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The Impact of Indonesian Agricultural Policies on Indigenous Populations, Natural Resources and the Economy: The Limits of Democratic Self-Determination Under Capitalist Regimes

Scott Brainard*

I. INTRODUCTION

A. Understanding the Future of Palm Oil Production in Latin America Through Its History in Indonesia

The title of this paper highlights a number of interconnected themes: how Indonesian agricultural policy has affected its indigenous populations, its natural environment, and the structure of its economy; the relationship between these effects; and, more generally, the structure of capitalist markets and democratic institutions. This set of topics is complex; it is useful, therefore, to analyze them not with an elaborate theoretical paradigm, but through a concrete example. Specifically, this paper will examine how palm oil production has evolved in Indonesia over the last fifty years. Palm oil is an edible and versatile plant oil produced from the pulp of the fruit of oil palm trees. It is a common ingredient in many detergents, processed foods and, increasingly, biodiesel fuels.¹ Historically, palm oil production in Indonesia has involved massive deforestation and air pollution, the expropria-

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1. CONSUMER AND FOOD ECON. INST., U.S. DEP'T. OF AGRIC., , COMPOSITION OF FOODS: FATS AND OILS; RAW, PROCESSED, PREPARED, AGRICULTURE HANDBOOK 8-4, 4 (1979); John F. McCarthy & R.A. Cramb, *Policy Narratives, Landholder Engagement, and Oil Palm Expansion on the Malaysian and Indonesian Frontiers*, 175 THE GEOGRAPHIC J. 112, 113 (2009).

tion of indigenous peoples' lands, and the increasing privatization of one the fastest growing sub-sectors of the Indonesian economy.² However, that palm oil production has had these effects is by no means the consequence of the laws of nature. Instead of leading to "land alienation, loss of livelihoods, social conflicts, exploitative labour relations and degraded ecosystems," to quote a recent report by a coalition of Indonesian human rights and environmental organizations, palm oil could have functioned as a sustainable source of "wealth and employment for local communities."³

The opportunity to change course in this way is not lost; demand for edible oils is currently rising rapidly, especially in developing nations. Future global demand for edible oil alone is predicted to double by 2050⁴ as consumption of biofuels rises worldwide.⁵ Simultaneously, levels of capital investment, increasingly foreign, are on pace to continue to drive the expansion of land being used for oil palm cultivation at the same rate that drove the amount of cultivated land from 120,000 hectares⁶ in 1968 to more than six million hectares in 2005.⁷

These trends are not only of enormous significance for Indonesia, but the global South as whole, and Latin America in particular. As noted in a Declaration released by the Latin American Network against Monoculture Tree Plantations (hereinafter "RECOMA") on August 1st, 2009, the first decade of the 21st century has seen a dramatic expansion of monoculture tree plantations in the represented countries of Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Nica-

2. *E.g.*, MARCUS COLCHESTER ET AL., PROMISED LAND: PALM OIL AND LAND ACQUISITION IN INDONESIA: IMPLICATIONS FOR LOCAL COMMUNITIES AND INDIGENOUS PEOPLES 11 (2006).

3. *Id.*

4. R. H. V. Corley, *How much palm oil do we need?*, 12 ENVTL. SCI. & POL'Y 134, 134 (2009).

5. See Wim C. Turkenburg et al. *Renewable Energy Technologies*, in WORLD ENERGY ASSESSMENT, ENERGY AND THE CHALLENGE OF SUSTAINABILITY 219, 223 (Jose Goldemberg ed., 2000), available at <http://www.undp.org/energy/activities/wea/drafts-frame.html> (last visited Apr. 2, 2010) ("A number of studies have assessed the potential contribution of biomass to the world energy supply. . . . Although the percentage contribution of biomass varies considerably, especially depending on expected land availability and future energy demand, the absolute potential contribution of biomass in the long term is high—from 100–300 exajoules a year. World-wide annual primary energy consumption is now about 400 exajoules.").

6. 1 hectare 2.47 acres and 1 square mile 259 hectares. By applying these ratios in this instance, for example, the increase in the area of land under oil palm cultivation can be described as rising from ~463 sq. miles in 1968 to ~19,305 sq. mi. in 2005.

7. COLCHESTER ET AL., *supra* note 2, at 21.

ragua, Paraguay, Peru and Uruguay.⁸ This expansion has led to the violent appropriation of indigenous lands and political disempowerment of local communities by way of methods that bear striking similarity to tactics used in Indonesia over the last several decades.

For example, since 2004, Mexico has adopted aggressive policies supporting the development of oil palm plantations. In 2009, the governor of the state of Chiapas announced plans to bring 100,000 hectares under palm oil cultivation by 2012.⁹ The manner by which this expansion was to take place was evidenced in January of 2010 when, after the Chiapas State Congress approved the construction of an palm oil processing plant in the Municipality of Ocosingo, paramilitary units arrived, “and with aggressive violence evicted men, women and children from their homes, which they then burnt down and with no explanation, removed the community to the city of Palenque.”¹⁰

As organizations like RECOMA attempt to build resistance to this form of expansion by developing alternative models for oil palm production, it is useful to first consider what forces have historically contributed to these devastating methods of expansion in the palm oil industry. Indonesian history supplies an ample record of these forces beginning with the rise of General Suharto’s New Order government in 1965. An analysis of the palm oil sub-sector of Indonesia’s agricultural market will proceed in this context as a method for understanding, and supporting attempts at opposing, the expansion of palm oil production in Latin America today.

The programs implemented from 1965-1998 by General Suharto, the second President of Indonesia, to revitalize palm oil production as a profitable sector of the economy illustrate how the motives of the wealthiest sectors of society will, if sufficiently empowered, override all other competing interests including: concerns for the ecological welfare of Indonesia’s natural environment; the economic wellbeing of the landless poor; and the basic sanctity of the millions of indigenous peoples living in the Outer

8. *Declaration by the Latin American Network Against Monoculture Tree Plantations*, WORLD RAINFOREST MOVEMENT (Aug. 1, 2009), <http://www.wrm.org.uy/plantations/RECOMA/Declaration.html>.

9. *Mexico: Oil Palm Business at the Expense of the Poor*, WORLD RAINFOREST MOVEMENT (July 2009) <http://www.wrm.org.uy/bulletin/144/Mexico.html>.

10. *Mexico: Violent Evictions in Chiapas for Establishing Oil Palm Monocultures*, WORLD RAINFOREST MOVEMENT (Feb. 2010), <http://www.wrm.org.uy/bulletin/151/Mexico.html>.

Islands¹¹ of the archipelago. Of course, the tendency for a certain narrow set of powerful economic interests to seek exclusive control over the means of production is not a unique aspect of the palm oil sub-sector, but rather a general trend throughout the agricultural sector. Thus, characterizing the ways market tendencies have manifested themselves in terms of their historical effects on palm oil production will shed some light on the nature of the more general relations indicated in the title.

B. The New Order Regime's Rise to Power

Before proceeding with an analysis of the policies established under the New Order regime that dramatically accelerated palm oil production, however, it is useful to consider some of the history of General Suharto's "New Order." The rise of the New Order regime was facilitated by a CIA-backed military coup¹² that, from 1965-1967, eroded the power of then-President Sukarno,¹³ purged Indonesian society of the civilian left,¹⁴ and eventually led to the formal removal of Sukarno from power on March 12, 1967.¹⁵ This coup was motivated primarily by the burgeoning political viability of Indonesia's Communist Party, the Partai Komunis Indonesia (hereinafter "PKI").¹⁶ Hence, the 1965-1967 coup not only brought to power an authoritarian leader, General Suharto, but also destroyed the PKI—the only mass, grassroots political organization present in Indonesia at that time.¹⁷

11. The term "Outer Islands" typically refers to all the islands in the Indonesian archipelago other than Java, Madura and Bali, though in some cases Bali is implied as well.

12. For an excellent investigation of the United States' involvement in the overthrow of Indonesia's President Sukarno, see Peter Dale Scott, *The United States and the Overthrow of Sukarno, 1965-1967*, 58 PAC. AFF. 239-40 (1985) (explaining that in 1957-58, the CIA provided arms and personnel to support regional rebellions against Sukarno); see also JOSEPH B. SMITH, *PORTRAIT OF A COLD WARRIOR: SECOND THOUGHTS OF A TOP CIA AGENT* 205 (1976).

13. Sukarno was one of the leaders of Indonesia's struggle for independence against Dutch colonial rule and Indonesia's first president, from 1965-67. Scott, *supra* note 12, at 239.

14. *Id.*

15. *Id.* at 239-40.

16. *Id.* at 254.

