environmental impact analysis, which contains a clause outlining the participation of the community²⁶. In addition, plantation enterprises holding cultivation plantation business permits are required to facilitate the development of community plantations measuring at least 20% of the total area cultivated by the plantation companies.

Despite the fact that the Plantations Law contains provisions that are intended to enhance protections and rights, this has not been the case. The new provision inserted following the Constitutional Court's decision provides that:

"Any unlawful person who uses and controls plantation land or commits logging in plantation areas will be subject to a penalty of imprisonment for a maximum of 4 years or a fine of up to Rp 4 billion.²⁷"

Palm oil companies are often 'permitted' to operate without proper legal requirements in place²⁸. The opposite applies to indigenous peoples and local communities, who are subjected to very strict and challenging requirements in any efforts to secure rights to access and use land. It is common for there to be competing interests. Hence, this provision is considered favourable to a company in circumstances where there is any dispute related to purported plantation land as a local person or group may seek to continue to use the land, whilst claiming an unresolved entitlement to do so. Furthermore, this provision of the Plantations Law does not identify the minimum amount of logging, so people who cut down one single tree could be punished under this Act.

17. When considering law and policy context in Indonesia, one should note the hierarchy of laws, decrees and the fact that lower ranking regulation cannot be contrary to the higher ranking law. If so the higher ranking provisions prevail. The hierarchy is the following:

1. 1945 Constitution = Undang-Undang Dasar (UUD)
2. Act/ Law/ Government Regulation Replacing Act = (Undang-undang(UU)/ Peraturan Pemerintah Pengganti UU (PERPPU)
3. Government Regulation = Peraturan Pemerintah (PP)
4. Presidential Regulation = Peraturan Presiden (PERPRES)
5. Provincial Regulation = Peraturan Daerah Provinsi
6. District Regulation = Peraturan Daerah Kabupaten

18. Act No. 39 Year 2014 regarding Plantation

19. Government Regulation No. 61 of 2011 on National Action Plan for Reducing Greenhouse Gases (RAN-GRK)

20. Government Regulation No. 24 of 2015 and Presidential Decree No. 61 of 2015 on CPO Fund

21. Presidential Decree No. 59 of 2017

22. Law No. 16 Year 2016 concerns the ratification of the Paris Climate Agreement.

23. Jong, Hans Nicholas (October 16, 2017), *Indonesia to Miss Carbon Emissions Target Under Existing Climate Policies Study*. Mongabay. Retrieved on October 20, 2017 from: <https://news.mongabay.com/2017/10/indonesia-to-miss-carbon-emissions-target-under-existing-climate-policies-study/>

24. Law No. 39 of 2014

25. Law No. 39 of 2014 on Plantation, Article 12.

26. The law requires that the participation of communities includes: participation in the planning, area development, research and development, financing, empowerment, supervision, system and information development, institutional development and preparation of guidelines for the development of the plantation with the participation in the form of recommendations, responses, filing objections, suggestions and/or assistance.

27. Law No. 39 of 2014 on Plantation, Art. 107.

28. Banyak Perkebunan Sawit Beroperasi Tanpa HGU (November 1, 2009). Retrieved from: <http://ekonomi.kompas.com/read/2009/11/01/20401842/banyak.perkebunan.sawit.beroperasi.tanpa.hgu>; And: Perkebunan Sawit: Banyak Perusahaan Beroperasi Tanpa HGU (March 24, 2015). Retrieved from: <http://www.tuk.or.id/perkebunan-sawit-banyak-perusahaan-beroperasi-tanpa-hgu/>

Indonesia's first NDC states: "In the energy sector, Indonesia has embarked on a mixed energy use policy."

Indonesia has also established the development of clean energy sources as a national policy directive. Collectively, these policies will eventually put Indonesia on the path to de-carbonization.

Government Regulation No. 79/2014 on National Energy Policy, set out the ambition to transform, by 2025 and 2050, the primary energy supply mix with shares as follows:

-
- New and renewable energy at least 23% in 2025 and at least 31% in 2050
 - Oil should be less than 25% in 2025 and less than 20% in 2050
 - Coal should be minimum 30% in 2025 and minimum 25% in 2050
 - Gas should be minimum 22% in 2025 and minimum 24% in 2050
-

Source: First Nationally Determined Contribution
Republic of Indonesia, p. 3, November 2016

Biofuels, Forest and Climate Change

On 24 October 2016, the Paris Agreement was ratified by Indonesia²⁹ and the government is now taking steps to implement its obligations under the agreement and has submitted a Nationally Determined Contribution (NDC), which provides that greenhouse gas emissions should be reduced by 29% by 2030. Special attention is given to land use with an expected reduction of emissions from the land sector by 17% by 2030 and from energy by 11%. The remaining 1% reduction will come from waste, industry, agriculture and others. The NDC is of relevance to the palm oil industry in relation to the land use and forest provisions (which include REDD+), the renewable energy provisions and the provision on greenhouse gas reductions.

Indonesia's implementation of climate change-related actions has not gone without challenges linked to palm oil and other plantations in the past. Challenges associated with clarity of tenure and resulting conflicts between communities and companies are ongoing and the Greenhouse Gas Reductions Action Plan (RAN GRK), which was mandated in 2011³⁰, continues to have unresolved issues pertaining to its implementation on 'existing' plantations, as most decisions rely heavily on government initiatives at the provincial level. This has in turn impacted environmental management plans in palm oil plantations and the palm oil industry.

One of the most important steps taken to address climate change in Indonesia is through its renewable energy policies. The legal framework for renewable energy policy is contained in the Law on Energy³¹ (Energy Law). The Energy Law regulates the development of renewable energy, including bioenergy. One year earlier, under the former government led by Susilo Bambang Yudhoyono, a Presidential Instruction³² was issued stipulating the use of biofuels as liquid fuel. Biofuel is one of the major fuel sources in the energy diversification trajectory taken by the Indonesian government to slowly reduce fossil fuels and transition to renewable energy. In addition to palm oil, biofuel can be produced with a variety of raw materials, such as soy, sugarcane, jatropha, cassava, sweet potatoes and nyamplung (*Calophylluminophyllum*)³³. However, palm oil remains the mainstay of the Indonesian government because of its competitive price, and entrenched production and infrastructure capacity and established industry readiness, and it looks highly likely that expansion of the industry will occur in order to feed the growing demand for biofuels, increasing the risk of rights violations.

A major concern related to palm oil expansion concerns that of the recently developed fuel efficiency measures to be applied through the aviation industry's Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). Through the industry's international body, the International Civil Aviation Organization

(ICAO) the aviation industry is expecting to achieve carbon neutrality, largely through the use of biofuels for planes. Palm oil is said to be the only potentially cost-effective and viable option, however subsidies will be required³⁴. This global expansion and trend is also reflected in Indonesian national policies. In 2013, the Indonesian Ministry of Transportation issued a Decree³⁵ establishing a target for aviation biofuel of 2% by 2015, 3% by 2020, and 5% by 2025. Following this, the National Energy Policy set the target for renewable energy³⁶. Recent estimates suggest biofuels will increase to around 5 million tonnes per year by 2025, to 128 million tonnes by 2040; and 285 million tonnes by 2050. The EU market has been the main export destination and the Indonesian domestic market is increasing.

