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## Private Certification Versus Public Certification in the International Environmental Arena

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# Private Certification Versus Public Certification in the International Environmental Arena: The Marine Stewardship Council and Marine Eco-Label Japan Fisheries Certification Schemes as Case Studies

## ABSTRACT

*In recent decades, the world's various fisheries have seen a number of problems, primarily depletion of fish stocks due to overfishing. While the UN has created some soft law, including sustainable fishing standards, to deal with the problem of fisheries depletion, no binding international laws currently exist. Several entities have decided to deal with the problem on their own, through eco-labeling programs. The Marine Stewardship Council, a private entity not directly affiliated with the government of any country, has created such a program. In addition, some governments have created similar programs, including Japan through its Marine Eco-Label Japan program. While the Marine Eco-Label Japan program is fairly new and therefore difficult to fully evaluate, it seems as though private programs such as the Marine Stewardship Council are better situated to run eco-labeling programs than state-run entities. Private entities such as the Marine Stewardship Council lack many of the pressures faced by state-run programs such as Marine Eco-Label Japan where governments have a strong interest in the fishing industry's success. By running an independent program with an unbiased third party certification scheme and making the governance of the program visible, programs such as the Marine Stewardship Council are able to run efficient certification schemes while maintaining accountability.*

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## I. INTRODUCTION

Fisheries are the units where the harvesting of fish for commercial purposes occurs, defined by such categories as location of the seabed or type of fish being harvested.<sup>1</sup> Understandably, since many fisheries are located across the globe in the world's oceans, regulation of fisheries is a topic of international interest. Effective management of fisheries requires balancing the goal of producing and selling as many fish as possible in order to maintain a profitable business with that of running fisheries that are resilient and environmentally friendly.<sup>2</sup> Naturally, the relevant questions are how exactly these goals should be balanced, and who or what type of organization is in the best position to determine what regulation needs to occur, how regulating standards should be created, and how those standards should be monitored.

Several different approaches have been taken in recent years to decide what guidelines fisheries should follow and how they should be implemented and monitored. The Food and Agriculture Organization of the United Nations (FAO) has developed a set of guidelines applicable to fisheries around the world.<sup>3</sup> Although the United Nations (UN) has developed guidelines as opposed to strict regulations, national governments, including those of Japan and Iceland, have recently undertaken the task of implementing official fisheries certification programs.<sup>4</sup> Another approach to regulating fisheries in recent years has been to develop a third-party, private organization to design a certification scheme, complete with measurable criteria to be met by member fisheries. Currently the Marine Stewardship Council (MSC), a private international organization, runs the most extensive effort of this type.<sup>5</sup>

1. United Nations Food and Agriculture Organization Glossary, <http://www.fao.org/fi/glossary/default.asp> (search term "fishery") (last visited Feb. 20, 2010).

2. United Nations Food and Agriculture Organization Fisheries and Aquaculture Department, Fisheries Governance, <http://www.fao.org/fishery/topic/3016/en> (last visited Feb. 20, 2010).

3. UNITED NATIONS FOOD AND AGRICULTURE ORGANIZATION, FAO TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES—FISHING OPERATIONS, 3–23 (1996), available at <ftp://ftp.fao.org/docrep/fao/003/W3591e/W3591e00.pdf> [hereinafter TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES—FISHING OPERATIONS].

4. See Consulate General of Iceland, *Iceland to Document and Certify Responsible Fisheries*, Mar. 20, 2009, available at <http://www.iceland.org/us/nyc/consulate-general/news-and-events/nr/6859> (discussing Iceland's plans to certify responsible fisheries); Japan for Sustainability, *'Marine Eco-Label Japan' to Start in 2008*, Jan. 4, 2008, available at <http://www.japanfs.org/en/pages/026893.html> ("The Japanese Fisheries Association (JFA) is planning to establish a Japanese certification system for fishery products . . .").

5. Christopher J. Carr & Harry N. Scheiber, *Dealing with a Resource Crisis: Regulatory Regimes for Managing the World's Marine Fisheries*, 21 STAN. ENVTL. L.J. 45, 74 (2002).

This Note focuses on the recent development of programs designed to regulate or certify fisheries on an international level. Part II begins by providing a brief overview of the international fisheries industry and what certification of fisheries strives to accomplish. It then describes attempts at hard regulation through the Fish Stocks Agreement, as well as soft regulation through the guidelines promulgated by the FAO. Part III examines the concept of third-party fisheries certification by private organizations, focusing primarily on the program designed by the MSC. Part IV discusses programs designed by State governments to regulate their fisheries, using the Japanese government's recently implemented program as an example. Finally, Part V analyzes the pros and cons of both public regulation and private certification of fisheries, concluding that private certification is the preferred method for efficient and unbiased regulation of fisheries.

## II. THE BASICS: FISHERIES, ECO-LABELING, AND CERTIFICATION

### A. *The Problem of Fisheries Depletion*

Depletion of fisheries is a global problem that has been recognized in recent years by international organizations, including the UN. The FAO has indicated that at least 60% of the world's top 200 commercial marine fish stocks are in fisheries classified as either "mature" or "senescent."<sup>6</sup> According to the FAO, 47% of main fish stocks or species groups are fully exploited, 18% are overexploited, and 10% are "significantly depleted, or are recovering from depletion and are far less productive than they used to be, or than they could be if management can return them to the higher abundance levels commensurate with their pre-depletion catch levels."<sup>7</sup> In addition to having the obvious environmental consequences of a decrease in ecological health and species diversity, fisheries depletion also has negative social and economic implications.<sup>8</sup> Global food supplies can

6. *Id.* at 46. The FAO defines a "mature" or "maturing" fishery as one with "catches reaching and remaining around their historical maximum," and a "senescent" fishery as one with "catches consistently falling below the historical maximum." JEAN-JACQUES MAGUIRE ET AL., FAO FISHERIES TECHNICAL PAPER 495: THE STATE OF WORLD HIGHLY MIGRATORY, STRADDLING AND OTHER HIGH SEAS FISHERY RESOURCES AND ASSOCIATED SPECIES 62-68 (2006), available at <http://www.fao.org/docrep/009/a0653e/a0653e0a.htm#bm10>.

7. FISHERIES DEPT., UNITED NATIONS FOOD AND AGRICULTURAL ORGANIZATION, THE STATE OF WORLD FISHERIES AND AQUACULTURE 23 (2002), available at <ftp://ftp.fao.org/docrep/fao/005/y7300e/y7300e00.pdf> [hereinafter THE STATE OF WORLD FISHERIES].

8. Tracy Cooper, *Picture This: Promoting Sustainable Fisheries Through Eco-Labeling and Product Certification*, 10 OCEAN & COASTAL L.J. 1, 5 (2004-2005).

be drastically reduced, which can also lead to a decline in employment.<sup>9</sup>

Fisheries become depleted as a result of overexploitation through overfishing and wasteful fishing practices, pollution, habitat destruction and depletion, the lack of effective fisheries management efforts, and natural causes.<sup>10</sup> “Overexploitation [generally] takes place when more fish are caught than can be replaced through natural reproduction.<sup>11</sup> The two major types of commonly occurring overexploitation are overfishing, when there is a “race for the commons” because too many fishermen try to exploit the fish in a given fishery, and wasteful fishing practices, when large commercial fishing gear is used to catch mass quantities of fish at a time, but only the desired fish are kept, while all others are disposed of in various ways.<sup>12</sup>

### B. *The Development of Fisheries Certification and Eco-Labeling*

The goal of fisheries certification and eco-labeling is to create and maintain sustainable fisheries. A “sustainable fishery” can be defined as a “healthy fishery that is ‘managed in a way to preserve fish populations for future generations.’”<sup>13</sup> The FAO Code of Conduct sets out the goal of obtaining sustainable fisheries:

Fisheries management should promote the maintenance of the quality, diversity and availability of fishery resources in sufficient quantities for present and future generations in the context of food security, poverty alleviation and sustainable development . . . [and] should not only ensure the conservation of target species but also of species belonging to the same ecosystem or associated with or dependent upon the target species.<sup>14</sup>

Eco-labeling and fisheries certification have been developed in recent years as tools for establishing sustainable fisheries.

Eco-labeling helps increasingly environmentally aware consumers satisfy their demand for products that are environmentally friendly.<sup>15</sup> Eco-labeling is generally defined as “the affixing of a label to a product indicating its superior environmental attributes, to inform the consumer of those attributes and encourage

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 5–6.

13. *Id.* at 12 (quoting SEAFOOD CHOICES ALLIANCES, THE MARKETPLACE FOR SUSTAINABLE SEAFOOD: GROWING APPETITES AND SHRINKING SEAS 1 (2003), available at [http://www.seaweb.org/resources/documents/reports\\_sustainableseafood.pdf](http://www.seaweb.org/resources/documents/reports_sustainableseafood.pdf)).

14. FOOD AND AGRICULTURE ORGANIZATION, CODE OF CONDUCT FOR RESPONSIBLE FISHERIES § 6.2, U.N. Doc. 95/20/Rev/1, U.N. Sales No. E.98.V.11 (1998), available at <http://www.fao.org/DOCREP/005/v9878e/v9878e00.htm#6>.