17. *Id.* at 247 ("By 1958, however, the PKI had emerged as the largest mass movement in the country."). The possibility of a communist movement taking control of Indonesia's government provoked U.S. strategic planners to train, arm and coordinate anti-PKI military forces that not only overthrew Sukarno, but also carried out a massacre of the PKI that was described later in a CIA report as "one of the worst mass murders of the 20th century, along with the Soviet purges of the 1930s, the Nazi mass murders during the Second World War, and the Maoist blood bath of the early

II. THE OIL PALM SUB-SECTOR UNDER SUHARTO

A. Transmigration

This history provides an important context for analyzing the ethnocide the New Order regime committed against the indigenous peoples inhabiting Indonesia's Outer Islands in the course of expanding oil palm plantations. This process began to accelerate rapidly in the late 1970s under the auspices of Transmigration—a state program that, like the coup against Sukarno, “enjoyed the unstinting financial support of the western powers,”¹⁸ receiving “massive financial backing from international agencies and western governments.”¹⁹ The Dutch first implemented transmigration schemes at the end of the nineteenth century as a method to provide a labor force, imported from urban slums on Java and Bali, to work on rubber and oil palm plantations on Sumatra and other Outer Islands.²⁰ The New Order regime gave similar justifications for the rapid expansion of the program beginning in the 1970s, publicly arguing that Transmigration would raise the standard of living of the urban poor and alleviate the pressures of population growth in the central islands.²¹ Privately, however, government officials overseeing the program admitted that any such hopes were entirely unrealistic.²²

1950s.” AUDREY R. KAHIN & GEORGE KAHIN, *SUBVERSION AS FOREIGN POLICY: THE SECRET EISENHOWER AND DULLES DEBACLE IN INDONESIA* 227-28 (1997). While exact casualty figures are not known, “the head of the Indonesian State security agency, Admiral Sudomo, gave a definitive estimate: he said that more than half a million people were killed following the attempted coup. There can be no doubt about the authority of that estimate, except that the true figure is possibly much higher.” AMNESTY INT’L, *INDONESIA: AN AMNESTY INT’L REPORT* 22, 41 (1977).

18. Carmel Budiardjo, *The Politics of Transmigration*, 16 *THE ECOLOGIST* 111, 112 (1986).

19. Marcus Colchester, *Banking on Disaster: International Support for Transmigration*, 16 *THE ECOLOGIST* 61, 61-62 (1986) [hereinafter *Banking on Disaster*] (“by June 1985, western governments had collectively poured nearly \$800 million into the program. A further \$750 million is ‘in the pipeline.’”).

20. Mariël Otten, *‘Transmigrasi’: From Poverty to Base Subsistence*, 16 *THE ECOLOGIST* 71, 71 (1986).

21. *Id.*

22. See, e.g., Colchester, *supra* note 19, at 62 (reporting that at an aide at a 1985 conference between the Intergovernmental Group on Indonesia (IGGI) and the Ministry of Transmigration remarked, “Demographically, the transmigration of people from Java does not mean very much, because the rate of growth on this island is big. . . . It is evident that demographically the target of transmigration is not important. The documentation which has been distributed . . . shows that for 150 years the relocation of people from Java has no effective meaning.”); *Proceedings of the Meeting between the Department of Transmigration and the Intergovernmental Group on Indonesia* (IGGI), *JAKARTA POST* (Mar. 20, 1985).

Indeed, because the government exerted little effort in training and supporting settlers,²³ it quickly became clear that Transmigration was instead being used as a method for developing large plantation sites and making them available for exploitation by state-run companies and later, privately-owned corporations.²⁴ As J.P. Perez-Sainz, a researcher for the Food and Agricultural Organization (FAO), observed in 1978:

What remains clear is that whatever will be the new course to be followed by Transmigration, the outcome will be the total proletarianisation of the transmigrants. In this sense, Transmigration is clearly being structured as a State intervention in favor of and support of capital, mobilizing relative surplus-labour from Java, implying the further exploitation of migrants. *Therefore Transmigration is*

23. See, e.g., Mayling Oey, *The Transmigration Program in Indonesia*, in POPULATION RESETTLEMENT PROGRAMS IN SOUTHEAST ASIA, 27, 42 (Gavin W. Jones & Hazel V. Richter eds., Austrl. Nat'l Univ., 1982) (noting that the small plots of land granted to settlers were often not cleared prior to their arrival, and because transmigrants did not possess the money, time, or machinery to finish clearing the land, these plots would frequently remain unsuited for agricultural production for years); see also Otten, *supra* note 20, at 76 n.11. ("Harun Zain, formerly Minister for Transmigration, did not mince his words on this point. In an interview with NRC Handelsblad (9, June 1982), he said that transmigrants were sent into the jungle and if they produced a surplus, they could not market it."); see also Sediono M.P. Tjondronegoro, *Transmigration Problems Affecting Population Mobility in South Sumatra*, in POPULATION RESETTLEMENT PROGRAMS IN SOUTHEAST ASIA, 53, 54 (Gavin W. Jones & Hazel V. Richter eds., Austrl. Nat'l Univ., 1982) (reporting that the infrastructure that was directly necessary for agricultural production itself was often absent, as was the case at the Way Seputih site in Southern Sumatra where transmigrants waited fourteen years before any irrigation or drainage canals were built); see also Catherine Caufield, *Indonesia's Great Exodus*, NEW SCIENTIST, May 17, 1984, at 25, 26 (describing the detrimental effects of the industrial machinery employed when clearing the land, she writes, "Although machetes and chain saws do less damage to the soil than heavy equipment does, the rush to meet the target of half a million families in five years means that most land is cleared by big machines. Generally the trees are knocked down by bulldozers and then burnt—often even before the commercially valuable species have been taken out. Heavy clearing equipment compacts the soil so that it loses much of its capacity for retaining water. Hard rains can then erode the land, silt up nearby rivers and dams, and lead to flash flooding as the waters 'sheet' along the surface to the ground. The wheels of the clearing machines scrape off much of the topsoil, exposing subsoils that are less capable of receiving and storing nutrients, so that fertilisers become less effective.").

24. See Otten, *supra* note 20, at 75 ("In 1984, in a major policy shift, Martono announced that the government intended to concentrate on setting up cash-crop 'estates' rather than on giving out land to settlers for subsistence agriculture. Those settlers who are still able to grow their own food (and, in many areas, the soil is now so impoverished that growing rice is impossible) will have to fend for themselves, regardless of whether they have good harvests or bad. The Transmigration programme will now direct its energies towards investing in sites for exploitation by state-run or privately-owned plantation companies.").

*changing its focus from an ineffective 'welfare' policy to a generalized exploitation of migrants.*²⁵

Perez-Sainz concludes that the consequences of Transmigration, a state policy ostensibly engineered to improve Indonesia's national economic development, in fact exacerbated existing economic and social inequities.²⁶ This conclusion can be confirmed independently by examining the manner in which Indonesian laws were implemented to systemically expropriate indigenous lands for palm oil production.²⁷ It is crucial to emphasize from the outset, however, that xenophobia²⁸ alone was not the sole motivation behind such attacks on indigenous communities; the attacks were a reflection of Transmigration's function as a capitalist instrument for extending and centralizing private control over the means of production.

B. The Legal Status of Indonesia's Indigenous Communities

The original Indonesian Constitution of 1945—a legacy of Indonesia's own colonization by the Dutch—contains language that on the one hand demands respect for the legitimacy of the customary rights of indigenous communities²⁹ while, on the other hand, confers power upon the state to manage and regulate the

25. *Id.*

26. *Id.*

27. *See, e.g.*, ULRICH LÖFFLER, LAND TENURE DEVELOPMENTS IN INDONESIA, DEUTSCHE GESSELLSCHAFT FÜR TECHNICAL ZUSAMMENARBEIT [GERMAN SOCIETY FOR TECHNICAL COOPERATION], 35 (1996) ("The Presidential Decree No. 1 / 1976 concerning the Implementation of Agrarian Affairs . . . Where a piece of land (intended as a part of an HPH [in Bahasa: Hak Pengusahaan Hutan] [Forest Use Right]) is controlled by the local adat community under a valid right [hak yang sah] that land must be cleared (of those rights) at the outset with the payment of compensation . . . and where the holder of an HPH needs to close off an area with the result that the local community cannot enjoy its adat rights, the HPH holder must give compensation to the community."), available at [http://www.mekonginfo.org/mrc_en/doclib.nsf/0/2EC60BFD3F9C90CB802566DA003DCB40/\\$FILE/FULLTEXT.HTML](http://www.mekonginfo.org/mrc_en/doclib.nsf/0/2EC60BFD3F9C90CB802566DA003DCB40/$FILE/FULLTEXT.HTML).

28. *See, e.g.*, Marcus Colchester, *Unity and Diversity, Indonesian Policy Towards Tribal Peoples*, 16 THE ECOLOGIST 89, 89 (1986) [hereinafter *Unity and Diversity*] (reporting that at the 1985 conference between the Intergovernmental Group on Indonesia (IGGI) and the Ministry of Transmigration, Martono, the Minister of Transmigration, declared, "we have one native country, Indonesia; one language, the Indonesian language. By way of Transmigration, we will try to realize what has been pledged, to integrate all the ethnic groups into one nation, the Indonesia nation. . . ."); *Proceedings of the Meeting between the Department of Transmigration and the Intergovernmental Group on Indonesia* (IGGI), JAKARTA POST (Mar. 20, 1985).