To stimulate the industry, the Indonesian government provides a subsidy for biofuels of around Rp 11 trillion³⁷. This does not include another Rp 9.6 trillion issued by the Palm Oil Plantation Fund Management Board (the CPO Supporting Fund³⁸). CPO supporting funds are funds collected through a levy to cover the cost of processing bio-diesel in a programme of mixing 15%-20% biofuel into diesel fuel, which took effect as of 2015. The levy is US\$50 per tonne for crude palm oil exports and US\$30 per tonne for exported oil. The CPO fund is used to replant unproductive palm oil, to fund research and development and for other needs.

An expansion of the biofuel industry will be accompanied by an expansion of the palm oil industry and the associated risks related to ongoing human rights violations. The intersection between human rights and climate change in Indonesia is, however, not specifically regulated. Within the NDC the government declares that

"In line with the Paris Agreement, Indonesia respects, promotes and considers its rights to adat (indigenous) communities, local communities, migrants, children, persons with different abilities and empowerment of women and intergenerational equity".

In addition, the SDGs in their wider context bring together aspects of human rights and climate change to ensure the fulfilment of objectives related to both issues. Furthermore, in the Constitution, it is stated clearly that the right to a good and healthy environment is part of human rights.

The combination of human rights and climate management is a principle that needs to be mainstreamed, however it is currently too early to tell whether and when this will occur in the context of the Paris Agreement. A complaint related to human rights violations may be made to the National Human Rights Commission, however no complaints have yet been made that include matters related to climate change.

29. Indonesia Law No. 16 of 2016 on Ratification of the Paris Agreement to the United Nations Framework Convention on Climate Change (UNFCCC).

30. Indonesia Presidential Regulation no. 61 of 2011

31. Law No. 30 Year 2007

32. Presidential Instruction No. 1 of 2006

33. Kementerian Energi dan Sumber Daya Mineral Republik Indonesia (October 28, 2008) *Mandatory BBN Dorong Peningkatan Permintaan Komoditas Pertanian* (October 28, 2008). Retrieved on August 14, 2017 from: <http://www.3.esdm.go.id/berita/migas/40-migas/2083-mandatory-bbn-dorong-peningkatan-permintaan-komoditas-pertanian-.html>

34. Ernsting, A. (October 6, 2017) *Aviation biofuels: How ICAO and industry plans for sustainable alternative aviation fuels' could lead to planes flying on*

palm oil. Retrieved from: <http://www.biofuelwatch.org.uk/wp-content/uploads/Aviation-biofuels-report.pdf>

35. Indonesia Ministry of Transportation Decree No. KP 201/2013 concerning The Establishment of National Action Plan for Emission Reduction in Transportation Sector

36. Indonesia Government Regulation No. 79 Year 2014 on National Energy Policy

37. Institute for Essential Services Reform (July 7, 2017), *Energi Terbarukan Terabaikan*, Retrieved on 7 August 2017 from <http://iesr.or.id/2017/07/energi-terbarukan-terabaikan/.Article IESR>

38. As set forth in Article 18 of Presidential Regulation No. 61 of 2015.

Some of the elements that apply to the opening of a new palm oil plantation according to ISPO principles are :

- Availability of SOP/instructions or technical procedures for clearing new palm oil plantation.
- Land clearing has to be done without burning to conserve the land.
- Prior to land clearing, entrepreneurs shall conduct feasibility studies and EIA studies.
- The land cannot be planted with a slope of <30%, peatland with a depth of <3 metres and an expanse of more than 70%; customary land, water sources, historical sites and so on must be preserved.
- Peat land clearance may only be done on cultivated areas with a peat thickness of 3 metres, sapric (mature) and hemic (half-baked) maturity and the layer under the peat is not a quartz sandstone layer or sulfuric soil layer. In addition, the drainage should also be regulated to reduce greenhouse gas emissions.
- Specifically for peatlands, a water system should be developed in accordance with the applicable regulations.
- Road facilities, terracing, rorak and cover crops should be planted in the framework of land conservation.
- Availability of annual work plan (RKT) for new land clearing.
- Documented opening activities (and business actors' statements that the land has been cleared without fuel).

Source: "Indonesia Sustainable Palm Oil (ISPO) dalam Peningkatan Citra Kelapa Sawit Indonesia dalam Perdagangan Internasional" http://pphp.deptan.go.id/disp_informasi/. Accessed on 28 December 2016.

Human rights Law and Women's Rights

Human rights provisions are comprehensive in the Indonesian Constitution, including the rights of indigenous and tribal peoples. In particular, human rights are regulated through the Human Rights Act³⁹, which establishes the National Commission of Human Rights and the Human Rights Tribunal. Indonesia has also ratified the core of human rights covenants, such as the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child, the Convention against Torture, the Convention on the Elimination of all Forms of Racial Discrimination,



Photo by Icaro Cooke Vieira / CIFOR

39. Human Rights Act no. 39 of 1999

40. CEDAW is ratified through law number 7/1984

41. Basnett et al. (2016). *Transforming the Roundtable on Sustainable Palm Oil for greater gender equality and women's empowerment*. Infobrief no 166. Bogor: CIFOR.

the International Convention on the Rights of Persons with a Disability, and the International Convention on the Protection of all Rights of Migrant Workers.

Women's rights in Indonesia are mostly considered under CEDAW, which was ratified in 1984⁴⁰. This was then followed by Presidential Instruction No. 9/2011 concerning Gender Mainstreaming, which emphasizes that gender mainstreaming is a strategy to integrate gender into the design, preparation, implementation, monitoring and evaluation of national development policies and programmes. It aims to eliminate the gender gap and is expected to enhance transparency and accountability from central to local government. Procedures include gender mainstreaming in development planning; implementation of development; and monitoring and evaluation of implementation.

Gender issues in the palm oil sector are often overshadowed by poverty and human rights violations that do not distinguish between the sexes. Gender issues are "relegated to the periphery of the debate around sustainable palm oil even though women play a critical role in the sector and gender inequalities are rampant"⁴¹. This is not only the case for the government and palm oil companies, but also for civil society.

Indonesia has also developed a National Action Plan (NAP) for Business and Human Rights, premised on the UN Guiding Principles on Business and Human Rights, also known as the Ruggie Principles. These principles have been developed to address poor business practices resulting in human rights violations and are built on three main pillars:

- the State's duty to protect human rights
- the corporate responsibility to respect human rights
- access to remedies for victims of human rights violations.

The Business and Human Rights NAP is a manifestation of the first pillar, and provides guiding principles for corporate responsibility, to respect human rights throughout the entire company, regardless of size, sector, context of activity, ownership, and structure⁴². However, implementation of this NAP is going slowly and possibly failing due to a lack of political will and the voluntary nature of the process.

