

Access to Justice Within the  
Sustainable Development  
Self-Governance Model

Stephen Tully

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# Access to Justice Within the Sustainable Development Self-Governance Model<sup>1</sup>

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## Introduction

Little attention has been given to the development and operation of non-state models of global governance and the extent to which they conform to principles of good governance. Focusing primarily on issues of access to justice and secondarily on the independence of such bodies from the industries which they purport to regulate, this paper argues that adjudicative mechanisms established by non-governmental organisations (NGOs) and firms may not produce outcomes which are considered 'just' by them. Part one locates dispute resolution as a narrower aspect of participation in decision-making, identifies several deficiencies of the state-centric model in the provision of justice and outlines collaborative NGO-corporate arrangements. Part two provides an account of one NGO-corporate arrangement, portrays its principal function and governance structure and identifies the relevant procedural aspects for initiating its private adjudicative arm. The case study considered in part three involves recourse by the Royal Forest and Bird Protection Society to the objections procedure of the Marine Stewardship Council with a view to challenging the certification of the New Zealand hoki fishery as well-managed and sustainable. Finally, it is argued in part four that the lack of independence and limited remedies available to such arrangements does not merely fail to realise justice but has wider ramifications for the continued governance of corporate-NGO arrangements.

## 1. Global governance, Access to Justice and Non-State Actors

Governance is the exercise of power and authority by political institutions through rules and processes with a view to controlling resources<sup>2</sup>. Governance is democratic if the legitimate aspirations of its members are represented and their rights respected. It accordingly becomes a governmental responsibility to make information widely available and facilitate public awareness and participation<sup>3</sup>. The attributes of sound governance include political legitimacy, freedom of information, association and expression, fair and reliable dispute resolution systems, efficiency and cooperation with interested parties. The relevant objectives include openness, participation,

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<sup>1</sup> The support of BP is gratefully acknowledged.

<sup>2</sup> UN Development Programme (1995) *Public Sector Management, Governance and Sustainable Human Development*, New York, 22.

<sup>3</sup> Eg Principle 10, United Nations Conference on Environment and Development, (1992) Rio Declaration, UN Doc A/ CONF.151/ 26.

accountability, effectiveness and coherence<sup>4</sup>. Environmental protection may be an additional expectation<sup>5</sup>.

However, the global context is characterised by transnational issues, governments shedding governmental functions and greater prominence for consumers, producers and civil society. The governance structure for achieving sustainable development within the ‘public’ or intergovernmental sphere is decentralised and lacks policy coherency<sup>6</sup>. More pertinently, tribunals for enforcing international environmental law are absent, thereby lagging other equally prominent concerns such as human rights<sup>7</sup>. Furthermore, the state-centric system does not cater to non-state interests. For example, a right to initiate legal action is a narrower aspect of participation in decision-making. Governments are expected to provide the necessary legal or administrative mechanisms whereby the substantive or procedural legality of decisions, acts or omissions may be challenged. Although this extends to ameliorating financial and other barriers to justice, it remains controversial whether environmental NGOs lacking any sufficient legal interest or directly impaired right can invoke the jurisdiction of national courts<sup>8</sup>. Standing is unreasonably narrow if all individuals nominally enjoy rights to a healthy environment thereby leaving diffuse interests unprotected and public participation ephemeral. However, restricting standing may prevent a costly adversarial environment, legal uncertainty, politically-motivated complainants and fewer resources for other dispute settlement measures.

Environmental NGOs have an interest of a regulatory nature in exercising oversight over corporations just as firms seek a market-receptive framework that is conducive to commercial operations and hence economic development. Since both actors are free to construct their own inclusive self-governing systems, the emergence of collaborative, rather than confrontational relationships, is one means of jointly addressing sustainable development. Participation in decision-making can be broadened to achieve consensual outcomes between affected parties who possess a lesser legal interest than rights-holders (‘stakeholders’). Such arrangements typically include standard-setting activity and compliance mechanisms to verify non-repetition of undesirable corporate conduct. However, such nuanced organisational forms need not be democratically governed<sup>9</sup>. Subsequent institution-building intended to render them more acceptable to their constituents and prevent deadlock between competing interests includes establishing dispute settlement mechanisms<sup>10</sup>. In the public sphere access to justice is expressed

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<sup>4</sup> European Commission, *European Governance: A White Paper*, EC Doc COM (2001) 428 Final, 10.