29. *See, e.g.*, Undang-Undang Dasar [UUD] [Constitution] Aug. 18, 2000, §XA, art. 28I, ¶3 (Indon.) ("The cultural identities and rights of traditional communities are to be respected in conjunction with progressing times and civilization.").

use of national resources as it sees fit.³⁰ The obvious tension between these two sources of authority—indigenous people's traditional laws and the Indonesian State—was resolved unequivocally in subsequent legislation which provided the State with expansive discretionary powers when determining whether, in any particular instance, indigenous rights could legitimately be subordinated for the benefit of Indonesia's "national interests."³¹

In the process of clarifying the potentially ambiguous relationship between indigenous communities' sovereignty and the sovereignty of the State, the Basic Agrarian Law ("BAL") provided the legal framework for the State to act as the sole adjudicator in determining ownership of agricultural resources.³² Decisions regarding whether indigenous peoples even *existed* were considered to be an evaluation that only the State could, in any given instance, legitimately carry out.³³

In this way, the state strategically acknowledged portions of indigenous communities' traditional laws while reserving to itself the power to legitimately violate them. The Indonesian Department of Social Affairs summarized Article 3 of the BAL:

. . . said isolated communities of autochthonous³⁴ people have a legal title over the land, that is needed for their living. Such a right of ownership over land, that prevails in said communities, is recognized and legalized by the Government of the Republic of Indonesia, but its implementa-

30. See, e.g., *id.* at § XIV, art. 33, ¶2-3 ("Production sectors that are vital to the state and that affect the livelihood of a considerable part of the population are to be controlled by the state. The land and the waters as well as the natural riches therein are to be controlled by the state to be exploited to the greatest benefit of the people.").

31. For example, with regard to the rights to natural resources conferred by indigenous peoples' customary laws, Article 3 of the Basic Agrarian Law (hereinafter "BAL") states: "In view of the provisions contained in Articles 1 and 2, the implementation of the *ulayat* [collective] rights and other similar rights of adat-law [customary] communities—as long as such communities in reality still exist—must be such that it is consistent with the national interest and the State's interest and shall not contradict the laws and regulations of higher levels." BAL, 1960, Art. 3 (Indon.), available at www.eastimorlawjournal.org/LEGALRESEARCH/UUPA_English.DOC (last visited Oct. 6, 2011.). Article 5 elaborates on this notion, stipulating that: The agrarian law applicable to the earth, water, and airspace is *adat* provided that it is not contrary to the national interest and the interest of the State, which are based on national unity, to Indonesian socialism, to the provisions stipulated in this Act, nor to other legislation. [*Id.* at Art. 5.]

32. See *id.*

33. *Id.*

34. *Autochthonous Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/autochthonous> (last visited Oct. 6, 2011) ("(1) Indigenous, Native; 2) formed or originating in the place where found.").

tion should take place in such a way as is in accordance with national and State interests.³⁵

As detailed in "General Explanation No. 4(a) of Law No. 20 of 1961," the BAL therefore implicitly legitimized the expropriation of lands in order to support private economic interests:

In general, according to Article 18 of the BAL, the revocation of rights may be executed for state businesses (central and local government) in order to serve public interest. However, this law opens the possibilities to revoke the rights for private purposes, based on agreement with the owner. The private sector plan should certainly have been agreed by the government and be in accordance with the national development plan.³⁶

An analogous notion was expressed in a clause that was added to the Basic Forestry Law of 1967 that explicitly sanctioned the seizure of indigenous lands and resources in order to support Transmigration.³⁷

It is unsurprising, therefore, that when oil palm companies were granted forest concessions that included indigenous lands, the state typically required the companies to pay compensation only for those lands whose ownership could be confirmed with an ownership title.³⁸ As Weinstock and Vergara explained in a 1987 study of land tenure practices in indigenous communities, Indonesian agrarian laws:

are based upon [the] western notion of absolute ownership. To be officially recognized, land must be demarcated, preferably by survey, and titled in the name of a single individual. Use rights to a loosely demarcated parcel of land that are held by a number of related individuals are not

35. Marcus Colchester, *The Struggle for Land: Tribal Peoples in the Face of the Transmigration Programme*, 16 *THE ECOLOGIST* 99, 105 (1986) [hereinafter *Struggle for Land*].

36. Revoking of Rights on Land and Assets Thereon, Law No. 20, Gen. Explanation No. 4(a) (1961), S.G. Gazette No. 283 (Indon.), *translated in* MARCUS COLCHESTER ET AL., *supra* note 2, at 53 (2006).

37. Basic Forestry Act, Clarification Act No. 2823, Clause 17 (1967), S.G. No. 8 (Indon.), *translated in* THE STRUGGLE FOR LAND, *supra* note 35 at 105 ("The rights of traditional-law communities may not be allowed to stand in the way of the establishment of Transmigration settlements.").

38. Martua Sirait, *Conversion of Public Land and Tenure Security in Lampong, Indonesia* 11 n.7 (Land, Poverty, Social Justice & Development International Conference, Jan. 9, 2006), *available at* www.iss.nl/content/download/3616/35277/file/Sirait.pdf

recognized.³⁹

In 1970, this principle was extended further in a governmental regulation that justified violating indigenous claims to their land and resources in order to maximize agricultural yields:

The rights of customary law communities and their members to harvest forest products based on customary law may be exercised, so long as those rights still exist, but they should be regulated so the exercise of these rights does not hamper the exploitation of forest concessions.⁴⁰

As in the BAL of 1960, policies such as these, while appearing to formally codify the legitimacy of indigenous communities' traditional rights and laws within certain limits, constituted a very clear assault on customary laws regulating ownership and use of all natural resources. This is because, as Weinstock and Vergara note:

Ownership of economically valuable plants, in the eyes of the government, must be made through ownership of the land on which they are growing. Somewhat tautologically, agrarian laws state that rights to land can only be secured if it is proved that the land has a *hasil* or "yield." To claim the plants, an individual must claim the land, but to claim the land, it must have plants on it.⁴¹

Most indigenous communities, however, practice a form of extensive agriculture that also functions as a method for conserving forest resources. As a result, vast tracts of land may lay fallow at any given time.⁴² Because indigenous communities were consequently stripped of any legitimate claim to these lands while they lay fallow, significant portions of their territory were made vulnerable to expropriation. Furthermore, concepts of individual ownership over clearly delimited quantities of natural resources are often absent in indigenous societies. For example, as geographers Brookfield and Hart write of the indigenous communities throughout Melanesia:

The foundation of any group's identity is ultimately in the land which the group "owns" and uses. Whether exercised

39. J.A. Weinstock & N.T. Vergara, *Land or Plants: Agricultural Tenure in Agroforestry Systems*, 41 ECON. BOTANY 312, 319 (1987).

40. Rights of Forest Concession and Forest Product Harvesting, (1970), S.G. 1970/31, Art. 16, ¶1(Indon.), *translated in* COLCHESTER ET AL., *supra* note 2, at 50.

41. Weinstock, *supra* note 39, at 318.

42. See Michael R. Dove, *The Agroecological Mythology of the Javanese and the Political Economy of Indonesia* 39 INDONESIA 1, 9 (1985).

or not, rights in land are the basis of personal status and security . . . An individual's rights mesh . . . into those of the group to which he belongs. Behind and around the individual title is a continuing group title, to used and unused land alike, and individual rights are validated by their membership of a group.⁴³

Because of this aspect of the relationship between indigenous societies and their lands, ownership rights over any specific tract of land cannot be legitimately granted or in any other way alienated from the groups that inhabit the land—even in the name of the members of communities themselves. Rather, ownership is transferred exclusively and in perpetuity through a process of collective inheritance within each community, and as among the Mae Enga of Papua New Guinea, “genealogies serve as charters that validate the rights of descent groups to patrimonial land.”⁴⁴ As Colchester summarizes, “to say that land *belongs* to or is *owned* by the group is somewhat misleading. It is much closer to the truth to say that the individuals of the group hold their land in trust.”⁴⁵ The Indonesian legislation discussed above—by recognizing the traditional rights of indigenous communities to their lands, but only insofar as the lands are actively being put to use for intensive agricultural production⁴⁶ and where ownership is certified and confirmed with surveys and titles held by individuals⁴⁷—therefore had the practical consequence of negating the principles by which land is owned and maintained by indigenous peoples. Instead of securing indigenous communities' claims of land ownership, these laws undermined them while codifying the logic of capitalist systems. Because economic development demands an unyielding expansion of private ownership over natural resources, Indonesian law provided an efficient justification for a policy of giving unwavering state support to industrial monoculture.

This is why, when increasing palm oil production was determined by the State to be a crucial element of Indonesia's “national economic development plan,” indigenous communities were forced to cede large pieces of “unused” lands to palm oil companies in order to allow for the expansion of oil palm plantations. That

43. H. C. BROOKFIELD & DOREEN HART, *MELANESIA: A GEOGRAPHICAL INTERPRETATION OF AN ISLAND WORLD* 227, 419 (1971).

44. MERVYN MEGGITT, *BLOOD IS THEIR ARGUMENT* 5-7 (1977).

45. *Struggle for Land*, *supra* note 35, at 101.

