

Marine Stewardship Council: A Case Study in Private Environmental Standard-Setting

by Will Martin

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This Comment will examine key features of the Marine Stewardship Council (MSC), one of the main private environmental standard-setting organizations, and describe MSC's standard-setting process, the status of MSC's review of its standard currently underway, and lessons learned in setting and adjusting the standard.

Private standard-setting organizations are part of what is sometimes referred to as "private environmental governance," a term that recognizes and compliments the significant impact of such organizations as agents of change. Standards provide not only a guide to responsible behavior, but also a way of measuring environmental performance, and in turn provide a basis for choice and selectivity of products based upon the sustainability of practices utilized by the measured performers. The story of MSC's development provides a case study of how private environmental standard-setters can make change happen, outside the context of laws and regulation.

Over an 18-month period in the late 1990s, MSC developed a standard for sustainable ocean fisheries (wild-caught), based on inputs from scores of scientists, managers, and industry representatives across the globe. The standard was refined in minor adjustments made from time to time in response to ad hoc issues, and it was clarified in a major review in 2008, in response to complaints about inconsistent assessments. A second major review is currently underway.

MSC's program is a "third-party certification program," in which MSC sets the standard but independent third-party expert teams assess applicants and certify the fisheries that meet the standard. The certifiers are themselves accredited and audited by another entirely independent organization, Accreditation Services International. Certified fisheries may use an eco-label indicating that the product is from a fishery that meets the standard. MSC is not only a standard-setter, but also a "standard-promoter"—it promotes the products of the certified fisheries to major buyers, and the consuming public, around the globe. Many processors (brand companies) and retailers use the

MSC eco-label to distinguish the product as sourced from a certified sustainable fishery, and gain market advantages.

MSC's work in the ocean fishery world is a part of the much larger picture of buyers that now look to factors beyond price and quality and demand that the producers and suppliers of products and services meet environmental standards. MSC is part of the "sustainability revolution" that developed during the past decade and a half, in which new approaches such as "market demands" and "market incentives" were developed as supplements to classic government regulation and to the advocacy approaches that promoted more stringent government regulation. In some cases, government regulation was not "moving the needle" sufficiently, and advocacy approaches were not moving government regulation sufficiently. Two areas that seemed ripe for a new approach were in tropical forestry and ocean fisheries. In both areas, there was a limited number of bright spots of government regulation, generally in nations in the developed world, but often, government management of the resources ranged from nonexistent to inadequate.

In this context, the concept of "private environmental standard-setting" arose (though it did not have such a name at the time). The concept was to link appropriate standards of environmental behavior to the markets for the relevant products and to identify and promote the purchase of products that met the standards. The concept relied heavily on the establishment of proper standards and the enforcement of those standards through a market mechanism that combined demand for "sustainable" products and market-access and price incentives for those producers who met the demand.

In the forestry arena, the Forest Stewardship Council (FSC) was established in 1993 in the wake of the failure of nations at the 1992 Earth Summit in Rio to negotiate a binding global treaty on forest management. The MSC was formed in 1998 after widespread failures of governments to address declines in ocean fisheries. Both FSC and MSC had a common parent: the global conservation group, World Wide Fund for Nature (WWF), which has

been remarkably prolific in promoting sustainability not only in the case of wild-caught fish and timber, but also in a number of other resource markets including farmed fish, mining, palm oil, soy, cotton, sugarcane, and beef. In the case of MSC, WWF co-founded the group with a transnational consumer products company, Unilever. Both WWF and Unilever were concerned about the spreading declines in ocean fisheries that became headline news in the 1990s. WWF's concern arose from its mission to protect wildlife and habitat, and Unilever's arose from its need to protect its fish supply, as well as its desire to demonstrate its environmental ethic to the consuming public.

For MSC, the engine for change and improvement in the management of wild ocean fish resources is based on demand by buyers for responsible practices in the supply chain. This market demand creates the expectation that suppliers will act responsibly in harvesting the resource, and it rewards producers that meet or exceed the privately established standard. For the certified fisheries, meeting high standards over a sustained period of time provides benefits that cannot necessarily be foreseen at the time of application, both in the market rewards to the fishery and in the fishery's environmental performance. Importantly, for those lower-performing fisheries that are not certified, the market demand and associated market rewards provide an incentive for these fisheries to "up their game."