15. Cooper, *supra* note 8, at 19.

product sales, while creating economic incentives for the satisfaction of environmental and social criteria.”<sup>16</sup> The technique of eco-labeling easily informs consumers that the product they are about to purchase is more environmentally friendly than similar products without the same label. Eco-labeling also informs consumers about the processes involved in creating the product.<sup>17</sup> Eco-labeling allows the purchaser to make informed decisions that “take into account the environmental impacts of a product and its production, and to weigh those environmental impacts against other product attributes such as quality, source, and price.”<sup>18</sup> Eco-labeling is a way of using market-based incentives to develop sustainable fisheries while supplementing other types of conservation efforts.<sup>19</sup>

A technique often used in conjunction with eco-labeling is environmental certification, where a specific label is added to a product after an environmental assessment and approval by a certifying organization.<sup>20</sup> Environmental certification “examines the level of sustainability of fisheries exploitation and is generally restricted to environmental issues, such as the maintenance of fish stocks and the ecological impacts of production, rather than any wider coverage of socio-economic issues . . . .”<sup>21</sup> In addition, environmental certification “rarely guarantees the quality of certified products, just their provenance.”<sup>22</sup> Environmental certification is not to be confused with social certification, which can also be used in connection with fisheries.<sup>23</sup> Social certification deals with the working conditions of the fish producers rather than the environmental conditions of the fisheries themselves.<sup>24</sup> According to the FAO, social certification “examines the social provenance of products, mainly in terms of the social/working conditions of those producing the fish and fish products; and/or whether they receive a fair price.”<sup>25</sup>

Although there are a variety of different types of environmental certification programs, there are some characteristics shared by almost of them. A majority of certification programs are voluntary, so product examination and certification occurs only when a producer

16. *Id.* at 3.

17. *Id.* at 17.

18. *Id.*

19. *Id.* at 2–3.

20. *Id.* at 3.

21. ASIA-PACIFIC FISHERY COMMISSION [APFIC], POTENTIAL COSTS AND BENEFITS OF FISHERIES CERTIFICATION FOR COUNTRIES IN THE ASIA-PACIFIC REGION 3, Rap Publication 2007/24 (2007) (prepared by Graeme Macfadyen & Tim Huntington), available at [http://www.globefish.org/files/2007-24fisheriescertification\\_697.pdf](http://www.globefish.org/files/2007-24fisheriescertification_697.pdf).

22. *Id.*

23. *See id.* (delineating between environmental and social certification).

24. *Id.*

25. *Id.*

submits a product to the certifying organization.<sup>26</sup> After a product is submitted for certification, it is inspected to see if it has met the requirements predetermined by the certifying organization.<sup>27</sup> If the product meets the requirements, the producer is allowed to use the eco-label of the certifying organization for marketing and advertising of that product for a set period of time.<sup>28</sup> Sometimes the actual product examination and certification process is conducted by an independent third-party certifier approved by the certifying organization.<sup>29</sup> This type of third-party product certification provides an additional level of credibility to the eco-labeling process, and helps avoid claims of partiality or bias by the organization doing the examination and certification.<sup>30</sup>

### C. *The Fish Stocks Agreement: A Hard Law Attempt at High Seas Fisheries Regulation*

In 1995, before the development of eco-labeling and certification schemes, member states of the UN developed a treaty to address fisheries in the high seas.<sup>31</sup> The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement) was created to promote the conservation and management of fish stocks that “straddle” exclusive economic zone (EEZ) and high seas boundaries<sup>32</sup> and to enable effective management of fish stocks on the high seas.<sup>33</sup> It set out “comprehensive areas in which a regional fisheries management organization [has] competence covering scientific research, stock assessment, monitoring, surveillance, control and enforcement and the setting of catch limits.”<sup>34</sup> The Fish Stocks Agreement also provides for several enforcement mechanisms, including obligating a flag state to allow access on its ships by “duly authorized inspectors from other States” and to use onboard observers from other states, as

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26. Cooper, *supra* note 8, at 20.

27. *Id.* at 21.

28. *Id.*

29. *Id.*

30. *Id.* at 3, 21–22.

31. *Id.* at 7.

32. *Id.* at 7–8.

33. See Food and Agriculture Department of the United Nations Fisheries and Aquaculture Department, Governance of High Seas Fisheries, <http://www.fao.org/fishery/topic/13337/en> (last visited Feb. 20, 2010) (noting that fishers on the high seas are subject only to treaty obligations, a general obligation of states to conserve marine resources, and specific requirements that states “co-operate in the management of fisheries for straddling stocks . . .”).

34. *Id.*



well as requiring flag states to take action against any vessel reported to have committed a serious violation.<sup>35</sup>

Despite the Agreement's efforts to provide effective enforcement mechanisms, it has not been successful in addressing fishery problems.<sup>36</sup> This is due in part to state sovereignty, an obstacle that plagues enforcement of international agreements generally.<sup>37</sup> In addition, problems in addressing fishery problems exist because not all fishing nations have chosen to ratify or accede to the Agreement.<sup>38</sup> Even if the agreement were fully implemented by all States Parties to the treaty, "there w[ould] still be nothing to prevent vessels from States that are not party to the agreement, and which choose not to comply with the rules established by a regional fisheries management organization, from freely fishing stocks which a regional fisheries management organization is attempting to manage."<sup>39</sup> Hard law measures have thus been largely ineffective so far at successfully regulating fisheries resource management.

#### D. *UN Soft Law: FAO's Creation of Sustainability Guidelines*

The UN recognized that ocean resources "although renewable, are not infinite and need to be properly managed, if their contribution to the nutritional, economic and social well-being of the growing world's population [is] to be sustained."<sup>40</sup> Although the UN Convention on the Law of the Sea, adopted in 1982, had been designed in part to provide a framework for fisheries management, by 1991 "[c]lear signs of over-exploitation of important fish stocks, modifications of ecosystems, significant economic losses, and international conflicts of management and fish trade threatened the long-term sustainability of fisheries and the contribution of fisheries to food supply . . . ."<sup>41</sup> As a result, the UN felt that there was a clear need to develop new "soft law" guidelines, taking a closer look at conservation and environmental needs surrounding fisheries.<sup>42</sup>

35. *Id.*

36. See Cooper, *supra* note 8, at 2 (discussing the failure of initial international efforts to address fisheries depletion).

37. See, e.g., Hong Thao Nguyen & Hai Oanh Hoang, *Ten Years' Implementation of the 1982 Convention in Vietnam*, VIETNAMESE LAW CONSULTANTS, Dec. 21, 2004, <http://vietnamese-law-consultancy.com/english/content/browse.php?action=shownews&category=&id=2&topicid=7> (discussing the role sovereignty considerations played in Vietnam's decision to ratify the 1982 Convention).

38. Food and Agriculture Department of the United Nations Fisheries and Aquaculture Department, *supra* note 33.

39. *Id.*

40. Cooper, *supra* note 8, at 2 (quoting TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES—FISHING OPERATIONS, *supra* note 3, at 1).

41. *Id.* (quoting TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES—FISHING OPERATIONS, *supra* note 3, at 1).

42. *Id.*

In 1995, in addition to the Fish Stocks Agreement, the UN developed the FAO Code of Conduct, created to establish “global principles and standards for the management, conservation, and development of fisheries.”<sup>43</sup> These principles, however, soon proved insufficient to accomplish their goals.<sup>44</sup> Consistent with the trend towards ensuring sustainability in fisheries, in 2005 the FAO embraced a new approach by developing guidelines for the eco-labeling of fish products.<sup>45</sup> These guidelines signaled FAO’s decision to endorse eco-labeling and product certification techniques as methods to promote fisheries sustainability. The guidelines outline general principles that the FAO found should govern eco-labeling schemes.<sup>46</sup> These include: “the need for reliable, independent auditing; transparency of standard setting and accountability; and the need for standards to be based on good science.”<sup>47</sup> In addition, the FAO requires that interested parties be able to participate and that review and revision of standards and of standard-setting procedures be conducted periodically by eco-labeling organizations.<sup>48</sup>

### III. THE MARINE STEWARDSHIP COUNCIL: PRIVATE CERTIFICATION OF FISHERIES

#### A. *Development of the Marine Stewardship Council*

“The MSC was formed in 1996 by the World Wildlife Fund, an environmental organization, and Unilever, an Anglo-Dutch consumer goods company that is one of the world’s largest buyers of ground fish,”<sup>49</sup> as a private effort to combat fisheries depletion.<sup>50</sup> The MSC

43. *Id.* at 8–9.

44. *See id.* at 12–16 (discussing the difficulties of enforcing sustainable management techniques and noting that “[w]idespread improvement in the state of fisheries has yet to be obtained.”).

45. Daniel Lee & John Connelly, *Global Aquaculture Alliance on Best Aquaculture Practices: An Industry Prepares for Sustainable Growth*, 7 SUSTAINABLE DEV. L. & POL’Y 60, 60–61 (2006); UNITED NATIONS FOOD AND AGRICULTURE ORGANIZATION, GUIDELINES FOR THE ECOLABELLING OF FISH AND FISHERY PRODUCTS FROM MARINE CAPTURE FISHERIES (2005), <http://www.fao.org/docrep/008/a0116t/a0116t01.htm#bm1.3> [hereinafter GUIDELINES FOR THE ECOLABELLING OF FISH AND FISHERY PRODUCTS].