46. Weinstock, *supra* note 39, at 318.

47. Michael R. Dove, *The Agroecological Mythology of the Javanese and the Political Economy of Indonesia*, 39 *INDONESIA* 1, 9 (1985).

forced cession occurred despite the fact that indigenous notions of collective rights precluded *a priori* the possibility of a legitimate transfer of land ownership to a private company.⁴⁸ Thus, as stipulated in Presidential Decree No. 1 of 1976 "Regarding the Implementation of Agrarian Affairs with the Forestry, Mining, Transmigration and Public Works Sectors":

Where a piece of land (intended as a part of an HPH is controlled by the local *adat* community under a valid right [*hak yang sah*] that land must be cleared [of those rights] at the outset with the payment of compensation, . . . [and] where the holder of an HPH needs to close off an area with the result that the local community cannot enjoy its *adat* rights, the HPH holder must give compensation to the community.⁴⁹

At the 1985 meeting between the IGGI and the Ministry of Transmigration, the method by which communities should be compensated was described in terms of the Alokasi Pemukiman Penduduk Daerah Transmigrasi (hereinafter "APPDT") (Resettlement Allocation for Inhabitants of Transmigration Regions) program.⁵⁰ According to this model, in addition to paying the development costs of a central "nucleus" estate, private companies would finance the conversion of the satellite areas into oil palm plantations. This was supplied by way of loans that the indigenous community would be required to begin repaying after the seventh growing season⁵¹ (prior to which oil palm plantations are either non-productive altogether and/or unprofitable). Further-

48. See, COLCHESTER ET AL., *supra* note 2, at 168-69.

49. LÖFFLER, *supra* note 27, at §3.6.

50. *Struggle for Land*, *supra* note 35, at 105 n.49.

51. COLCHESTER ET AL., *supra* note 2, at 75; "In 1985, the bupati (district head) issued a decree regarding the land allocation for PT KCMU's nucleus estate smallholder plantation, requiring that fully 40% of acquired lands should be allocated to the company for its nucleus estates (*inti*) while only 60% should be allocated to the community members registering on the scheme, as smallholdings (*plasma*). The decree also elaborated in some detail on the installments for the payment of credit to the farmers. The company was to loan IDR 7.4 million per hectare of land to the community. In the 7th year of the plantation cycle, project participants should start to pay off the loan in installments in the form of 30% of the takings from harvested produce. Payments should then be made every three months to the company-established smallholder cooperative. Moreover the company would only hand over titles to the *plasma* land to those project participants who had paid off all their loan. In effect therefore, the community members were losing 40% of their land to the company and only recovering their ownership rights to the remaining 60% if they could pay off their debts. According to interviewees, in practice the harvests have never been good, debts remain unpaid and in any case the company has been more interested in buying full rights to the land for use as *inti* than in maintaining

more, the owner of the nucleus would act as the exclusive buyer of oil palm fruits grown on satellite estates.⁵²

This model severely subordinated those cultivating satellite areas to the operator of the nucleus estate: Not only did the owners of the nucleus estate manipulate the price at which they purchased satellite growers' oil palm, they also frequently underinvested in satellite areas. This consequently made it likely that satellite growers would eventually have to abandon their lands due to poor harvests, often by selling them to the nucleus estate at a loss. Indeed, the ultimate consequence of the escalation of the Transmigration program in the 1980s was the creation of large nucleus estates maintained by a transmigrant labor force. This labor force was made up of settlers who, having failed to gain ownership over their satellite areas and reneged on their loans, became wage-laborers for corporate plantation operators.⁵³ It is therefore unsurprising that indigenous groups often cited concerns regarding price manipulation and underinvestment as rationales for their opposition to such arrangements.⁵⁴

plasma." see, e.g., Sirait, *supra* note 38 at 14 n.20 (citing Minutes of Meeting of *Musyawah* (June 10, 1995)).

52. John McCarthy & Zahari Zen, *Regulating the Oil Palm Boom: Assessing the Effectiveness of Environmental Governance Approaches to Agro-industrial Pollution in Indonesia*, 32 *LAW & POL'Y* 153, 156 (2010) ("The institutional arrangements of the various KKPA schemes specify the conditions under which the satellite smallholders obtain agricultural inputs and sell their output (FFB) to the oil palm mill owned by the estate, and how they repay their credit to the farmer cooperative. However, these arrangements subjected smallholders to a monopsony situation, whereby they were contractually obliged to sell FFB to the one buyer (the estate) who was able (locally) to manipulate prices."); see also Sirait, *supra* note 38 at 14.

53. See Caufield, *supra* note 23, at 74 ("In 1984, in a major policy shift, Martono announced that the government intended to concentrate on setting up cash-crop 'estates' rather than on giving out land to settlers for subsistence agriculture. Those settlers who are still able to grow their own food (and, in many areas, the soil is now so impoverished that growing rice is impossible) will have to fend for themselves, regardless of whether they have good harvests or bad. The Transmigration programme will now direct its energies towards investing in sites for exploitation by state-run or privately-owned plantation companies.").

54. Colchester et al., *supra* note 2 at 88 ("An environmental impact assessment (ANDAL) study for the PT KCMU operation carried out in 1996, reveals that a high percentage of the people were concerned about the establishment of the oil palm plantation. Their main fear was that the oil palm plantation would destroy the people's *damar* gardens. They were also concerned that the company would determine prices of oil palm fruits and undermine the communities' businesses in coffee, pepper and *damar*. Also, some of the *adat* community who did not own land were afraid that they would lose opportunities to get wage labour on local farms because of the establishment of oil palm plantations. The impact study also described the popular unrest in the face of the land acquisition and land consolidation processes based on concerns that this could lead to land scarcity in the future. For these reasons, many

III. CONTINUITIES BETWEEN THE NEW ORDER AND THE CURRENT REFORMASI PERIOD

A. *Failed Attempts at Empowering Indigenous Communities*

It is undeniable that militaristic sentiments influenced the manner in which oil palm plantations were expanded during the New Order.⁵⁵ General Murdani—Commander-in-Chief of the Indonesian armed forces, and previously the leader of the 1975 invasion of East Timor—was quoted in 1985 describing Transmigration as:

the only programme in the economic field that must quite categorically be tied in with defence and security considerations. The preparation of sites and the removal of obstacles to land availability need to be given special focus, because the choice of sites is related to the ABRI [Armed Forces of the Republic of Indonesia] concept of territorial management. This is why the armed forces must be involved at the earliest possible stage in selecting the sites.⁵⁶

The foregoing illustrates that an atmosphere of xenophobia⁵⁷ was not the only, and indeed not the primary condition that made the acceleration of palm oil production possible. More fundamentally, the oil palm sub-sector received crucial financial support from for-

adat communities wanted to firmly reject the establishment of the plantation. The report wisely recommended that the company should provide the communities with clear information on: the goals of the project; their plans to enclave the lands of any community members that chose not to be involved in the project; and how they would pay appropriate prices for harvested products from the *plasma* plantation.”); see, e.g., Sirait, *supra* note 38, at 17 n.33 (citing PT KCMU, ENVIRONMENTAL IMPACT ASSESSMENT (ANDAL) PIR OIL PALM PLANTATION AND OIL PALM PROCESSING FACTORY KCMU COMPANY, SUB-DISTRICT OF SOUTH SEASHORE).

55. *Struggle for Land*, *supra* note 35.

56. PETER KING, WEST PAPUA AND INDONESIA SINCE SUHARTO: INDEPENDENCE, AUTONOMY OR CHAOS? 114 (University of New South Wales Press, 2004) (quoting *Sinar Harapan* (Mar. 8, 1985)).

57. See, e.g., *Unity and Diversity*, *supra* note 28, at 89 (reporting that at the 1985 conference between the Intergovernmental Group on Indonesia (IGGI) and the Ministry of Transmigration, Martono, the Minister of Transmigration, declared, “we have one native country, Indonesia; one language, the Indonesian language. By way of Transmigration, we will try to realize what has been pledged, to integrate all the ethnic groups into one nation, the Indonesia nation.” (quoting Proceedings of the Meeting between the Department of Transmigration and the Intergovernmental Group on Indonesia (IGGI), Jakarta (Mar. 20, 1985))). Clearly, Transmigration’s function as a method for realizing the imperial aims of economic and territorial expansion was frequently downplayed in certain contexts; instead, its justification was seen as founded upon its specifically cultural and social power as a unifying force capable of assimilating numerous disparate foreign populations.

eign governments and international banking institutions, a set of economic programs—like Transmigration—designed to create a displaced and disempowered labor force, and a legal framework justifying the expansion of increasingly private modes of production.⁵⁸ Only by first recognizing the numerous and complex forces which supported the initial surge in palm oil production in the 1970s and 1980s can the effects of political decentralization since the fall of Suharto's New Order regime in 1998 be effectively analyzed.