<sup>5</sup> Citizens Conference on NGO-UN Relations, (1999) Declaration of Accountability for Global Governance, San Francisco, 1995, para 2 extracted in Kunugi, T. & Schweitz, M. (Eds), *Codes of Conduct for Partnership in Governance: Texts and Commentaries*, UN University, Tokyo, 302.

<sup>6</sup> UN University/ Institute of Advanced Studies, (1987) *Final Report on International Sustainable Development Governance: The Question of Reform: Key Issues and Proposals*, Tokyo, 2002. Sustainable development involves meeting the needs of present generations without compromising the ability of future ones to satisfy their own requirements: World Commission on Environment and Development, *Our Common Future*, Oxford University Press, New York.

<sup>7</sup> Eg Art 8, Universal Declaration of Human Rights, (1948) UN General Assembly (GA) Resolution 217A (III).

<sup>8</sup> European Union Network for the Implementation and Enforcement of Environmental Law, (2000) *Complaint Procedures and Access to Justice for Citizens and NGOs in the field of the Environment within the European Union*, Final Report, The Hague, <[http://europa.eu.int/comm/environment/impel/access\\_to\\_justice.pdf](http://europa.eu.int/comm/environment/impel/access_to_justice.pdf)>

<sup>9</sup> UNDP, (2001) Human Development Report, *Deepening Democracy*, New York, 108-9.

<sup>10</sup> The Forest Stewardship Council (FSC) initiated in 1993 by inter alia WWF is a non-profit international organisation composed of some 400 individuals, corporations and NGOs from 50 states. FSC’s certification scheme

institutionally by independent tribunals and responsible governance and conceptually by the separation of powers and the rule of law<sup>11</sup>. Even if these criteria are not wholly transposable, are private tribunals purporting to assert international jurisdiction over multiple sub-systems but lacking the state element of compulsion more effective in providing access to justice?

## 2. The Marine Stewardship Council and its Objections Procedure

The Marine Stewardship Council (MSC) was established in 1997 as a partnership between the World Wide Fund for Nature (WWF) and Unilever. At that time, 60 per cent of the world's 200 most valuable fishing stocks were estimated as overexploited, fish stocks were poorly managed and catch limits inaccurate or under-enforced<sup>12</sup>. However, the inclusive participation of all interested parties was not considered essential and the MSCs governance structure attracted NGO criticism as lacking due credibility, democratic representivity and effectiveness<sup>13</sup>. Accordingly in 2000 a Governance Review Commission engaged in far-reaching consultation<sup>14</sup>. The MSCs present manifestation, as a non-profit NGO headquartered in London, enjoys support from 100 corporations, environmental NGOs and consumer groups from 20 states. As depicted in Annex 1, page 17, its tripartite governance structure consists of a technical advisory board advising on scientific matters, a stakeholder council (established in 2002) divided into public interest and commercial groups and a board of trustees composed of former and serving politicians, businessmen and two stakeholder representatives.

The MSC seeks to promote responsible, environmentally appropriate, socially beneficial and economically viable practices which maintain productivity but respect marine ecosystems integrity. Fisheries irrespective of size voluntarily conforming to the MSC Principles and Criteria are eligible for certification by MSC accredited organisations. The Principles resulted from an 18 month consultation process involving 300 fishery experts and stakeholders, a 1997 workshop and a 1999 review<sup>15</sup>. Certified fisheries are to ensure healthy populations of targeted species, formulate effective management systems and undertake legal compliance<sup>16</sup>. Major Corrective Action Requests (CARs) must be addressed before certification whereas Minor CARs do not preclude certification but should be dealt with before the subsequent surveillance audit. MSC certification mirrors the international legal obligations applicable to governments: in seeking the maximum sustainable yield of harvested stocks, environmentally safe fishing gear and practices

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provides for a two-stage review system whereby complainants including non-members can challenge decisions of the FSC Board, Secretariat or accredited certification bodies before a specially-instituted Dispute Resolution Committee: Forest Stewardship Council, Interim Dispute Resolution Protocol, Document 1.4.3, 1998, <<http://www.fscoax.org/principal.htm>>

<sup>11</sup> Stec, S. (Ed), (2001) *Handbook on Access to Justice under the Aarhus Convention*, Draft, Regional Environmental Center for Central and Eastern Europe, Estonia, 4.