46. Lee & Connelly, *supra* note 45, at 60–61; GUIDELINES FOR THE ECOLABELLING OF FISH AND FISHERY PRODUCTS, *supra* note 45, § 2.

47. Lee & Connelly, *supra* note 45, at 61; *see also* GUIDELINES FOR THE ECOLABELLING OF FISH AND FISHERY PRODUCTS, *supra* note 45, § 2 (listing the principles that should apply to ecolabelling schemes for marine capture fisheries).

48. GUIDELINES FOR THE ECOLABELLING OF FISH AND FISHERY PRODUCTS, *supra* note 45, § 60.

49. Carr & Scheiber, *supra* note 5, at 74.

became fully independent in 1999.<sup>51</sup> The goal of the MSC is to “tap into the purchasing power of ‘green’ consumers in Northern Europe and North America.”<sup>52</sup> In the Preamble to its Principles and Criteria for Sustainable Fishing, the MSC identifies “the overarching philosophical basis for this initiative in stewardship of marine resources” as “the use of market forces to promote behaviour which helps achieve the goal of sustainable fisheries.”<sup>53</sup> When a fisheries product has the MSC label, consumers know that the product “is from a sustainably managed, wild-catch fishery.”<sup>54</sup>

The MSC is based in London and is comprised of an average of thirty-two employees<sup>55</sup> and a CEO who reports to a board of trustees made up of a maximum of fifteen members.<sup>56</sup> The board is comprised of representatives from the environmental, political, food safety, and commercial fishing industry sectors nominated for three-year terms.<sup>57</sup> Also, the MSC has a technical advisory board of eleven experts who assist the board in making technical determinations, including those related to the implementation of the MSC Principles and Criteria for Sustainable Fishing.<sup>58</sup>

The Marine Stewardship Council modeled its private fisheries certification program on the Forest Stewardship Council’s (FSC) program.<sup>59</sup> The FSC is an “independent, non-governmental, not-for-profit organization established to promote the responsible management of the world’s forests.”<sup>60</sup> It was started in 1993 by a group led by the World Wildlife Fund, other non-governmental organizations, small-scale timber producers, high-end furniture

50. Steven Bernstein & Erin Hannah, *Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space*, 11 J. INT’L ECON. L. 575, 581 (2008).

51. DNV North America, DNV—MSC Fisheries, [http://www.dnv.us/industry/food\\_bev/services\\_solutions/sustainable\\_fisheries/msc\\_fisheries/index.asp](http://www.dnv.us/industry/food_bev/services_solutions/sustainable_fisheries/msc_fisheries/index.asp) (last visited Feb. 20, 2010).

52. Carr & Scheiber, *supra* note 5, at 75.

53. MARINE STEWARDSHIP COUNCIL, STATEMENT OF PRINCIPLES AND CRITERIA FOR SUSTAINABLE FISHING 2 (2002), [http://www.msc.org/documents/msc-standards/MSC\\_environmental\\_standard\\_for\\_sustainable\\_fishing.pdf](http://www.msc.org/documents/msc-standards/MSC_environmental_standard_for_sustainable_fishing.pdf).

54. Cooper, *supra* note 8, at 33.

55. MARINE STEWARDSHIP COUNCIL, TRUSTEES’ REPORT AND ACCOUNTS FOR THE YEAR ENDED 31 MARCH 2008, at 10 (2008), <http://www.msc.org/documents/institutional/finance/MSC-accounts-FY0708.pdf>.

56. Marine Stewardship Council, MSC Board of Trustees, <http://www.msc.org/about-us/governance/structure/board-of-trustees> (last visited Feb. 20, 2010) [hereinafter MSC Board of Trustees].

57. Cooper, *supra* note 8, at 33–34.

58. *Id.* at 34; MSC Board of Trustees, *supra* note 56.

59. Lars H. Gulbrandsen, *Organizing Accountability in Transnational Standards Organizations: The Forest Stewardship Council as a Good Governance Model, in ORGANIZING TRANSNATIONAL ACCOUNTABILITY: MOBILIZATION, TOOLS, CHALLENGES* 61–79 (Magnus Böstrom & Christina Garsten eds., 2008).

60. Forest Stewardship Council, About FSC, <http://www.fsc.org/about-fsc.html> (last visited Feb. 20, 2010).

makers, retailers, and individual forestry professionals.<sup>61</sup> Primarily, the FSC sets standards for forest certification and accredits organizations selling FSC-certified wood.<sup>62</sup> Products certified under the FSC scheme are entitled to carry the FSC logo.<sup>63</sup>

The FSC's mission is to promote "environmentally responsible, socially beneficial and economically viable management of the world's forests, by establishing a worldwide standard of recognized and respected Principles of Forest Management."<sup>64</sup> The FSC founders sought to create a sustainable forest management system and set standards in a trans-governmental fashion.<sup>65</sup> The FSC's eco-labeling program is the first successful eco-labeling scheme and similar in many ways to the MSC's later-enacted eco-labeling program.<sup>66</sup>

The Principles of Forest Management are similar to the principles governing the MSC. Both the FSC and MSC principles call for maintenance of existing ecosystems and ecological functions.<sup>67</sup> Both sets of principles also take macro-level issues into account, such as requiring each program to be compatible with existing local, national, and international laws.<sup>68</sup> The organizations themselves are also structured similarly. The FSC is made up of an international governing body consisting of three chambers—economic, social, and environmental—each with equal voting power.<sup>69</sup> The MSC's technical advisory board and the FSC's international governing body are both composed of members of various interest groups.

61. Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, 17 EUR. J. INT'L L. 47, 51 (2006).

62. *Id.*

63. *Id.*

64. *Id.* (quoting FOREST STEWARDSHIP COUNCIL, FSC INTERNATIONAL STANDARD: FSC PRINCIPLES AND CRITERIA FOR FOREST STEWARDSHIP 3–4 (1996), [http://www.fsc.org/fileadmin/web-data/public/document\\_center/international\\_FSC\\_policies/standards/FSC\\_STD\\_01\\_001\\_V4\\_0\\_EN\\_FSC\\_Principles\\_and\\_Criteria.pdf](http://www.fsc.org/fileadmin/web-data/public/document_center/international_FSC_policies/standards/FSC_STD_01_001_V4_0_EN_FSC_Principles_and_Criteria.pdf)).

65. *Id.*

66. See Forest Stewardship Council United States, *Confirms FSC at the Forefront of Forest Certification*, FSC INT'L CENTER—NEWS & NOTES, Aug. 31, 2006, <http://www.fscus.org/news/index.php?article=473> (describing the success of the FSC).

67. See Forest Stewardship Council, *The FSC Principles and Criteria for Responsible Forest Management*, <http://www.fsc.org/pc.html> (last visited Feb. 20, 2010) [hereinafter FSC Principles and Criteria] (explaining the principles that "describe how forests have to be managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations"); MARINE STEWARDSHIP COUNCIL, *MSC PRINCIPLES AND CRITERIA FOR SUSTAINABLE FISHING*, [http://www.msc.org/documents/msc-standards/MS environmental\\_standard\\_for\\_sustainable\\_fishing.pdf](http://www.msc.org/documents/msc-standards/MS environmental_standard_for_sustainable_fishing.pdf) [hereinafter MSC PRINCIPLES AND CRITERIA] (setting out principles to promote conservation).

68. FSC Principles and Criteria, *supra* note 67; MSC PRINCIPLES AND CRITERIA, *supra* note 67.

69. Meidinger, *supra* note 61, at 53.

### B. *The Mechanics of the Certification Process*

Instead of certifying products, the MSC certifies specific fisheries if they meet certain criteria set out in its “Environmental Standard for Sustainable Fishing.”<sup>70</sup> In order to be certified a fisher must meet the following core criteria: “(1) the fishery does not lead to overfishing or depletion and recovers those stocks that are overfished or depleted; (2) the fishery is conducted with attention to ecosystem imperatives; and (3) the fishery is subject to a management system that incorporates and enforces governing international, national, and local standards.”<sup>71</sup> These standards closely mirror the FAO’s 2005 suggested guidelines.<sup>72</sup>

The MSC does not conduct the certification process itself—instead the MSC approves and the fisheries pay independent certification companies to carry out the certification.<sup>73</sup> Products from certified fisheries are then permitted to carry the MSC label for a period of five years, as long as the fishery continues to satisfy the standards during annual inspections.<sup>74</sup>

The MSC fisheries certification program is open to all fisheries, “regardless of their size, type, geographic location, or current status.”<sup>75</sup> Because it takes a market-based approach, the methods the MSC uses to promote conservation are appreciated by fisheries producers.<sup>76</sup> Also, the MSC certification standards, and the fact that the examination of fisheries is conducted by independent third-party certification companies, ensure consistency and transparency throughout the entire process of certification and to consumers.<sup>77</sup> In addition, “[t]he certification process allows organizations opposed to a specific certification a chance to make a formal objection to the certification of a fishery . . . , based on either an irregularity of procedure or a determination on the merits.”<sup>78</sup>

70. Carr & Scheiber, *supra* note 5, at 74; Marine Stewardship Council, MSC Environmental Standard for Sustainable Fishing, <http://www.msc.org/about-us/standards/standards/msc-environmental-standard> (last visited Feb. 20, 2010) [hereinafter MSC Environmental Standard for Sustainable Fishing].