Following the collapse of Suharto's New Order regime, a number of pieces of legislation were passed that did affirm and recognize the legitimacy of indigenous communities' customary political and cultural institutions, and apparently fulfilled these communities' demand that the State guarantee and protect their autonomous status.⁵⁹ In the years since their passage, however, these laws have proven to be generally ineffective as mechanisms for empowering indigenous communities and democratizing regional governmental institutions. For example, one piece of legislation that is commonly cited as helping to usher in what is commonly referred to as the "Reformasi Period"⁶⁰ in Indonesia politics by

58. See Caufield, *supra* note 23, at 74 ("In 1984, in a major policy shift, Martono announced that the government intended to concentrate on setting up cash-crop 'estates' rather than on giving out land to settlers for subsistence agriculture. Those settlers who are still able to grow their own food (and, in many areas, the soil is now so impoverished that growing rice is impossible) will have to fend for themselves, regardless of whether they have good harvests or bad. The Transmigration programme will now direct its energies towards investing in sites for exploitation by state-run or privately-owned plantation companies.")

59. ANNE CASSON, CTR FOR INT'L FORESTRY RESEARCH, *THE HESITANT BOOM: INDONESIA'S OIL PALM SUB-SECTOR IN AN ERA OF ECONOMIC CRISIS AND POLITICAL CHANGE* 18 (1999). ("In East Kalimantan, LonSum was accused of clearing land and planting oil palm before obtaining the necessary permits. In response, 'Representatives from 9 villagers went to LonSum's estate office in East Kalimantan to present their demands for compensation. They requested Rp 250 billion (approximately \$US 25 million) for land, crops and damage to burial sites.' In addition, 'Villages seized heavy equipment, including bulldozers and trucks and set fire to part of the base camp. Two office buildings, a fertilizer store and some workers accommodations were destroyed in this incident.' In Aceh, Socfindo expanded their plantation estate without paying adequate compensation. In January, 1998, 'Socfindo claim[ed] that two of their staff were tortured and three seriously beaten' and 'accused the local community of destroying oil palm plantations, and staff houses.' In Riau, after the customary land of a number of communities was allocated to a plantation company, PT Torganda, without their consent, 'hundreds of villagers from Ujung Gading Jae village clashed with PT Torganda. The clash resulted in two villagers being wounded and a bulldozer being burnt. The incident occurred after farmers ambushed PT Torganda workers who were clearing land to make way for oil palm plantations in Bukit Harapan, Ujung Gading.'")

60. The Reformasi period refers to the years since the collapse of the New Order

allowing indigenous communities to play a more direct role in how their lands are incorporated into massive oil palm plantations is Law No. 22 of 1999.⁶¹ In this regard, Law No. 22/1999 is understood as an attempt to overturn the rigid hierarchical distribution of political power established by the Village Administration Act of 1979. As Marcus Colchester explains:

One of the important impacts of the Village Administration Act was that it subordinated all villages to a single common bureaucratic structure that was imposed throughout Indonesia. Villages were often regrouped and were all renamed by the Javanese term *desa*. Each *desa* was run by a village head (*kepala desa*) who was placed under the control of the head (*camat*) of the sub-district (*kecamatan*).⁶²

Law No. 22/1999 explicitly noted the unconstitutionality of the Village Administration Act⁶³ and affirmed the principle that the customary rights of self-governing indigenous communities ought to be formally respected by Indonesian law.⁶⁴ Despite such promising endorsements of civil society's demands for increased popular control of state functions, however, in the years since its passage Law No. 22/1999 has been implemented primarily for the

regime in 1998, during which attempts have been made at passing legislation to democratize political processes. See, e.g., Kurt Biddle, *Indonesia: Reformasi Betrayed*, SOLIDARITY-US.ORG (last visited Oct. 6, 2011).

61. Regarding Regional Governance [RRG], Law No. 22, (1999), S.G. No. 60 (Indon.) translated in SUNARYATI HARTONO ET AL., POLITICAL CHANGE AND LEGAL REFORM TOWARDS DEMOCRACY AND SUPREMACY OF LAW IN INDONESIA (2002), available at <http://www.ide.go.jp/English/Publish/Download/Als/pdf/12.pdf>.

62. COLCHESTER ET AL., *supra* note 2, at 47.

63. Indeed, Law No. 22/1999 contains language that was clearly crafted as a response to the portion of the Village Administration Act. See, e.g., HARTONO ET AL., *supra* note 61, at Art. 1, § o. ("The Village/Desa or a similar unit known under different names but for short to be called Desa [here], is a legal-communal bond of a community which has competencies to regulate and administer the interests of its local community based on its origins [*asal-usul*] and local customs, which is acknowledged by the National Governmental System and [its territory is] within the regency.").

64. See, e.g., Id. at 146 (commending Art. 9 for allowing villages, "to choose their own territorial names according to indigenous local common laws, thus acknowledging the variety and multiplicity of the village[s] cultural backgrounds, the community's customary ways of village participation, the indigenous local autonomy and system[s] of democracy"); see also Id. at 139 (noting that Art. 104 requires that a guiding principle of Villages' representational institutions must be to act, "to protect the common laws, to make village regulations, to tap and channel local people's aspirations, and control the activities of the Village administration"); see also Id. (noting that Art. 111 "legally obligates everybody to adhere to the indigenous origins and common laws of the villages.")

purposes of centralizing state functions. For example, as Colchester notes discussing the law's lasting impact:

After being implemented for more than five years, Law No. 22 of 1999 was replaced by Law No. 32 of 2004 regarding Regional Autonomy. The new Law was passed hastily without real debate or prior evaluation of what had been achieved under the law it replaced. The new law somewhat restricts the scope for community self-governance and has been interpreted as an attempt to re-centralize government authority at the village level by subordinating the authority of village-level representative bodies (*Badan Perwakilan Desa*) to the village head (*Kepala Desa*), in turn clarifying that they are subject to the district regent (*bupati*).⁶⁵

This is consistent with the analysis of Hartono, whose evaluation of the actual effects of Law No. 22/1999 led to the conclusion that although, "politically a number of competencies were gladly handed over to the regencies [sub-divisions within a given province] . . . realities demanded a more active role of the provinces [Indonesia consists of 33 provinces, which are analogous to State Governments in the U.S.] into the regencies' affairs."⁶⁶

Such indictments of Law No. 22/1999 can be generally applied to similar legislation passed at the outset of the Reformasi Period. For example, in 2001 a survey team assembled by a number of Indonesian Non-Governmental Organizations ("NGO") published a report⁶⁷ comparing the social impacts of Law No. 22/1999 and Law No. 25/1999, the latter being another prominent piece of legislation passed in 1999 which, under the pretense of decentralizing government functions, attempted to reform the state's economic decision-making processes.⁶⁸ The assessment of the survey team not only confirmed the judgments made by Hartono and

65. COLCHESTER ET AL., *supra* note 2, at 48.

66. HARTONO ET AL., *supra* note 66, at 143 (highlighting the fact that the control of "the exploitation of human resources"—a process that is obviously highly relevant to oil palm production in Indonesia—was "not transferred to the provinces the [sic] less to the regencies," as an emblematic example of how "the clash of interests between the Central Government versus the Local Governments," has been resolved in the wake of Law No. 22/1999); *see also id.* at 149 (wherein Hartono et al. describe how Art. 7 in particular represented a strategic attack on "local political decisions based on local religious realities," since it "made 'religious affairs' the competency for the Central Government.").

67. HARTONO ET AL., *supra* note 61, at 148.

68. Law No. 25 of 1999, *Regarding the Fiscal Balance Between the Central Government and the Regions*, (1999), (Indon.), available at http://ipdprojects.org/logoling-sea/resource/pdf/Law25_99_99_n_eluc.pdf.

Colchester regarding Law No. 22/1999,⁶⁹ but argued that an equivalent anti-democratic tendency manifested itself in the implementation of Law No. 25/1999. Instead of creating practically feasible mechanisms by which economic policy could be designed more democratically, "Law No. 25/1999 in its further elaborations, still reflect[s] the struggle of forces to retain the centralistic approach in economic policies and development in general."⁷⁰

Similarly, while some of the most abusive amendments to the BAL passed under Suharto have been repealed or modified during the Reformasi Period, the fundamental hierarchy of interests established by the BAL continues to be used as the basis for negotiating conflicting rights claims. Thus, palm oil production in Indonesia has not significantly changed in terms of who is deciding how, and on what basis, plantation development and expansion unfolds. The terms of the land concessions previously awarded to companies already operating oil palm plantations, despite enduring opposition by indigenous groups,⁷¹ have for the most part remained unchanged.⁷² It is true that some policies do contain stipulations that recognize, to a very limited degree, the legitimate claims of indigenous peoples to their traditional lands. For example, Presidential Regulation No. 36 of 2005 on Land Procurement for Development for Public Purposes requires that the determination of the amount of compensation provided for any lands taken from indigenous communities be "based upon a consensus between the rights holders and the government."⁷³ Nevertheless, such procedural recommendations have had very little

69. See, e.g., HARTONO ET AL., *supra* note 61, at 148 ("[Law No. 25 of 1999] still reflects a number of political efforts to withdraw competencies already transferred to the regions . . . in order to 'contribute to national development' giving to the villages no instruments to refuse or veto.").