When we speak about market demand, we refer to demand coming in part from consumers, but the most powerful demand is coming from retailers and seafood product companies. The businesses making this demand are in many cases large companies that are attentive to Corporate Social Responsibility, and they are telling their supply chains that they prefer, and sometimes require, fish products from sustainably managed sources. The demands made by these companies are admittedly driven by varied motivations. Some are engaged in an exercise of "branding" their company as environmentally sensitive, seeking a long-term competitive advantage with their advocacy of sustainable sourcing as a competitive tool. Some are seeking to assure the continuity of their supply source. Most are combining these motivations. In any event, this pro-activity by major buyers is a relatively new phenomenon, and it is a clear signal that passivity in the selection of sources of supply is giving way to a new paradigm in which major buyers are asserting their power through selective sourcing from responsible suppliers. Given the close link between sustainable practices and conservation of the resource, it is somewhat surprising that the major buyers of ocean fish did not assert their demands earlier, but it should be recognized that until about the last quarter of the 20th century, the sea was viewed by the public as an inexhaustible source of protein, and only in relatively recent times has the question of fisheries management been recognized as a global environmental issue.

Private environmental standard-setting, and its application through market mechanisms rather than traditional government regulation, produce a disruptive force, and the

MSC has its critics on both ends of the spectrum, especially from those governments or groups who view MSC as taking away their assumed prerogatives to set standards and define "sustainability." Some groups in the catch sector have complained that the MSC standard is arbitrary and unreasonably high. Some industry groups see the MSC standard as a "moving target," and they believe that changes in the standard are a violation of an implied commitment to keep the "bar" at the level at which they were first assessed. Some environmental groups see the MSC standard as too low. And, some governments have complained that the steps necessary for a fishery to meet MSC's test put a stress on government managers and their budgets. Notwithstanding these criticisms, MSC has been, since its founding, and remains today, the leading private program for defining and assessing the sustainability of global marine fisheries.

One of the reasons that MSC has achieved this position is because of *good design*. Before discussing MSC's standard, I will summarize these design features.

Before listing the design features of the MSC program, I should note that in an action that is unique to fisheries, a United Nations (U.N.) body, the U.N. Food and Agriculture Organization (FAO), developed guidelines for certification and eco-label programs for wild-caught ocean fish, like the MSC's program.¹ These FAO Guidelines, adopted in 2005 and revised in 2009, by consensus of the member nations of FAO's Fisheries Division, set forth the minimum requirements for a credible certification and eco-label program for assessing the sustainability of wild-caught, ocean fish. This remarkable action at once put a fence of requirements around the programs such organizations offer, *but*, in effect, validated private standard-setting organizations that meet the guidelines. The FAO Guidelines address both minimum procedural requirements and minimum substantive (i.e., standards) requirements. Importantly, the FAO Guidelines require² that an independent third party conduct the assessment and certification functions (the so-called third-party approach). While the FAO Guidelines are designated as the "minimum" that is required for a credible program, considered as a whole, they are robust and far-ranging. The consequence is that few organizations are able to achieve compliance with the standards. MSC has been able to claim such compliance with the FAO Guidelines, in large part because of its design features described below. These MSC design features track very closely to what the FAO Guidelines require, in terms of inclusiveness, openness, stakeholder engagement, third-party certification, appellate procedures, standard-setting processes, and the substance of the standards themselves.

A key design feature is that the MSC standard is based on sound science. Ideology and emotional issues are not involved in the standard. MSC's standard is proportional,

1. U.N. FOOD AND AGRICULTURE ORGANIZATION, GUIDELINES FOR THE ECOLABELLING OF FISH AND FISHERY PRODUCTS FROM MARINE CAPTURE FISHERIES (2005), Revision 1 (2009), available at <http://www.fao.org/docrep/012/i1119t/i1119t.pdf>.
2. *Id.* Item 39.

that is, the standard is not beyond what is required to meet the goal of the program, namely to stop the depletion of ocean fish resources. Scientific decisions are transparent and vetted through a technical advisory board of scientists, a stakeholder council, and then a public comment process, before the final product is sent to the board of trustees for consideration and adoption.

