

# The Paradox of International Sustainability Standards Schemes in Fragile State Contexts

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## Introduction

The purpose of International Sustainability Standards Schemes (ISSSs) is to verify that businesses comply with minimum social and environmental standards, no-matter where a product is produced or sourced. ISSSs clearly have potential in low resource or fragile state contexts, where they can substitute for state social and environmental monitoring and regulatory mechanisms that may be absent, poorly resourced, lacking in transparency, or otherwise ineffective. However, logical contradictions come into play when the process of gaining certification with a standards scheme in such a context requires evidence of compliance with state administrative processes that may lack rigour. This situation raises the issue of the extent to which ISSSs should be complicit in reinforcing the authority of public officials in jurisdictions known to be at risk of producing dysfunctional and/or corrupt public administration outcomes. There is a strong argument in such contexts for ISSSs to minimise reliance on compliance with the requirements of public sector agencies and utilise alternative means of verification wherever possible.

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## What are International Sustainability Standards Schemes (ISSSs)

ISSSs exist for the purpose of assuring consumers, regulators, and other interested parties that particular goods and services have been produced in compliance with minimum environmental and social standards. The origins of ISSSs lie in the increasing social and environmental awareness of recent decades, which have also been reflected in legislative changes in developed countries. Notable among the latter is the 2008 amendment to the (United States) *Lacey Act* prohibiting the import and trade of fish, wildlife and plant products sourced in violation to laws *anywhere*.<sup>2</sup>

Broadly, certification schemes are intended to verify that production processes have not involved labour exploitation or the unsustainable management of natural resources, that land has been accessed only with the Free, Prior and Informed Consent (FPIC) of landholders, and that production has occurred in compliance with prevailing laws in the countries of origin (which for reasons outlined below, could perhaps be better thought of, as *not illegally*).

Examples of organisations offering standards certification include the following:

- Forest Stewardship Council (FSC)
- Rainforest Alliance Sustainable Agriculture Network (SAN),
- Round Table on Sustainable Palm Oil (RSPO), and
- Marine Stewardship Council (MSC), which certifies sustainable fishing activities.

Standards schemes are not restricted to primary industries; for example the certification of sustainable tourism ventures is possible through the Global Sustainable Tourism Council (GSTC). ISSSs normally provide certification based on external audit, the objective of which is to determine observance of a range of principles and criteria through verification of compliance with specific *indicators* (which may include laws). There are also meta-programs that specialise in monitoring and accrediting entire standards schemes to ensure their robustness. These include the International Social and Environmental Accreditation and Labelling Alliance (ISEAL).

### ISSSs and Fragile State Contexts

ISSSs would appear to have considerable potential for improving public administration outcomes in low resource or fragile state contexts where existing monitoring and regulatory frameworks are weak or non-existent.<sup>3</sup> In such contexts, certification of commercial

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<sup>2</sup> Note that the 'Prohibited Acts' section of the legislation refers to 'violation of any foreign law' in relation to 'fish or wildlife', but not in relation to plants. Notwithstanding this feature, the Act is also taken to apply to plants, as per US Department of Agriculture (2016) guidance that the 2008 revisions to the *Lacey Act* make it 'unlawful to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant, with some limited exceptions, taken, possessed, transported or sold in violation of the laws of the United States, a State, an Indian tribe, or any foreign law that protects plants or that regulates certain plant related offenses....'.

<sup>3</sup> The utility of ISSSs in developing country contexts has received donor attention, including in a Policy Note prepared by the Swiss-German Donor Network on Sustainability Standards (DNSS). According to the Network

operations by ISSSs can ideally contribute to islands of functional public administration in contexts more broadly characterised by administrative variability or neglect. In the process, communities gain exposure to more robust standards, and conceivably may raise their expectations of the performance of both business and government.