71. Carr & Scheiber, *supra* note 5, at 74; MSC Environmental Standard for Sustainable Fishing, *supra* note 70.

72. See GUIDELINES FOR THE ECOLABELLING OF FISH AND FISHERY PRODUCTS, *supra* note 45, §§ 30–32 (setting forth the three major requirements for an ecolabelling process: the “stock under consideration” not being overfished, ecosystem considerations being effectively addressed, and appropriate methodological methods being used).

73. Carr & Scheiber, *supra* note 5, at 74–75; Cooper, *supra* note 8, at 35.

74. Carr & Scheiber, *supra* note 5, at 75; MSC Environmental Standard for Sustainable Fishing, *supra* note 70.

75. Marine Stewardship Council, Eligible Fisheries, <http://www.msc.org/get-certified/fisheries/eligible-fisheries> (last visited Feb. 20, 2010).

76. *Id.*

77. Cooper, *supra* note 8, at 34.

78. *Id.*

### C. Market Effects of the MSC's Certification Process

The MSC's certification program impacts two broad groups: first, the general seafood market, including fishermen, processors, wholesalers, importers, exporters, retail, foodservice, and restaurant sectors; and second, fisheries, fishing communities, and "those in society who value sustainable fisheries."<sup>79</sup> The success of the eco-labeling program depends on the willingness of both the producers at various places along the chain of custody and consumers to realize the importance of the MSC's goal of developing environmentally friendly, sustainable fisheries, as well as popular belief that the MSC is actually meeting this goal.<sup>80</sup>

MSC's eco-labeling scheme will only be successful if certified product is accessible to consumers.<sup>81</sup> Consumers must understand the significance of the label itself, and must accept that the label signifies what the MSC claims it does—in other words, consumers must trust the label and the process it represents.<sup>82</sup> This can only occur if consumers are provided with information that demonstrates the connection between relevant issues (i.e., environmentally friendly fisheries) and product choices (i.e., the actual fish to be purchased at grocery stores or restaurants).<sup>83</sup> Since its foundation, the MSC has vastly improved the visibility to the general public of its eco-labeling process and what the labels themselves represent.<sup>84</sup>

Some worry that eco-labeling programs will drive up market prices and that this will negatively impact the sales.<sup>85</sup> If consumers are unwilling to pay a price premium for eco-labeled products, retailers may be unwilling to continue to purchase the fish from certified fisheries. Fortunately, this has not been the case thus far with MSC-certified products—the number of retailers selling MSC-certified products has been growing exponentially since the MSC's founding.<sup>86</sup> In January 2009, the 2,000th MSC product officially hit supermarket shelves.<sup>87</sup> It took seven years to get from the first MSC-labeled product to the 500th, but after that it took only nine months

79. Cathy A. Roheim, *Thalassorama: Early Indications of Market Impacts from the Marine Stewardship Council's Ecolabeling of Seafood*, 18 MARINE RESOURCE ECON. 95, 95–96 (2003).

80. *Id.* at 102–03.

81. *Id.* at 97.

82. *Id.*

83. *Id.*

84. *See id.* at 97 (describing the significant consumer access to MSC labels).

85. *See id.* at 101 (listing an increase in prices as one of the potential market impacts of eco-labeling).

86. Marine Stewardship Council, *MSC Ecolabelled Products Crosses 2,000 Milestone*, Jan. 22, 2009, <http://www.msc.org/newsroom/news/msc-ecolabelled-products-crosses-2-000-milestone/>.

87. *Id.*

to reach the 1,000 mark and just twelve more months to reach 2,000.<sup>88</sup>

With this increase in product lines, MSC products are now more accessible to the general public. The market has therefore been successful so far—once public awareness of the MSC program increased, demand for MSC products increased; with that increase in demand, suppliers have been more willing to purchase products from MSC-certified fisheries.<sup>89</sup> Even though MSC-certified products cost more to the end-consumer, the success of the program so far has shown that the consumer is willing to pay this price premium in order to purchase products from sustainable fisheries. Retailers pay more for fish from MSC-certified fisheries, but they are also able to charge more to consumers, so their profits do not decrease but rather stay the same or even increase.<sup>90</sup>

In the United States, Whole Foods Market is one of the leading grocers selling MSC-labeled products and was one of the first retailers to do so.<sup>91</sup> Whole Foods issued a press release after the company signed on to the MSC in 1999, iterating its reasons for doing so and spelling out the goals of the MSC's program of sustainability.<sup>92</sup> The press release explained the problem of overfishing and went into some detail about the process of MSC certification and the idea behind eco-labeling.<sup>93</sup> In so doing, Whole Foods was able to provide MSC with greater visibility, making its mission known to regular Whole Foods customers.<sup>94</sup>

In 2006, Wal-Mart announced plans to purchase all of its wild-caught fish and frozen fish for its U.S. stores from MSC-certified fisheries in the three to five years to follow—a huge step for the MSC.<sup>95</sup> Wal-Mart began carrying its first MSC-labeled products in

88. *Id.*

89. *See* Roheim, *supra* note 79, at 99 (describing both the desire of grocers to increase the range of offerings for their consumers and the positive effect of certification on prices paid to fishers for their catches).

90. *See id.* at 96 (“[D]irect effects on the seafood industry might include greater profits from the higher prices consumers are willing to pay for seafood certified as coming from a sustainable fishery.”)

91. *Id.* at 97–98; Whole Foods Market, *Whole Foods Market Joins Marine Stewardship Council*, <http://www.wholefoodsmarket.com/values/stewardship-council.php> (last visited Feb. 20, 2010).

92. Whole Foods Market, *supra* note 91.

93. *Id.*

94. *See, e.g., id.* (describing partnership with MSC and the goals of MSC).

95. *See* Laine Welch, *Wal-Mart Makes Strides in Selling Wild-Caught Fish*, ALASKA J. OF COM., Feb. 5, 2006, [http://www.alaskajournal.com/stories/020506/fis\\_20060205023.shtml](http://www.alaskajournal.com/stories/020506/fis_20060205023.shtml) (stating Wal-Mart's use of MSC approved products will “launch the sustainability concept into mainstream America.”); Wal-Mart Takes Lead On Supporting Sustainable Fisheries, <http://walmartstores.com/FactsNews/NewsRoom/5638.aspx> (last visited Feb. 20, 2010) [hereinafter *Wal-Mart Takes Lead*] (quoting MSC chief executive as hoping the decision would encourage fisheries to join the

late 2006.<sup>96</sup> The fact that Wal-Mart, one of the United States' largest supermarket chains, has signed on to the MSC is a huge success. This demonstrates that sustainability is becoming important to more and more American consumers.

Regarding Wal-Mart's commitment to the MSC, Peter Redmond, Wal-Mart's vice president and divisional merchandise manager of deli and seafood, said: "We believe it's absolutely essential to take a leadership role in working with suppliers to ensure that the world's wild fish populations can grow and replenish themselves."<sup>97</sup> Redmond hinted that Wal-Mart's taking this step was at least somewhat due to pressure from customers for environmentally friendly products: "The MSC label assures our customers that they are buying from a retailer that is taking concrete steps to keep wild-caught fish available to present and future generations. This is both environmentally responsible and responsive to our customers."<sup>98</sup> After Wal-Mart's commitment, Rupert Howes, chief executive of the MSC, said, "[i]t is hoped that this commitment to the MSC program will encourage other fisheries into the assessment process and provide a powerful new route to raise awareness of sustainable seafood choices with the American public."<sup>99</sup> The fact that Wal-Mart, a general American supermarket (as opposed to a specialty market like Whole Foods), has taken such a huge step shows a promising future for the MSC.

The restaurant industry has been slower to catch on to the trend, but recently has been showing a growing interest in MSC. In 2002, two United Kingdom restaurant chains began using MSC-labeled products—Fish! and Little Chef.<sup>100</sup> In the U.S., Bamboo Sushi, a restaurant in Seattle, Washington, that opened on November 7, 2008, was the first independent restaurant in the United States to become certified for MSC-labeled products.<sup>101</sup> Bamboo Sushi places MSC's distinctive blue logo on its menu next to items from certified fisheries.<sup>102</sup> Kristofor Lofgren, owner of Bamboo Sushi, "is passionate about environmental stewardship and . . . turned to the MSC to help him realize his commitment to selling only sustainable seafood" in his

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assessment process and would raise awareness in America about sustainable food choices).

96. Wal-Mart Stores, Inc., Introduces New Label to Distinguish Sustainable Seafood, <http://walmartstores.com/FactsNews/NewsRoom/5910.aspx> (last visited Feb. 20, 2010).

97. Wal-Mart Takes Lead, *supra* note 95.

98. *Id.*

99. *Id.*

100. Roheim, *supra* note 79, at 99.

101. Marine Stewardship Council, *First MSC-Certified Independent Restaurant in U.S. Opens*, Nov. 20, 2008, <http://www.msc.org/newsroom/news/first-msc-certified-independent-restaurant-in-us/>.