Palm Oil Sustainability Policy

Mandatory: Indonesian Sustainable Palm Oil (ISPO)

The Indonesian Sustainable Palm Oil (ISPO) policy is a policy within the Ministry of Agriculture to enhance the competitiveness of Indonesian palm oil in the world market. It was established in 2009 by the Indonesian government⁴³ to ensure that all palm oil entrepreneurs meet the permitted farming standards and is the first national standard for palm oil for a country. ISPO-certified products are, however, not accepted in many European products on the basis

42. Rencana Aksi Nasional Bisnis dan Hak Asasi Manusia (Komnas HAM dan Elsam: Jakarta, May 2017), p. 15.

43. Certification schemes. (September 30, 2016). Retrieved on December 27, 2017 from: www.sustainablepalmoil.org/standards-certification/certification-schemes

that it is not 'sustainable enough', although there is currently no agreed definition of what 'sustainable' or 'unsustainable' means. In 2011, the ISPO issued its Sustainable Palm Oil Plantation Guidelines. Unlike the voluntary private sector Roundtable on Sustainable Palm Oil (RSPO), the ISPO is a mandatory government regulation, especially for large-scale plantation companies, but voluntary for small farmers. The above-mentioned guidance was revised in 2015 and became the Indonesian Sustainable Palm Oil Certification System⁴⁴. The seven principles of ISPO today are:

- Legality of plantation business
- Plantation management
- Protection of the use of primary natural forests and peatlands
- Environmental management and monitoring
- Responsibility to workers
- Social responsibility and economic empowerment of the community
- Continuous improvement of business

As at April 2017, the ISPO commission has certified 266 palm oil business actors covering 1.67 million ha of plantation land or only around 13% of the total palm plantations. Only two of them fall within the Indonesian plasma scheme⁴⁵ concerning smallholder farmers and independent farmers' cooperatives. It is this lack of involvement of smallholders, who make up 40% of the entire industry, which creates significant reputational challenges for the ISPO. Meanwhile, according to data from Greenpeace and WRI there are around 1,700 palm oil companies operating in Indonesia, meaning there could be some 1,400 palm oil companies that are not certified by the ISPO, giving rise to serious questions about the enforcement measures that are not applied to this scheme. Those certified cover only 7.6 million tonnes of crude palm oil (CPO) production from the total 31 million tonnes of CPO produced by Indonesia in 2016⁴⁶.

Voluntary: Roundtable on Sustainable Palm Oil (RSPO) and Zero Deforestation Commitments

The RSPO was established in 2004 with the aim of promoting the sustainable growth and use of palm oil products through global standards. The RSPO is based in Zurich, Switzerland, with the Secretariat in Kuala Lumpur, Malaysia and a Satellite Office in Jakarta. It has 3,082 members ranging from civil society to producers, processors and traders of palm oil, whose membership mechanism is voluntary.⁴⁷

In 2014 the RSPO established a Human Rights Working Group (HRWG)⁴⁸, which has become an official part of its structure. The HRWG links its work to the UN Guidelines on Business and Human Rights ('the Ruggie Principles') and seeks to cover: the duty of states to protect human rights; the responsibility of businesses to respect human rights; and the access to remedy for human rights victims. The responsibility of businesses to respect human rights in the palm oil sector implies that companies should apply due diligence to human rights and develop action plans to avoid human rights violations. It also calls on companies to be pro-active and constructive in the remediation of situations where rights have been abused.

The core mission of HRWG is primarily to ensure the successful implementation of the Principles of the 2013 RSPO Principles & Criteria that are relevant for the protection and respect of human rights. The HRWG reviews the Criteria and associated Guidance for adequacy, clarity, relevance and meaningfulness, and works to provide RSPO members with mechanisms to identify, prevent, mitigate and address human rights issues and impacts. However, despite the HRWG's involvement with the RSPO, there is no provision for human rights included in the RSPO's conflict resolution policies.

During 2017, the HRWG will focus on areas concerning⁴⁹ Free Prior and Informed Consent (FPIC) processes by companies; improvements in auditing mechanisms through accreditation and certification bodies; and workers' rights, especially related to forced labour, child labour and the rights of vulnerable groups. Ongoing monitoring of the measures taken by the HRWG, including by palm oil-importing countries, such as those in the EU and the EU itself will be important, and may contribute to efforts to mainstream human rights in climate policies.

Companies' Sustainability commitments

The New York Declaration on Forests was a global milestone achieved in 2014, which brought together States and non-state actors, including subnational governments, companies, indigenous peoples, and CSOs who made voluntary pledges to work together to halve the rate of loss of natural forests globally by 2020. The signing of the NY Declaration has now led to wider adoption of zero deforestation pledges by commodity producers and traders. Major global traders of palm oil have adopted zero deforestation policies covering about 60% of global trade⁵⁰, including Wilmar International, Golden Agri-Resources (GAR) and Cargill. Transparency and accountability with regard to these pledges will be a major challenge and questions related to participation, tracking, independent monitoring, independent verification and the timeframe of the application are consistently raised, but to date only voluntary reporting processes through non-governmental channels have been undertaken and there is no official accountability system in place, leaving such 'campaigns' open for greenwashing.

44. Suharto et.al. (2016). Loc.cit., p. 6

45. Under the Indonesian plasma scheme, businesses may develop the land first and then distribute it to local communities to manage and harvest their own oil palm trees as smallholders. In return for this assistance, smallholders commit to selling their crops to the company at a set price to be processed at the company's nearby mill, with a proportion of any loans received deducted from the revenue.

46. Saragih, S. (April 11, 2017). *Disepelekan Uni Eropa, Perpres ISPO Tetap Lanjut*. Retrieved from: <http://industri.bisnis.com/read/20170411/99/644566/disepelekan-uni-eropa-perpres-ispo-tetap-lanjut>

47. Responsible Palm Oil Roundtable. Retrieved from: <http://www.rspo.org>

48. Human Rights Working Group. RSPO. Retrieved on June 17, 2017 from: <http://www.rspo.org/about/who-we-are/working-groups/human-rights-working-group>

49. Ibid.

50. United Nations (2014). *New York Declaration on Forest: Action Statements and Action Plans*. Retrieved on July 30, 2017 from: <http://www.un.org/climatechange/summit/wp-content/uploads/sites/2/2014/07/New-York-Declaration-on-Forest-%E2%80%93-Action-Statement-and-Action-Plan.pdf>

Wilmar was amongst the first palm oil companies to declare a sustainability commitment. Their first commitment was published in 2005, which consisted of “zero deforestation, zero exploitation (of indigenous people and local communities), and zero peatland destruction”. In 2014, however, Pusaka Foundation released an investigation of subsidiary companies of Wilmar in the Sorong District in West Papua Province where they identified that no FPIC had been put in place before Wilmar chopped down the Malalilis community’s forest. It is also alleged that the company used intimidation to force the local community to give up their customary forest and the forest was razed without consent or compensation for the community⁵¹.

GAR has developed a social and environmental policy⁵² covering environmental management, social management, work environment and industrial relations and marketplace and supply chains. GAR commits itself to no development of and the conservation of high carbon stock forests; high conservation value areas; the conservation of peatlands of any depth; no burning for new plantings; and re-planting. GAR also says it will respect the right to FPIC for indigenous peoples and local communities and recognizes the need for food security. However, in West Kalimantan Province, where a community has won a legal battle for the return of customary land, it is still under the control of GAR, and has not been given back to the community (See Case Study 2)⁵³.

Financial institutions such as HSBC, Rabobank, and BNP Paribas have all adopted no burn policies and BNP Paribas and Credit Agricole have explicitly mentioned there will be no new plantation development in peatland areas⁵⁴. The Working Group of Principles for Responsible Investment Consumers has become more aware of palm oil-related deforestation. By 2014, ten companies are listed as making sustainability commitments to de-linking their operations from deforestation. Those companies are Nestlé, Unilever, Kellogg, Starbucks, L’Oreal, Mars, Inc., Hershey’s, Mondel z, Procter & Gamble, and Reckitt Benckiser⁵⁵. Their ultimate objective is to ensure that their supply chains are deforestation-free, have a net positive environmental impact and improve livelihoods for smallholder farmers⁵⁶.

