

Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards

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The implementation of transnational standards — in codes of conduct, certification, and monitoring initiatives — necessarily intertwines with domestic law and other types of rules. Yet much of the existing literature overlooks or obscures this fundamental point. Indeed, scholars often err either by treating private regulatory standards as transcendent or by viewing implementation as fundamentally a technical problem. This Article argues that understanding the operation of transnational private regulation requires attention to the layering of multiple rules (and the politics surrounding them) in a given location. It develops a framework for examining this layering and illustrates it by briefly looking at two major issues — community rights in sustainable forestry standards and freedom of association in fair labor standards — and their implementation in Indonesia. In various ways, these domains illustrate how conflict and complementarity between public and private standards structure the practice of private regulation.

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INTRODUCTION

Recent decades have witnessed a dramatic expansion of transnational governance, including both legal and quasi-legal standard-setting and rule-making projects.¹ Included in this group are a growing number of standards for the social and environmental conditions of production in global supply chains, such as those for fair labor, sustainable forestry, or fair trade in agriculture. These standards have proliferated rapidly since the 1990s, in the form of voluntary policies and codes of conduct adopted by individual companies, collective standards adopted by groups of companies, and third-party systems for certifying compliance. The resulting architecture of standards has been theorized as a form of soft law, private regulation, or transnational new governance, with some arguing that this architecture can even come to resemble democratic structures of law.²

Contrary to much of the discourse surrounding them, these standards do not simply add new rules for previously ungoverned phenomena.³ Rather, they add an additional layer of rules for phenomena that are already embedded in complex political, legal, and regulatory orders. In nearly all parts of the world, labor relations, conditions of work, and natural resource management are subject to established sets of laws and regulations, even if their enforcement is often lax. For example, private standards for fair labor conditions in export-oriented apparel factories are layered on top of existing laws governing minimum wages, hours of work, and union representation, some of which are quite strong on paper (though often flouted in practice). Transnational standards for sustainable forestry or agriculture similarly exist amidst numerous laws governing land use, pesticides, and water pollution. Yet the growing literature on social and environmental standards, codes of conduct, and certification systems routinely ignores this layering of

1 MARIE-LAURE DJELIC & KERSTIN SAHLIN-ANDERSSON, TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION (2006); Kenneth Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501 (2009).

2 Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, 17 EUR. J. INT'L L. 47 (2006); Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHI. J. INT'L L. 513 (2008).

3 *Contra* ALISON BRYSK, HUMAN RIGHTS AND PRIVATE WRONGS: CONSTRUCTING GLOBAL CIVIL SOCIETY 120 (2005) (writing in the context of human rights that global standard setting "concerns areas previously ungoverned or even unknown").

rules, instead portraying private standards as filling a "regulatory void" or "governance gap" created by the inability or unwillingness of states and international bodies to regulate a world of mobile capital and global supply chains.⁴

The existence or perception of regulatory voids and governance deficits has clearly been important in the rise of transnational private regulation, but it is becoming clear that such images greatly impede the understanding of its "on the ground" operation and impacts. Recent scholarship has shown that differences in state policy help to explain variation in the uptake of voluntary standards, the extent to which firms will support more stringent standards, and the degree to which voluntary codes contribute to meaningful social change.⁵ In this Article, I argue that understanding the concrete implications of transnational standards requires one to embrace the complexity that results when multiple sets of rules are layered. This account stands in contrast to more common images of private standards as transcending domestic structures or of implementation as a matter of technical design.⁶ Instead, it extends work by scholars who have begun to theorize complementarity and conflict among public and private standards, hard and soft law, or "old" and "new" governance.⁷ This work has developed a conceptual language for exploring complementarity, rivalry, and hybridity in the interplay of multiple standards, but a great deal of work remains to be done to unpack these concepts and apply them to particular empirical settings.

Accordingly, this Article develops a framework for conceptualizing the

4 See SUSAN STRANGE, *THE RETREAT OF THE STATE* (1996); John G. Ruggie, *Taking Embedded Liberalism Global: The Corporate Connection*, in TAMING GLOBALIZATION: FRONTIERS OF GOVERNANCE 93 (David Held & Mathias Koenig-Archibugi eds., 2003); Charles Sabel et al., *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace* (KSG, Working Paper No. 00-010, 2000), available at <http://ssrn.com/abstract=253833>.

5 See BENJAMIN CASHORE ET AL., *GOVERNING THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY* (2004); RALPH H. ESPACH, *PRIVATE ENVIRONMENTAL REGIMES IN DEVELOPING COUNTRIES: GLOBALLY SOWN, LOCALLY GROWN* (2009); GAY SEIDMAN, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS AND TRANSNATIONAL ACTIVISM* (2007).

6 See John Boli, *The Rationalization of Virtue and Virtuosity in World Society*, in TRANSNATIONAL GOVERNANCE: INSTITUTIONAL DYNAMICS OF REGULATION 95 (Marie-Laure Djelic & Kerstin Sahlin-Andersson eds., 2006); Matthew Potoski & Aseem Prakash, *A Club Theory Approach to Voluntary Programs*, in VOLUNTARY PROGRAMS: A CLUB THEORY PERSPECTIVE 17 (Matthew Potoski & Aseem Prakash eds., 2009).

7 See David M. Trubek & Louise G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry or Transformation*, 13 COLUM. J. EUR. L. 539 (2007).

intersection of multiple rules and the actors associated with each. It then examines the dynamics of layering with illustrations from two fields — sustainable forestry and fair labor standards — as implemented in Indonesia. As a site of controversy over both tropical deforestation and sweatshop labor, Indonesia is a substantively crucial site for both sets of standards. It is also a rich site for illustrating the relationships between governmental and private authority, in part because its legal rules and structures have evolved substantially over the same period (roughly the past two decades) that has witnessed the expansion of transnational authority.

I. THEORETICAL APPROACHES

A. The Transcendent and the Technical in Theories of Private Governance

Much of the existing literature on transnational standards, codes of conduct, and certification systems fails to take states and the layering of rules seriously. Instead, scholars often treat private regulatory standards as either *transcendent* or *technical*. On one hand, many scholars view them as transcending old systems of governance, bypassing the state, and expressing a truly global set of principles. Theorists of "world society," for instance, have portrayed social and environmental certification systems as an expression of a global moral order, which requires some organizational actors to be ritually praised while others are publicly shamed.⁸ This extends similar theoretical claims about how international standards transcend national power differentials⁹ and create global order.¹⁰ Similarly, scholars often emphasize the ways in which transnational governance arrangements bypass corrupt or ineffective governments or avoid the high costs of inter-governmental coordination. Such claims often echo either Keck and Sikkink's foundational arguments about transnational activism that bypasses domestic states or Abbott and Snidal's arguments about soft law as an alternative to the high costs

⁸ Boli, *supra* note 6.

⁹ See Thomas A. Loya & John Boli, *Standardization in the World Polity: Technical Rationality over Power*, in CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875, at 169 (John Boli & George M. Thomas eds., 1999). *But see* Walter Mattli & Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 WORLD POL. 1 (2003).