102. *Id.*



restaurant.<sup>103</sup> “I want to show first that it can be done, that restaurants can make the commitment to source only sustainable seafood,” said Lofgren,<sup>104</sup> “I also want to show that it will contribute to business success. I believe people care about how their actions affect the environment and when they are made aware of options they will support restaurants that demonstrate they are sourcing sustainably.”<sup>105</sup> Since Lofgren’s restaurant opened a little over a year ago it is too early to tell whether his venture will be successful or not. The opening of Bamboo Sushi, however, is a positive sign for MSC’s success.

#### D. Success Stories: European Sea Bass and Alaskan Salmon

There are currently sixty-three certified fisheries worldwide in the MSC program.<sup>106</sup> In the United States, 66% of the total catch (by volume) is from fisheries certified by the MSC.<sup>107</sup> Much of this MSC certified catch consists of Alaskan fish including salmon and pollock.<sup>108</sup> The Alaskan salmon fishery, which was certified in September of 2000 and recertified in November of 2007, is one of the MSC’s success stories.<sup>109</sup> All five salmon species (sockeye, chum, Chinook, coho, and pink) have been certified within U.S. territorial waters adjacent to the coast of Alaska.<sup>110</sup> Additionally, three fishing methods—nets, trolling, and fishwheels—have also been certified.<sup>111</sup>

Under the MSC’s first principle, which requires no overfishing or depletion, the fisheries were grouped into sixteen certification units; for each unit, “fishing methods employed and areas of capture were well understood for each to pass the assessment.”<sup>112</sup> As for the MSC’s second principle, requiring attention to ecosystem imperatives, certified fisheries typically have low by-catch rates on animals such as marine mammals, birds, and marine fishes.<sup>113</sup> Under the MSC’s third principle, requiring a management system that incorporates

103. *Id.*

104. *Id.*

105. *Id.*

106. Marine Stewardship Council, Certified Fisheries, <http://www.msc.org/track-a-fishery/certified> (last visited Feb. 3, 2010).

107. Nicholas Day, *A Corporate Approach to Rescuing the World’s Fisheries*, YALE ENV’T 360, Oct. 2, 2008, available at <http://e360.yale.edu/content/feature.msp?id=2069>.

108. *Id.*

109. Roheim, *supra* note 79, at 100; Marine Stewardship Council, Alaska Salmon, <http://www.msc.org/track-a-fishery/certified/pacific/alaska-salmon> (last visited Feb. 20, 2010) [hereinafter MSC Alaska Salmon].

110. MSC Alaska Salmon, *supra* note 109.

111. *Id.*

112. Marine Stewardship Council, Alaska Salmon Sustainability Notes, <http://www.msc.org/track-a-fishery/certified/pacific/alaska-salmon/sustainability-notes> (last visited Feb. 20, 2010) [hereinafter MSC Alaska Salmon Sustainability].

113. *Id.*

and enforces existing international, national, and local standards, the evaluation showed that, within the Alaskan salmon fishery, management objectives are clearly defined and there is annual assessment of the status of stocks for each major target stock unit in the fishery.<sup>114</sup> The European sea bass is a migratory predator and has been heavily commercially exploited throughout most of its geographic range.<sup>115</sup> As a result, it was a prime candidate for the MSC's certification program, which stepped in (via the North Eastern Sea Fisheries Committee) and improved conditions for the European sea bass in some specific areas.<sup>116</sup>

The European sea bass fishery on the Holderness Coast of Northeast England has been certified as sustainable since December 3, 2007.<sup>117</sup> Under the MSC's first principle, "the state of the fish stock," progress was made in the selectivity of mesh sizes and gear types used when catching the sea bass.<sup>118</sup> Under the MSC's second principle, "the impact of the fishery on the marine environment," notable changes included the establishment of a detailed record-keeping process to keep track of non-target species (e.g., sea trout, sole, whiting) that are often hauled in as by-catch during fishing for sea bass.<sup>119</sup> As for the MSC's third principle, "the fishery management systems," the countries participating in bass fisheries are members of the European Union, so the Common Fisheries Policy of the EU serves as the management system for sea bass fisheries and "is supported by scientific research and assessment[s] carried out by member states."<sup>120</sup> The European sea bass and Alaskan salmon fisheries are just two of many examples of the instances where the MSC has successfully met its goal of establishing and maintaining sustainable fisheries.

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114. *Id.*

115. Marine Stewardship Council, North Eastern Sea Fisheries Committee Sea Bass, <http://www.msc.org/track-a-fishery/certified/north-east-atlantic/nesfc-sea-bass> (last visited Feb. 20, 2010) [hereinafter North Eastern Sea Fisheries Committee].

116. See Marine Stewardship Council, North Eastern Sea Fisheries Committee Sea Bass Sustainability Notes, <http://www.msc.org/track-a-fishery/certified/north-east-atlantic/nesfc-sea-bass/sustainability-notes> (last visited Feb. 20, 2010) [hereinafter Sea Bass Sustainability] (assessing the North Eastern Sea Fisheries Committee sea bass fishery and describing areas for improvement).

117. North Eastern Fisheries Committee, *supra* note 115.

118. Sea Bass Sustainability, *supra* 116.

119. *Id.*

120. *Id.*

## IV. JAPAN: STATE REGULATION OF FISHERIES

A. *Marine Eco-Label Japan: Beginnings and Structure*

The government of Japan recently initiated an eco-labeling program of its own. The program, Marine Eco-label Japan (MEL), was established in Tokyo on December 6, 2007, as “a system to support fisheries that are friendly both to marine resources and the oceans.”<sup>121</sup> MEL recognized that, after the FAO made clear the problem of overfishing, eco-labeling of fish products from qualifying fisheries has been promoted “particularly in [W]estern countries.”<sup>122</sup> Japanese stakeholders in the fishing industry and fisheries management decided to establish the program after taking notice of “the global nature of the seafood industry” and the fact that “Japan is one of the largest markets for fishery products.”<sup>123</sup> Their goal at the outset was to respond to the situation “proactively” and establish an eco-labeling scheme that was “most suitable to the situation of the Japanese fisheries.”<sup>124</sup>

MEL is organized around three basic principles. The first main principle is “[p]romotion of the conservation and sustainable use of ma[r]ine resources and the conservation of marine ecosystems.”<sup>125</sup> The second principle is that of co-management: “MEL Japan pursues utilizing the merits of co-management which have been practiced in order to ensure the sustainable use of aquatic resources in Japan and Asia from olden times.”<sup>126</sup> The main aim underlying this principle is to create a “positive cycle in which fishers, through ecolabel certification, give closer attention to resource management, reinforce cooperation with scientists and administrators, and contribute to the accumulation of scientific data and the improvement of information through fishing activities.”<sup>127</sup> The third and final principle of MEL is scientific and objective certification.<sup>128</sup> The basic framework of MEL

121. Japan Fisheries Association, *Marine Eco-label Japan Established*, 57 ISARIBI FISHING FIRE 1, 1 (Feb. 2008), [http://www.suisankai.or.jp/topics\\_e/isaribi/isaribi\\_57.pdf](http://www.suisankai.or.jp/topics_e/isaribi/isaribi_57.pdf); Japan Fisheries Association, *Several Fisheries Immediately Applied for MEL Japan Certification*, 59 ISARIBI FISHING FIRE 3, 3 (July 2008), [http://www.suisankai.or.jp/topics\\_e/isaribi/isaribi\\_59.pdf](http://www.suisankai.or.jp/topics_e/isaribi/isaribi_59.pdf).

122. Marine Eco-Label Japan, *Outline of Marine Eco-Label Japan*, <http://www.melj.jp/index.cfm> (last visited Feb. 3, 2010) (select “English” for translated page).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

is established in line with the FAO guidelines in an attempt to ensure legitimacy and integrity of the overall scheme.<sup>129</sup>

MEL is composed of several different parts. The first organization within MEL is the Council, which is made up of members representing a "broad spectrum of Japanese society," from producers to consumers of fishery products in Japan.<sup>130</sup> The duties of the Council include accrediting certification bodies, registering industry organizations, and making decisions on the certification standards and procedures in an effort to ensure fairness and objectivity.<sup>131</sup> The Council oversees two committees: (1) the Technical Committee, which oversees the development and application of the certification standards; and (2) the Public Relations Committee, which publicizes the system in Japan and overseas.<sup>132</sup> The second main body involved in the governance of MEL, after the Council, is the Audit Committee.<sup>133</sup> The Audit Committee, which is independent of the Council, supervises the requirements of the certification bodies and the administration of the system by the Council.<sup>134</sup> The third body, independent of the first two, is the Board, which is composed of experts and academics from various fields; this body oversees basic administrative matters and serves as a general advisory board to the overall MEL organization.<sup>135</sup>

#### B. *The MEL Certification and Labeling Process*

There are also several certification bodies involved with MEL. According to MEL, a certification body is "an entity having certain technical knowledge and expertise by type of certification (Fishery Certification and Chain of Custody Certification) in order to exercise fair and neutral judgment independent from that of the applicant and to ensure highly precise inspections."<sup>136</sup> These certification bodies are accredited by MEL for a period of five years on the basis of their compliance with MEL's objectives.<sup>137</sup> They conduct inspection activities for certification, report the results to MEL, and carry out regular management inspections regarding the contents of

129. *Id.*

130. Marine Eco-Label Japan, Organization and Administration of MEL Japan, <http://www.mel.jp/index.cfm> (select "English" for translated page; then follow link for "Organization and Administration of MEL Japan") (last visited Feb. 20, 2010) [hereinafter Organization of MEL].