<sup>12</sup> UN Food and Agriculture Organisation (1996), *The State of World Fisheries and Aquaculture*, Sofia, <<http://www.fao.org/DOCREP/003/W3265E/W3265E00.htm>>

<sup>13</sup> Fowler, P. & Heap, S. (2000) 'Bridging Troubled Waters : The Marine Stewardship Council' in Bendell, J. (Ed), *Terms for Endearment: Business, NGOs and Sustainable Development*, Greenleaf, Sheffield, 134 at 143- 4.

<sup>14</sup> MSC, Terms of Reference for MSC Governance Review, July 2001, 4.

<sup>15</sup> MSC, (1998) Principles and Criteria for Sustainable Fishing, Airlie House Draft, Virginia.

<sup>16</sup> A 'sustainable fishery' is defined under the MSC principles as one which can be continued indefinitely at a reasonable level, maximises ecological health and abundance, maintains ecosystem diversity and habitat quality with minimal adverse effects, is managed responsibly and maintains present and future economic options and social benefits.

are employed, reproduction of target species protected, dependent species impacts considered and non-target species catches minimised<sup>17</sup>. Government decisions which allocate quotas or permit access to marine resources lie beyond the ambit of the Principles. Fish processors, traders and retailers undertake public commitments to purchase products only from certified sources, thereby providing market incentives to fisheries to pursue sustainable marine resource stewardship, assure continued supply and maintain commercial viability. Fisheries are encouraged to adhere to MSC standards even when higher than national law to obtain marketplace recognition for distinctive products, access environmentally-friendly markets, secure preferred supplier status, alleviate consumer concerns and reap price premiums.

Principle one provides that catch levels must not deplete marine resources: targeted populations must retain their reproductive capacity and be able to recover. Principle two states inter alia that fishery management should allow for ecosystem diversity - including that of dependent species – with the associated mortality of endangered, threatened or protected species minimised. Principle three calls for an effective management system which includes appropriate institutional structures, fishing methods which minimise adverse habitat impacts and precautionary approaches<sup>18</sup>. They should also entail transparent consultative processes with affected parties, research plans which assess the biological status of resources, periodically-conducted fishery impact studies and appropriate internal monitoring and enforcement procedures. Since conflict resolution mechanisms are also envisaged, outstanding disputes of substantial magnitude involving a significant number of interests will normally disqualify fisheries from certification. Documentary evidence in the nature of an ecological risk assessment (ERA) is required to illustrate that fishery practices do not pose ‘unacceptable’ environmental impacts.

Pursuant to the MSCs objections procedure organisations can formally object to a determination by a certification body that a candidate fishery satisfies the MSC Principles and Criteria. Objections may be procedural (where failure to follow the MSC certification methodology has prevented or impaired the objecting party’s participation) and/ or merits-based (where the final determination is challenged on the basis that the assessment team ignored, misinterpreted or failed to obtain information). Objecting parties must possess the relevant credentials. With respect to merit objections, standing requires previous participation in the process either through written submissions to the certification body or by attending stakeholder meetings as an invitee. Objecting parties must identify any ill-considered issues, provide the necessary information for proper decision-making - published and peer-reviewed information carry greater weight - and recommend an appropriate certification condition by way of remedy. For procedural objections, objecting parties must identify the omitted or incorrectly applied procedures and demonstrate how this significantly affected the final determination.

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<sup>17</sup> Arts 61 (4), 119 (1) (b) & 192, UN Convention on the Law of the Sea 33 *ILM* 1309 (1982); General Principles, Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea Relating to the Conservation of Straddling Stocks and Highly Migratory Fish Stocks, UN Doc A/ CONF.164/ 37 (1995); Art 6 (6), FAO, Resolution on a Code of Conduct for Responsible Fisheries, 28<sup>th</sup> Session, 1995 <<http://www.fao.org/fi/agreem/codecond/ficonde.asp>>

<sup>18</sup> The precautionary principle provides that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation: Principle 15, Rio Declaration, *supra* n3.