¹⁰ See NILS BRUNSSON & BENGT JACOBSSON, *A WORLD OF STANDARDS* (2000).

and rigidity of inter-governmental agreements.¹¹ Elliott, for instance, argues that forest certification — as embodied in the Forest Stewardship Council — represents a "fast track policy change" that is an alternative to the slowness and inertia of governmental policy change.¹² Some parts of the literature go even further, framing private regulatory initiatives as occupying a regulatory void, or what Strange terms a "yawning hole of non-authority, ungovernance it might be called."¹³ Though the specific arguments vary, a great deal of existing research is united by the presumption that new forms of transnational governance largely transcend old power struggles and structures.

Such accounts sustain the image of a regulatory void by focusing almost exclusively on the global level, ignoring existing rules at domestic and regional levels. As evidence of a governance gap, scholars often cite the lack of a world state or the failure of international agreements.¹⁴ There is no doubt that this makes global governance difficult and may in some settings allow for regulatory arbitrage. But it does not erase domestic regulations or make states wholly irrelevant to the governance of industry.¹⁵ Furthermore, a focus on the global often obscures implementation processes, which involve assessments of performance in particular places. It may be true that "the space for standard-based organizations is . . . great at the global level, where they do not have to compete with state rules and state agencies,"¹⁶ but the implementation of those standards always occurs within a particular nation-state, where domestic law still holds sway. This is not to deny that the implementation of domestic law and regulation may be extraordinarily weak

11 MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: TRANSNATIONAL ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT. ORG.* 421 (2000).

12 CHRIS ELLIOTT, *FOREST CERTIFICATION FROM A POLICY NETWORK PERSPECTIVE* (2000).

13 STRANGE, *supra* note 4, at 14.

14 See Steven Bernstein & Benjamin Cashore, *Non-State Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE* 33 (John J. Kirton & Michael J. Trebilcock eds., 2004).

15 As many scholars have shown, global capital mobility may indeed put downward pressure on domestic regulation, but this does not take the form of a full-scale "race to the bottom" or an "eclipse" the nation state. See DAVID VOGEL & ROBERT A. KAGAN, *DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES* (2004); Peter Evans, *The Eclipse of the State? Reflections on Stateness in an Era of Globalization*, 50 *WORLD POL.* 62 (1997).

16 Goran Ahrne et al., *Standardizing Through Organization*, in *A WORLD OF STANDARDS* 66 (Nils Brunsson & Bengt Jacobsson eds., 2000).

or compromised. But, as later parts will illustrate, when problems do receive attention, the "law on the books" remains a crucial foundation for defining compliance and adjudicating conflicts.

A second common portrayal of transnational governance pays greater attention to concrete characteristics of voluntary programs, but frames them in fairly technical terms, with implementation argued to flow from program design. Potoski and Prakash, for example, theorize the performance of voluntary programs according to the exclusivity of their standards and the strength of their monitoring and sanctioning capacities.¹⁷ Comparing several cases, they suggest that "successful voluntary programs have effective monitoring and enforcement mechanisms that prevent shirking among participants."¹⁸ Similarly, King and Lenox's influential analysis of the voluntary Responsible Care standards in the chemical industry attributes the ineffectiveness of this program to weaknesses in its institutional design.¹⁹ Indeed, a growing literature in economics and political science takes similar approaches, theorizing the informational, monitoring, and sanctioning capacities of different types of voluntary programs.²⁰

Though this approach has lent useful structure to theorizing about voluntary programs, it suffers from a technocratic outlook. Scholars in this tradition imply that making transnational standards effective is merely a matter of getting the rules and incentives right (especially for participating firms). In addition, it is typically presumed that implementation in one place is essentially the same as in another. Lost in this formulation is a rich conception of social context — in particular, a sense of the deeply political character of the standards being discussed or the locally situated and socially constructed character of compliance.

Yet scholars who have looked closely at implementation in the field have found that standards can become deeply intertwined with durable domestic configurations of power. Ponte shows how Marine Stewardship Council certification of sustainable fisheries in South Africa was appropriated by white-owned fishing groups to maintain market control and exclude

¹⁷ See Potoski & Prakash, *supra* note 6.

¹⁸ *Id.* at 38.

¹⁹ Andrew A. King & Michael J. Lenox, *Industry Self-Regulation Without Sanctions: The Chemical Industry's Responsible Care Program*, 43 ACAD. MGMT. J. 698 (2000).

²⁰ See Thomas P. Lyon & John W. Maxwell, *Environmental Public Voluntary Programs Reconsidered*, 35 POL'Y STUD. J. 723 (2007).

black-owned companies.²¹ Seidman shows that independent monitoring of apparel factories in Guatemala and carpet mills in India is severely constrained by the power of industry and government elites.²² Research on organic coffee production in Mexico argues that organic standards took hold among smallholder farms due not merely to incentives in international markets but due "over a decade of populist agrarian organizing and accompanying organizational innovations, . . . a process of self-organization and institutional learning and the existence of significant subsidies."²³ Studies that bracketed variation in the social and political context would miss these dynamics and profoundly misunderstand the implementation of voluntary standards.

Rather than viewing private regulation as either transcendent or technical, a more promising route involves paying attention to its substantive intersections with domestic law, regulation, and other rules. This means accepting that nationally-based "old" forms of governance still matter and that variation in the politics surrounding them can deeply shape the effects of private regulation. In this vein, scholars of transnational governance have begun to theorize the conditions for "hard" and "soft" governance to co-exist in a state of rivalry, complementarity, or hybridity.²⁴ Other scholars have considered this relationship by asking whether private regulation might "crowd out" government regulation or hinder the expansion of citizenship rights,²⁵ or whether the expansion of private regulation might gradually lead to a strengthening of government regulation.²⁶ Empirical research has begun to show some of the ways in which public and private regulation "on the ground" might prove complementary²⁷ or tension-filled,²⁸ depending on the

21 Stefano Ponte, *Greener than Thou: The Political Economy of Fish Ecolabeling and Its Local Manifestations in South Africa*, 36 *WORLD DEV.* 159 (2008).

22 SEIDMAN, *supra* note 5.

23 David Barton Bray et al., *Social Dimensions of Organic Coffee Production in Mexico: Lessons for Eco-Labeling Initiatives*, 15 *SOC'Y & NAT. RESOURCES* 431 (2002).

24 See Trubek & Trubek, *supra* note 7.

25 See SEIDMAN, *supra* note 5; Tim Bartley, *Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry*, 12 *RES. POL. SOC.* 211 (2005).

26 See DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* (2005); Benjamin Cashore et al., *Can Non-State Governance 'Ratchet Up' Global Environmental Standards? Lessons from the Forest Sector*, 16 *REV. EUR. COMMUNITY INT'L ENVTL. L.* 158 (2007).

27 See Matthew Amengual, *Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic*, 38 *WORLD DEV.* 405 (2010).

28 See Xiaomin Yu, *Impacts of Corporate Code of Conduct on Labor Standards: A*

setting. Going further, the reinvigorated literature on global legal pluralism suggests that scholars ought to also take account of "customary law," rights-based claims that lack clear state endorsement, and informal norms operating at multiple levels.²⁹ Here, the complexity of multiple, overlapping, and ambiguously connected sets of rules is a central facet of globalization and transnational governance.