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

certification.<sup>138</sup> In addition, industry organizations are encouraged to participate in the MEL certification process in order to advise and exchange views and opinions.<sup>139</sup> Finally, the Japan Fisheries Association serves as secretariat to the overall MEL scheme, providing a variety of services to facilitate administration, including logistical and communication services.<sup>140</sup>

Under the MEL program there are two types of actual certification: Fishery Certification and Chain of Custody Certification.<sup>141</sup> Fishery Certification involves certification during the actual production stage, while Chain of Custody Certification addresses the distribution and processing stages.<sup>142</sup> During Fishery Certification, producers (including fisheries cooperative associations and fisheries organizations) apply for certification based on their specific fishery, as defined by both species of fish and fishing method used.<sup>143</sup> Certification standards in the production stage, determined by the Council, include: "(1) Fisheries should be conducted under an effective management scheme; (2) The target resource should maintain the level of being used sustainably; and (3) Appropriate measures should be taken for the conservation of the ecosystem."<sup>144</sup>

During the Chain of Custody Certification, distributors and processors apply for certification based on "target catch and product."<sup>145</sup> The Council also determines standards and guidelines for the distribution and processing stage: "(1) A management system should be in place, such as the appointment of persons in charge and custody of related documents; and (2) Traceability should be secured through [subsection] (1), etc., and the co-mingling of seafood other than the target seafood should not occur."<sup>146</sup>

"Where necessary"<sup>147</sup> the applications for both types of certification, at the production, and distribution and processing stages, can be combined into a single application.<sup>148</sup> Certification applications are approved or denied after consultation with the Audit Committee, and the certification body then issues a certificate to the applicant if the application is approved.<sup>149</sup> Production stage certification is good for a maximum of five years, while distribution and processing stage certification lasts for a maximum of three

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138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

years.<sup>150</sup> Finally, once organizations have received MEL certification, they are permitted to affix the MEL label to their products prior to sale.<sup>151</sup> MEL notes that the overall system will be reviewed every two years to “ensure further improvement.”<sup>152</sup>

### C. *The MEL Program in Practice*

Since MEL Japan is a new program, its current primary goal is to promote public awareness in the Japanese fish market of the organization and its eco-labeling process.<sup>153</sup> Any eco-labeling scheme needs to establish awareness, since the success of the entire program depends on market-based factors. Low cost is also an important factor in the implementation of MEL: “What MEL Japan pursues is a practicable framework in which diverse fishers—large- and small-scale alike—proactively engaged in sustainable fisheries can obtain certification at low costs.”<sup>154</sup> MEL’s website assures the public, however, that sustainability requirements will not be compromised in any way to minimize certification costs.<sup>155</sup>

Because the Japanese MEL program was established so recently, there is a dearth of information available on its success so far. However, an article in a Japan Fisheries Association newsletter from early 2008 stated that the MEL Japan program was discussed at Seafood Summit 2008.<sup>156</sup> According to the article, “[t]he Secretariat for MEL Japan reported . . . that the eco-labeling program was introduced and received favorably at Seafood Summit 2008 held in Barcelona, Spain.”<sup>157</sup> The Summit was sponsored by Seafood Choices Alliance and attended by over 500 distributors and retailers, including Wal-Mart, as well as individuals from the fishing industry and conservation groups from around the world.<sup>158</sup>

There were three panel discussions at the Summit, “on such subjects as seafood safety, the sustainable utilization of fishery resources, food traceability, seafood eco-labeling, and the measures that can be taken by distributors against IUU (illegal, unregulated and unreported) fishing activities.”<sup>159</sup> With regard to MEL, Dr. Makoto Miyake, an adviser to the Japan-Tuna Fisheries Cooperative,

150. *Id.*

151. *Id.*

152. *Id.*

153. Marine Eco-Label Japan, *supra* note 122.

154. *Id.*

155. *Id.*

156. Japan Fisheries Association, *MEL Japan Received Favorably at Seafood Summit 2008*, 57 ISARIBI FISHING FIRE 2, 2 (Feb. 2008), [http://www.suisankai.or.jp/topics\\_e/isaribi/isaribi\\_57.pdf](http://www.suisankai.or.jp/topics_e/isaribi/isaribi_57.pdf).

157. *Id.*

158. *Id.*

159. *Id.*

gave a presentation about the implementation of the new MEL Japan program.<sup>160</sup> When speaking to the participants at the Summit, Dr. Miyake described the goals of MEL: “to build a highly transparent and credible eco-labeling system with the aim to ensure the sustainable use of fishery resources in Japan.”<sup>161</sup> According to the MEL Japan Secretariat, the presentation of Dr. Miyake “was received favorably by many Summit participants.”<sup>162</sup> MEL Japan has also released a report on which fisheries were certified as of July 11, 2008.<sup>163</sup> According to that report, three fisheries have applied to be certified by the Japan Fisheries Resource Conservation Association under the producer certification process.<sup>164</sup> The first is the Sea of Japan Crab Pot Fishery Association in Sakaiminato City, which “targets red snow crab in the offshore area of the Sea of Japan.”<sup>165</sup> The Sea of Japan Crab Pot Fishery Association has also applied for chain of custody certification; if certified, the Association will be able to attach the MEL Japan label to its final products.<sup>166</sup> The Tottori Prefecture Offshore Trawl Fishery Association in Tottori City, targeting “snow crab and flathead flounder in the Sea of Japan by single-vessel Danish seining,” has also applied for producer certification.<sup>167</sup> As of July 11, 2008 the Yui Fishermen’s Association and Oigawa Town Fisheries Cooperative Association in Shizuoka Prefecture, which “targets stardust shrimp off Suruga Bay,” was the third fishery to apply for producer certification.<sup>168</sup> Finally, the Sakaiminato Fisheries Promotion Association “applied for chain of custody certification for some more processors and distributors of the red snow crab.”<sup>169</sup>

MEL Japan is a relatively new program, and it will be a matter of time before its true success can be measured. Right now the only people speaking to the success of the program are representatives of the program itself—according to the MEL Secretariat himself the program was “received favorably” at the Seafood Summit 2008.<sup>170</sup> Third-party opinions in the near future will perhaps provide better insight into the reception of the program by other groups and countries around the world. Moreover, it will be some time before the

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160. *Id.*

161. *Id.*

162. *Id.*

163. Marine Eco-Label, Marine Eco-Label Japan Update, <http://www.melj.jp/index.cfm> (select “English” for translated page; then follow link for “Marine Eco-Label Japan Update”) (last visited Feb. 20, 2010) [hereinafter Japan Update].

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Japan Fisheries Association, *supra* note 156.

actual success on the environmental level will be measurable, simply because it will take time for the fisheries to replenish themselves in the event the program is successful.

## V. ANALYSIS: PROBLEMS AND CONSEQUENCES OF ECO-LABELING SCHEMES

Although in theory eco-labeling of fish products from certified fisheries may seem like the perfect solution to the world's overfishing dilemma, the approach is not without problems. Because certification and eco-labeling are a type of "soft" regulation, instead of straight command-and-control regulation, they are completely at the mercy of the market.

### A. Potential Consumer Demand Problems for Eco-Labeled Products

One of the key problems with eco-labeling programs in general is that the entire success of the programs depends on the willingness of consumers to buy eco-labeled products.<sup>171</sup> Restaurants, retailers, and wholesalers simply will not continue to purchase eco-labeled products if there is no consumer demand for them.<sup>172</sup> Several studies have been undertaken to gauge the demand in the marketplace for eco-labeled products versus unlabeled products.<sup>173</sup> Generally, the "[r]esults have indicated that consumers prefer ecolabeled products, as long as the price premiums are not large."<sup>174</sup> A 2005 survey of European consumers showed that for 79% of those polled "the environmental impact of seafood is an important factor in their purchasing decisions."<sup>175</sup> In the same poll, 86% "would prefer to buy seafood that is labeled as environmentally responsible," 40% "are willing to pay 5-10 percent more for seafood labeled as ecofriendly," and 95% of consumers "said they wanted more information about how to buy sustainable seafood."<sup>176</sup>

Some assume demand is similar in the United States,<sup>177</sup> although concrete numbers are not as readily available. A Seafood Choices Alliance report from 2008, while speaking highly of seafood demand in general in the United States, as well as of purchases of

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171. See APFIC, *supra* note 21, at 8 (discussing consumer demand for certification).

172. See *id.* (discussing the potential benefits of eco-labeling the report provides data on consumer demand for eco-labeled products).

173. See, e.g., *id.* (describing studies of consumer reactions to two samples of the same seafood species—one ecolabeled and the other not).

174. *Id.* at 8.

