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EU environmental norms and third countries: the EU as a global role model?

Wybe Th. Douma
Steffen van der Velde
(eds.)

PRIVATE SECTOR DRIVEN SUSTAINABILITY STANDARDS. HOW CAN THEY PROMOTE SUSTAINABILITY IN THIRD STATES

Reinier de Man

THE QUESTION

Large quantities of raw materials from agriculture and mining used in Europe are being sourced from countries outside Europe, many of them in the developing world. Moreover, Europe is exporting huge quantities of materials, products and waste to countries outside Europe. Promoting sustainable consumption and production in a globalised economy cannot stop at Europe's borders, and the European Union recognises this in its treaties.¹ In order to contribute to sustainable development in its relation to third countries, the EU should take into account the sustainability of raw materials, products and waste streams that pass the border as imports or exports. This article refers to the imports of agriculture and forestry related raw materials, such as timber, palm oil or cane sugar and how their sustainability can be promoted. There are several fundamental, practical and legal limits – mainly related to international trade law – to the extent to which European and national legislation can be effectively used to promote the sustainability of imported raw materials or even to limit imports to sustainable sources only. What is more, the use of other instruments that do not follow the classical 'command and control' regulatory approach, but rather focus on stimulating 'good' behaviour, are believed to have many advantages, notably from the point of view of effectiveness. The question, posed in this article, therefore is: to what extent can private sector driven sustainability standards – standards created by partnerships between private sector companies and their stakeholders – be seen as an alternative or a complement to the classical regulatory approach?

Before trying to answer this question, the emergence of these private sector driven sustainability standards will be placed in a historical context. One standard initiative, the Roundtable on Sustainable Palm Oil, will be used as a particular example.² It will then be shown what contribution such standards are currently playing in converting global markets to sustainability and how the future relationship between public government and private governance with respect to setting and implement sustainability standards for agricultural raw material might look like.

¹ As explained in more detail by L. Krämer in the previous chapter.

² Between 2001 and 2004, the author was actively involved in setting up the RSPO on behalf of WWF, Unilever and additional partners.

THE EMERGENCE OF PRIVATE SECTOR SUSTAINABILITY STANDARDS

During the last decades, many voluntary 'sustainability standards' for agricultural and other commodities as well as for consumer products were developed by private sector companies and their associations, more than often in close cooperation with non-governmental organisations. Well known commodity standards are FSC (Forest Stewardship Council) for sustainable forestry and forestry products,³ MSC (Marine Stewardship Council) for fish⁴ and RSPO (Roundtable on Sustainable Palm Oil) for palm oil.⁵ More recently, standards and associated certification systems were set up for major agricultural commodities such as soy (RTRS),⁶ cane sugar (Bonsucro)⁷ and cotton (Better Cotton).⁸⁹ A number of competing sustainability standards have been developed for coffee and tea, of which Rainforest Alliance and UTZ Certified can be seen on many consumer end products.

Another family of sustainability related standards is not so much focusing on ecology, but rather on human rights and labour conditions. In the 1990s, labour unions and non-governmental organisations (such united in as the Clean Clothes Campaign)¹⁰ pointed at the often appalling conditions in the international textile industry and exerted pressure on retailers and their brands to set ethical standards and to certify compliance. This resulted in a number of different initiatives, standards and certification systems, including SA8000,¹¹ the Ethical Trade Initiative (ETI)¹² and Business Social Compliance Initiative (BSCI).¹³

These standard setting and certification initiatives have in common that they try to fill up a vacuum in international trade regulation. Ecological (or social) standards, especially in the emerging third world economies, often are either too low or not well implemented in the production countries. Citizens, consumers and NGOs have put pressure on retailers and brand owners to set acceptable standards and to take responsibility for their proper implementation. As a

³ See website of the Forest Stewardship Council, available at < <https://ic.fsc.org/index.htm>>.

⁴ See website of Marine Stewardship Council, available at < <http://www.msc.org/>>.

⁵ See website of Roundtable of Sustainable Palm oil (RSPO), available at <www.rspo.org>.

⁶ See website of Round Table on Responsible Soy Association, available at <<http://www.responsiblesoy.org/>>.

⁷ See Bonsucro, *Bonsucro – Better Sugar Cane Initiative Production Standard, Principles and Criteria* Version 3.0, (Bonsucro March 2011) and the website of Bonsucro, available at <<http://www.bonsucro.com/>>.

⁸ See website of Bettercotton, available at < <http://bettercotton.org/>>.

⁹ For an overview of different commodity initiatives and standards, see R. de Man, 'Land Issues in Voluntary Standards for Investments in Agriculture, a discussion paper', in *The World Bank Annual Bank Conference on Land Policy and Administration* (Washington: World Bank, April 26 and 27 2010).

¹⁰ See website of Clean Clothes Campaign, available at < <http://www.cleanclothes.org/>>.

¹¹ See Social Accountability International (SAI), *Social Accountability 8000*, (New York: SAI 2008) and the website of SAI, available at < <http://www.sa-intl.org>>.

¹² See Ethical Trade Initiative (ETI), *The ETI Base Code* (ETI: London 2001) and the website of ETI, available at < <http://www.ethicaltrade.org/>>.