B. Unpacking Public-Private Intersections

Though scholars have developed a range of arguments about the interplay of public, private, and other rules, it is not always clear how these ideas might guide empirical inquiry. As Parker argues, the reinvigorated legal pluralism literature calls attention to important phenomena but ultimately offers minimal guidance for empirical research on "the way official law and other 'laws' and regulatory orderings interact."³⁰ For its part, the growing literature on "complementarity" of public and private regulation uses the term to mean a variety of things. In Amengual's analysis of labor standards, complementarity means that public and private regulators fill different niches, which helps to spread the overall impact of standards more broadly.³¹ In other analyses, complementarity of public and private regulation comes from the possibility for heavily regulated firms to support stringent private standards³² or for firms with voluntary "beyond compliance" commitments to support an upgrading of state regulation.³³ Private regulation may also be conceptualized as a laboratory of standards and benchmarks to later be institutionalized in government regulation and law, another possible form of complementarity.³⁴ Conceptions of conflict and rivalry are also varied. It could be that the content

Case Study of Reebok's Athletic Footwear Supplier Factory in China, 81 J. BUS. ETHICS 513 (2008).

29 See SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006); Christine Parker, *The Pluralization of Regulation*, 9 THEORETICAL INQUIRIES L. 349 (2008); Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOBAL LEGAL STUD. 25 (2003); César A. Rodríguez Garavito, *Nike's Law: The Anti-Sweatshop Movements, Transnational Corporations, and the Struggle over International Labor Rights in the Americas*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARD A COSMOPOLITAN LEGALITY* 64 (Boaventura de Sousa Santos & César A. Rodríguez Garavito eds., 2005).

30 Parker, *supra* note 29, at 355.

31 Amengual, *supra* note 27.

32 Cashore et al., *supra* note 26.

33 VOGEL, *supra* note 26.

34 Charles F. Sabel & Jonathan Zeitlin, *Learning From Difference: The New*

of public and private standards call for fundamentally incompatible actions.³⁵ Or, as some critics warn, the growth of private regulation might contribute to the gutting of state capacities or otherwise crowd out governments.³⁶

Many of these conceptions deal with how various types of rule-making projects subtly influence each other over time — in some cases, over long stretches of time. Though this is an obviously important concern, it has inspired more speculation than empirical research. Moving from this diachronic approach to a synchronic one helps to identify patterns in the layering of public, private, and customary rules. Specifically, if one starts by examining the content of standards "on the books," this can highlight topics where the substantive meanings of various rules are consistent, conflicting, or ambiguous. The next step is to use this analysis of the content of standards to identify focal points for studying implementation in the field. Though this two-step approach — starting with the relationship between standards on paper and then examining their interplay in practice — is not the only way to analyze the intersections of public and private rules, it has the virtues of being straightforward, empirically tractable, and amenable to mapping configurations in a variety of national and sectoral settings.

Consider several stylized versions of the relationship between the content of public and private standards. Private standards can (and often do) simply require compliance with national law, otherwise remaining silent on the particular practices involved. Here, private standards essentially subsume themselves to national law. Alternatively, private standards may require particular practices. In some instances, these may be substantively different than those in national law; it is here that private standards potentially require "beyond compliance" activities (though they are also sometimes "below" legal compliance). In other instances, the required practices may be substantively similar to those in national law, with legal compliance and private compliance being *de facto* equivalents. These three simple intersections capture the most common patterns of public and private layering. The literature on legal pluralism suggests an additional layer — that of "customary law" and other rules rooted in informal norms. These too may be either in dissonance or resonance with private standards and law. Of course, both formal and customary law may vary across sub-national levels

Architectures of Experimentalist Governance in the European Union, 14 EUR. L.J. 271 (2008).

³⁵ See Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

³⁶ SEIDMAN, *supra* note 5.

(regions, provinces, districts) as well, in which case the relevant layers of standards may not be entirely national in scope.

With these relationships between the content of rules in mind, one can then examine how they play out in practice. When rules conflict, do actors involved in assessing compliance defer to one set or the other? Do they develop alternative measures that attempt to resolve the differences? When rules endorse the same practices, does this lead to stronger, more robust implementation? Do circumstances arise that disrupt the apparent compatibility of rules?

Below, I illustrate how this approach can shed light on standards for sustainable forestry and fair labor, as implemented in Indonesia. My main goal is to assess the significance of transnational private regulatory systems by mapping their relationships to public and customary orders, although the focus could also be inverted to make sense of governmental law in light of a growing world of transnational standards.

II. ILLUSTRATIONS FROM FORESTRY AND LABOR STANDARDS IN INDONESIA

Indonesia is an important site for research on both labor standards and forestry. It has large export-oriented manufacturing sectors (e.g., garments, footwear, furniture), the fourth largest labor force (behind China, India, and the United States), and the third largest tropical forest area (behind Brazil and the Congo) in the world. During the Suharto regime (1965-1998, often dubbed the "New Order" era), the country became a leading exporter of oil, timber, and apparel. The post-Suharto "reformasi" (reform) period has witnessed significant democratic reforms and the expansion of civil society and trade unions, but also growing inequality, persistent corruption, and accelerated rates of deforestation.³⁷

Sustainable forestry standards have a special significance in Indonesia. It was there, in 1990, that the Rainforest Alliance (a U.S.-based nonprofit auditor) certified the forests of Perum Perhutani (a state-owned forestry company) in what is usually considered the first independent forest certification leading up to the formation of the Forest Stewardship Council (FSC) in 1993. Since then, a variety of organizations have sought to promote

³⁷ RICHARD ROBINSON & VEDI R. HADIZ, REORGANISING POWER IN INDONESIA: THE POLITICS OF OLIGARCHY IN AN AGE OF MARKETS (2004); L.M. Curran et al., *Lowland Forest Loss in Protected Areas of Indonesian Borneo*, 303 SCIENCE 1000 (2003).

FSC certification in Indonesia, including auditors like the Rainforest Alliance and Société Générale de Surveillance (SGS); international NGOs like WWF and The Nature Conservancy; specialized consultancy operations like the Tropical Forest Fund and Tropical Forest Trust (supported by tropical timber importers in Europe); and development aid agencies from the United States and Europe. Another cluster of organizations has been more critical of the FSC project in Indonesia, while sometimes still supporting particular certification efforts. This includes international NGOs like Greenpeace and the Forest People's Programme and domestic NGOs like Telapak and the Indigenous Peoples Alliance of the Archipelago (AMAN). A domestically-driven certification initiative, Lembaga Ekolabel Indonesia (LEI), has attracted support from some companies and domestic NGOs, though its relationship with the FSC has alternated between cooperation and challenge at various points in time. Overall, the field of forest certification in Indonesia has been quite dynamic and often contentious, though the amount of certified forest land has remained comparatively low.³⁸

The field of voluntary labor standards in Indonesia is somewhat more fragmented. It includes a variety of codes of conduct adopted and audited by individual apparel and footwear brands and retailers, including Nike, adidas, The Gap, Wal-Mart, H&M, and many others.³⁹ A handful of labor NGOs and trade unions — such as Sedane Labour Resource Centre (LIPS), Serikat Pekerja Nasional (SPN), and Gabungan Serikat Buruh Indonesia (GSBI), have pressured firms to implement their codes more fully, supported by international organizations like Oxfam and the Friedrich Ebert Stiftung. While codes of conduct have been the most common form of private labor standards, some Indonesian factories have also been certified to the SA8000 standard, developed by Social Accountability International (SAI),⁴⁰ or to the Worldwide Responsible Accredited Production standards developed by the American Apparel and Footwear Association.⁴¹ Furthermore, some brands participate in associations that oversee third-party factory monitoring — like the U.S.-based Fair Labor Association (FLA) and European-based Business

38 See Tim Bartley, *Transnational Private Regulation in Practice: The Limits of Forest and Labor Standards Certification in Indonesia*, 12 *BUS. & POL.* 7 (2010).