175. *Id.*

176. *Id.*

177. *Id.* at 9.



eco-labeled products by chain restaurant, retailer, and wholesaler groups, is able to speak only speculatively about the consumer demand for eco-labeled products as opposed to unlabeled seafood products of a similar type.<sup>178</sup> Further, according to a 2005 study, “while consumers consider overfishing sufficiently important to cause them to contemplate changing the species of fish they buy, they are unwilling to choose a less-favoured species (i.e., to sacrifice taste) based solely on the presence of an eco-label.”<sup>179</sup>

Importantly, although consumers’ answers to surveys tend to favor eco-labeled products, this preference is not always expressed in practice in the actual marketplace.<sup>180</sup> One survey concluded that in relation to decisions about food and shopping consumers were unashamedly selfish.<sup>181</sup> Most decisions are based on self-benefit (e.g. value for money, taste and convenience) rather than being driven by altruistic motivations.<sup>182</sup> There is also a “widely recognize gap between what consumers *say* they do on ethical issues and how they *actually* act.”<sup>183</sup> In a more general consumer survey, although 80% of those surveyed claimed to shop or invest ethically, only 30% were found to “practice what they preach.”<sup>184</sup> So although surveyed consumers may say that they care about environmental issues and are willing to purchase eco-labeled fish products, when it comes down to actually paying a higher price, consumers may not be as willing to buy such products as they claim.

Consumers must be willing to pay higher prices in order for a certification scheme to be successful because there is no doubt that certification itself is expensive.<sup>185</sup> Certification schemes “can have prohibitively high costs for testing, certification and logo use . . .”<sup>186</sup> The costs of certification may be passed on from distributors either “along the chain of distribution or . . . [to] the consumer, who will have to determine whether the product’s environmental attributes

178. See generally SEAFOOD CHOICES ALLIANCE, THE U.S. MARKETPLACE FOR SUSTAINABLE SEAFOOD: ARE WE HOOKED YET? (2008), [http://seafoodchoices.org/documents/USMarketplace2008\\_Full.pdf](http://seafoodchoices.org/documents/USMarketplace2008_Full.pdf) (describing “trends” in consumer awareness of issues prompting eco-labeling programs).

179. Cathy A. Roheim & Robert J. Johnston, *A Battle of Taste and Environmental Convictions for Ecolabeled Seafood: A Choice Experiment*, 30(2) J. AGRIC. & RES. ECON. 283, 285 (2005), available at <http://ageconsearch.umn.edu/bitstream/8617/1/31020283.pdf>.

180. *Id.* at 9.

181. INSTITUTE OF GROCERY DISTRIBUTION (IGD), CONSUMER ATTITUDES TO ‘EAT THE VIEW’ 110 (2003) (report prepared for the Countryside Agency by the IGD).

182. *Id.*

183. APFIC, *supra* note 21, at 9.

184. *Id.* (quoting KEY NOTE LTD., THE GREEN AND ETHICAL CONSUMER (2002)).

185. Cooper, *supra* note 8, at 27.

186. Megan Ladage, *Ecolabels Tell a Story (Focus on Fresh)*, 68 GROCERY HEADQUARTERS 62, 64 (Apr. 1, 2002).

justify [the product's] higher price."<sup>187</sup> Producers and distributors are not likely to take on the added cost of certification if they cannot pass it down to their consumers in the end. Essentially, the success of such certification and eco-labeling schemes comes down to whether consumers will pay a higher price for products that come from fisheries certified as meeting environmentally friendly conditions.

#### B. *Regional Differences in Availability of Certified Products*

A second potential difficulty with certification and eco-labeling schemes is the availability of the products: "[I]t is clear that consumer demand for certification is certainly not homogenous among countries."<sup>188</sup> Since certification and eco-labeling schemes for fisheries are relatively new, this discrepancy in availability is to be expected. However, if certification programs, such as the Marine Stewardship Council, want to be successful on a global level they must expand the availability of eco-labeled products to a broader range of consumers. For example, consumer and retailer demand for MSC-labeled products is highest in Northern European countries (Switzerland, United Kingdom, and Germany are the three highest) and the United States but lower in Southern Europe and most other parts of the world.<sup>189</sup>

This disparity in availability of MSC-labeled products is in part due to a higher demand in some parts of the world than in others, but "it may also be the case that existing demand is strongly orientated to those countries/regions on which MSC has focused its attention to date."<sup>190</sup> The MSC could, for example, put an increasing focus on developing countries.<sup>191</sup> Areas in Asia and the Pacific, for example, have not been targeted strongly by the MSC but have large markets for fish products.<sup>192</sup> The demand in such countries "may... be readily exploitable"—Japan, for example, has recently shown an increase in the availability of MSC-labeled products for sale in that country.<sup>193</sup> Because the 2007 numbers of available MSC products were measured before the implementation of the MEL Japan program, it will be interesting to see how the two different certification and eco-labeling schemes will compete in Japan.

187. Cooper, *supra* note 8, at 27.

188. APFIC, *supra* note 21, at 9.

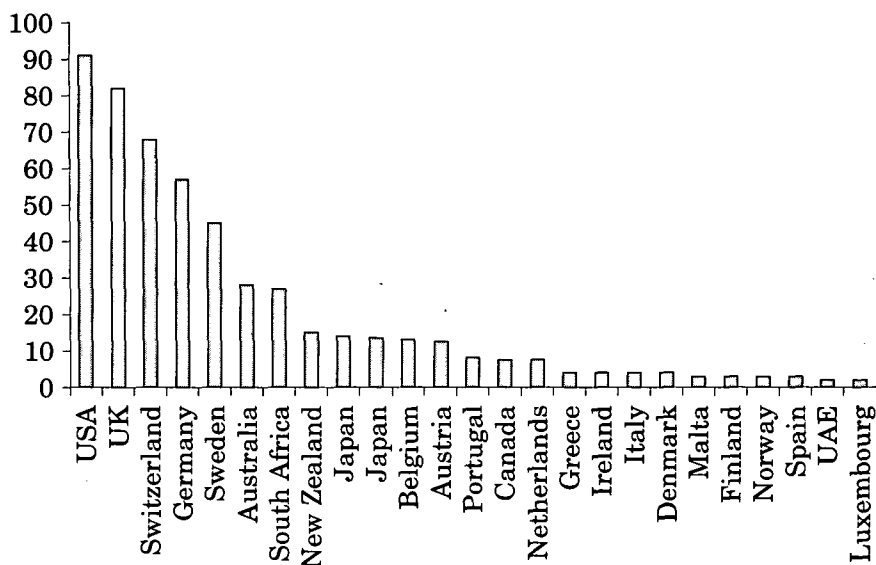
189. *Id.*

190. *Id.* at 9–10.

191. Jonathan Peacey, *The Marine Stewardship Council Fisheries Certification Program: Progress and Challenges* 5 (2000), available at <http://oregonstate.edu/dept/iifet/2000/papers/peacey.pdf>.

192. APFIC, *supra* note 21, at 9–10.

193. *Id.*

Figure 1: MSC labeled products by country, June 2007<sup>194</sup>

However, even in countries where MSC-certified products are somewhat readily available, “the relative levels of demand as expressed in terms of sales values should be kept in mind.”<sup>195</sup> While the MSC is “the most well-known and high-profile environmental certification scheme globally,” sales of MSC-labeled products still do not represent a high percentage of overall seafood products sold worldwide.<sup>196</sup> There is a variety of MSC products available, but the value of the total sales was only \$236 million in 2005 and 2006.<sup>197</sup> According to 2004 FAO data, the total sales of MSC products was “less than 0.5 percent of the value of imports by the ten largest importers, 0.7 percent of the value of exports by the ten largest exporters and 0.33 percent of the value of internationally traded seafood products.”<sup>198</sup> These numbers are a few years old, which must be taken into account. Nevertheless, MSC still has a long way to go

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194. *Id.* at 11.

195. *Id.* at 10.

196. *Id.*

197. *Id.*

198. *Id.*

before its certified products will represent a decent share of the overall seafood market.

### C. Problems Surrounding the Labels Themselves

A potential problem with eco-labeling is that the average consumer may not be aware of the significance of a particular label.<sup>199</sup> The MSC labels lack detail.<sup>200</sup> If a potential buyer sees two similar products with different labels, he or she will not know simply from looking at the two labels which one is “better” or really what the difference is at all between the two labels and programs they represent.<sup>201</sup> If a consumer is not aware of the variations between two different labels, the consumer will likely just ignore them and the labels will be unsuccessful at communicating that their product comes from an environmentally friendly, certified fishery. Consumers need to be educated about the issues the certification and eco-labeling schemes seek to address.

Consumers who care deeply about environmental issues are likely to do the research on their own to find out what eco-labels mean, but the average consumer will probably not take the time to do so. There are likely many consumers who will not take the time to independent research, but if they knew about the environmental issues and the significance of an eco-label they would probably buy the product. A key to the success of eco-labeling programs is informing the public of the significance of the labels in order to influence the purchasing choices of the consumers in this gray area.

One eco-labeling group conducted a survey and found that less than 30% of polled shoppers noticed the group’s labels on products.<sup>202</sup> While this study was not related to MSC or MEL products specifically, it proves a point—eco-labeling cannot influence consumers’ decisions when they are not even aware of the simple *existence* of the eco-label, let alone its meaning. Unfortunately, the advertising and public relations efforts needed to promote public awareness are expensive.<sup>203</sup> The certification groups, such as the MSC, have not been doing much advertising themselves, so some retailers are assuming the burden of educating consumers themselves, by alerting customers about the retailers’ conservation and safety efforts.<sup>204</sup>

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199. *Id.* at 9.