¹³ See R. de Man, *supra* note 9, Annex 1: 'A Review of Selected Voluntary Standard Initiatives'.

result, the standards defined in these private sector based initiatives are all voluntary and have not been formulated as part of any legal framework. As already indicated above, more than often these sustainability standard initiatives are based on multi-stakeholder participation in one form or another, reflected in their governance structures, in which social and environmental NGOs are being represented alongside with interests from production and trade.

THE HISTORICAL CONTEXT

Rio and Sustainability

For a better understanding of the development of the aforementioned private sector and civil society driven sustainability initiatives and standards, it is helpful to place them into their historical context. The ideas underlying the initiatives and the expectations about their effectiveness were rooted in the discussions and policy developments between the 1990s and the first decennium after the year 2000.¹⁴ The successive United Nations conferences held in 1992 ('Rio Summit'), 2002 ('Johannesburg') and 2012 ('Rio +20') provide an appropriate historical frame of reference.

At the 1992 United Nations Conference on Environment and Development in Rio the Janeiro, 'sustainability', developed earlier by the so-called Brundtland Commission between 1983 and 1987, had become the guiding principle that united ecological and developmental goals.¹⁵ It had also become clear that sustainable development had to go beyond government policies and that it required active roles of all stakeholders involved, including the private sector and civil society. Already at the Rio Summit it became clear that not much progress on forest protection principles and their implementation could be made. The 'Forest Principles' document, produced in Rio, was a rather weak, legally non-binding document. There was fierce resistance from developing countries against any stronger forest policy document, mainly based on arguments related to costs for setting aside forests.

The processes that followed after 'Rio' (such as the Montreal process) were slow and lacked strong ambitions to protect the world's most threatened forest areas. Disappointment about the outcome of 'Rio' was the trigger that started the process resulting in the Forest Stewardship Council (FSC) in 1993. World Wide Fund for Nature (WWF), in cooperation with private sector companies, took the initiative to set up this first major market-driven sustainable commodity initiative, based on a private 'governance' rather than a public 'government'

¹⁴ For more historical backgrounds, see for example R. de Man and T.R. Burns, 'Sustainability: supply chains, partner linkages, and new forms of self-regulation', in *25 Human Systems Management* 2006, Number 1, 1-12; R. de Man, 'Stoffstrommanagement: Lernprozess für Staat und Wirtschaft' [Material flow management: learning process for government and industry], in *Ökologisches Wirtschaften* (Ausgabe 5 1996), 10-12.

¹⁵ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press 1987).

model.¹⁶ The choice for this novel governance model was not so much based on a belief in the private sector. It was rather born out of frustration about the lacking results in national policies and international conventions.

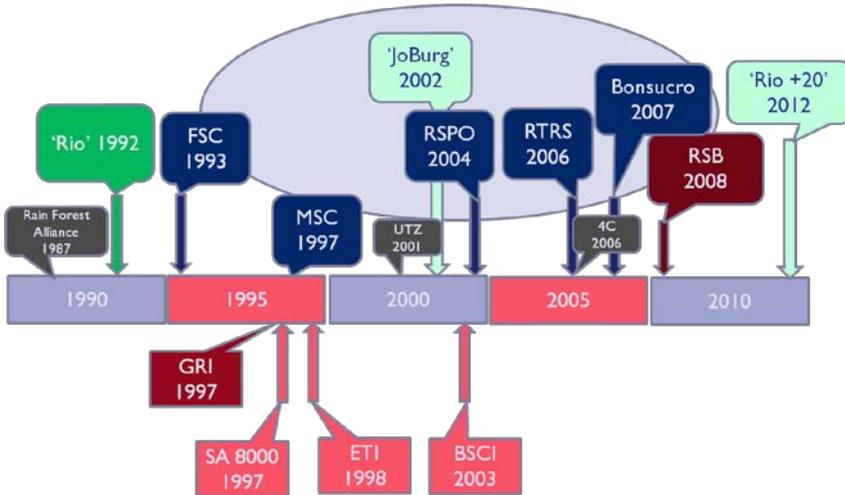


Figure 1. The Emergence of Private Sector Standards in a Historical Perspective

Johannesburg and the Belief in Voluntary Initiatives

Voluntary Partnerships

Ten years after ‘Rio’, the Johannesburg World Summit on Sustainable development, was almost entirely focused on so-called Type II partnerships, voluntary agreements between public and private players with an important role for civil society and business. Liberal-conservative philosophies were dominating the discussion. Voluntary partnerships were increasingly regarded as more effective than top-down government policies. Multi-stakeholder approaches were dominating the sustainability agenda. The development of many multi-stakeholder based initiatives for setting sustainability standards for agricultural commodities was a clear expression of the trend at the time.¹⁷

¹⁶ See B. Cashore *et al.*, *Governing Through Markets: Forest Certification and the Emergence of Non-state Authority* (New Haven: Yale University Press 2004).

¹⁷ The author was strongly involved in organising Type II partnerships at that time, notably on creating sustainable supply chains for the timber and paper chain. The paper partnership ‘Newspapers that Know their Trees’ – organised for the German company Axel Springer and partners from the private sector and civil society – was rewarded one of the 10 prizes at a competition organised by the International Chamber of Commerce in the Framework of the Johannesburg summit. Apart from euphoria, there were many doubts as well, especially in government circles. See for example R. de Man, *Bruikbare Partnerschappen, Beleidsadvies aan DGM/SB* [Effective Partnerships – Policy Advice to the Environmental Directorate in the Dutch Ministry for Environment and Spatial Planning, confidential], (Leiden: Sustainable Business Development 2005).