70. *Id.* at 149.

71. COLCHESTER ET AL., *supra* note 2, at 92 ("Surveys conducted by the University of Lampung in 2002 revealed that most community members (99.4%) favoured the change of these areas' status from forest zones into non-forest zones (APL). Yet, this research also highlighted that people were worried about the unclear boundaries between their lands and the remaining protected forest, as well as the overlap between redistributed areas and lands claimed to be owned by customary marga. Most people did not possess land titles, leaving them vulnerable to being appropriated by more powerful interests, thereby risking further land conflicts.").

72. See, e.g., Christopher R. Duncan, *From Development to Empowerment: Changing Indonesia Government Policies toward Indigenous Minorities*, in *CIVILIZING THE MARGINS: SOUTHEAST ASIAN GOVERNMENT POLICIES FOR THE DEVELOPMENT OF MINORITIES*, 86, 104 (Christopher R. Duncan ed., NUS Press, 2008) (citing Ministry of Forestry Decree No. 47/1998).

73. COLCHESTER ET AL., *supra* note 2, at 55.

practical significance since, as Presidential Regulation No. 36/2005 adds, “. . . if any dispute arises, the government may unilaterally set the compensation and entrust the compensation money to a district court.”⁷⁴

B. Limitations on the State's Power to Regulate Palm Oil Production

In order to understand the overall effect of the legislation that has been passed during the Reformasi Period on how oil palm is grown in Indonesia, it is important to also consider the dramatic deregulation of the palm oil sub-sector that has occurred since the fall of the New Order regime. For example, in 1998 the government granted State Forestry Companies permission to use 30% of their concession for estate crops⁷⁵ such as oil palm. Anne Casson, an economist at the Center for International Forestry Research, observed:

The decision will therefore contribute to, and legitimize, expansion of estate crops onto permanent production forest land. Estate crops were previously only supposed to be established on conversion forest land, which supposedly have less forest cover than permanent production forest land.⁷⁶

Indeed, this was seemingly the intended consequence, as this policy was soon expanded in August of 1999 to give all plantation companies the right to obtain holdings in production forest (which previously had only been granted to logging companies), 40% of which could be devoted to estate crops. As Casson wrote:

This new regulation has the potential to be particularly damaging to Indonesia's forest cover as it gives plantation companies the right to plant oil palm, or other tree crops, in production forest. The regulation also gives logging companies little incentive to practice sustainable logging techniques or to rehabilitate their concessions. This is because forest land allocated to logging companies can now be directly converted to plantation crops after the HPH license expires. Logging companies are therefore more likely to clear cut their concessions rather than use selective logging

74. *Id.*

75. Crops grown on large plantations, often by workers who live on-site. See *Estate Crops*, COUNTRYSTUDIES.US (last visited Oct. 6, 2011) <http://www.countrystudies.us/indonesia/67.htm>

76. CASSON, *supra* note 59, at 18.

techniques.⁷⁷

More recently, in February of 2009, Indonesia lifted its ban on the use of peat land for palm oil production, a ban that had been put in place because the process of converting a tract of peat land into an oil palm plantation releases tremendous quantities of greenhouses gases.⁷⁸

Interestingly, there have also been substantial attempts to decentralize the regulation of oil palm plantations during the Reformasi Period. For example, in October of 1999, President Habibie—Suharto's vice president who rose to power immediately following the New Order regime's overthrow—issued a decree that gave provincial authorities full control over the approval of foreign or domestic palm oil investment projects, regardless of the size of the planned investment.⁷⁹ This decentralization was justified as a method for creating a more democratic regulatory process that might bring palm oil production under greater popular control and allow for the enforcement of more stringent environmental standards than the national government could effectively apply. Instead, however, it has made it significantly easier for oil palm companies to pursue environmentally destructive production practices.⁸⁰ This is because, as Casson noted presciently at the time:

Provincial Investment Offices will be eager to accept investment in order to generate much needed revenue and palm oil investors will be eager to take advantage of simplified investment procedures. It is possible investments will be pushed through without much consideration for local com-

77. *Id.* at 37.

78. Ian MacKinnon, *Indonesia Reopens Peatland to Palm Oil Plantation*, GUARDIAN UNLIMITED (Feb. 18, 2009, 4:16 PM), <http://www.guardian.co.uk/environment/2009/feb/18/indonesia-peat-palm-oil>.

79. See *Investment Licensing Powers to be Delegated to Provinces*, THE JAKARTA POST, July 21, 1999, at 8.

80. These damages themselves have been well-documented. See, e.g., John McCarthy & Zahari Zen, *Regulating the Oil Palm Boom: Assessing the Effectiveness of Environmental Governance Approaches to Agro-industrial Pollution in Indonesia*, 32 LAW & POL'Y 153, 156 (2010) ("sixty tons of fresh fruit bunches (FFB) per hour. . . produce 1,200 cubic meters of effluent per day of liquid waste. This level of liquid waste produces a biological oxygen demand (BOD) of 25,000 mg/L, a pollution load (15,000 kg BOD/day) equivalent to the sewerage produced by a city of 75,000 people. . . . While some State companies employ the shells of oil palm fruits to fill roads around the plantation, most factories use the shells for internal combustion for powering their boiling stations, producing an enormous amount of black smoke and dust.").

munities or the environment.⁸¹

If, in addition to formally decentralizing the regulation of oil palm plantations, the national government had provided provinces with the funding necessary to enforce meaningful environmental standards, Casson's predictions might not have come to pass. But sufficient funds were never allocated, and thus provincial governments were forced into a position where the rigorous application of a strict set of regulations was impossible. Instead, provincial governments now attempt to attract private investments for new oil palm plantations with such desperation that, as described in a recent report conducted by the Indonesia-Netherlands Study on Environmental Law and Administration in Indonesia ("INSELA"), "large [oil palm] factories have considerable political and economic leverage, and bribery and intimidation of regional officials attempting to enforce environmental regulations is not unknown."⁸²

This situation—in which local governments have been forced into opposing the enforcement of environmental regulations with such resolve that they often actively work against attempts to democratize regulatory procedures—has had some very unfortunate consequences. An exemplary and vivid illustration of such consequences came in 2001 when Wahana Lingkungan Hidup (hereinafter "WALHI") (Friends of the Earth Indonesia), a grass-roots NGO based in Jambi, distributed a press release criticizing a newly proposed 1 million hectare oil palm plantation, "arguing that it would destroy forests, and wipe out the sustainable livelihoods of communities living near the forests."⁸³ Subsequently, the US-British-Swiss venture capital consortium, Asian Jade Venture Ltd.—with whom the governor of Jambi had signed a Memorandum of Understanding covering a \$500 million investment in the plantation—put a temporary hold on the plantation's construction in order to allow for a re-review of its potential environmental impact. In response, Zulkifli Nurdin, the governor of Jambi, furiously accused WALHI "of being anti-investment, anti-progress and anti-regional autonomy"⁸⁴ and launched a campaign to shut down WALHI's operations in Jambi.⁸⁵

81. CASSON, *supra* note 59, at 19.

82. McCarthy & Zen, *supra* note 80, at 159-160.

83. *Oil Palm Investments Opposed*, DOWN TO EARTH No. 49 (Down to Earth, Hallbankgate, Cumbria, U.K.), May 2001, at 3, available at <http://dte.gn.apc.org/49OP.htm> [hereinafter *Oil Palm*].

84. *Id.*

85. The attack on environmentalist NGOs continues right through to the present

This exemplifies the paradoxical result of decentralizing authority in Indonesia. Ironically, that decentralization has produced a political situation that continues to vigorously exclude popular participation in decision-making by allowing for the emergence of local elites who are “insisting strongly on the transfer of power from central to regional governments,”⁸⁶ without then opening these local governing bodies to actual democratic control by regional populations. As with legislation like Law No. 22/1999—laws that appeared to constitute a response to demands for the recognition of the sovereignty of indigenous communities’ systems of customary rights—popular demands for the democratization of state functions were betrayed, and incorporated into a renewed effort to further centralize power in the hands of anti-democratic, state-corporate institutions.