39 See Guy Mundlak & Issi Rosen-Zvi, *Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment*, 12 *THEORETICAL INQUIRIES L.* 603 (2011).

40 SOCIAL ACCOUNTABILITY INTERNATIONAL (SAI), SA8000 (2008), available at http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf.

41 See WORLDWIDE RESPONSIBLE ACCREDITED PRODUCTION, <http://www.wrapcompliance.org> (last visited Mar. 14, 2011).

Social Compliance Initiative (BSCI). Yet the proliferation of voluntary labor standards has neither radically transformed the industry nor made it more stable, and a wave of relocations and factory closures has undermined some previous improvements.

To study the operation of sustainable forestry and fair labor standards, I have conducted seventy-one interviews with individuals from NGOs, companies, unions, and certifiers in Java and East Kalimantan in 2008, 2009, and 2010. Individuals were selected based on their relevance to the implementation of private standards, as revealed in referrals from previous interviewees and other scholars in the field. Care was taken to reach a range of different types of organizations, in order to triangulate information and capture a variety of viewpoints. To maximize the candor of the interviews and conform to common procedures for the protection of human subjects, the interviews were confidential and the informants are identified here by the type of organization they are affiliated with and the date of the interview, rather than by name. All interviews were conducted either in English or in Bahasa Indonesia with the assistance of interpreters. The interviews were supplemented with information from the secondary literature.

The illustrations in this Article focus on two specific issues: (1) community land rights as they pertain to forestry; and (2) freedom of association as it pertains to labor standards. Each is a central component of codes of conduct and the leading initiatives to certify best practices in social and environmental governance. Furthermore, each represents a case where voluntary standards deal with *collective, enabling* rights, not merely individual rights or protective measures. As such, these standards pose the greatest challenges for voluntary initiatives and test the limits of firms' commitments. Yet they are also among the most important issues at stake in debates over the capacity of transnational standards to promote justice and sustainable development. To the extent that voluntary initiatives take these sorts of standards seriously and have the capacity to implement them, their credibility and contribution to social change will be increased.

A. Forest Governance: Community Land Rights

While transnational standards for sustainable forestry are often portrayed as "environmental" initiatives, some of the most important standards deal with the rights of forest-dwelling communities. In fact, forest governance in most countries is intimately bound up with political struggles regarding the authority and constitution of communities and indigenous populations.⁴²

42 See ARUN AGRAWAL & CLARK C. GIBSON, COMMUNITIES AND THE ENVIRONMENT:

As shown below, these issues are crucial to Indonesia, where formal law and central government authority often conflict with customary law and transnational private standards. This relationship has significantly shaped the implementation of sustainable forestry certification, getting in the way of some certifications and putting a premium on consultative mechanisms intended to resolve this conflict of rules.

1. Community Rights in Private Standards

Community rights are prominent in the Forest Stewardship Council's "Principles and Criteria" for forest management, largely due to the influence of indigenous rights NGOs and community forestry advocates in the founding of this organization.⁴³ FSC Principle 2 requires that "long-term tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established."⁴⁴ This principle also explicitly recognizes "customary" rights and stipulates that "local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies."⁴⁵ FSC Principle 3 adds another layer, by explicitly recognizing the "legal and customary rights of indigenous peoples" and stating that "forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples."⁴⁶ The FSC's references to indigenous communities' customary land claims have some basis in international legal norms, including the International Labor Organization's (ILO) convention 169 on indigenous and tribal peoples and a U.N. Declaration on the Rights of Indigenous Peoples.⁴⁷

Some corporate sourcing policies also recognize customary claims of

ETHNICITY, GENDER, AND THE STATE IN COMMUNITY-BASED CONSERVATION (2001); J. PETER BROSIUS ET AL., COMMUNITIES AND CONSERVATION: HISTORIES AND POLITICS OF COMMUNITY-BASED NATURAL RESOURCE MANAGEMENT (2005).

43 See Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297 (2007).

44 Forest Stewardship Council, *FSC Principles and Criteria for Forest Stewardship* (1996), available at http://www.fscus.org/images/documents/FSC_Principles_Criteria.pdf.

45 *Id.* art. 2.2.

46 *Id.* art. 3.2.

47 MARCUS COLCHESTER ET AL., OBSTACLES AND POSSIBILITIES: THE APPLICATION OF FSC PRINCIPLES 2 AND 3 IN INDONESIA (2003); ILO, INDIGENOUS AND TRIBAL PEOPLES CONVENTION, art. 13-19 (June 27, 1989), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>; U.N., DECLARATION ON THE

communities, albeit in less specific terms. Staples Inc.'s Sustainable Paper Procurement Policy, for instance, states that the company "will seek to have our suppliers demonstrate that they provide paper products from non-controversial sources" including wood "harvested in violation of traditional and civil rights."⁴⁸ The domestically generated LEI initiative also includes community rights in its standards and arguably has closer ties to community forest operations than the FSC does, though there is some ambiguity about how strongly LEI's standards support customary rights.⁴⁹

2. *Community Rights in Indonesian Legal Orders*

These statements about community rights take on special significance in Indonesia, because they endorse a pre-existing system of customary, community-based land use rights, known as *adat* rights. The *adat* system of customary law is based on collective right to land, which survived Dutch colonialism, though scholars have pointed out that it is not so much a stable system of tradition as a set of practical claims that have been expressed in different ways over time.⁵⁰ However, these customary rights are not fully recognized in "positive" law and the practice of the Indonesian state. This situation is not entirely unique, since customary forest rights exist in ambiguous legal territory in many countries, including Canada, Sweden, Brazil, and Bolivia, though their standing appears to be especially unsettled in Indonesia.

Indonesian law has variously suppressed and symbolically endorsed *adat* rights in different periods, though rarely granting this system of customary law anything more than minimal force in practice. As described by Colchester et al., the Basic Agrarian Law of 1960 claimed to be based on *adat* but only if such claims did not conflict with the "national interest," which was interpreted broadly.⁵¹ Early in Suharto's "New Order" regime, the government further centralized control of land — making essentially all forest land the

RIGHTS OF INDIGENOUS PEOPLES, art. 26-28 (Sept. 13, 2007), available at <http://www.un.org/esa/socdev/unpfi/en/drip.html>.

48 STAPLES INC. SUSTAINABLE PAPER PROCUREMENT POLICY 1 (Last revised Jan. 28, 2010), http://www.staples.com/sbd/img/content/soul/pdf/staples_paper_procurement_policy_2010.pdf.