WWF and the Emergence of Sustainable Commodity Roundtables

WWF played a central role in initiating and organising a number of multi-stakeholder initiatives for setting sustainability standards and the associated certification systems. The initiative to set up the Roundtable on Sustainable Palm Oil was made in 2002. Apart from the Marine Stewardship Council (1997), it was the first major multi-stakeholder sustainable commodity initiative after FSC. It was based on a governance model somewhat less complicated than FSC. The RSPO model was more or less copied for setting up the Roundtable on Responsible Soy (RTRS, 2006). Other initiatives like Bonsucro (for sugar, 2007) and Better Cotton (2005) were based on a similar multi-stakeholder model: an international multi-stakeholder association ('Roundtable'), with private sector members along the supply chain and from the financial sector and environmental and social NGOs representing civil society. The original focus of these sustainable commodity initiatives (forestry, palm oil, soy, sugar), all initiated by WWF and private sector partners, was primarily ecology, with an emphasis on biodiversity. However, by including social NGOs, human rights issues – such as food security and land rights – gradually became more prominent during their development.¹⁸ More recently, the Roundtable on Sustainable Biofuels (RSB, 2008), was set up. In contrast to the aforementioned initiatives, its standard is including multiple commodities used for bio-fuel and includes a stronger focus on human rights issues.

Voluntary Standards for Social Compliance

During the same period, a number of 'social compliance' initiatives and associated certification systems were set up. Among them are SA8000 (1997), the Ethical Trade Initiative and the Business Social Compliance Initiative (BSCI), which was initiated by the German industry to provide a somewhat more cost-effective implementation of social compliance standards. These, and other, voluntary social compliance standards can be regarded as an implementation of the ILO Conventions that deal with workers' rights, child labour, labour safety and related issues.¹⁹

¹⁸ On the growing importance of land rights and food security issues in voluntary sustainability standards, see my earlier publications and the references included there: R. de Man, *supra* note 9;

R. de Man, *Land Governance and Food Security Issues in Commodity Standards*, interim report to SDC Bern (Leiden: Sustainable Business Development 2011);

R. de Man, *Agricultural Commodities that Respect Land Rights and Food Security*, report of a High Level Workshop of the Swiss Agency for Development and Cooperation and the Netherlands Ministry of Foreign Affairs, The Hague February 20 2012, (Leiden: Sustainable Business Development 2012a);

R. de Man, 'Agricultural Commodities that Respect Land Rights and Food Security – How to Include Land Governance Issues in Sustainable Commodity Standards', paper presented at the *2012 World Bank Conference on Land and Poverty*, (Washington: World Bank April 23-26 2012b).

¹⁹ See R. de Man, *supra* note 9.

Reality after Rio +20

Ten years after the Johannesburg euphoria on the blessings of voluntary partnerships and voluntary standards, around the time the Rio+20 conference was held, the world looks a bit different. Certainly voluntary partnerships and the voluntary standard initiative ('Roundtables') have been playing and are still playing important roles, but their contributions are more modest than originally hoped for. Private 'governance', in the end, does not appear to be the alternative to public 'government', but can certainly complement more classical forms of policy making and policy implementation. Success factors and limitations have become clearly visible, as will be discussed later in this article.

THE CASE OF SUSTAINABLE PALM OIL

The development of the Roundtable on Sustainable Palm Oil (RSPO) is a good example that shows both the real contributions of multi-stakeholder commodity roundtables to promoting sustainability in supply chains and their limitations.²⁰

The idea of setting up a Roundtable on Sustainable Palm Oil (RSPO) was born in WWF around 2001.²¹ For WWF, the trigger was the problem of deforestation in South-East Asia and the role oil palm expansion was playing in that. It was recognised that forest cannot be protected by promoting sustainable forestry only. One of the key factors in deforestation was the development of agriculture and the related clearing of valuable forests. The initiative was not an anti-palm oil initiative. On the contrary, it was meant to promote the use of 'sustainable' palm oil, to satisfy the growing demand for palm oil without destroying high conservation value forests like tropical rainforests. WWF, in cooperation with a number of private sector partners, decided to define a set of broadly supported sustainability principles and criteria and to set up a certification system. It was to be assured that certification is feasible for mainstream producers.

Among the initiating stakeholders (Figure 2) were retail companies (such as Migros and Sainsbury's), producers of consumer products (including Unilever), vegetable oil traders and processors (Anglia and Aarhus) and palm oil producers (including the Golden Hope company and the Malaysian Palm Oil Association MPOA). Both Unilever and Migros had already formulated their own sustainability criteria. Apart from some unavoidable hick-ups in the political process, it was not too difficult to create a set of reasonable sustainability

²⁰ More detailed information about RSPO's history can be found at the RSPO website <www.rsपो.org>; and, on the author's website <<http://www.rdemān.nl/site/palmoil.htm>>; J. von Geibler, *Nachhaltigkeit in globalen Wertschöpfungsketten □ nicht-staatliche Standards als Steuerungsinstrument im internationalen Biomassehandel* [Sustainability in global value chains – non-state standards as a management tool in the international biomass trade](Marburg, Metropolis Verlag 2010), chapter 4; J. Nikoloyuk *et al.*, 'The Promise and Limitations of Partnered Governance – the Case of Sustainable Palm Oil', *Journal of Corporate Governance* 2010.