However, in the event that certification with an international standards scheme requires that an operator demonstrate compliance with the requirements of one or more national government agency in a low resource/fragile state context, then a paradoxical situation may arise. On one hand, if compliance procedures administered by a national government agency are efficient, effective and robust, then the context may not be consistent with the low resource/fragile state typology (potentially meaning that the role of the ISSS in this context is redundant). On the other hand, if compliance procedures administered by a national government agency are not administered robustly (due to indolence, a lack of capacity, resources or transparency, or some combination of factors) then the compliance of the operator with the administrative procedures may serve little or no purpose in assuring adherence to sustainability principles, if indeed the agency even bothers to prepare appropriate documentation.<sup>4</sup>

Perversely, a requirement to achieve documented compliance with a particular administrative procedure administered by a dysfunctional agency, as a requisite for certification with an ISSS, may even incentivise an otherwise bona fide operator to bribe an agency for compliance documentation. This would be contrary to the principles underlying all ISSSs and is a key point given the delays often experienced in low resource/fragile state contexts. In such environments it is not uncommon to experience prolonged delays in dealings with officials assigned legal competence (see Papua New Guinea example discussed below). Very high demands and expectations are commonly placed on any high-performing and responsive individuals who may work in such agencies, and such persons can be feted especially by international organisations. The clear absence of a broader functioning Weberian bureaucracy becomes starkly apparent every time such individuals are relocated or are temporarily absent.

### **Legalities and Realities**

Palm oil is produced in equatorial regions, mostly in developing countries, and the industry has its own standards scheme. The Round Table on Sustainable Palm Oil (RSPO) is a non-profit entity involving a range of industry stakeholders, which certifies sustainable palm oil production based on compliance by companies with 'a set of environmental and social criteria'.<sup>5</sup> In the following paragraphs, criteria relating to legal compliance generally, and land tenure especially, are considered.

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(DNSS N.D.:1) group that has considered the potential of ISSSs, these schemes were 'were originally developed as a substitute for lacking international regulation and ineffective mechanisms for the enforcement of national legislation'.

<sup>4</sup> Note that in the case of the MSC, the standard requires first that management exists, that management stipulates processes and procedures to ensure sustainability and that there is monitoring and control to ensure compliance with managements objectives. Accordingly there is not just an evaluation of compliance with management, but also an evaluation of management, the objectives set by management and ability of management to enforce compliance.

<sup>5</sup> See <http://www.rspo.org/about>

Beginning with legal compliance broadly, under RSPO Principles and Criteria 2.1 '[e]vidence of compliance' is required 'with all applicable local, national and ratified international laws and regulations'.<sup>6</sup> Meanwhile, 2.2 requires that '[d]ocuments showing legal ownership or lease, history of land tenure ownership/control, and the actual legal use of the land...' be available.<sup>7</sup> At face value such requirements, clearly calculated to ensure that an operator is violating no laws, appear well intended. However, of the 18 'Grower certification' countries listed on the RSPO website (RSPO 2017), only two (Costa Rica and Malaysia) score *above* the 2016 average score of 43 in the Transparency International (TI) 2016 Corruption Perception Index (TI 2017), which ranks countries from '0 (highly corrupt) to 100 (very clean)'. The majority of the RSPO 'Grower certification' countries score on or below this 'global average score' of 43, which indicates 'endemic corruption in a country's public sector.'<sup>8</sup> For this reason, countries scoring 43 or less might be considered 'higher risk' jurisdictions, suggesting reason to question the integrity of formal land tenure documentation processes in these countries and the capacity of government agencies generally (although this may vary across agencies).

Of the 16 higher risk RSPO 'Grower certification' countries, *national interpretations* (documents outlining how the RSPO standard will be applied in a particular country context) are available on the RSPO website for Columbia, Ghana, Guatemala, Honduras, Indonesia, Papua New Guinea (PNG), Solomon Islands and Thailand. The general legal compliance and land tenure provisions of these documents are similar, although Thailand and Solomon Islands differ from the norm in the number and importance (major or minor status) of land indicators. With the exception of Thailand (which uses different wording), the guidance on 'laws and regulations' specifies that 'Implementing all legal requirements is an essential baseline requirement...'<sup>9</sup>