49 COLCHESTER ET AL., *supra* note 47.

50 See Nancy Lee Peluso & Peter Vandergeest, *Genealogies of the Political Forest and Customary Rights in Indonesia, Malaysia, and Thailand*, 60 J. ASIAN STUD. 761 (2001); Franz von Benda-Beckmann & Keebet von Benda-Beckmann, *Contested Spaces of Authority in Indonesia*, in SPATIALIZING LAW: AN ANTHROPOLOGICAL GEOGRAPHY OF LAW IN SOCIETY 116 (Franz von Benda-Beckmann et al. eds., 2009).

51 COLCHESTER ET AL., *supra* note 47, at 126.

property of the state — and began a series of relocation ("transmigration") and assimilation programs that sought to "modernize" isolated communities. In effect, the resettlement program often dismantled *adat* rights, and the expanded authority of the Ministry of Forestry "radically redefined the property rights of the tens of millions of Indonesians living in areas that were to be classified as 'State Forest.'"⁵² While these laws regulated land use rather than business activity itself, they significantly expanded the scale of timber available for firms to harvest and facilitated the growth of timber exports.

The "Reformasi" period saw a greater recognition of *adat* rights, both in the revised constitution of 1999 and the Human Rights Act of 1999.⁵³ Yet their utility to forest dwelling communities remains quite limited. The new Forestry Act of 1999 affirmed state control over forest land and subsumed communities within them without explicitly recognizing collective *adat* rights.⁵⁴ Perhaps more importantly, the Ministry of Forestry routinely allocates logging concessions with little regard for community claims, and some regional governments deny the existence of *adat* communities in their territory.⁵⁵ Yet *adat* has also become an increasingly salient basis for community linkages to international environmental justice campaigns,⁵⁶ and community claims often get "settled" on the ground through bargaining (and graft) between community leaders and logging companies.⁵⁷

This situation creates a conflict between Indonesian law and the community rights standards of the FSC. Specifically, one finds here the layering of three sets of rules: Transnational forest certification standards and customary law are compatible, but both conflict with predominant interpretations of national law. By some accounts, the disjuncture goes even deeper, since the entire process of defining forest boundaries and gazetting

52 *Id.*

53 INDON. CONST. art. 18B (1945/1999) (Indon.); HUMAN RIGHTS ACT 39 (1999) (Indon.).

54 COLCHESTER ET AL., *supra* note 47.

55 See Jan Barkmann et al., *Land Tenure Rights, Village Institutions, and Rainforest Conversion in Central Sulawesi (Indonesia)*, in TROPICAL RAINFORESTS AND AGROFORESTS UNDER GLOBAL CHANGE 141 (Teja Tscharntke et al. eds., 2010).

56 Nancy Lee Peluso et al., *Claiming the Grounds for Reform: Agrarian and Environmental Movements in Indonesia*, 8 J. AGRARIAN CHANGE 377 (2008).

57 See Anne Casson & Krystof Obidzinski, *From New Order to Regional Autonomy: Shifting Dynamics of "Illegal" Logging in Kalimantan, Indonesia*, 30 WORLD DEV. 12 (2002); Stefanie Engel & Charles Palmer, *Who Owns the Right? The Determinants of Community Benefits from Logging in Indonesia*, 8 FOREST POL'Y ECON. 434 (2006).

forests of particular types has been stalled in Indonesia, due in part to conflicts between communities and government authorities. Some estimate that roughly ninety percent of the twelve million hectares of state forest land in Indonesia has not been properly defined, meaning that almost no forest land has fully legitimate property rights.⁵⁸ This, of course, makes the FSC requirement of legal tenure problematic in Indonesia.

2. *Forest Certification in Practice*

Despite numerous attempts to increase it, the amount of FSC-certified forest land in Indonesia remains limited — far less than in Brazil and comparable to much smaller countries like Bolivia and Lithuania.⁵⁹ One reason for this (though not the only one) has to do with conflicts between land rights rules and the actors that support different sets of rules. As one observer put it, "there's a lot of complexity around conflicting and competing land rights with local communities. Jakarta's rights [i.e., the central government's rights] sit on top of traditional community rights."⁶⁰ One auditor explicitly noted that "FSC says there can't be conflicts with the community, but that's a 'paradise dream' — there's always conflict."⁶¹ In theory, the government requires concessionaires to negotiate with communities and develop land use agreements (and community elites have surely benefitted from this channel in some cases), but this rarely happens in a full and fair enough way to stand up to external scrutiny.⁶² Some NGOs have argued that credible certification in this environment is essentially impossible.⁶³

Land disputes between communities and companies have kept some forests from getting certified and have led to suspensions in several others.⁶⁴ Two FSC-certified forests — PT Diamond Raya in Riau province and PT Intracawood in East Kalimantan — have struggled to keep their certifications in the face of charges that they paid insufficient attention to community claims.⁶⁵ In an especially prominent case, the Perum Perhutani forests of

58 COLCHESTER ET AL., *supra* note 47.

59 Forest Stewardship Council, *Global FSC Certificates: Type and Distribution* (2010), available at http://www.fsc.org/fileadmin/web-data/public/document_center/power_points_graphs/facts_figures/Global-FSC-Certificates-2010-11-15-EN_01.pdf.

60 Telephone interview with NGO Representative, in Wash. DC, Wash. (June 23, 2008).

61 Interview with Certifier/Certification Consultant, in Bogor, Indon. (July 2, 2008).

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

63 *Certification in Indonesia: A Briefing*, DOWN TO EARTH (2001), <http://dte.gn.apc.org/Ccert.htm> (last visited Jan. 16, 2011).

64 Interview with Forest Certifier, in Bogor, Indon. (July 1, 2008).

65 Forest Watch Indonesia, *Certification Rift in Indonesia* (2006), available at

Java had their FSC certificate suspended in 2001 due to growing concerns about instability in Indonesian forest governance, a rising tide of unauthorized logging, and strained — sometimes violent — relations between the company and communities.⁶⁶

The conflict of rules (FSC standards and *adat* customary law vs. Indonesian formal law) has put a premium on the FSC's mechanism of assessing whether communities have given "free and prior informed consent" to harvest forest land. On one hand, this mechanism represents an alternative channel for communities to legitimate their claims. But on the other hand, attempts to assess "free and prior informed consent" are wrought with difficulty. Often, "prior" consent is impossible, since a company has already received a logging concession from the government before consultations with local communities begin.⁶⁷ Getting consent of "the community" is also made problematic by power differentials within communities and longstanding patterns of exploitation and bribery.⁶⁸ One former auditor suggested that assessment teams generally do not spend enough time on the ground to understand community dynamics, explaining that you are "lucky if there's an NGO there," or it can be difficult to learn the real situation.⁶⁹ A supporter of forest certification in Indonesia nevertheless granted that "it's quite possible that the certifiers have interpreted the [community-related] standards in a way different than how [a well-known advocate] and I would interpret them."⁷⁰ Some involved in forest certification also worry that community consultations allow community leaders and local NGOs to "hold up" firms acting in good faith and demand, in effect, larger bribes.⁷¹ Yet the attention that community

<http://fwi.or.id/english/?p=126>; Rainforest Alliance, *Annual Audit Report for PT Intracawood Manufacturing* (2007), available at <http://www.rainforest-alliance.org/forestry/documents/ptintracawoodmanupubsum07.pdf>.