By December 2016, 269 companies around the world had made commitments to support sustainable supply in the palm oil sector,

of which 114 included zero deforestation commitments. Meanwhile, in the tropical domain, net annual loss of forest area from 2000 to 2010 was about 7 million hectares and net annual increase in agricultural land area was more than 6 million hectares⁵⁷. According to the Global Forest Resources Assessment 2015 (FAO, 2015), the global forest area fell by 129 million hectares (3.1%) in the period 1990–2015, to just under 4 billion hectares⁵⁸. The challenges associated with the pledges and so-called commitments may not lie so much with their implementation as with the ability to know whether they are being achieved. The pledges are voluntary and have no legal enforceability and there are no associated governance or accountability frameworks. This creates circumstances that may enable corporate greenwashing and claims that certain measures have been taken or pledges achieved, when in fact they have not been. As a result it is not possible to assess the impact of these pledges at this time.

EU Policy Context concerning biofuels

The EU has an important role to play with regard to sustainable palm oil because of the extent to which demand for products containing palm oil requires their export to Europe. For the purposes of this report, the emphasis is placed on biofuels, as 46% of imported palm oil is used to produce biofuels in the EU and is directly linked to measures to address climate change, and its use is expected to increase rapidly⁵⁹.

Through the EU Renewable Energy Directive (2009)⁶⁰, the EU has developed a roadmap toward sustainable energy that progressively seeks decarbonisation pathways split across several generations of renewable energy. Biofuel is included in the second generation of EU steps to reduce dependence on fossil fuels. In April 2015, it was agreed by the European Parliament that by 2020 fuels in the transport sector derived from food-based biofuels would make up 7% and that this should be reduced by half by 2030.⁶¹

However, this EU Directive as it relates to biofuels does not adequately prevent social impacts⁶² arising from high demand for land to meet the demand for *biofuels*, which raises questions about the human rights of people in remote Indonesia.

51. Yayasan Pusaka Foundation (July 2014). *Lain Ditulis, Lain Diucapkan, Lain Pelaksanaannya: Hutan Rusak dan Masyarakat Adat*, p 5.

52. GAR Social and Environmental Policy. Retrieved on July 18, 2017 from: <https://goldenagri.com.sg/wp-content/uploads/2016/01/GSEP-English.pdf>

53. Joint Press Statement (November 8, 2016). *Sustainability without Human Rights Respects and Victims Justice is Meaningless*. Elsam. Retrieved on July 1, 2017 from: <http://elsam.or.id/2016/11/sustainability-without-human-rights-respect-and-victims-justice-is-meaningless/>

54. Burley et.al. (2015). *Up in Smoke: Failures in Wilmar’s Promises to Clean Up the Palm Oil Business*, p. 26. Brussels: Friends of the Earth Europe.

55. Mazzoni, M. (June 14, 2014). *3p Weekend: 10 Companies to Sustainable Palm Oil*. Retrieved on August 14, 2017 from: <http://www.triplepundit.com/2014/06/3p-weekend-companies-committed-sustainable-palm-oil/>

56. Hubert, T. (May 27, 2015). *In Indonesia, Corporate Commitment to Sustainable Palm Oil*. Forest News. Retrieved on 20 August, 2017 from: <https://blog.cifor.org/28657/in-indonesia-corporate-commitment-to-sustainable-palm-oil?fnl=en>

57. Food and Agriculture Organization of the United Nations (2015). *State of the World’s Forests*, p. 7. Rome.

58. Op. Cit., p. 10.

59. Flach et. al. (2017). *EU Biofuels Annual 2017*, p. 11. The Hague: Global Agricultural Information Network.

60. Directive 2009/28/EC of the European Parliament and of the Council (23 April 2009). Retrieved on July 20, 2017 from: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0028&from=EN>

61. European Parliament Press Room (April 28, 2015). Parliament supports shift towards advanced biofuels. Retrieved on January 25, 2017 from: <http://www.europarl.europa.eu/news/en/press-room/20150424IPR45730/parliament-supports-shift-towards-advanced-biofuels>

62. Chiavari, J. (2013). *EU Biofuel Policies and Their Implication for Southeast Asia, The Palm Oil Controversy in Southeast Asia: A Transnational Perspective*. Singapore: Institute of Southeast Asian Studies. Page 413 states:

“The impact assessment accompanying the renewable energy directive does not recommend including social criteria in the sustainability scheme given the technical and administrative difficulties of linking social criteria to individual consignments of biofuels and complications regarding international law. Despite an effort by the European Parliament to include social sustainability requirements within the biofuels sustainability criteria, including compliance with principles on labour standards set out by the ILO, this was notably excluded from the final text.”

The sustainability criteria of the Directive stipulate

- a minimum GHG-saving requirement
- a ban on using biomass from primary forest, nature protection areas, or highly biodiverse grassland
- a ban on using biomass from land converted from wetland, forest, or undrained peatland
- a requirement to report on certain environmental and social impacts.

Hence, there is only a reporting requirement concerning social impacts and if adverse impacts are identified and noted in the report, corrective action will be proposed. However, there is no clear process on the follow-up to the report, let alone the continual monitoring of the implications of these measures⁶³. This deficiency in the EU Directive may create indirect exposure to human rights violations in Indonesia that may come from the expanding palm oil biofuels industry, for example through the aviation industry, especially if European airlines are major purchasers of palm oil-based biofuels. This situation should be considered as serious, especially where the dominant national law, namely the Plantations Law, favours companies over communities; enforcement (police, army and/or private security companies) can legally be financed by the companies⁶⁴, without standard operating procedures or codes of conduct to mitigate the risks of biased or partial application of said laws⁶⁵; the mandatory national ISPO standard has only certified a small portion of companies operating; the RSPO is only voluntary; and there is evidence of human rights violations already occurring within the industry.

Another relevant directive concerns the Indirect Land Use Change (ILUC) Directive 2015/1513. This requires biofuel suppliers to report greenhouse gas emissions estimates to EU countries and the European Commission⁶⁶. With these regulations in place Indonesia must identify the amount of greenhouse gases emitted from the change of function or land use to enable importers in Europe to report the greenhouse gas emissions (GHG) relating to their indirect land use change⁶⁷. This Directive is primarily intended to address GHG emissions, however this should somehow be made consistent with applicable/relevant social and environmental considerations, as reflected in the EU-sponsored reference land mitigation frameworks, for example the REDD+ safeguards.

It does appear that many in Europe, including civil society and policy-makers, recognise these concerns. In April 2017, the European Parliament voted to call on the EU to phase out the use of palm oil in biofuels by 2020 and adopted the Palm Oil and Deforestation

of Rainforest Report. Members of the European Parliament (MEPs) noted that the EU demand requires the use of about one million hectares of tropical soils⁶⁸, identifies that self-regulation is not enough to stop deforestation, and points to the thin standards and weak enforcement capacities. This resolution builds on the Amsterdam Declaration (2015) of which the EU and its Member States take note and support the private-sector-driven commitment to 100% sustainable palm oil in Europe by no later than 2020. More recently, in January 2018, the European Parliament took another significant step and voted in favour of phasing out palm oil-based biofuel as a renewable energy source by 2021 and to cap Member States' consumption levels of crop-based biofuels at no more than their 2017 levels and no higher than 7% of their total consumption of transport fuels until 2030⁶⁹. This then raises questions as to how the EU will fulfil its 2030 commitment related to renewable energy and energy efficiency of at least 35% and the long-term target of net zero GHG emissions by 2050.