PNG is alone of the eight higher risk countries in that it features 'Specific Guidance' (under 2.2 on land) which expressly recognises performance issues associated with a government agency, noting (emphasis added) that '[i]n PNG, the issuance of land titles...can take several years, and has proven an unpredictable process. Cases have been recorded where valid requests have taken over twenty-years to be processed...' The guidance, outlined below, then specifies a number of measures less reliant on a response from a government agency which, if fulfilled in combination, demonstrate compliance with the land access provisions:

- a) the land has been alienated;
- b) boundaries have been defined by a registered surveyor and portion numbers allocated by the Surveyor General;
- c) there is no dispute over tenure...;

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<sup>6</sup> Based on reference to the RSPO 'national interpretation' documents for Columbia, Ghana, Guatemala, Honduras, Indonesia, Thailand, Papua New Guinea and Solomon Islands. See, respectively, RSPO (2016b), RSPO (2015c), RSPO (2015d), RSPO (2015a), RSPO (2013), RSPO (2011), RSPO (2016a), and RSPO (2010).

<sup>7</sup> Other areas of 'relevant legislation' referred to include labour, agriculture, environmental management, storage, transportation and processing.

<sup>8</sup> Of the remaining 16 RSPO grower certification countries, Ghana scores 43, Solomon Islands 42, Brazil 40, Columbia and Indonesia 37, Gabon and Thailand 35, Ivory Coast 34, Ecuador 31, Honduras 30, Guatemala and Papua New Guinea (PNG) 28, and Cambodia 21.

<sup>9</sup> National interpretation information is available at <http://www.rspo.org/key-documents>

- d) there is evidence that an application has been submitted to the relevant Government authority (Provincial Division of Lands and Physical Planning); and
- e) there is evidence of follow-up to the authorities on more than one occasion.’

This particular ‘specific guidance’ is a recent addition to the PNG RSPO national interpretation, and it is clearly aimed at particular cases involving undisputed parcels of land previously alienated from customary tenure (almost certainly during the colonial period) over which ‘boundaries have been defined by a registered surveyor and portion numbers allocated by the Surveyor General’. The reference to ‘evidence of follow-up to the authorities on more than one occasion’ is a refreshingly frank reference to the sub-optimal outcomes and lack of responsiveness frequently associated with attempts to communicate with government agencies in higher risk jurisdictions for the purpose of advancing matters in accordance with due process. The reality is that in any jurisdiction characterised by endemic corruption, a single competent agency may, depending on the commitment to transparent and efficient service of the incumbent staff, as well as other fickle aspects including the status of fuel allowances, vehicle availability, printer ink, telephone lines, etc., be capable of furnishing compliance-related documentation promptly, within weeks, in 20 years, or at no foreseeable time. For ISSSs, the probability of corruption and other forms of administrative dysfunction in higher risk jurisdictions begs the question of whether the identification of indicators less dependent on action by government agencies should be prioritised broadly in relation to higher risk contexts, and across all or most criteria (at least as alternatives, if not as indicators of first resort).

The expectation that officials in endemically corrupt jurisdictions will operate competently extends to other sustainability standards approaches. The Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreement (VPA) between the European Union (EU) and the Republic of Liberia (2016 TI score 37), for example, charges the Liberian police with checking ‘that all loads passing checkpoints have the required waybills with them’. Already skilled at checking for fire extinguishes, safety triangles, working headlights, etc., as a basis for extorting drivers unfortunate enough to have neglected any of these areas, there is no question that Liberian police officers will relish all additional responsibilities.<sup>10</sup> But should international standards programs of any kind be complicit in adding to the authority of public officials already well known for venal and predatory behaviour, or should standards schemes be endeavouring to keep engagements with public sector officials to an absolute minimum at least until such time as public sector performance levels in particular jurisdictions reach minimum standards?