66 Richard Donovan, *A Perspective on the Perum Perhutani Certification Suspension* (2001), available at <http://www.rainforest-alliance.org/news/2001/perhutani-perspective.html>; Rainforest Alliance, *Forest Management Public Summary for PT Perhutani — KPH Lawu* (2002), available at <http://www.rainforest-alliance.org/forestry/documents/pp-lawu.pdf>.

67 Interview with Forest Certifier/Advisor, in Bogor, Indon. (Sept. 8, 2010).

68 See Joyotee Smith et al., *Illegal Logging, Collusive Corruption and Fragmented Governments in Kalimantan, Indonesia*, 5 INT'L FORESTRY REV. 293 (2003).

69 Interview with Forestry Researcher/Advisor, in Bogor, Indon. (June 30, 2008).

70 Telephone interview with NGO Representative, in Wash. DC, Wash. (June 23, 2008).

71 Interviews with NGO Representatives, in Jakarta, Indon. (July 3, 2008; July 8, 2008).

issues in Indonesia have gained has made it difficult for FSC-accredited certifiers to simply ignore community issues.

The conflict between FSC standards and the reality of Indonesian land tenure also raises significant questions about the limits of firms' responsibility. Some question whether it is appropriate to hold companies responsible for the policies and negligence of the Indonesian government, absent evidence that the firm was complicit in the corruption of land tenure in the first place. As one member of the Indonesian environmental community put it, "whose fault is it that the community was ignored in land use rights originally?"⁷² Or as one forestry consultant put it, "the problem is where you [a company] as a rights holder come up against an ineffective government. 'I've done what I can. Is that good enough? Or are you [the certifier] going to hold me ransom?'"⁷³

In sum, the case of community rights to forest land provides a vivid case for examining the interplay of multiple public, private, and customary sets of rules and the actors who mobilize them. It clearly demonstrates that FSC standards have not simply transcended national law, imposing their own logic and "bypassing the state." Nor has the technical design of the FSC auditing process allowed community conflicts to be assessed in a straightforward way. Forest certification does introduce an alternative set of rules, which are amplified by their resonance with customary law. Yet its operation is shaped not by these rules alone but by their relationship with domestic law. It remains to be seen whether this configuration will persist over time, crumble under the weight of its own contradictions, or potentially even help build a larger coalition for land tenure reform in Indonesia.

B. Labor Rights: Freedom of Association⁷⁴

Freedom of association is fundamental to establishing fair labor conditions. In contrast to "protective" labor standards, freedom of association is a central "enabling" standard that provides space for unionization and collective bargaining, as well as protection from anti-union discrimination

⁷² Interview with NGO Representative, in Jakarta, Indon. (July 8, 2008).

⁷³ Interview with Forestry Consultant, in Jakarta, Indon. (July 3, 2009).

⁷⁴ While freedom of association and related labor standards are included in the principles of the FSC, they have not been as rigorously enforced as the FSC's environmental and community standards. After discussing steps to make sure that FSC certified products are coming from the very worst labor conditions, an FSC official admitted, "We can't do everything — we remain focused on the environment," Interview with Certification Official, in Bonn, Ger. (July 17, 2009).

or harassment.⁷⁵ The vast majority of codes of conduct and factory certification initiatives call for freedom of association, but existing evidence suggests that this is the area in which such voluntary principles tend to be the weakest in practice.⁷⁶

Looking closely at labor codes of conduct, one finds several types of intersections with national law, as described in more detail below. Many codes simply subsume their standards to national law, which allows them to be used in countries (like China and Vietnam) where freedom of association is legally restricted. In Indonesia, labor law as reformed since the fall of Suharto is generally consistent with freedom of association provisions in ILO conventions and private codes. In this setting, the different layers of rules are overlapping and compatible, though this surface-level compatibility gives way to greater ambiguity and contestation as one moves closer to "on the ground" practice.

1. Freedom of Association in Private Standards

ILO conventions form the basis for most freedom of association standards. ILO convention 87 states that "workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation."⁷⁷ Importantly, it stipulates that "the public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof"⁷⁸ and that "the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention."⁷⁹

Most voluntary codes refer to ILO standards but few echo these ideas fully. The Fair Labor Association's (FLA) compliance benchmarks adopt the initial ILO statement almost verbatim, but while the ILO convention explicitly prohibits the use of law to restrict freedom of association, the

75 See KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, *CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION?* (2003).

76 See IVANKA MAMIC, *IMPLEMENTING CODES OF CONDUCT: HOW BUSINESSES MANAGE SOCIAL PERFORMANCE IN GLOBAL SUPPLY CHAINS* (2004); Stephanie Barrientos & Sally Smith, *Ethical Trading Initiative Impact Assessment Report* (2006), available at http://www.ethicaltrade.org/sites/default/files/resources/Impact%20assessment%20Part%201,%20main%20findings_0.pdf.

77 ILO, *FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE CONVENTION*, art. 2 (July 9, 1948), available at www.ilo.org/ilolex/cgi-lex/convde.pl?C087.

78 *Id.* art. 3.

79 *Id.* art. 8.

FLA is conspicuously silent on this issue. Its only references to national law *subsume* the code to national law, as in requiring employers to "comply with all local laws, regulations and procedures concerning freedom of association and collective bargaining,"⁸⁰ and stating that "employers shall bargain with any union *that has been recognized by law* or by agreement between the employer and that union, *provided such agreement does not contravene local law*".⁸¹ The FLA benchmarks do stipulate that "employers shall not interfere with the right to freedom of association by favoring one workers' organization over another,"⁸² but they fail to address the situation in which favoritism of this sort is built into national law or government practice, past or present. Because the FLA subsumes this aspect of its code to national law, participating firms can comply while still sourcing from countries where freedom of association is legally restricted.

Individual corporate codes of conduct typically endorse freedom of association but often leave the principle vague or sidestep possible conflicts with law. In a few rare cases, firms have sought to implement these principles in spite of national law, as with Reebok's experiment in supporting elections of trade union representatives in two Chinese factories.⁸³ Still, even brands known for their corporate social responsibility programs tend to emphasize that the "complex and varied legal framework for Freedom of Association from country to country" is largely outside their zone of influence.⁸⁴

SAI's SA8000 standard for the certification of decent workplaces goes further in engaging the potential conflict between national law and international norms on freedom of association.⁸⁵ In addition to boilerplate statements about freedom of association and respect for the principles of relevant international conventions, the SA8000 standard states that "in situations where the right to freedom of association and collective bargaining are restricted under law, the company shall allow workers to freely elect their own representatives."⁸⁶ In essence, this opens up a new

80 *FLA Compliance Benchmarks, section VI*, FAIR LABOR ASSOCIATION, http://www.fairlabor.org/images/WhatWeDo/compliance_benchmarks.pdf (last visited Jan. 16, 2011).

81 *Id.* at 20 (emphasis added).

82 *Id.* at 18.