Objections to certification are first addressed by the certification body and only subsequently does the board of trustees initiate dispute resolution. Draft reports of the certification body's appointed assessment team are published through the MSC website for 30 days, inviting comment. The main assessment report, together with decisions if any of a peer review panel instituted by the certification body and any stakeholder comment, are considered before a final determination is made and published. On the MSC objections form the objecting party specifies its interest in the fishery, its mandate and its objections to the determination. Other parties may file briefs in support of merits objections. The certification body has 30 days to respond and objecting parties may file further particulars explaining why that response is considered inadequate. Within five days, the MSC Board can either dismiss frivolous objections or establish an objections panel. Selection of panel members follows consultation between the chair, MSC executive staff and the tripartite governance structure as appropriate with appointment decisions being final. The objections panel determines the subsequent procedure to be followed. The certification body, candidate fishery or objecting party may be requested to present oral argument and external advice may also be solicited. There is no time limit for deliberations. Decisions are made by majority (including the chair) with no opportunity for appeal. Since periodic surveillance audits conducted by certification bodies do not afford a further basis for objection, complaints can only be lodged when the fishery becomes due for re-certification after five years. A case study will illustrate how these procedures (do not) function in practice.

### **3. The Certification of New Zealand Hoki**

The hoki is a deep-water white fish and New Zealand's (NZ's) largest commercial species. Export earnings – valued at approximately NZ \$300 million annually – were anticipated to further expand following MSC certification and recent European Community regulations implementing catch reductions for competing species<sup>19</sup>. However, conservationists are concerned by detrimental ecosystem impacts upon seabed communities as a consequence of bottom-trawl fishing techniques, the discharge of factory vessel fish waste, by-catches including seal and seabird mortality incidental to mid-water netting, and the effects of removing large volumes of the target catch upon dependent species. The National Institute of Water and Atmospheric Research, under contract to the NZ government, concluded that although the hoki stock was currently being sustainably harvested, a possible risk may arise within five years. At the insistence of environmental groups the government reduced the total allowable commercial catch (TACC) by 20 per cent.

The Hoki Fishery Management Company Limited (HFMC) is owned by 40 small businesses who collectively hold 99 per cent of the national hoki quota allocation. HFMC is a 40 per cent shareholder in the NZ Seafood Industry Council Limited (SeafIC) which inter alia represents fishing industry interests to government. HFMC volunteered for MSC certification with pre-assessment commencing in 2000 and on-site inspections between October 2000 and January 2001. As depicted in Annex 1 – a diagrammatic representation of the relevant actors, activities and information flows - the assessment process was administered by SGS Product and Process Certification, part of the Societe Generale de Surveillance Group which specialises in providing

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<sup>19</sup> European Community (2002) Regulation No 2371/ 2002 on the Conservation and Sustainable Exploitation of Fisheries Resources under the Common Fisheries Policy *OJEC* L358/ 59.

certification services for consumer products<sup>20</sup>. SGS recruited four management system and fishery experts, audited a randomly-selected sample of management and operations personnel and consulted conservation NGOs including the Royal Forest and Bird Protection Society (RFBPS).

The main assessment report observed that the medium to long term ecosystem impacts of hoki fishing were not well understood<sup>21</sup>. Since HFMC had failed to conduct a full ecological risk assessment, knowledge was limited with respect to the size of the fur seal and seabird populations, threats posed by the fishery industry and the consequences for dependent species. National law mandated a precautionary approach where adverse fishery impacts were identified<sup>22</sup>. In SGS's view, the information available was inadequate even for the purposes of legal compliance<sup>23</sup>.

SGS confirmed an occasional and incidental non-fish by-catch which included fur seals and seabirds. Although fur seals were not nationally characterised as 'threatened', it was a matter of controversy whether the three affected species of albatross were 'vulnerable', 'endangered' or 'threatened' as classified by the International Union for the Conservation of Nature. Accidental non-target species mortality is permissible provided the catching vessel's skipper declares it to the competent governmental authority. Since such an industry-based observer programme can provide unreliable information, the NZ Ministry of Fisheries remained legally responsible for monitoring compliance with the national fisheries management regime. Notwithstanding their deployment elsewhere, the hoki industry had refused to conduct sea trials of seal excluder devices (SEDs), arguing that they were ineffective and were associated with lost catch. Voluntary environmental codes of conduct were implemented instead and updated subject to government approval but which NGOs rejected as ineffectual<sup>24</sup>.