C. The Policy Effects of Indonesia’s Need for Foreign Investment

These striking failures of the policies of the Reformasi Period bring into focus the complicated factors that explain the forces that drove the transformation in Indonesian’s agricultural laws during the 1960s and 1970s. Given the degree to which democratically elected officials have, since 1998, been unwilling to significantly modify these laws, the fact that xenophobic sentiments may have laid behind the state’s rigorous defense of its “national economic interests and security” in the case of certain individuals (e.g., Minister Martono and General Murdani’s defense of Transmigration as a method for expanding oil palm plantations⁸⁷) cannot fully explain their policies. Rather, even the expansion of Transmigration in the 1970s and 1980s was fundamentally a method of absorbing the means of agricultural production into a capitalist regime, despite the fact that it was only later that state-

on the eastern coast on Sumatra. See, e.g., Budi Otmansyah, *Greenpeace Protest Camp Destroyed in Suspicious Fire*, THE JAKARTA GLOBE, Apr. 12, 2010, <http://www.thejakartaglobe.com/home/greenpeace-protest-camp-destroyed-in-suspicious-fire/368919> (reporting that on April 11, 2010 in the neighboring province of Riau, a Greenpeace Indonesia camp was burned down in what appears to be an act of arson perpetrated by the corporate powers that profit from the deforestation Greenpeace has raised protests against).

86. *Oil Palm*, *supra* note 83 at 159.

87. See, e.g., *Unity and Diversity*, *supra* note 28, at 89 (statement of Martono, Minister of Transmigration) (“we have one native country, Indonesia; one language, the Indonesian language. By way of Transmigration, we will try to realize what has been pledged, to integrate all the ethnic groups into one nation, the Indonesia nation. . .”).

run oil palm companies were privatized. From the outset, a very narrow set of economic interests have consistently benefited, and the enduring power of these interests is also what has prevented the democratization of State functions since 1998 from meaningfully reforming Indonesia's laws or how palm oil is produced.

This "enduring power" is largely the result of the degree to which countries like Indonesia are dependent on foreign investment—whether it comes from the World Bank, the IMF, the Asian Development Bank, private firms based in Malaysia, Thailand, the Philippines or other South Asian countries, or multinational corporations headquartered in Western nations. As with many Latin American countries today, because it must attract the investments of international economic institutions in order to sustain itself—a position analogous to how individual Indonesian provinces are in many ways now subordinated to the oil palm companies they are supposed to regulate—the types of policies that the Indonesian State is able to practically pursue are highly restricted. If, for instance, President Habibibe would have preferred to carry out meaningful reforms of the oil palm sub-sector, it is almost certain that the economy would have ground to a halt due to capital flight if he had succeeded in doing so.⁸⁸

In this regard, it is relevant to note that the Reformasi Period began in the midst of the 1997-1999 Asian Financial Crisis, one of the consequences of which was to dramatically increase Indonesia's need for foreign investment, and thus expand international economic institutions' power over the policies adopted by the Indonesian State. This was because, as a recent review of the expansion of oil palm plantations in Indonesia explains:

following the crisis of 1999, the central state no longer had the fiscal, administrative or coercive capacity required to support or extend the expansion of the estates. Rather, following the decentralisation reforms and in accordance with the governance paradigm, the central state was to operate more in a facilitation and coordination role, largely withdrawing from direct involvement as a financier, facilitator and guarantor of plantation operations involving the conversion of lands subject to landowner claims.⁸⁹

88. For recent economic evaluations of the devastating effects of capital flight, see, e.g., Joseph P. Joyce & Malhar Nabar, *Sudden Stops, Banking Crises and Investment Collapses in Emerging Markets*, 90 J. DEV. ECON. 314, 314-322 (2009); Valerie Cerra, Meenakshi Rishi & Sweta Saxena, *Robbing the Riches: Capital Flight, Institutions and Debt*, 44 J. DEV. STUD. 1190, 1190-1213 (2008).

89. John F. McCarthy & R.A. Cramb, *Policy Narratives, Landholder Engagement,*

These economic institutions' have lent well-documented support to some of the most destructive policies pursued by the New Order regime (such as the expansion of Transmigration described above). It is not unreasonable to suggest that this significant expansion of foreign political influence in Indonesia immediately prior to the passage of a series of policies that failed to realize (and in some case directly undermined) demands for real democratic reform is to some extent responsible for failure of those policies. In fact, the results of a recent internal audit of the private sector arm of the World Bank, the International Finance Corporation (IFC), appear to support conclusions that such a causal relationship may be hampering reform efforts in Indonesia even today. The audit reveals in detail how the World Bank is currently funding a number of multinational oil palm trading groups operating in Indonesia, despite having been made aware of the fact that the oil palm plantations these groups have invested in explicitly and consistently violate the World Bank's own Performance Standards for loans, due to their negative environmental and social effects.⁹⁰

Further clarity regarding the types of policies international investors find objectionable can be gained by considering how foreign oil palm companies operating in Indonesia reacted immediately after the overthrow of General Suharto. Following the collapse of the New Order regime, indigenous populations' suppressed opposition to oil palm plantations' expansion erupted in the form of protests, worker-occupation of plantations, and other tactics aimed at limiting the productive capacity of palm oil corporations.⁹¹ As Casson wrote succinctly at the time, these demands for increased popular involvement in decision-making about where oil palm plantations would be developed and how they would be operated "resulted in the consequent withdrawal and

and Oil Palm Expansion on the Malaysian and Indonesian Frontiers, 175 THE GEOGRAPHICAL J. 112, 116-117 (2009).

90. OFFICE OF THE COMPLIANCE ADVISOR/OMBUDSMAN, CAO AUDIT OF IFC CAO COMPLIANCE 2-3 (2009), *available at* http://www.forestpeoples.org/documents/ifi_igo/ifc_wilmar_cao_audit_report_jun09_eng.pdf.

91. *See, e.g.*, CASSON, *supra* note 59, at 13 ("Since May 1998, reformists have called upon the national government to examine the domination of conglomerates in the forestry sector and allow local communities to play a larger role in new economic development. Unrest has also increased in and around estates because the 'reform era' has provided an opportunity for communities to reclaim their land from plantation companies. Communities have stepped up protests against further oil palm expansion by burning estate offices, large machinery, processing plants and plantations. Conflicts between estate workers and communities have also increased and many have resulted in injury or death.").

withholding of foreign investment.”⁹² Such a response is understandable given that the expansion of palm oil production under General Suharto was often supported directly by the Indonesian army.⁹³ The fact that Habibie’s administration did not respond to indigenous communities’ demands for democratization with military force sent a clear signal to foreign investors that the Indonesian labor market would be much more undisciplined than it had been under the New Order regime, thus potentially endangering corporate interests. Casson further reported:

[M]any companies have said that, since the fall of Suharto, they can no longer call on the armed forces to control the security situation. . . . Unable to rely on Indonesian authorities for assistance some companies have been forced to close down their operations, reduce their planting targets, or withdraw their investments.⁹⁴

Clearly, as long as barriers impeding the global movement of capital continue to be dismantled, capital flight will remain a potential consequence of nearly any policy that is perceived as hindering the expansion of private control over the means of production. Evidently, this even includes a policy of not systematically sup-

92. *Id.* at 13.

93. For example, on December 7, 1975, nine days after Fretilin (the Revolutionary Front for an Independent East Timor) declared independence from Indonesia, the New Order sent in the Indonesia military—an invasion which, like the 1965 coup, was supported both militarily and politically by Western governments. *See, e.g.,* John Pilger, *Land of the Dead; Journey to East Timor*, THE NATION, Apr. 25, 1994, at 550-552; *see also* Arnold Kohen, *The Cruel Case of Indonesia*, THE NATION, Nov. 26, 1977, at 553-556. This annexation of East Timor had a staggering human cost, with estimates placing the death toll at roughly 30% of the population. *See, e.g.,* John Pilger, *A Voice That Shames Those Silent on Timor*, NEW STATESMAN & SOCIETY, Apr. 8, 1994, at 16. In addition, “by the end of 1979, several hundred thousand Timorese had been rounded up and forced into dozens of strategic encampments, called *pemukiman* or settlements by the Indonesians but de[s]pised by the Timorese as concentration camps. Security regulations are strict; inhabitants are prohibited from moving in and out without special permission, even to grow food, and land use is restricted to areas very close to camp boundaries.” Budiardjo, *supra* note 18, at 115. Nevertheless, the suppression of the popular demands for democratic self-governance created a bonanza for the relevant economic interests. *See, e.g.,* John Pilger, *A Voice That Shames Those Silent on Timor*, NEW STATESMAN & SOCIETY, Apr. 8, 1994, at 16. (“Within two months of the Dili massacre . . . the Australian government oversaw the awarding of 11 contracts [to exploit Timorese oil] under the Timor Gap treaty. Signed in 1989 by [Australian Foreign Minister Gareth] Evans and his Indonesian counterpart, Ali Alatas, flying over the mass graves of East Timor and toasting each other in champagne, the treaty allows Australians and other foreign companies to exploit the gas and oil reserves off East Timor which, says Evans, could bring in ‘zillions’ of dollars.”).

94. CASSON, *supra* note 59, at 13-14.

pressing popular political demands with state violence. Especially, as long as there are states like Mexico—which most recently reaffirmed its willingness to exert military force to defend the expansion of oil palm plantations against the protests of its poorest and most disenfranchised citizens in January of 2010⁹⁵ – corporate palm oil enterprises will see no reason to do business in nations whose governments do not facilitate and protect their rapacious practices.