### **Practical Approaches**

The land tenure revisions to the PNG RSPO national interpretation demonstrate efforts to facilitate compliance using a more flexible, less legalistic approach; one clearly adopted in recognition of the non-responsiveness of the competent government agency. The requirement that ‘boundaries have been defined by a registered surveyor and portion numbers allocated by the Surveyor General’ still requires a level of state functionality, but less than previous requirements.

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<sup>10</sup> A 2015 TI Africa survey (TI 2015: 14,35) found that 69% of Liberian public service users reported paying a bribe in the last 12 months, the highest rate of any country surveyed. Meanwhile, 77% of respondents surveyed believed that ‘most’ or ‘all’ Liberian police officers are corrupt.

Elsewhere, the Marine Stewardship Council (MSC) has taken a more systematic approach to enabling certification of compliance through verification of alternative (non-legalistic) indicators. For example, the 'Governance and policy' component of the MSC Standard Principle 3 on Management Systems refers to the requirement for a 'Legal and/or customary framework' for ensuring the sustainability of fisheries that is 'appropriate and effective'. Although the specific indicators included in the 'Governance and policy' section refer primarily to the existence of a 'national legal system' meeting minimum standards, the general guidance on Principle 3 (under SA4.1.4) implies that assessment teams are not limited to state laws provided they provide sufficient evidence concerning the effectiveness of alternative management systems (MSC 2014:65):

'When scores are based on the consideration of informal or traditional management systems, the team shall provide, in the rationale, evidence demonstrating the validity and robustness of the conclusions by:

- a. Using different methods to collect information.
- b. Cross checking opinions and views from different segments of the stakeholder community.'

The regard for 'traditional or informal management systems' in the MSC Standard is certainly not without precedent in sustainability initiatives. For example, the US *Lacey Act* (2008) also refers to the authority of 'Indian Tribal Law' in areas of US jurisdiction, in relation to dealings in fish, wildlife and plants.

### **ISSSs in an Imperfect World**

Writing on the burgeoning number of new states in the second half of the 20th Century, post-Empire, historian Niall Ferguson (2004:372-373) remarks that '...many...are tiny. No fewer than fifty-eight...have populations less than 2.5 million; thirty-five have less than 500,000 inhabitants'. Noting the 'economic disruption' inherent in the fact that many small countries, post-1945, originated out of 'civil war within an earlier multi-ethnic polity' Ferguson remarks that such countries 'can be economically inefficient even in peacetime, too small to justify all the paraphernalia of statehood they insist on decking themselves out in: border posts, bureaucracies and the rest'. Moreover, it is not just small states that struggle to achieve quality public administration outcomes. Realising effective and transparent public administration remains a challenge facing a great number of countries, and Transparency International reported in their 2016 Corruption Perception Index report (TI 2017) that '[m]ore countries declined than improved...'.

Assuming that the realisation of effective and transparent public administration remains a medium-to-long term project across a host of nations in the developing world, ISSSs can play an important role in advancing robust social and environmental monitoring and regulation systems in places that currently lack it. ISSSs might increase their workability in fragile state/low resource contexts by keeping the need for national agency compliance documentation to an absolute minimum, increasing recognition of bona fide attempts by operators to comply with state law even in the absence of cooperation and responsiveness on the part of state agencies, and expanding the option of greater consultation with traditional authorities/village leaders, civil society actors, and community members as a basis for measuring compliance.

## Conclusion

International Sustainability Standards Systems (ISSS) hold potential as a means of ensuring that businesses comply with minimum social and environmental standards in low resource/fragile state contexts. Arguably it is in these contexts where ISSSs can make the greatest contribution. There is, however, an inherent contradiction in requiring compliance documentation from poorly resourced government agencies in high risk jurisdictions, and a possibility that such requirements will actively encourage otherwise bona fide business operators to bribe civil servants for documentation that might otherwise not be forthcoming. For this reason, it is important for ISSSs to keep requirements for national agency compliance documentation to an absolute minimum, as well as to recognise bona fide attempts by operators to comply with state law even in the absence of any response by the agency concerned, and expand options for consultation with traditional authorities/village leaders and community members as a basis for measuring compliance.

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