83 See Anita Chan, *Challenges and Possibilities for Democratic Grassroots Union Elections in China: A Case Study of Two Factory-Level Elections and Their Aftermath*, 34 *LAB. STUD. J.* 293 (2009).

84 NIKE, *Corporate Responsibility Report*, 58 (2007-09), available at www.nikebiz.com/crreport/pdf.

85 SA8000, *supra* note 40.

86 *Id.* art. 4.2.

route for compliance in countries where trade unions are legally restricted. The Business Social Compliance Initiative, led by European retailers, echoes this SA8000 language.⁸⁷ The Worker Rights Consortium (WRC), which deals with compliance of firms that manufacture university-licensed goods, also goes further than most codes in addressing freedom of association. Its model code of conduct not only calls for licensees to respect freedom of association and collective bargaining, but also stipulates that "licensees shall not cooperate with governmental agencies and other organizations that use the power of the State to prevent workers from organizing a union of their choice."⁸⁸

Though they vary in content and strength, these private standards all include a good deal of ambiguity about how freedom of association might be operationalized. How should one judge whether unions have been established by "employees' choice," free of intimidation by management? Except for the WRC provisions to some degree, none of these codes stipulates how one might distinguish unions that have been fairly established from "legacy unions" that derived power from authoritarian regimes or company unions ("yellow unions") that have signed "sweetheart" deals with management, both of which are common in export-oriented manufacturing.⁸⁹ Of course, ambiguity in law and quasi-legal rules is commonplace, allowing for multiple constructions of compliance.⁹⁰

2. *Freedom of Association in Indonesian Law*

The "New Order" Suharto regime came to power via anti-communist purges and killings of union leaders, with a total death toll often approximated at 500,000. During the Suharto era, a single union (Serikat Pekerja Seluruh Indonesia, SPSI) was recognized by the government, though activism in the early-1990s began to challenge state control of labor, with a rising tide of militant strikes and expansion of labor NGOs.⁹¹ The "Reformasi" process that followed the fall of the Suharto regime included a substantial

87 BUSINESS SOCIAL COMPLIANCE INITIATIVE, CODE OF CONDUCT (2009), available at www.bsci-eu.org/dl.php?id=10407.

88 WORKER RIGHTS CONSORTIUM, MODEL CODE OF CONDUCT (2007), available at www.workersrights.org/university/coc.asp.

89 See RALPH ARMBRUSTER-SANDOVAL, GLOBALIZATION AND CROSS-BORDER LABOR SOLIDARITY IN THE AMERICAS: THE ANTI-SWEATSHOP MOVEMENT AND THE STRUGGLE FOR SOCIAL JUSTICE (2005).

90 See Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992).

91 See MICHELE FORD, WORKERS AND INTELLECTUALS: NGOS, TRADE UNIONS AND THE INDONESIAN LABOUR MOVEMENT (2009); Interview with Labor Rights Advocate, in Bogor, Indon. (July 2, 2008).

strengthening of formal labor rights, in part as a response to external criticism. Influenced by the ILO, the Trade Union Act of 2000⁹² guaranteed freedom of association, "added strong sanctions for discrimination against union members and employer obstruction of unionization efforts, and designated unions as authorized bargaining agents."⁹³ Yet it also allowed unions to be formed with groups as small as ten workers and set a low threshold for registration, though it required membership of at least fifty percent of workers in order for exclusive collective bargaining to take effect.⁹⁴ The result has been an active but extraordinarily fragmented labor movement, with far more unions than effective collective bargaining agreements.⁹⁵ As of 2008, Indonesia had over 11,000 enterprise-level unions and ninety different union federations, fifty-seven percent of which are not associated with any larger confederation.⁹⁶

Overall, Indonesia has strong legal guarantees of freedom of association and comparatively strong labor laws. As one set of scholars puts it, "on paper, Indonesia already enjoys a system that grants an impressive range of fundamental labour rights, many of which are still in dispute in some developed and most developing countries."⁹⁷ However, implementation is weak and often corrupted, and the practice of labor law "continue[s] traditions of reserving discretion in the hands of the employer or the state."⁹⁸ Furthermore, company unions and legacy unions are common and often compete with insurgent union movements.⁹⁹ Because multiple unions may be recognized in a single workplace, the interpretation of freedom of association is complex.

92 Act of the Republic of Indonesia No. 21 (Trade Unions) (2000) (Indon.).

93 See Teri L. Caraway, *Freedom of Association: Battering Ram or Trojan Horse?*, 13 REV. INT'L POL. ECON. 222 (2006).

94 *Id.*

95 *Id.*; ROBINSON & HADIZ, *supra* note 37; Interviews with Labor Rights Activists, in Jakarta, Indon. (June 24, 2008; June 27, 2008; June 25, 2009); Interview with Labor Rights Activist, in Bogor, Indon. (July 2, 2008).

96 Benedictus Hari Juliawan, *Against All Odds: Mobilisation amidst Fragmentation*, Paper presented at Asia Pacific Soc. Ass'n Conf., Bali, Indon. (June 2009).

97 See COLIN FENWICK ET AL., *LABOUR DISPUTES SETTLEMENT REFORM IN INDONESIA: A GUIDE TO THE POLICY AND LEGAL ISSUES RAISED BY THE INDUSTRIAL DISPUTES SETTLEMENT BILL 12-13* (2002).

98 *Id.* at 13; Alexandra Owens, *Testing the Ratcheting Labor Standards Proposal: Indonesia and the Shangri-La Workers*, 5 MELB. J. INT'L L. 169 (2004).

99 See Teri L. Caraway, *Explaining the Dominance of Legacy Unions in New Democracies: Comparative Insights from Indonesia*, 41 COMP. POL. STUD. 1371 (2008).

A central node in this process is the new system of industrial dispute resolution, created by the Indonesian government in 2004 to replace an older set of tribunals based in an authoritarian model. This labor court system is an important arena for addressing disputes among unions, with the "potential to create a significant body of jurisprudence,"¹⁰⁰ though it has also been charged with imposing new legal costs on unions, individualizing labor claims, and restricting strikes.¹⁰¹

3. Labor Codes in Practice

One might expect the compatibility of private and legal standards to support the growth of unions in export-oriented factories in Indonesia. In a very limited sense, it has: The GSBI union has organized factories producing for adidas, the Gap, Tommy Hilfiger, and others. Unions affiliated with SPN and Serikat Pekerja Tekstil, Sandang Dan Kulit (SPTSK) have used codes of conduct as leverage to support collective bargaining and seek justice for injured or fired workers.¹⁰² Yet most such attempts have struggled in the face of managerial recalcitrance and a wave of factory closures. And although brands with codes of conduct purport to support freedom of association, they have certainly not demonstrated a preference for unionized factories, and several factories where unions experienced significant gains later shut down or lost business.¹⁰³ In other instances, the apparent compatibility between private standards and domestic law gave way to ambiguity when it came to putting freedom of association standards into practice.

Perhaps the most high profile case of this involved the PT Panarub shoe factory in Tangerang (near Jakarta), a supplier for adidas. In 1998, an insurgent union (Perbupas) formed and began to challenge the existing union, which it charged with being too close to management.¹⁰⁴ An ugly and protracted conflict ensued, during which organizers of the insurgent union

100 Kosuke Mizuno, *Strengths and Weaknesses in Law No. 2 of 2004 about Industrial Disputes Resolution*, 9 LAB. MGMT. DEV. 5 (2008).