²¹ The author was involved as a consultant to WWF and its private sector partners in setting up RSPO. He gained support from important stakeholders and was responsible for organising the first Roundtable Meeting in Kuala Lumpur, August 2003.

principles and criteria. After some preparations in 2001, first informal meetings were held in 2001, after which an Organising Committee was set up in January 2002.²² The Committee prepared the first RSPO meeting, which took place in Kuala Lumpur in August 2003, for which a draft text for its future constitution – the Statement of Intent (Sol) – had been prepared. The draft text was discussed at the Roundtable and the final Sol was the basis for formalising the Roundtable as an Association registered in Switzerland with an office in Kuala Lumpur in early 2004. Already in 2005, the first version of the Principles and Criteria was published. After a period of testing, formulating national interpretations and defining requirements for traceability, the first RSPO certified palm oil arrived in Rotterdam in August 2008, five years after the constituting RSPO Roundtable meeting.²³ Nine years after its constitution, in 2012, RSPO's membership exceeded 1000 members from more than 50 countries. RSPO certified Crude Palm Oil production was about 14% of the global market.

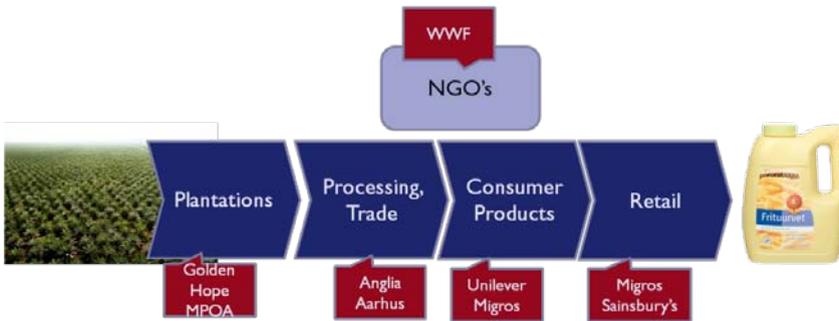


Figure 2. RSPO-Initiators (2002)

Taking the complexity of the many stakeholder interests around the table into account, the process has been extremely quick, certainly in comparison with processes driven by the national governments or multi-lateral organisations.

RSPO's Principles

1. Commitment to transparency
 2. Compliance with applicable laws and regulations
 3. Commitment to long-term economic and financial viability
 4. Use of appropriate best practice by growers and millers
 5. Environmental responsibility and conservation of natural resources and biodiversity
 6. Responsible consideration of employees and of individuals and communities affected by growers and mills
 7. Responsible development of new plantings
 8. Commitment to continuous improvement in key areas of activity
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²² Facilitated by the author of this article.

²³ See *supra* note 5, available at <<http://www.rspo.org/en/milestones>>.

SECTOR CONVERSION TO SUSTAINABILITY: THEORY AND PRACTICE

What role can such private sector and civil society driven initiatives, such as the RSPO described above, actually play? Are they an alternative to more traditional forms of government intervention? Or are they at least a welcome complement to government policies and legislation? In this context, it may be useful to compare theory and practice. On the one hand, there is a theory, the explicit and implicit expectations of those who see a potentially high contribution of voluntary sustainability standards to 'sector conversion'. 'Sector conversion' means here: the global conversion of the entire sector from unsustainable to sustainable raw materials, for example the conversion of the do-it-yourself sector to FSC certified timber or the food industry to using RSPO palm oil. On the other hand, there is the development in practical reality. Below, the discrepancies between 'theory' and 'practice' will be discussed.

Theory

How could a sector as a whole convert to sustainable raw materials on the basis of voluntarily set sustainability standards such as FSC, RSPO or RTRS? Those who argue that a conversion is possible on the basis of voluntary standards, or that those standards at least play an important role in the conversion process, follow an argumentation like this. The present situation is characterised by the existence of raw materials with different degrees of sustainability. The different sustainability 'qualities' vary between worst performers (the 'bottom') and best performers (the 'ceiling'). As the 'ceiling' can usually only be reached by small niche markets (such as organic cotton with less than 1% global market share),²⁴ much more net sustainability can be produced by moving the worst performers to a somewhat higher level than by trying to move the middle performers to the best level. In the language of those who adhere to this theory: 'it makes much more sense to raise the floor than to raise the ceiling'²⁵ (see Figure 3).

In a pure commodity market – i.e., in a market where the customer asks for a well-defined uniform minimum base quality –, there is an unavoidable race to the bottom. In such a situation, only the commodity price counts. In the absence of a strict government policy, raising the floor by the market parties themselves, is critically dependent on the existence of strong pre-competitive cooperation. The theory, used for example by the WWF-led Market Transformation Initiative, is that the conversion from lower to higher sustainability inputs is critically dependent on the willingness of a few major commodity buyers, for example in food producing and retail companies, representing a major part of the demand for a certain commodity to create a critical mass that makes the

²⁴ See the *Organic Cotton Market report* (published by Textile Exchange), available at < http://textileexchange.org/access_to_TE_2011_OC_market_report>.