MSC's governance is a key part of its good design. From the outset, the organization—a child of a partnership of a conservation group and a multinational corporation—was founded as a multi-stakeholder organization. MSC is a very big tent that covers scientists, fishing companies, seafood brand companies, retailers, and conservation groups. Each of these groups has an assured place on the board and on the stakeholder council. Governance is intentionally balanced, so that no one sector dominates. While a multi-stakeholder organization can be ungainly at times, the clash of differing interests and views provides an opportunity for consideration of all sides, and yields much more “buy in” than in standard-setting groups that are one-dimensional.

Because of the balance among the sectors in MSC's governance, MSC is more independent—it is not beholden to any one sector represented in its constituency. This independence distinguishes the organization from industry-sponsored certification programs, those sponsored by nongovernmental organizations (NGOs), and even certification programs that are sponsored by governments. NGO-sponsored certification programs are susceptible to criticism on the basis of subjectivity and alignment with ideology or their specific campaigns. And programs sponsored by industry and governments are often not trusted because of a subjective tendency to approve all that they manage.

Key to MSC's program is an objective third-party approach, as opposed to first-party or second-party approaches of some other programs. First-party programs are those in which a producer makes the determination that its product or processes meet a certain claim. Second-party programs involve an association of producers making the determination. Third-party programs require that an independent assessor make the determination. In the MSC program, teams of independent scientists, who in turn are monitored by an independent accreditation organization, perform the assessments of fisheries.

The MSC's assessment process is highly transparent and is open to the scrutiny and participation of anyone with an interest in the fishery. Relevant parties are notified of the assessment and invited to provide information and comments. The assessment results are described in a series of reports produced by the scientific team and posted on the MSC website. Once certified, a fishery is subject to annual surveillance audits, and undergoes a reassessment every five years.

An important part of the MSC assessment process is the opportunity for the applicant fisheries as well as interested conservation groups to file an appeal to an assessment scoring. This appeal is heard by one of the group of

independent, experienced lawyers that MSC has engaged to serve as judges, and an administrative law approach is used to determine if the assessment team acted arbitrarily or unreasonably.

I. MSC's Standard for a Sustainable and Well-Managed Fishery³

While there have been some changes, refinements, and clarifications over the life of MSC, its basic standard of sustainable fishing has remained at approximately the same level, or “bar”—one designed to be sufficiently high enough to assure sustainability of the fishery (that is, that it will continue to be productive indefinitely), but not so high as to create a “niche” group of elite fisheries. The general design of the standard is based on a combination of “outcome” and “inputs” analysis. Some other programs set arbitrary requirements such as banning particular types of fishing gear, or focus on the professional capacity of the management authority. The MSC program, by contrast, judges a fishery on both the outcomes (environmental impacts) and inputs (quality and effectiveness of the management) of the fishing operations.

At the first level of the MSC standard, there are three high-level Principles, which MSC summarizes as follows:

- **Principle 1: Sustainable fish stocks.** The fishing activity must be at a level that is sustainable for the targeted fish population. The fishery must operate so that fishing on the targeted fish stock can continue indefinitely, and fishing does not overexploit the resource.
- **Principle 2: Minimizing environmental impact.** Fishing operations should be managed to maintain the structure, productivity, function, and diversity of the ecosystem on which the fishery depends, including habitat and non-targeted catch.
- **Principle 3: Effective management.** The fishery must respect all local, national, and international laws and must have an effective management system (normally operated by a government) in place to respond to changing circumstances and to maintain sustainability.

At the second level of the standard, there are 31 “performance indicators” that elaborate the three Principles and that are tested to demonstrate whether the three Principles are met.

Some examples of performance indicators required to be considered by the assessment team, under, for instance, Principle 1, would include whether there is an adequate program in the fishery for assessing the status of the targeted fish stock, whether the fish stock is harvested at a level

3. Complementing the MSC standard for sustainable fisheries is the Chain of Custody standard, which must be met in order to assure that the fish actually comes from a certified fishery. Like the assessment of fisheries, the chain of custody assessment process uses independent teams to determine if the chain member can be certified.

that generates high yields and is well above the point where recruitment would be impaired,⁴ and whether the management utilizes appropriate and robust harvest strategies.

Each of the 31 performance indicators receives a numerical score based on examination of specified issues listed under each indicator. Certification is based on meeting the required weighted average score in each of the three Principles. The required average score of all indicators at each Principle is set at the level of “global best practice.” For any individual indicator that is scored below the required average, the fishery must adopt an action plan to improve that indicator to the required level within a period that is normally equal to the certification period of five years.