Photo by Icaro Cooke Vieira/CIFOR

While trade is an area where the EU has exclusive competencies under Article 3 of the Treaty on the Functioning of the European Union (TFEU), climate change is an area of shared competencies between the EU and Member States according to Article 4 of the TFEU. The resolution also calls for the European Commission to develop an EU action plan to put in place concrete regulatory measures to ensure EU supply chains and financial transactions are free from deforestation. Furthermore, it suggests that the European Commission and EU Member States should provide support to developing countries to implement environmentally and socially responsible production practices for securing the rights and livelihoods of indigenous peoples and local communities.⁷⁰ The European Parliament resolution also calls on the European Commission to phase out the use of biofuels based on vegetable oil, which includes palm oil. However, when considering the expected increase in demand and dependence of the European aviation industry on palm oil for biofuels, it is difficult

63. Ibid.

64. Steni et al. (2016). *Adding Insult to Injury: A Portrait of Violation of Community Rights and Natural Resources in Indonesia*. Jakarta, 2012, presented at South East Asian Conference on Promoting Peoples' Rights to Land and Natural Resources on 23-25 July 2012 p. 10.

65. Persch-Orth, Meri and Mwangi, Esther (May 2016). Company-community Conflict in Indonesia's Industrial Plantation Sector. Infobrief No. 143. Bogor: CIFOR.

66. Kotrba, R. (April 28, 2015) *Parliament votes to approve EU biofuels cap, provides closure*. Biomassmagazine. Retrieved on January 17, 2017 from: <http://biomassmagazine.com/articles/11869/parliament-votes-to-approve-eu-biofuels-cap-provides-closure>

67. Flach et. al. (2017). *EU Biofuels Annual 2017*, p. 5. & Flach, B., loc. cit., p. 11. The Hague: Global Agricultural Information Network, p. 5.

68. Flach, B., loc. cit., p. 11.

69. Michalopoulos, S. (January 19, 2018) *EU Parliament ends palm oil and caps crop-based biofuels at 2017 levels*, Euroactiv. Retrieved on January 25, 2018 from: <https://www.euractiv.com/section/agriculture-food/news/eu-parliament-ends-palm-oil-and-caps-crop-based-biofuels-at-2017-levels/>.

70. Greenpeace press release (April 4, 2017). *EU Stop Palm Oil Deforestation* Parliament, retrieved on August 19, 2017 from: <http://www.greenpeace.org/eu-unit/en/News/2017/EU-stop-palm-oil-deforestation-Parliament/>.

to see how this can be achieved when all EU Member States have confirmed their intention to participate⁷¹ in the ICAO CORSIA.

The response from Indonesia to the recent developments at the European Parliament has come from both government and the palm oil industry itself. Some tensions have emerged between the EU and Indonesia around the subject, with some alleging a 'trade war' and arguing that the EU is being discriminatory and protectionist. The official position(s) taken by Indonesia make the following points⁷²:

- It is a discriminative act that is contrary to the EU's position as the champion of open, rules-based, free, and fair trade
- The EU Parliament is making decisions and acting in a protectionist way in favour of rapeseed because it is the world's largest supplier, despite the fact that rapeseed is less efficient than palm oil⁷³
- It is based on inaccurate and unaccountable data and disregards the multi-stakeholders approach
- Palm oil is not the main cause of deforestation and European Commission studies show that palm oil contributes to approximately 2.5% of total 'global' deforestation
- Palm oil is part of the solution to reduce global demand for biofuels to replace fossil fuels
- The single certification scheme proposed could potentially increase the quality of palm oil sustainability
- The recommendation to phase out the use of palm oil within the resolution is protectionist
- The resolution disregards the right of small-scale palm oil farmers to make a living
- The resolution ignores Indonesia's role in positive initiatives related to palm oil, peatland restoration and the implementation of the SDGs and the Paris Agreement
- The palm oil industry makes a significant contribution to poverty alleviation in Indonesia
- If these outcomes are implemented by the EU, the CEPA negotiations between the EU and Indonesia would be negatively affected

71. Carbon Offsetting and Reduction Scheme for International Aviation. Retrieved from: <https://www.icao.int/environmental-protection/Pages/market-based-measures.aspx>

72. Kementerian Luar Negeri Republik Indonesia . (April 8, 2017) *Indonesia's Response to European Parliament Palm Oil Resolution*. (April 8, 2017). Retrieved from: <http://www.kemlu.go.id/en/berita/Pages/response-european-parliament-palm-oil-resolution-.aspx>

73. Kementerian Luar Negeri Republik Indonesia (January 21, 2018). *Indonesia Disaffirms European Parliament's Discriminative Decision on Palm Oil Based Biofuel*. Biofuel, Retrieved on January 25, 2018 from: <https://www.kemlu.go.id/en/berita/berita-perwakilan/Pages/Indonesia-Disaffirms-European-Parliament%E2%80%99s-Discriminative-Decision-on-Palm-Oil-Based-Biofuel%E2%80%99.aspx>

CASE STUDY 1 : PTPN IV

(state-owned enterprise)

PT Perkebunan Nusantara IV (PTPN IV), is the biggest palm oil producer owned by the state. PTPN IV owns 30 plantations managing the cultivation of palm oil and tea, mainly in the province of North Sumatra. Its total concession area covering palm oil plantations and tea plantations extends to 175,735 ha. In addition, it also has forest area preserved as buffer forests covering an area of 13,309 ha¹. Total palm oil production in 2015 was 622,065 tonnes while the palm oil kernel production in 2015 amounted to 115,616 tonnes. The realization of palm oil commodity earnings before income tax in 2015 was Rp. 476.93 billion¹.

As at 2015 PTPN IV had obtained Roundtable on Sustainable Palm Oil (RSPO) certification for 3 palm oil business units namely Pulu Raja, Dolok Ilir and Pabatu, which is valid from 25 August 2015 to 24 August 2020. In addition, in 2015, the company also received a Corporate Performance Evaluation Programme in Environmental Management (PROPER) certificate for 3 (three) palm oil mills (PKS) namely PKS Berangir, PKS Bah Jambi and PKS Pulu Raja from the Ministry of Environment and Forestry.

The plantation owned by PTPN IV is mainly old plantation, which was inherited from the Dutch colonial era (1920). Thus, PTPN IV does not do land expansion, rather than replanting. However, PTPN IV also has faced unresolved land-related conflicts with local communities, especially in the field of land administration. It is noted that there are at least two land disputes with local communities: in Labuhanbatu Regency and at the Adolina Plantation in North Sumatra, covering 200 hectares of land².

1. PTPN IV (2015). Annual Report 2015 of PTPN IV, p. 17. Retrieved on August 14, 2017 from https://www.ptpn4.co.id/wp-content/uploads/2017/07/AR_2015.pdf, 2015,.