200. Cooper, *supra* note 8, at 26.

201. *Id.*

202. Ladage, *supra* note 186, at 64.

203. *Id.* at 63.

204. *Id.* at 66.

D. *Problems Unique to the MSC and Other  
Private Certification Schemes*

One major criticism of the Marine Stewardship Council is that it lacks credibility with U.S. environmental groups.<sup>205</sup> Two evaluations of the MSC in early 2004, conducted by Wildhavens Consultancy (contracted by the Homeland and Oak Foundations and the Pew Charitable Trusts) and The Bridgespan Group (contracted by the Packard, Oak, and Esmée Fairbairn Foundations), discussed the MSC's credibility.<sup>206</sup> The major suggestion noted in both reports was that the "MSC needed to improve the quality and consistency of assessments and annual audits."<sup>207</sup> However, these reports were conducted over four years ago, and since then the MSC has taken steps to address such concerns and "has made considerable progress on many fronts."<sup>208</sup>

Despite specific complaints about the frequency of assessments, the fact that MSC certification occurs through respected independent third-party certifying organizations improves the legitimacy and credibility of the MSC's program drastically. That being said, the MSC still needs to gain and maintain the confidence of consumers and industry groups.<sup>209</sup> The MSC is a relatively new organization, and it takes time to build confidence in an organization. "[T]he seafood industry (fishers, processors, retailers), other fishery stakeholders, environmental NGOs, government agencies, and certifiers" will only have confidence in the MSC after it continues to strengthen its reputation by demonstrating the success of its certification scheme.<sup>210</sup>

The MSC's program, like most other private regulation schemes, is criticized for the lack of an accountability mechanism.<sup>211</sup> Traditionally, regulation has been conducted by sovereign governmental bodies, which typically "require some form of democratic accountability to [their] electorate."<sup>212</sup> That same type of accountability is not present in private environmental regulatory schemes since they "are not controlled by publicly elected officials."<sup>213</sup>

205. GUNNAR KNAPP ET AL., THE GREAT SALMON RUN: COMPETITION BETWEEN WILD AND FARMED SALMON 247, 250 (2007), available at [http://www.iser.uaa.alaska.edu/Publications/greatsalmonrun/SalmonReport\\_Ch\\_16.pdf](http://www.iser.uaa.alaska.edu/Publications/greatsalmonrun/SalmonReport_Ch_16.pdf)

206. *Id.*

207. *Id.*

208. *Id.*

209. Peacey, *supra* note 191, at 1.

210. *Id.* at 5.

211. See Gulbrandsen, *supra* note 59 (describing demand for accountability for the MSC).

212. Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 942 (2007).

213. *Id.*

Because the individuals “in charge” of the MSC are not elected officials, they are not politically responsible to any group of constituents. As a result, some call into question the democratic legitimacy of organizations like the MSC.<sup>214</sup>

However, there is a strong counterargument that market-based private regulatory schemes like the MSC’s, while missing elected officials, are held accountable to consumers through the market itself.<sup>215</sup> The traditional accountability mechanism present in domestic governments is clearly not feasible in many international situations.<sup>216</sup> Ruth Grant and Robert Keohane argue that “accountability to the governed cannot be replicated on the global level and that nondemocratic ‘accountability mechanisms’ are necessary.”<sup>217</sup> They offer several different alternative accountability mechanisms including market incentives and reputational risk.<sup>218</sup> The MSC certification scheme clearly functions under both market incentives and reputational risk, which are interrelated. If the MSC does not respond to expressed consumer preferences or gets a bad reputation because its methods, it will not be successful in the overall seafood market. Therefore, the market itself acts as an accountability mechanism to ensure the MSC program’s legitimacy.

#### E. *Problems with State Certification Programs Such as MEL Japan*

Since the fisheries certification and eco-labeling program started by Marine Eco-label Japan is a government-run program, it does not face the same accountability challenges as the MSC does. However, MEL Japan does not appear to be run entirely, or even primarily, by elected officials, which raises similar accountability issues.<sup>219</sup> The program’s tie to the Japanese government does increase political accountability, since Japan is a democratic nation, but the strong link between the fishing industry, MEL Japan, and the Japanese government raises serious accountability issues.<sup>220</sup>

However, the fact that the certification process is not conducted by independent third-party organizations is the most serious concern

214. See Errol E. Meidinger, *Environmental Regulation, Human Rights, and Community*, 7 BUFF. ENVTL L.J. 123, 236 (2000).

215. Vandenberg, *supra* note 212, at 917.

216. *Id.* at 956.

217. *Id.* at 957 (quoting Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29, 35 (2005)).

218. Grant & Keohane, *supra* note 217, at 37.

219. See Organization of MEL, *supra* note 130 (stating that Japanese stakeholders in the fishing industry and fisheries management established their own ecolabelling system).

220. See *id.* (describing that the fisherman share a role in the fisheries management).

about the MEL Japan certification and eco-labeling program.<sup>221</sup> Although MEL's website states that it is the organization's goal "to exercise fair and neutral judgment independent from that of the applicant" during the certification process, it never expressly identifies the certification bodies.<sup>222</sup> What the website does say is that industry organizations are *encouraged* to participate in the MEL certification process.<sup>223</sup> While MEL's likely goal is to promote dialogue during the certification process, one cannot help but wonder how much input industry groups have in the actual certification approval process. Industry groups have so much at stake in the certification process that their involvement in the certification process raises questions about the independence and neutrality of the MEL Japan program.<sup>224</sup> According to the International Foundation for the Conservation of Natural Resources, "[i]ndustry-conceived eco-labels are self-defeating in that they work against consumer confidence and are vulnerable to persuasive attacks by [non-governmental organization] activists."<sup>225</sup> Labels certified by organizations with political affiliations may be questioned, especially when no independent third-party certifier is used.<sup>226</sup> Overall, MEL Japan's ties to the Japanese fishing industry raise serious questions about the legitimacy of the program that can only be quelled with proven results over time.

## VI. A SOLUTION GOING FORWARD

The Marine Stewardship Council's certification scheme is not perfect. Some will always argue against regulation by private organizations because of their lack of accountability. However, while elected officials do not run the MSC, there is a strong argument that the market and consumer preferences create an accountability mechanism for the MSC. The MSC has proven its legitimacy through its demonstrated record of creating sustainable fisheries through an independent third-party certification process. While the MSC still has to contend with a potential lack of consumer demand for eco-labeled products, this challenge exists with both private and public certification schemes. The MSC should promote its success by

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221. *Id.*

222. *Id.*

223. *Id.*

224. *See id.* (explaining that Japanese stakeholders in the fishing industry developed the ecolabeling system).

225. International Foundation for the Conservation of Natural Resources, IFCNR's Mission to COFI: Taking the Next Step to an FAO Seafood Eco-Label, <http://www.ifcnr.com/Archives.htm> (last visited Feb. 20, 2010).

226. *Id.*

continuing to raise awareness of the environmental issues surrounding fisheries and advertise how its certified products, marked by the signature eco-label, help to lessen the problem of overfishing and fisheries depletion.

Since MEL Japan's certification and eco-labeling program is new, it is difficult to judge its overall success or its legitimacy and accountability. Nevertheless, serious questions arise about the underlying motivations of the program due to the unmistakable ties between the fishing industry and the certification process. It would be difficult to believe that the government of Japan, a country with a major economic interest in fishing, does not maintain some stake in the overall success of fishermen, independent of the sustainability of its fisheries. The Japanese program may, over time, demonstrate that these concerns are unfounded, but so far MEL Japan has not yet proven success in achieving sustainable fisheries. In order to prove that it is in fact a legitimate, unbiased program, MEL should take steps such to restructure the organization's members to include representatives of more diverse interest groups as well as representatives from groups that are not affiliated with the Japanese government or the Japanese fishing industry. Time will tell if MEL Japan's objectives and standards will create and maintain sustainable fisheries.

Currently, the private regulation scheme of the MSC seems to be more successful at maintaining sustainable fisheries than the public scheme of MEL. MEL Japan may in time prove that a public scheme can succeed, but in order to do, so it must overcome barriers that do not exist in the private scheme, such as the allegation that government interests in the fishing industry prevent complete neutrality and objectivity. Private certification schemes such as the MSC seem to be best suited for regulating international environmental problems like fishery depletion, and they likely can continue to be successful as long as they have transparency in their organizational structure and demonstrate positive outcomes after evaluation of fisheries based on strong, objective criteria.

## VII. CONCLUSION

There is no doubt that the concerns about the depletion of the world's fisheries in recent years are well-founded. Overfishing has become a massive problem in the past several decades, a fact of which the global community is well aware. The important question is what should be done to regulate fisheries so that they are made sustainable and capable of being used as resources by human populations in the future, while at the same time not causing too much hardship on the present global fishing industry. The answer to this question, at least based on the analysis of the MSC and MEL Japan, seems to be that



private regulation is best situated to address the complex problem of fisheries depletion, as well as other similar resources problems in the international environmental arena.

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