²⁵ One of the most prominent representatives of this school of thought is Jason Clay, WWF US. See for example his TED presentation, available at < http://www.ted.com/talks/jason_clay_how_big_brands_can_save_biodiversity.html>.

raw material producers switch *en masse* to sustainable production. Commodity roundtables, such as FSC or RSPO, could, in that theory, provide the mechanism for such a conversion process. This theory is well expressed at a WWF website:

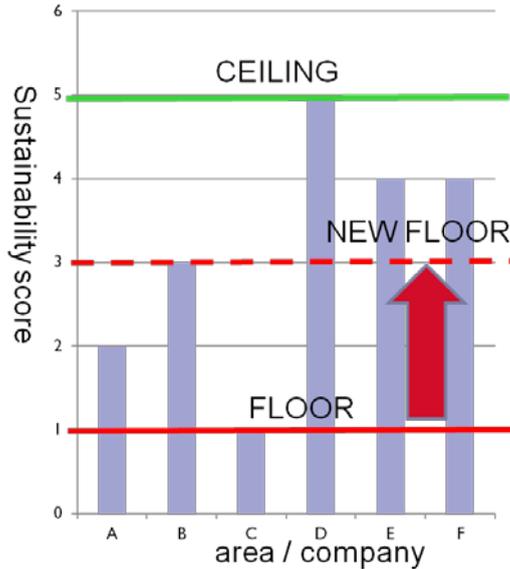


Figure 3. Raising the Sustainability Floor

‘Rather than trying to educate 7 billion consumers or improve the practices of 1.5 billion producers, the most efficient way to effect change is to work with this handful of companies – about 100 in total. Together they buy and sell 25 percent of the commodities with the greatest impact on WWF’s priority places. And this demand can shift 40-50% of global production. By engaging these companies, WWF helps them achieve positive and measurable benefits for their businesses, while creating conservation impacts where they matter most’.²⁶

Practice

Partnerships between civil society and business – such as the cooperation projects between WWF and major retail and food companies – have demonstrably resulted in positive change. We do see a positive role of the different multi-stakeholder based standard and certification initiatives. However, we do not (yet) see the great conversion of entire global markets to sustainability. It is illustrative to check how three certification schemes for sustainable commodities are developing: FSC and similar certification systems for forestry and

²⁶ *Transforming Business*, available at <<http://worldwildlife.org/initiatives/transforming-business>>.

timber, RSPO for palm oil and RTRS for soy. Combining the figures for FSC with figures for comparable schemes (such as PEFC, Canadian and US systems), the share of certified timber is below 15%, more than 20 years after the establishment of these schemes. RSPO is doing better and has reached more than 15% global market share in less than 7 years. RTRS's share is still negligible (see figure 4). Better Cotton's global market share (not in the figure) was not more than 2% in 2011-2012, despite several years of development and financial support from the Dutch government.²⁷

Current experience with FSC, RSPO, Better Cotton and similar voluntary market-based sustainability standards and certification systems suggests that it appears to be highly unlikely that global market transformation based on these standards and systems will develop beyond 20%. This is not a surprise. There are several factors that block a development towards 100% transformation. Two factors appear to be particularly important: lack of global market demand and lack of government involvement in implementation.

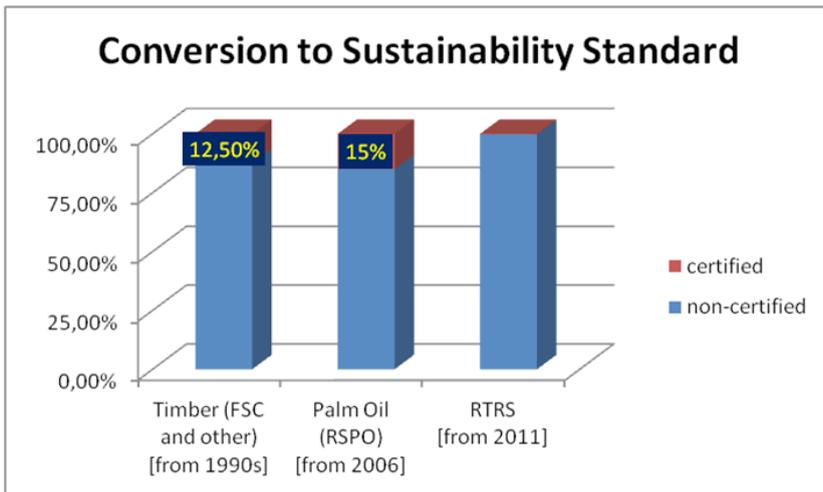


Figure 4. Conversion in Practice

- *Lack of Market Demand*

Motivation to switch to sustainable raw materials is mainly limited to companies operating in markets with critical consumers and critical citizens. The highest growth in consumption of palm oil and soy, for example, is in emerging economies with rapidly increasing demand for vegetable oils and proteins, such as India and China. For the time being, non-certified palm oil or soy can easily be sold in these markets. WWF's dream to convert 40-50% of global production by influencing 100 large companies turns out to be a bit too optimistic. In prac-

²⁷ Through IDH Sustainable Trade Initiative, see <<http://www.idhsustainabletrade.com/cotton>>.

tice, the procurement managers' willingness in these companies to switch to sustainable sourcing is often much lower than the Corporate Social Responsibility and Public Relations managers want us to believe.