2. Karokaro, A.S. (January 30, 2014). Dituding Rambah Hutan, PTPN IV Didemo Masyarakat Labuhan Batu, Retrieved on August 4, 2017 from :<http://www.mongabay.co.id/2014/01/30/dituding-rambah-hutan-ptpn-iv-didemo-masyarakat-labuhanbatu/>

CASE STUDY 2 : PT BANGUN NUSA MANDIRI

(private plantation, golden agri-resources)

PT Bangun Nusa Mandiri is fully owned by Golden Agri-Resources (GAR). GAR is the world's second-largest private plantation manager and cultivates 488,300 ha of palm oil plantations.

The majority of the population inhabiting the concession are indigenous Dayak Jelai whose livelihoods largely depend on the land and ecosystems therein, in particular the tropical rainforests and rivers¹. The Silat Hulu indigenous group was among the groups resisting the acquisition of their customary land, arguing that occurred without proper consultation and no consent.

In 2008, conflict arose when the company destroyed the community's ancestral graveyard and livelihood area with company machinery. The community had made several peaceful demands and opposed the action on the basis it was in breach of their rights under customary law. Around sixty people from the community protested by seizing 2 bulldozers that had been used for the destruction as a guarantee of compensation from the company. The community also reported the case to the police.

When the police became involved, they sided with the company and accused the community of infringement of a concession area in breach of the Plantations Law, and two community members were charged and imprisoned. The case went to appeal in the Constitutional Court, where it was found that the provisions under the Plantations Law that were used to charge the two community members were unconstitutional, on the basis that they contradict human rights protections in the 1945 Constitution of Indonesia, especially the rights of masyarakat hukum adat (known internationally as indigenous peoples). Upon review by the Supreme Court of Indonesia the community members were freed and granted rehabilitation and restitution rights².

In this case, the company's environmental impact assessment did not mention any potential impact on the local community and the company had not obtained the procedural legal requirements including an environmental licence, operating licence or rights of cultivation to be issued by the National Land Agency, which are necessary to start a plantation operation. GAR remains a member of the RSPO and the Silat Hulu rights of restitution including the return of their customary land have not been realized.

1. Environmental Justice Atlas. Retrieved on 30 July 2017 from: <https://ejatlas.org/conflict/establishment-of-pt-bnm-palm-oil-plantation-in-jelai-hulu-ketapang-district>

2. Jiwan, N.(2013). PT Bangun Nusa Mandiri and the Dayak Jelai and Dayak Kendawqangan Peoples of Ketapang District, West Kalimantan. In Colchester, Marcus; Chao, Sophie (Eds). Conflict or Consent: The Oil Palm Sector at a Crossroads. Forest Peoples Programme, Sawit Watch and TUK Indonesia. Retrieved from: <https://www.forestpeoples.org/sites/fpp/files/publication/2013/11/conflict-or-consentenglishlowres.pdf>

EU Actions concerning palm oil for biofuels and Human rights in Indonesia

When considering the role of the EU insofar as human rights are concerned, it is important to recognize the limitations of a supranational body's powers in another sovereign nation, especially a country as economically strong and independent as Indonesia. For example, it is not possible for the EU to directly involve itself in the development of, or require the reform of, laws in Indonesia. And diplomatic and political limitations exist insofar as asserting pressure or making criticisms is concerned.

Despite this, in recent times, and through the 2017 European Parliament resolution, it would appear that the EU is seeking to increase its diplomatic pressure on Indonesia around the subject of palm oil and sustainability. In doing so, there are 3 important areas to consider:

- gender and women's rights
- indigenous peoples and local communities' lands rights
- sufficiency and effectiveness of international interventions

At the end of 2017, a report was issued by the EU Committee on Women's Rights and Gender Equality⁷⁴, which, inter alia, calls "*on the Commission to consider the social and environmental impacts of its trade and foreign development policies, including the impact of its actions regarding women; further calls on the Commission to insist on binding status for the social and environmental norms in the chapters on sustainable development in the trade agreements that it is negotiating, and to apply sanctions in the event of non-compliance*". This recent document could be seen as a major step forward to the integration of climate justice and gender equality values.

Gender and Women's Rights

Research shows that about 89% of women devote their time to activities in the garden to manage palm oil plantations with men. Their activities include everything from initial land clearance to sales. In small-scale plantations (2-4 hectares) women undertake productive work such as helping their husbands with weed spraying, fertilizing, harvesting, transporting, picking fresh fruit bunches, and pruning⁷⁵. This shows a multiple role in the context of employment activities on the part of women, which is also not balanced between women and men, with only 27% of men involved in the home domestic activities. The unrecognised multiple roles of women leads to them being marginalised at multiple levels.



Photo by Icaro Cooke Vieira / CIFOR

The main issue concerning gender relates to the rights of women to land. Social norms are applied in the local communities, which are not included and may be inconsistent with legal requirements in the process of land use. Often, without women's consent, land is sold to palm oil companies, which can leave entire communities with food insecurity and water scarcity and prevent access to natural traditional medicines. Women also get paid a lower salary than men even though the burden is relatively equal. Women often work in an informal economy and are unregistered as staff, mostly assigned to the fertilizing work, which is dangerous to their health, especially for expectant mothers, and safety measures are often not provided due to efficiencies. Further, because land ownership is mostly titled under men's names, women cannot have access to credit without the permission or support of the man in the family.⁷⁶ Research in East Kalimantan has shown that these gender norms identified as far back as the 1980s remain remarkably resilient in the face of large-scale landscape change⁷⁷.

74. European Parliament (December 18, 2017). *Report on Women, Gender Equality and Climate Justice*, Retrieved on 25 January 2018 from <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A8-2017-0403&language=EN>

75. Uwin, S., *Perempuan dan Perkebunan Kelapa Sawit: Studi Kasus di Kabupaten Sekadau, Provinsi Kalimantan Barat*. SPKS Nasional. Retrieved on July 30, 2017 from <https://www.spksnasional.or.id/research/perempuan-dan-perkebunan-kelapa-sawit/>.

76. Komisi Nasional Anti Kekerasan terhadap Perempuan (2014). *Pencerabutan Sumber-sumber Kehidupan: Pemetaan Perempuan dan Pemiskinan dalam Kerangka HAM*. Jakarta. (National Commission on Violence Against Women (2014). *Uprooting Livelihood Sources: Mapping Women and Improverishment in Human rights Frame*. Jakarta)

77. Elmhirst, R., Siscawati, M., Colfer, C. (2016). *Revisiting gender and forestry in Long Segar, East Kalimantan, Indonesia: palm oil and divided aspirations*. In: Colfer et al (ed) (2016). *Gender and Forest, Climate Change, Tenure, Value Chains and Emerging Issues*, p.314. Routledge, New York.

There is a systematic failure to accommodate the special needs of women in the palm oil industry. Despite Indonesia putting in place legal tools for making programmes achieve gender equality, the issues do not feature with any priority in regulations and policies concerning palm oil and biofuels.

The RSPO Principles and Criteria have not sufficiently provided a foundation for gender equality. It makes gender issues a household or communal matter and hence is not within the boundaries of certification standards. Principle 2 (on compliance with local and customary systems), Principle 6 (on responsible consideration of individuals and communities affected by growers and millers), and Principle 7 (on responsible development of new plantations), which are all related to land tenure rights and FPIC, use gender-neutral language and do not explicitly mention that women need to be included in the negotiations during and after land acquisition of new plantings. Corporate policies are no different, for example in GAR's social and environmental policy commitment, there is no specific criteria for gender issues, and similarly in the commitment of PTPN IV⁷⁸.