101 Jafar Suryomengglo, *Labour, Politics and the Law: A Legal-Political Analysis of Indonesia's Labour Law Reform Program*, 9 LAB. MGMT. DEV. 1 (2008); Surya Tjandra, *Understanding Workers' Law Reform in Indonesia, 1998-2004*, 9 LAB. MGMT. DEV. 1 (2008).

102 Interviews with trade union leaders, in Jakarta, Indon. (Sept. 24, 2010; Sept. 25, 2010).

103 WORKER RIGHTS CONSORTIUM, UPDATE ON PT DAE JOO LEPORTS (2004), available at http://www.workersrights.org/Freports/PTDaeJooMemo_09082004.pdf; Interview with Trade Union Leader, in Jakarta, Indon. (Sept. 26, 2010).

104 Interview with Labor Rights Activist, in Jakarta, Indon. (June 27, 2008).

were harassed or fired. Domestic and international labor rights activists called on adidas to support the right of free association in this factory, and following a 2004 report from the Worker Rights Consortium, adidas expressed willingness to do so. As one activist put it, "adidas did pressure management to issue a public statement that they supported freedom of association. This is pretty significant."¹⁰⁵ Yet as the conflict continued, the two unions were unable to agree on the terms of a union verification process, and adidas declined to get directly involved in this process.¹⁰⁶ Theoretically, this is the point at which a credible governmental system for adjudicating labor conflicts could be crucial. However, the new industrial dispute resolution system was not yet in operation.¹⁰⁷ Ultimately, the insurgent union continued to exist in the factory — since Indonesian law allows multiple unions in a single factory — but lost many of its members and the chance to be recognized for bargaining purposes.

One disputed SA8000 certification similarly illustrates the inability of private regulation to substitute for an effective legal apparatus for union recognition. In 2001, the PT Kasrie towel factory in East Java had its SA8000 certification challenged by an international NGO, which charged that the original auditors (SGS) had overlooked management's firing of union organizers, which successfully derailed the insurgent union in the factory.¹⁰⁸ As one observer noted, it is "incredible that trade unionists were fired and a new trade union structure was raised close to management, and SGS [the SAI-accredited auditing firm] said there was no problem."¹⁰⁹ After an investigation, SAI allowed the certificate to continue, on the grounds that although the original audit was faulty, no current violation or path to remediation could be identified, since the insurgent union no longer existed in the factory.¹¹⁰ Here, private regulators essentially avoided the chance to clarify the precise meaning of freedom of association in practice. Fair Labor Association monitoring in Indonesia has also revealed problems in implementing freedom of association standards — in one case, finding a

105 Interview with NGO Representative, in Jakarta, Indon. (July 7, 2008).

106 Interview with Company Representative, in Jakarta, Indon. (July 10, 2008); interview with Labor Rights Activist, in Jakarta, Indon. (June 27, 2008); interview with Labor Researcher, in Jakarta, Indon. (July 9, 2008).

107 Interview with Trade Union Leader, in Jakarta, Indon. (Sept. 23, 2010).

108 Social Accountability Accreditation Services (SAAS), *Complaint #006: Certification Improper because of Major Non-Conformance* (2005), available at <http://www.saasaccreditation.org/complaint006.htm>.

109 Interview with Labor Rights Advocate, in Bonn, Ger. (July 17, 2009).

110 SAAS, *supra* note 108.

delay in signing a new collective bargaining agreement because some union members "attempted to form another union,"¹¹¹ though it is not clear if a resolution was ever reached.

In general, even though international norms, transnational standards, and domestic law on freedom of association are consistent in Indonesia, their overlap is not as reinforcing as one might expect. Here we find a configuration of complementarity without reinforcement. In part this appears due to the reluctance or inability of private regulators to adjudicate labor disputes and the immature character of governmental structures for doing so. In the "on the ground" operation of private labor standards, one does not find stateless regulation, but a messy intermingling of multiple (albeit ultimately partial and incomplete) sets of standards.

CONCLUSION

The rise of transnational governance generates neither a transcendence of the state nor a transformative solution to vexing social problems. Instead, it generates a more elaborate layering of rules. This conclusion makes the implications of transnational governance less profound but more complex than most discussions imply. They are less profound, since it is clear that the additional layer of transnational rules has no inherent capacity to overpower (or for that matter, to undermine) domestic law. But they are more complex, since it is the specific intersection of transnational private regulation with domestic and customary orders that shapes the implementation process. To examine this intersection, I propose that scholars begin with an analysis of the content of public, private, and customary rules, and then seek empirical evidence on how the relationships between these standards are managed on the ground. This approach takes seriously both the force of rules themselves (as structuring attention and shaping actors' interests and strategies) and actors' attempts to mobilize rules and exert power in a given field. Most importantly, scholars should avoid analyzing private regulatory standards in isolation and embrace the task of unpacking the interplay of multiple rules in different national settings.

The brief empirical illustrations suggest directions for further inquiry. Having identified several specific spaces where the intersection of rules

111 Fair Labor Association, *Independent External Monitoring Report 7* (2008), available at http://www.fairlabor.org/fairlaboradmin/trackingchart_files/550233756G_Indonesia.pdf.

manifests itself in practice, a more detailed analysis of those spaces is in order. Researchers have not yet closely examined what happens in community "free and prior informed consent" consultations during forest certification audits, but those settings are crucial in determining the ultimate significance of forest certification in Indonesia and elsewhere. In the case of labor, much could be gained from a close analysis of how competing claims about the legitimacy of unions are assessed by both private auditors and in the labor dispute resolution courts. The current account of layering would suggest that a variety of rules, both public and private, would be mobilized in the struggle to define "compliance." In this sense, this account of layering provides one avenue for moving from technocratic to constructed notions of compliance.

This analysis also suggests a broader agenda and novel cross-sectoral and cross-national comparisons. While Indonesian labor law is mainly consistent with transnational standards, that is not the case in some other countries, such as China, where the All-China Federation of Trade Unions has a legally imposed monopoly on worker representation.¹¹² While many codes conveniently overlook this, others suggest that brands ought to promote elected worker committees and other mechanisms to allow workers to have a voice.¹¹³ There is thus an interesting parallel between the situation of community forest rights in Indonesia and collective labor rights in China. In each instance, transnational standards operate within a legal order that is fundamentally contrary to their stated principles. In each case, private regulatory initiatives have responded by supporting parallel processes — "free and prior informed consent" consultations in the forestry case and elected worker committees in the labor case. Future work might productively compare the operation and power (or lack thereof) of these mechanisms. Of course, the Chinese context has far less space for civil society and autonomous organizational development than found in the Indonesian case. But there too, it is the interplay of public and private rules and actors that most decisively shapes the meaning of "soft law" and "corporate social responsibility."

112 See Chan, *supra* note 83.

113 See Anita Chan, *Recent Trends in Chinese Labour Issues — Signs of Change*, 57 CHINA PERSPECTIVES 2 (2005).