- *Lack of Government Involvement in Implementation*

Principles and Criteria that define sustainable raw materials such as timber or palm oil are the basis for the associated certification systems. Certification tests whether the certified company complies with the criteria set in the standard. Certification can never refer to obligations of any other organisation or person than the company that receives the certificate. Taking RSPO certification as an example, the oil palm plantation company has to comply with a number of detailed criteria under Principle no. 4 ('use of appropriate best practice by growers and millers') and Principle no. 5 ('environmental responsibility and conservation of natural resources and biodiversity'), which can easily be tested by relatively simple auditing procedures. However, things get a bit more complicated when it comes to criteria for land use, both ecological criteria on biodiversity and social criteria on access to land. Proper implementation of such criteria is highly dependent on the existence of appropriate public land use planning systems and well organised legal and extra-judicial systems for resolving land use conflicts.²⁸ In order to ensure full implementation of such criteria, roundtable organisations such as FSC and RSPO are now seeking closer cooperation with governments in producing countries.

PRIVATE SECTOR DRIVEN STANDARDS: THEIR CONTRIBUTION TO REGULATION

Three Steps

Transformation on the basis of voluntary standards, developed in multi-stakeholder roundtables, is clearly not an alternative to regulation. It is more plausible to assume that the roundtable based standards and voluntary certification systems are the beginning rather than the end of a process in which eventually national and international forms of legislation and regulation will play a decisive role again. The following three-step process can be observed for a number of commodities.

- In *step 1*, '*single company projects*', single companies set sustainability standards for sourcing their raw materials. In the case of palm oil, notably Unilever and the Swiss retailer chain Migros defined their own sustainability standards before there was any generally accepted industry standard.²⁹ Simi-

²⁸ See R. De Man, *supra* note 18, (2012b); R. de Man, *The Settlement of Disputes on Land Rights – Creating a Facility that Serves Present and Future Needs*, Report prepared for Oxfam-NOVIB and IDH (Leiden: Sustainable Business Development May 2012c).

²⁹ J. Nikoloyuk *et al.*, *supra* note 20; J. Von Geibler, *supra* note 20.

larly, large paper users, such as the German publisher Axel Springer, defined their own sustainable forestry and traceability requirements for wood used for paper production, long before certification systems such as FSC and PEFC were operational.³⁰ These companies had good reasons, related to risks and opportunities of their public visibility and the vulnerability of their brands, to actively set standards and to lead the industry towards common standards. Unilever and Migros, for example, were leading, in cooperation with WWF, the development of RSPO, see step 2. Other examples are the German Otto Group's forerunner role in setting and implementing social compliance criteria (later consolidated in BSCI), Nestlé's leading roles related to coffee and milk and McDonald's leadership in the beef industry.³¹

- In *step 2, 'industry self-regulation with multi-stakeholder participation'*, single companies – usually the leaders from step 1 – and their allies from different stakeholder groups start a voluntary initiative for setting a common industry standard and organising related certification systems. In this step, the experience gained in individual company projects or specific cooperation projects between companies, NGOs and others are being consolidated and transformed into a general industry standard. This step is best described as non-competitive consolidation. It produces a standard with a high level of credibility that, in principle, can be used by any company in the sector that is motivated to do so. However, the standard is voluntary and, as has been discussed, it is not very likely that more than 20% of the global market will voluntarily follow it.
- *Step 3, 'the inclusion into national or international/EU regulation'*. Although the standard has been developed in cooperation between the private sector and civil society and as such is voluntary, it may eventually become part of legislation. This is what we see happening in different sectors. A good example on the demand side is European regulation on biofuels that refers to a number of so-called voluntary standards, including RSPO and RSB.³² Biofuels that are certified to have been produced following a voluntary standard approved by the European Commission³³ count towards the 10% goal that all EU Member States need to reach by 2020. On the supply side, we see a trend that national governments include (parts of) 'voluntary' standards into their national regulation, although some countries have decided to develop their own national standard instead, such as the Indonesia's ISPO and Malaysia's MSPO,

³⁰ See R. de Man and T.R. Burns, *supra* note 14.

³¹ See R. de Man and A. Ionescu-Somers, *Sustainable Sourcing of Agricultural Raw Materials – a Practitioner's Guide* (Geneva: SAI-Platform and Partners March 2013).

³² Under the EU Renewable Energy Directive 2009/28 (OJ 2009, L 140, p. 16), among others, the following 'voluntary' certification schemes have been recognised: Bonsucro (cane sugar), RSB (biofuels) and RSPO (palm oil). See for example the website of European Biofuels technology Platform, available at <<http://www.biofuelstp.eu/certification.html>>; and 'Commission brands RSPO certified palm oil biofuels "sustainable"' on the Asser Institute website, available at <http://www.asser.nl/default.aspx?site_id=7&level1=12221&level2=12261&level3=12465&textid=40551>. Also see the contribution by Afionis on biofuels in this CLEER Working Paper.

³³ Note that L. Krämer in the previous chapter is critical about the manner in which the approval process takes place.

both national alternatives to RSPO (palm oil), which, however, do contain many elements of the original voluntary global standard.

THE PRIVATE PATH TOWARDS PUBLIC REGULATION

Four Potential Paths

We may conclude that, for the time being, market-based sustainability standards are both a success in terms of speed and credibility and a failure in terms of global market conversion. We may also conclude that the alternatives do not look much better. Let us compare four alternatives: international negotiation in the UN context, legislation in consumer countries, legislation in producer countries and the private sector and civil society based scenario: market-based governance (See Figure 5).