The EU Resolution does not adequately explore the importance of gender and human rights issues towards sustainable palm oil production, nor does the EU Renewable Energy Directive. The resolution does recognise the UN 2030 Agenda for Sustainable Development, which sets out 17 main goals that should be achieved within this timeframe.

Indigenous Peoples, Local Communities and Conflict Resolution

Throughout 2015, the Consortium for Agrarian Reform noted that there were at least 252 agrarian conflicts with a total area of conflict of 400 thousand hectares and involving at least 108,714 households. Half of these conflicts occurred in the plantation sector with a total area of 302,000 hectares of conflict.⁷⁹ Agrarian conflicts mostly involve the livelihood of indigenous peoples and local communities.⁸⁰ The cases related to PTPN IV and PT Bangun Nusa Mandiri, as mentioned above, provide examples of the slow rate at which cases are resolved by the RSPO and their ineffectiveness. One of the main problems is the slow settlement of cases, and there is also a very strong reluctance on the part of the power-holder to resolve the case satisfactorily for both parties.

In cases where palm oil plantations are problematic in solving the case, complaints may also go through the RSPO, which adopted a complaints system in 2007. There have been 50 complaints submitted since 2008, but the process of handling them is very slow. The executive board with the authority to handle conflicts consists of members of the RSPO (palm oil companies), which is perceived by many as a conflict of interest. There is no independent mechanism and it could be argued that the mechanism does not meet the

standards of non-legal complaints mechanisms in accordance with UN human rights principles.

The EU Resolution recognises the UN 2030 Agenda for Sustainable Development, however on the subject of indigenous peoples' rights, the SDG process has been criticized in Indonesia by the Indigenous Peoples' Alliance of the Archipelago⁸¹ (Aliansi Masyarakat Adat Nusantara – AMAN) as negating the participation of indigenous peoples. AMAN argues that all 17 goals and indicators have been developed without accommodating indigenous peoples' interests, with many terminologies used that are difficult to understand by indigenous peoples or that could be interpreted differently. There are at least three crucial issues for indigenous peoples that are not covered in the SDGs, namely:

- respect for indigenous knowledge of agriculture, medicine and sustainable food management
- collective rights of indigenous women in technology and innovation
- integral point of view of customary territories which perceive environment as an interconnected ecosystem unit between flora, fauna, land, and water, inseparable to the tenure and governance aspect in the hands of indigenous peoples

In addition to the potential outcomes of the Parliament's report, the EU Strategy on Human Rights in Indonesia does emphasize and prioritise land rights and human rights defenders, who are often members of indigenous communities, and it would seem that there may be some positive signs of progress on this subject.

The impact of recent EU Intervention on the Indonesian palm oil industry

Although the EP Resolution is a non-legally binding document, it is significant in that it was adopted by the European Parliament and has been influential in changing the dynamic between the European Commission and the Indonesian Government in a way that may have a significant bearing on the current ongoing free trade negotiations and much needed efforts to improve the ISPO. The report calls for concrete regulatory measures in order to ensure EU supply chains and financial transactions are free from deforestation and to provide support to developing countries for responsible production practices.

The Indonesian response has been one of concern and has been defensive and reactive, going so far as to threaten to disrupt trade to the EU related to other products. Whilst the EU seeks outcomes that require greater sustainability measures that will satisfy the EU market and uses its trade leverage to achieve this, Indonesia seeks to improve the increasingly damaged reputation and poor perception of palm oil in the international market. The Indonesian government

78. Basnett, et al. (2016). *Transforming the Roundtable on Sustainable Palm Oil for greater gender equality and women's empowerment*. Infobrief no 166. Bogor: CIFOR.

79. Purba, Christian. (2017). *Enam Tahun ISPO: Kajian Terkait Penguatan Instrumen ISPO dalam Merespon Dampak-dampak Negatif seperti Deforestasi, Kerusakan Ekosistem Gambut, Kebakaran Hutan dan Lahan, serta Konflik Tenurial*, Forest Watch Indonesia. Retrieved from: http://fwi.or.id/wp-content/uploads/2017/03/6_tahun_ISPO.pdf, p. 7

80. Komisi Nasional Hak Asasi Manusia, *Inkuiri Nasional Komnas HAM: Hak Masyarakat Hukum Adat atas Wilayahnya di Kawasan Hutan*, (National Commission on Human Rights, National Inquiry regarding Indigenous Peoples Rights on Their Area in Forest Area), 2016. The inquiry examines 40 indigenous peoples' cases.

81. Perempuan Aliansi Masyarakat Adat Nusantara (2017). *Position paper of PEREMPUAN AMAN concerning the SDGs*, Perempuan Adat dan Masyarakat Adat adalah Subjek Utama SDGs (Indigenous Women and Indigenous Peoples are Main Subject of SDGs). Bogor.

is engaging with EU countries to maintain its market access to palm oil products from Indonesia. The European Commission in Indonesia has since communicated with the Coordinating Ministry for Economic Affairs and is now putting more emphasis on improving Indonesia's certification through the ISPO and a number of meeting and communiqués are happening between the parties that are not public⁸². It will be important to maintain focus on new developments related to social and environmental certification and law enforcement through the ISPO and the CEPA free trade negotiations to fully understand the impact of the recent developments at the EU level.

However, as mentioned above, neither the biofuels provisions of the EU Directive nor the ILUC Directive contain strong provisions related to social considerations concerning biofuels, and despite all efforts the biofuels sustainability criteria do not include social sustainability requirements, including compliance with ILO labour standards. This is occurring in a global trade environment where it is expected that the palm oil industry will expand, premised on increasing demand for biofuels, especially for the aviation industry, much of which one would expect would be used by European airlines and palm oil will be grown in Indonesia.

More specifically on the subject of human rights, neither the EU nor Indonesia has clear policies in place drawing linkages between climate action and human rights. The EU Strategy on Human Rights in Indonesia, which prioritises labour conditions, land rights and human rights defenders, does not draw this linkage and the closest policy document identified in Indonesia on the subject is the NDC. Whilst the Paris Agreement is clear in its preamble that human rights is a central part of climate action, it may be too soon to expect such policies to be developed at national level, however in the context of the human rights violations identified in the palm oil sector and the relationship between sustainable palm oil and climate mitigation and adaptation, emphasis should be placed on this going forward in both the ISPO and the Comprehensive Economy Partnership Agreement (CEPA). The EU in its human rights priorities in Indonesia may contribute to building on an already strong body of human rights law in the country, including related to business and human rights and to promote the need for stronger enforcement. Further, as much of the recent surge in demand for biofuels is being driven by the aviation fuel developments within the ICAO, the EU should also be taking a strong position in this process on the subject of deforestation-free biofuels.

Whilst EU policies on sustainability and biofuels can impact the economy of countries such as Indonesia, this should not occur in a vacuum and without consideration of the impacts of these policies on the people of Indonesia, many of whom already live in poverty. There are significant challenges in terms of the readiness of the industry actors themselves at the national level, especially smallholder farmers, due to requirements to implement the higher environmental standards. The ILO Just Transition Guidelines can guide this transition toward sustainable palm oil through social dialogue, social protection and rights-based approaches⁸³. The provision of financial support from the EU for such measures could go a long way in Indonesia, and is consistent with the calls of the

European Parliament. Other possible assistance could be derived from the Green Climate Fund to support smallholders due to the obvious climate-related mitigation and adaptation benefits arising from a more sustainable palm oil industry.