The overriding deficiency identified by SGS was the absence of a mutually agreed and coherent fishery management plan. Following consultation with selected (and principally commercial) stakeholders, HFMC delegated responsibility for long term sustainable fishing to the quota holders<sup>25</sup>. Although its present system contained surveillance procedures, enforcement would remain weak until legally binding agreements were instituted. In effect, the quota holders would derive the financial benefits accruing from use of the MSC label but HFMC, designated as MSC certificate holder and hence responsible entity, would be unable to compel adherence from its voluntary membership with the certification requirements. Moreover, the existing management system ineffectively measured fishery impacts and lacked clear procedures for establishing

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<sup>20</sup> <<http://www.sgs.com/SGSGroup.nsf/pages/home.html>>

<sup>21</sup> SGS, (2001) Public Summary Report.

<sup>22</sup> Sec 10, *Fisheries Act* 1996 (NZ). Section 8 (2) imposes an obligation to mitigate adverse fishery effects upon the aquatic environment and pursuant to section 9 (b) to maintain biological diversity. Biological diversity is variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part. It includes diversity within species, between species and of ecosystems: Art 2, Convention on Biological Diversity 31 *ILM* 818 (1992).

<sup>23</sup> Sec 63B *Wildlife Act* 1953 (NZ); Sec 16 *Marine Mammals Protection Act* 1978 (NZ).

<sup>24</sup> HFMC, (2001) Industry Agreed Code of Practice for Hoki Target Trawling, Version 3, 2002; HFMC, Code of Practice for Mitigating Seal and Sea Lion By-Catch.

<sup>25</sup> HFMC, (1998) New Zealand Hoki Fishery Strategy Development Plan, 1997; HFMC, Hoki Sector Foresight Strategy-Our Vision to 2010 and Beyond.

environmental targets. Stakeholder participation was also flawed: fishery management was susceptible to industry manipulation with environmental input marginalised. Nonetheless, no Major CARs were identified. HFMC was awarded certification on 14 March 2001 for five years conditional upon ten Minor CARs being verifiably addressed. Each would be raised to Major CARs in the event that they were not satisfactorily 'closed out'.

HFMCs accreditation as a well-managed and sustainable fishery predictably prompted protests from environmental groups concerned by fur seal and seabird mortality in addition to seabed ecosystem damage. For example, the NZ Environment and Conservation Organisations (ECO) coalition challenged the factual basis of the assessment report. WWF by contrast was more reserved and considered voluntary corrective measures to constitute the first step towards more desirable environmental solutions. While there is no evidence that SGSs certification methodology was questioned before any peer review panel, on 25th March 2001 RFBPS formally lodged an objection against certification. It detailed, as concerns, mis-applied MSC Principles, factual errors, missing information, mis-characterising Major CARs as Minor ones, not implementing a precautionary approach, failing to consult stakeholders and failing to require measures of mitigation including the use of SEDs<sup>26</sup>.

The objection procedure occupied some 19 months since the date of lodging the complaint. During this period SGS continued to assess the fishery. The first surveillance audit concluded that HFMC had not satisfied seven of the ten CARs raised against it<sup>27</sup>. In particular, ecosystem knowledge remained inadequate given the failure to complete an ecological risk assessment and a fishery management plan possessing enforcement attributes (HFMC contracts with quota holders) had yet to materialise. In relation to the former, government agencies required another year to complete research which was industry funded and objected to by SeafIC. Notwithstanding its previously declared intention, SGS permitted an additional three months for completing these conditions for maintaining certification. Although it consulted inter alia government departments and WWF, constructive engagement between SGS and others continued to deteriorate. RFPBS indicated its unavailability and SGS considered RFPBS to bear the onus for presenting evidence during the main assessment period. Upon the departure of ECO and Greenpeace from the certification process SGS pointed to their failure to appreciate the continuing nature of the MSC scheme. HFMC subsequently developed a corrective action plan, several aspects of which required 'the full five year term of the certification to make meaningful progress<sup>28</sup>.' RFBPS and ECO were invited to participate but did not attend a workshop to review earlier drafts.