1. *International negotiation in the UN context*

Setting sustainability standards through international negotiation processes in the UN context is often slow and does not always lead to convincing results, as the negotiation in the context of climate change (United Nations Framework Convention on Climate Change UNFCCC, Kyoto protocol and its follow up),³⁴ biodiversity and forest protection show. In many cases, North-South conflicts have blocked progress, as was the case in the Rio forest protection agenda, which then triggered civil society and business to set up FSC as discussed above. In many cases, outcomes have been too weak, too late and not firmly implemented through national policies.

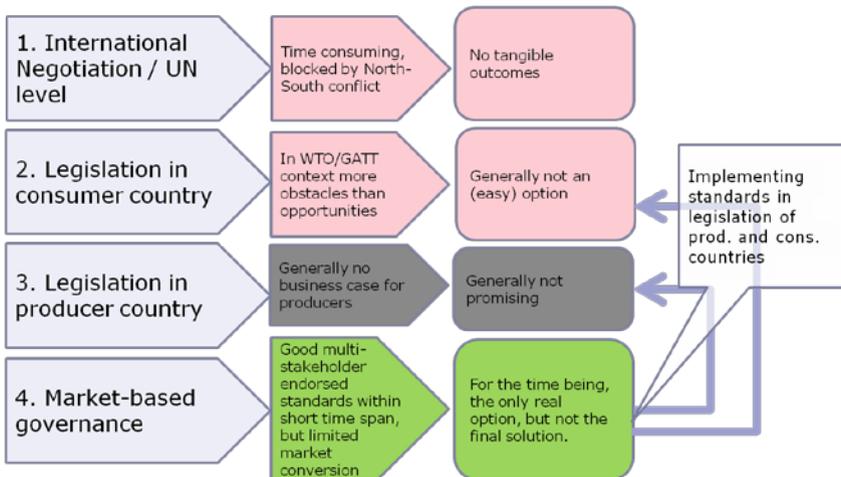


Figure 5. Four Paths to Implementing Sustainability

³⁴ See the contribution by L. Massai in this CLEER Working Paper on the issue of climate change negotiations and the role of the EU in this process.

2. *Legislation in consumer countries*

Legislation in consumer countries that limits the import of timber, palm oil, soy, etc. to sustainable sources only is an option, but with major difficulties. Although there are certainly options to include sustainability requirements for imported commodities, there are severe restrictions and risks in the WTO/GATT context.³⁵

3. *Legislation in producer countries*

The most effective path to sustainable commodity production is through appropriate national legislation and effective implementation. However, in a global commodity market, more than often there is not a clear business case for producing countries, as long as economic rewards for implementing sustainability are not perceived. Legislation in producer countries only becomes a realistic option once there are strong sustainability requirements from the market that make such legislation economically attractive.

4. *Market-based governance*

As international negotiation processes are slow, legislation in consumer countries is complicated in the context of international trade law, motivation in producer countries is often too low, the only realistic path available is through market-based governance. It has one overwhelming advantage: speed. Good multi-stakeholder endorsed, and therefore highly credible, standards can be formulated in a very short period of time, as the RSPO example has convincingly shown. As explained above, it does not yet lead to conversion to sustainability globally, however.

FROM MARKET-BASED GOVERNANCE TO PUBLIC POLICY

Comparing the four potential paths as defined above, one can conclude that in many cases the most promising start can be made through voluntary standards as developed in multi-stakeholder settings. They provide the best opportunity for relatively rapid development of highly credible principles, criteria and certification systems. The next step towards global market conversion to sustainability, however, is to bring both governments in consumer countries and governments in producing countries back in. By making the short-cut through market-based governance, the loss of valuable time will be avoided. By bringing governments back in, conversion processes beyond current levels of 15-20% will be made more likely. This is not a theoretical proposition: these developments are currently going on.

³⁵ On the WTO compatibility of the EU's biofuels rules, see for instance W. Th. Douma, 'Legal aspects of the EU biofuels policy: protection or protectionism?', in 53 *German Yearbook International Law* 2010, 371-420.

Implementation through Policy in Consumer Countries

Although there are still many potential barriers in international trade law, we can observe an increasingly important trend that policies in consumer countries use sustainability standards developed in voluntary cooperation between the private sector and civil society as a basis for legislation. In addition, we see other than regulatory policies to stimulate implementation of those standards:

- *Regulatory Instruments*

The most prominent example is how the EU Renewable Energy Directive recognises existing 'voluntary' schemes in the context of certifying sustainable bio-fuels, as has been discussed above. Voluntary schemes are no longer purely voluntary in these publicly regulated markets.

- *Development Finance*

An important instrument to promote sustainability of raw materials from development countries are the conditions for granting development finance for (agricultural) investments. The IFC performance standards³⁶ and the World Bank's Operational Policies³⁷ are important in this context.³⁸ IFC and national development finance institutions (such as CDC in the UK, DEG in Germany, FMO in the Netherlands) increasingly demand FSC certification for forestry plantations or RSPO certification for oil palm developments. The European Union also plays a role in this respect by using the European Principles for the Environment as guidelines when EBRD, EIB and others (co-)finance projects in third countries.