This examination of the influence foreign capital has upon Indonesian political processes helps explain why the manner in which palm oil is produced has not been significantly changed during the Reformasi Period in any of the respects discussed above. Thus, for example, even if the xenophobia of men like Murdani and Martono was completely eradicated from political decision-making in Indonesia, so long as the threat of capital flight persists, the customary rights of indigenous populations would likely never be protected and upheld by the state. The fact that, in the example just mentioned, the Indonesian State enacted a policy that was perceived to represent a disincentive for the investment of foreign capital—the State’s decision to not use the military to suppress labor protests—should not suggest that Indonesia frequently or seriously risks provoking significant capital flight. On the contrary, Indonesia’s generally unwavering adherence to the dictates of international economic institutions can be discerned by simply examining the rate at which land has been converted for oil palm plantations during the last 12 years.

Although land conversion initially fell after the New Order regime was overthrown,⁹⁶ oil palm investors quickly regained confidence as they “established new political connections so that rates of planting could be restored.”⁹⁷ The foregoing analysis has explored a few of the consequences of these “new political connections” that facilitated such a rebound in the growth of oil palm plantations (e.g., the deregulation of palm oil production on both the national and provincial level, and the consistent failure of the

95. *México: Violent Evictions in Chiapas for Establishing Oil Palm Monocultures*, WORLD RAINFOREST MOVEMENT BULLETIN NO. 151 (World Rainforest Movement, Montevideo, Uru.), Feb. 2010, at 1, available at <http://www.wrm.org.uy/bulletin/151/Mexico.html>.

96. ERIC WAKKER, GREASY PALMS: THE SOCIAL AND ECOLOGICAL IMPACTS OF LARGE-SCALE OIL PALM PLANTATION DEVELOPMENT IN SOUTHEAST ASIA 30 (Friends of the Earth, 2005), available at http://www.foe.co.uk/resource/reports/greasy_palms_impacts.pdf.

97. COLCHESTER ET AL., *supra* note 2, at 23.

few attempts that have been made during the Reformasi Period to implement legislation democratizing state functions). As a result, in 2006, provincial governments' own land-use plans identified 20 million hectares of forestland as suitable for conversion into oil palm plantations⁹⁸—proposals that will likely continue to be put into practice as they were between 2006 and 2008, during which time the amount of land encompassed by oil palm plantations grew from 6 million hectares to 7.3 million hectares.⁹⁹ There can be little doubt that the “political connections” foreign investors have been able to establish over the last decade lie behind this trend. These connections also explain why every Indonesian Administration since the fall of Suharto, who was swept into power following a wave of popular desire for democratic reforms, have nevertheless continued to make investing in Indonesian palm oil production much more attractive to private entities by reducing the public's ability to play a role in deciding how this investment should take place and increasing palm oil companies' ability to legally devastate Indonesia's environment in their pursuit of profit.

IV. CONCLUSION

None of the foregoing should suggest, however, that the fall of the New Order regime has entirely failed to create substantial possibilities for actual democratic reforms. Indeed, the fact that General Suharto was able to be driven from power reflects the fact that even exceedingly authoritarian and oppressive institutions will respond to sufficient amounts of public pressure. Despite the attacks it has suffered, there is still a civil society in Indonesia capable of acting in defense of social interests—nevermind the economic incentive to oppose political reform. The fact that some reforms were realized in 1998 and 1999 is due almost entirely to the enduring efforts of popular labor movements, student protests and demonstrations, and grassroots international solidarity campaigns such as the East Timor Action Network.¹⁰⁰ Indeed, in 2009,

98. *Id.* at 25.

99. SERGE MARTI, *FRIENDS OF THE EARTH, Losing Ground: The human rights impacts of oil palm plantation expansion in Indonesia* 19 (2008).

100. For a discussion of student dissent, see Seth Mydans, *Suharto, Besieged, Steps Down After 32-Year Rule In Indonesia*, N.Y. TIMES, May 21, 1998, at A1; see also GEORGE J. ADITJONDRO, *IN THE SHADOW OF MOUNT RAMELAU: THE IMPACT OF THE OCCUPATION OF EAST TIMOR* 83 (1994). For reports of labor unrest, see Jeremy Seabrook, *Indonesian Workers Risk Freedom for Rights*, MANCHESTER GUARDIAN WKLY., Oct. 23, 1994, at A7; see also John Pilger, *The Rising of Indonesia*, NEW

similar popular organizations succeeded in re-electing Susilo Bambang Yudhoyono, Indonesia's first President to be elected to the office by the general population,¹⁰¹ to a second five-year term. This affirmation of Yudhoyono's popular support has given him a mandate to continue to play a prominent role in pressuring nations to confront the effects that deforestation in their countries has on climate change, as he did so visibly during his first term.¹⁰²

Nevertheless, this paper should illustrate how nominal legal or procedural reforms, if they do not examine and address the underlying economic forces which drive Indonesia's democratically elected Parliament to act in ways that are explicitly anti-

STATESMAN & SOC'Y, June 16, 1995, at 14-15 ("Suharto's recent, disastrous trip to Germany has left him virtually friendless in Europe, with of course the exception of Britain. Governments do business with him, but they don't want his presence, a remarkable situation for the head of the Non-Aligned Movement [at the U.N.]. In Weimar, the city council voted to call off his visit; in Hanover, the Lord Mayor attacked him in a speech given in his presence; in Dresden, angry crowds virtually held him hostage, encircling his bus and plastering it with 'Free East Timor! Suharto Murderer!' signs. During this siege, Indonesian foreign minister Ali Alatas became apoplectic and entertained the crowd with obscene gestures. A photograph of Alatas giving the finger, reproduced on the next page, says much about the regime's deepening frustration and humiliation. In the past, Alatas has cultivated an image of urbanity and reasonableness, even turning up at the World Conference on Human Rights at Vienna in 1993 with his very own 'collected speeches on human rights' in a glossy folder. Then, no delegate raised the question of his regime's well-documented genocide in East Timor. Today, he would not get away with it.").

101. There were three other Presidents who held the office following the overthrow of General Suharto prior to Yudhoyono's election (B.J. Habibie, Abdurrahman Wahid and Sukarno's daughter, Dyah Permata Megawati). Habibie's Presidency was possible only because he was Suharto's vice-president before Suharto was forced from power, and the two President's that followed Habibie were elected to their position by the national legislature, not a popular election. *See generally, Presidents*, INDONESIA.COM (last revised Dec. 1, 2009) <http://indonesia.com/indonesia/PRESUH/suharto.php> (providing background on the history of Indonesian presidential actors, their history, and initiatives).

102. For example, on September 24, 2007, Yudhoyono led a summit of eight countries (Brazil, Cameroon, Congo, Costa Rica, Gabon, Indonesia, Malaysia and Papua New Guinea—nations that, collectively, are home to approximately 80% of the earth's tropical rainforests) in New York City, a conference that attempted to raise concerns about global warming. And from December 3rd to the 15th of 2007, Indonesia, under the United Nations Framework Convention on Climate Change (UNFCCC) hosted the 13th session of the Conference of the Parties (COP-13) in Bali. Furthermore, Yudhoyono's administration supported the U.N.'s passage of the Declaration on the Rights of Indigenous Peoples in 2007, which bears directly on oil palm production in Indonesia. *See Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept.13, 2007) ("Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.").

democratic, can do very little to alter the domination and subordination of the least powerful social classes or slow the continued destruction of the environment. The policies that have sanctioned the devastating effects of palm oil production on indigenous populations and the environment cannot be explained simply with appeals to greed, malice, misanthropy or xenophobic prejudice. Rather, the state-supported capitalist system which has developed in Indonesia since the 1960s—and not simply the ill will of a few individual actors—must be recognized and examined as the principal driver that has created the conditions under which attacks on civil society and the natural environment are permitted and supported by the State.

This is highly relevant to the work that is currently being done in Latin America. For example, in 2006, RECOMA organized mobilizations against monoculture tree-plantations in Brazil at the Federal University¹⁰³, Argentina in the Province of Entre Ríos and Misiones¹⁰⁴ and Uruguay at the City Hall Esplanade¹⁰⁵. Such popular political action is no doubt a necessary precondition to any effective resistance against the violent methods of expropriation employed in the expansion of palm oil plantations. Nevertheless, what the Indonesian experience illustrates is that this expansion cannot be conceived of as simply the consequence of malevolent palm oil companies, nor as an inevitable characteristic of palm oil production.

Without first analyzing and critiquing the structure and operation of this system, it is unlikely that any political reforms can be developed that will substantively address the very real problems of economic inequality and environmental degradation in Latin American countries; instead, they will likely fail in a manner similar to that exhibited in Indonesia. A critique of state-capitalist power consequently constitutes a preliminary task that can greatly aid attempts at cultivating the cultural conditions that can support institutional systems which serve human, and not merely capitalist, needs.

103. *International Day against Monoculture Tree Plantations*, WORLD RAINFOREST MOVEMENT (Sept. 21, 2006), <http://www.wrm.org.uy/plantations/RECOMA/International.html>.

104. *Id.*

105. *Id.*