82. According to the interview with an anonymous European Commission official in Indonesia.

83. International Labour Organization (2015). *Guidelines for a just transition towards environmentally sustainable economies and societies for all*. Geneva: ILO.

Conclusions

As the world's largest producer of palm oil, Indonesia continues to have a high appetite for development, resulting in approaches to trade and production being dominated by economics, and potential for revenues taking precedence over human rights and social and environmental considerations. Whilst the country has a strong basis for human rights law, has ratified the Paris Agreement and has shown an intention to put in place new measures towards sustainability, such as through support for sustainable supply chains, peatland restoration, business and human rights, and the gender action plan, many challenges remain, especially when it comes to actual implementation and law enforcement, which will continue to create a negative perception of the palm oil industry in the country and beyond its borders. Outcomes such as those in the recent European Parliament compounds these challenges by placing additional international pressure on Indonesia to reform a massive industry, much of which relies on informal economies and smallholder rural farmers. Significant reform of the ISPO with regard to smallholder certification, human rights and gender, rights of workers, and just transition will be necessary to achieve this, and Indonesia will require a significant amount of support in this respect. Said support and leadership could be achieved in a step-by-step manner, i.e. by changing the political economy at subnational scale, district by district, until a critical mass of fair, transparent and greener political leaders and responsible business/farmer organizations feel ready and able to challenge the status quo, as the best way to reap the full benefit of their efforts, namely getting better access to global markets than their less responsible peers.

National policies in the field of environment and plantations in Indonesia are often not aligned, favour large companies, and contradict each other, and when laws are revised to rectify an issue, as was the case with the Plantations Law and its potential to criminalize indigenous peoples, the new laws often result in the same or other problems⁸⁴. Palm oil companies are often able to operate without proper legal requirements, whilst indigenous peoples and local communities living on their communal land struggle to have their rights and land claims recognized or are punished for exercising their rights on their land, such as removal of products from forests or traditional farming practices⁸⁵. Gender considerations are lacking throughout meaningful regulations, and it remains to be seen as to how effective the new Gender Action Plan will be, along with efforts to integrate or implement it.

The relationship between the EU and Indonesia has, however, recently entered into a new phase, with the EU seemingly increasing its pressure through trade on Indonesia, during a time of expected expansion of the palm oil industry for the purposes of biofuels, especially for aviation. This extra pressure is now playing out through diplomatic channels related to reform of the ISPO and the CEPA free trade agreement negotiations as well as in other international processes such as the UNFCCC and ICAO. The ultimate challenge will, however, be whether policies are agreed that are efficient, effective, able to be implemented and have equitable social and environmental substance.

84. Provisions in the old Plantations Law (No. 39 Year 2004) were annulled by the Constitutional Court No. 55/PUU-VIII/2010 due to the potential for local people to be criminalized. This triggered a revision of the Plantations Law, which seemed to put more emphasis on the indigenous peoples. However, similar provisions that potentially victimize local people continue to emerge in the new Plantations Law (No. 18 Year 2014) through Article 107, which still enables the imprisonment of indigenous peoples or local communities who do not have legal bases for their land claim as a result of minimum access to the land agency and competing claims with other parties, such as companies and government. Article 107 Law no. 18/2014 regarding plantation stated that *"Any unlawful person who uses and controls plantation land, commits logging in plantation areas for a maximum of 4 years or a fine of up to Rp 4 billion"*.

85. Article 69, Law No. 32 Year 2009; and Article 23 of the Plantations Law

Recommendations

1

Both Indonesia and the EU should put in place appropriate policies related to mainstreaming climate change and human rights in relation to climate actions and measures, as well as climate-related impacts, and in doing so, take into consideration :

- Gender and human rights issues linked to palm oil production
- The measures taken by the RSPO HRWG
- Voluntary reporting channels related to zero-deforestation commitments.

2

The free trade negotiations between the EU and Indonesia through the CEPA should ensure the inclusion of :

- Respect for human rights including the rights of indigenous peoples and local communities;
- Social and environmental certification and law enforcement through the ISPO and provisions related to enforceability of actions not complying with sustainability requirements;
- Standards related to labour as provided by the ILO, including just transition of the workforce, including smallholder farmers.

3

Amendments should be made to the biofuels provisions of the EU Directive and all other relevant EU policies to prevent social impacts arising from high demand for land to meet the demand for biofuels and respect human rights including the rights of indigenous peoples, including :

- Respect for indigenous knowledge on agriculture, medicine and sustainable food management
- Collective rights of indigenous women in technology and innovation
- Integral point of view of customary territories, which perceive the environment as an interconnected ecosystem, inseparable from the tenure and governance aspects.

4

The EU should provide significant financial support to smallholder farmers to assist them to meet sustainability criteria and access supply chains arising from any measures taken in the EU that could negatively impact on smallholder farmers.

5

The EU should provide support to Indonesia to implement environmentally and socially responsible production practices for securing the rights and livelihoods of indigenous peoples and local communities.

6

Put in place legal tools for making programmes achieve gender equality with priority given to regulations and policies concerning palm oil and biofuels.

7

Adequate enforcement measures should be undertaken with regard to companies that do not adhere to the requirements of the ISPO.

8

Put in place accountability and transparency mechanisms related to zero deforestation commitments as a means to understand whether and how such commitments are being met.

9

Regulations should be put in place in the EU that require European airlines to only use deforestation-free biofuels under the ICAO CORSIA.

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Biography of the authors

Sisilia Nurmala Dewi

Sisilia is a policy advocate and campaigner who consistently and actively involves in development community with experiences ranging from local community to international level, nongovernmental and governmental background on the issues of human rights, land and natural resources and climate change. She was leading the advocacy and campaign at HuMa, an Indonesian NGO focusing on ecology and community based law reform from 2012-2016. She continues working with the Partnership for Governance Reform, an Indonesian non-governmental organization, in deployment to the Peatland Restoration Agency to assist its education, socialization, participation and partnership work field until present. Sisilia was graduated from Faculty of Law, University of Indonesia, with specific study on Law, Society and Development.

Stephen Leonard

Stephen Leonard is an international lawyer with specialist experience in climate policy, land use and forest in developing countries. Stephen has provided policy analysis and strategic advice to UN agencies and non-governmental organisations from around the world including Center for International Forestry Research, the Food and Agriculture Organisations, Rainforest Foundation Norway and the International Labour Organisations.

Arimbi Heroepoetri

Arimbi Heroepoetri., S.H.LL.M Actively working for environmental issues, indigenous peoples, consumers, women and globalization. She had worked in WALHI (Indonesian Forum for Environment-Friends of the Earth Indonesia) between the years 1988 to 2000. Coordinator and lecturer on the course in Feminist Political Ecology Women's Studies from the University of Indonesia (2001-2011). Director debtWATCH Indonesia (2000-2008). Arimbi also involves in a network of E-LAW (Environmental Law Alliance Worldwide), a worldwide network of environmental public defenders. With a background of environmental law, she completed her education at the Faculty of Law, Padjadjaran University, Indonesia and Dalhousie Law School in Halifax - Canada. Arimbi can be reached at debtwatch@yahoo.com