- *Supporting Roundtables*

Another non-regulatory instrument that governments can use is (financially) supporting sustainability standard initiatives. The Dutch government, for example, financially supported the Roundtable on Sustainable Palm Oil during its initial phase. The Swiss government (Swiss Development Cooperation SDC) played a key role in setting up the Roundtable on Sustainable Biofuels.

³⁶ Notably IFC Performance Standards on Environmental and Social Sustainability; see IFC, *IFC Sustainability Framework, Policy and Performance Standards on Environmental and Social Sustainability* (Washington: IFC 2012).

³⁷ See W. Kiene, 'Enforcing Industry Codes of Conduct: Challenges and Lessons from Other Sectors', Paper Presented at the *World Bank Annual Bank Conference on Land Policy and Administration* (Washington: World Bank, 26 and 27 April 2010).

³⁸ See R. de Man, *supra* note 9.

- *Supporting Market Conversion*

The Dutch government is actively promoting conversion towards sustainable raw materials imported from development countries through IDH – Sustainable Trade Initiative, a government fund that provides matching funds to private sector initiatives. IDH actively is promoting sustainable cocoa, tropical timber (FSC and other), cotton (BCI), aquaculture, soy (RTRS) and other sustainable raw materials. IDH is now aiming for extending its scope to other European countries in cooperation with their governments. The Swiss government has allocated CHF 30 million to the fund.³⁹

Implementation through Policy in Producing Countries

Global conversion to sustainability standards and full implementation of those principles and criteria will only be feasible once sustainability standards have become part of national legislation and enforcement is guaranteed by well-functioning public institutions in the producing countries. Voluntary standards developed in cooperation between the private sector and civil society are not the end of the process but rather the beginning. They provide effective and credible principles, criteria and certification systems accepted by major markets. It is more efficient to use these as a starting point than to develop national or European standards from scratch.

It is unlikely that producing countries are motivated to promote sustainability by legislation before market demand for sustainable commodities has developed. The only viable path is therefore that market-based initiatives ('path 4') take the lead, with some help from regulatory and non-regulatory policy instruments in consumer countries ('path 2'), before sufficient motivation for using legal instruments in producing countries has built up. Only then, there is a clear business case for producing countries. Roundtables, such as the RSPO for palm oil, can play – and do currently play – an important role in promoting best practice standards that can easily be included into government policy. Moreover, they motivate governments to create proper institutional conditions for implementing public policies, especially related to ecological and social land-use issues. Today sustainability standard organisations such as FSC and RSPO provide their own mechanisms for land dispute settlement. This can only be a temporary ad-hoc solution. These mechanisms try to fill in the gap in present institutional and legal structures, but they neither have the authority nor the resources to solve the underlying political and legal problems. It is essential that these 'privatised' tasks will eventually be taken over by governments again.⁴⁰

Similar developments can be seen in the 'social compliance' arena. Weak national policies or weak implementation, especially in less developed textile

³⁹ More information on IDH-Sustainable Trade Initiative's website, available at < <http://www.idhsustainabletrade.com>>. IDH is the abbreviation for Initiatief Duurzame Handel, Dutch for Sustainable Trade Initiative.

⁴⁰ See R. de Man, *supra* note 28.

producing countries, have created the need for private sector driven social compliance standards and certification systems, not only in the interest of the textile workers but also in the interest of major brands and company reputations, as was again shown by the recent tragic events in Bangladesh. Social compliance standard organisations such as SA8000, ETI or BSCI are not only private sector certification organisations. They also play a role as advisers to governments in the production countries, for example on the issue of defining a so-called 'living wage', i.e., the minimum income necessary for a worker to meet basic needs.

Partnerships between governments of producing countries and governments of countries importing raw materials can contribute to implementing sustainability criteria in the producing countries, based on demands from the consumer markets. Good examples are the partnerships between the Dutch government with Indonesia, Malaysia and Vietnam on palm oil, shrimp, tropical fruits and vegetables⁴¹ or the Voluntary Partnership Agreements (VPAs) between the European Union and wood exporting countries that are being set up in the context of the EU's FLEGT initiative.⁴²

CONCLUSION

It may be concluded that sustainability standards and associated certification systems defined in multi-stakeholder settings such as FSC, RSPO, RTRS or RSB, have played and are still playing an indispensable role in promoting sustainability of commodities imported from outside the EU. Their main advantage over the more classical solutions, such as international negotiations at the UN level or regulation in consuming or producing countries, is the speed at which they arrive at highly credible and efficient solutions with considerable acceptance by markets and critical stakeholders alike. However, they should not be regarded as an alternative to regulation, but rather as a powerful input into regulation, both in consuming countries (EU and individual countries) and countries exporting commodities to the EU. Only by recognising the need for stronger government involvement in implementing the standards developed in market-based settings, will global conversion to sustainable raw materials beyond 20% penetration of markets.

⁴¹ The Dutch partnerships were set up in the context of a larger WSSD partnership agreement that was set up in the context of 'Johannesburg': 'Market access through meeting quality standards for food and agricultural products'. See I. Visseren-Hamakers, 'The role of intersectoral north-south partnerships in sustainable fisheries', in *Conference Resource Policies: Effectiveness, Efficiency, and Equity*, (Berlin: November 17-18 2006).

⁴² See website of DG Environment (European Commission), FLEGT Voluntary Partnership Agreements (VPAs), available at <<http://ec.europa.eu/environment/forests/flegt.htm>>. Also see L. Krämer on this topic in the previous chapter.