The MSC Standard initially left a considerable amount of discretion to the assessment team in assigning scores. The reasoning for this approach was based on the belief that because there were so many types of fisheries and fishing practices, it was impractical to set directives for scoring, and thus the team should apply its best judgment under varying circumstances. This approach unfortunately yielded some inconsistencies in scoring in similar situations, resulting in complaints from both the fishing industry and NGOs. To address the criticisms, to clarify what is expected of assessment teams, and to promote consistency in assessments, MSC spent 2007-2008 developing a “default assessment tree” which assessment teams are required to follow in analyzing the indicators under each Principle, and a methodology that the teams are required to follow in determining the scores—regardless of the type of fishery that is under assessment. The default assessment tree and the methodology are now considered a part of the Standard, along with the three Principles and the performance indicators.

II. Review of the Standard

MSC is now conducting a multi-year process of reviewing its standard. The review is heavy with due process—it is transparent, and highly inclusive, with collaboration across multiple stakeholder groups. The technical advisory board, the stakeholder council, and the public will be consulted, in some cases multiple times.

In order to assure the stability of the standard, and fairness to the fisheries that are already in the program, not everything in the standard is up for grabs. For example, the three Principles are not subject to change. To provide further stability, changes to performance indicators (and associated scoring methodology) will be made only if the changes reflect widely accepted advances of scientific knowledge and if such new scientific knowledge has been integrated into fishery management “best practice.”

Proposed changes will undergo public consultation to ensure that all interested parties may comment. Following

the consultation, MSC’s stakeholder council and technical advisory board will make comments and recommendations to the board of trustees, who will make the final decision regarding changes.

Once the changes to the standard are adopted, an implementation period of a specified period of years will be provided to fisheries already in the program, in order to allow them to take appropriate action if necessary to adjust their practices to changes in the standard. This implementation period is an accommodation to the fisheries that entered the program before the changes are enacted, in order to equitably recognize that a change in the rules could cause a fishery to fail a reassessment in the near term and experience a negative market impact.

III. Lessons Learned

As a pioneer in developing and applying standards for sustainable fishing, MSC had no model, and even the FAO Guidelines were developed seven years after MSC was founded. Consequently, MSC has “learned while doing.”

Perhaps, the most important lesson MSC has learned in regard to its standard is that the initial approach of giving considerable leeway and discretion to the independent assessment teams in applying a general standard was flawed and led to inconsistencies in scoring. It became clear that a more prescriptive approach, in which the assessment teams were directed to make scores according to elaborated guidelines, could be utilized and was a better approach.

Another key lesson learned is that there is a legitimate need for the participants in the program (the fisheries) to know that there is a “stability” to the standard—that it is not subject to frequent change, and that it will only be changed when fisheries science and fisheries management practices so require. During the earlier days of the program, there were some refinements made to the standard, and even though the changes did not “raise the bar” overall, the process of making multiple small changes raised concerns and complaints among the fisheries in the program. At the same time, a counter-balancing consideration was that science and management advances that are widely accepted should be recognized and expressed in the standard. Taking these “lessons” into consideration, the current standard review will (1) only make changes to the standard that are warranted by advances in fisheries science and widely adopted management “best practices,” (2) fix the standard for a period of, probably, five years, and (3) allow minor operational clarifications to be made only annually.

IV. Conclusion

The MSC program represents an example of a private environmental standard-setting organization, based on a design that meets relevant international requirements set by a U.N. body. The program has benefitted from its multi-stakeholder approach, but this approach is fraught with challenges and criticisms as the organization tries to

4. “Impairment of recruitment” is a technical fisheries management term that refers to the point at which a fish stock is reduced so much that the number of juveniles that are spawned each year is seriously impacted, thus starting to jeopardize the long-term productivity of the stock.

walk a middle path among the often strikingly different interests of its constituents. In its 15 years of existence, the organization has evolved its standard from a general statement of principles and criteria with significant scoring discretion given to assessment teams to a more prescriptive scoring methodology. Now, the organization is reviewing

its standard, and coping on the one hand with the need of participants that the organization maintain a “stable standard,” and on the other hand the need to incorporate into the standard recognized advances in fisheries science and fisheries management practices.