The second surveillance audit determined that HFMC had adequately addressed the seven conditions. However, three new ones were raised against it<sup>29</sup>. The persistent issues – conducting an ecological risk assessment in conjunction with stakeholders, legally binding procedures which ensured member compliance with its fishery management plan and formulating measures to

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<sup>26</sup> RFBPS, (2001) Complaint against Certification of the New Zealand Hoki Fishery, Wellington, (held on file); RFBPS, 'MSC Hoki appeal shows fishery should never have been certified', Press Release, Wellington, 16 December 2002, <<http://www.forest-bird.org.nz/mediarel/02OcttoDec.asp#hoki>>

<sup>27</sup> SGS, (2002) Fishery Surveillance Audit Report 1.

<sup>28</sup> HFMC, (2002) MSC Certification Corrective Action Plan, Doc RC0001SP, 3.

<sup>29</sup> SGS, (2002) Fishery Surveillance Audit Report 2.

mitigate seal by-catch - were requested to be complete by November 2002. The third surveillance report covered up until December 2002; the period immediately preceding the panel's decision but issued subsequently<sup>30</sup>. Once again, prospective enforcement of the fishery management system through auditing and contractual agreements was inadequate, the credibility of sea trials to assess the operational requirements for safe SED handling questionable, and the ecological risk assessment contained technical deficiencies which limited its acceptability to stakeholders. Although a new condition was raised, progress was 'satisfactory' and HFMC would be re-assessed in November 2003, halfway through the life of certification. Although the consulted stakeholders endorsed HFMCs commitment to satisfying MSC requirements within this timeframe, both RFBPS and ECO were 'invited but unable to participate'.

The objections panel delivered its decision on 16 December 2002<sup>31</sup>. RFBPS was not consulted on the composition of the panel and it eventuated that a foreign government official, retired judge and fisheries scientist had been appointed<sup>32</sup>. The panel based its conclusions upon the MSC Principles and Criteria, the main SGS assessment report dated 14 March 2001 and RFBPSs complaint. An investigation also conducted by two panel members on the measures adopted by HFMC since initial assessment had the effect of modifying the guideposts employed by SGS 'to reflect more closely the object of improving the sustainability of the fishery'. It is unclear from the decision whether SGS's three subsequent surveillance audit reports were also evaluated as evidence. The panel also conducted a speedy site visit before retiring for 'extensive deliberations'<sup>33</sup>.

The panel observed that the certification process considers whether the candidate fishery 'is, or is likely to become' well-managed and sustainable. It acknowledged that information concerning ecosystem impact was 'poor to non-existent' and that greater effort could have been expended to improve fishery management. Although SGS would have been justified in refusing certification at the date of assessment, in its present condition the fishery was suitable for certification. In the panel's view, hoki stocks were in good shape, the available information was robust and management strategy reflected commercial best practice. RFBPS demands - increasing neutral observer coverage, dividing the hoki quota stock into two populations and limiting fishing techniques to pelagic (mid-water) trawling – were unrealistic or unworkable whereas HFMC was committed to remedying the identified deficiencies.

MSC certification was conditioned by compliance with the panel's recommendations. HFMCs research must include a genetic component using existing ecosystem knowledge and a precautionary approach, conducting an ecological risk assessment of the impact of the fishery upon seabed habitats even if this occupies several years, testing SEDs, accurately mapping trawl grounds and reviewing the efficacy of the industry observer programme. Although these measures were to have been implemented by the fishery, ECO and RFBPS were not consulted on

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<sup>30</sup> SGS, (2003) Fishery Surveillance Audit Report 3.

<sup>31</sup> MSC, (2002) Independent Panel Decision on the New Zealand Hoki Fishery.

<sup>32</sup> The Panel consisted of fisheries scientists Dr Rick Deriso (Inter-American Tropical Tuna Commission) and Dr Jake Rice (Department of Fisheries and Oceans, Canada), Sir Michael Connell QC (former UK High Court judge) with Sir Martin Laing CBE (MSC Board member) as chair.

<sup>33</sup> MSC, (2002) 'New Zealand Hoki Dispute Panel Releases its Findings on Certification of the Fishery to the MSC Standard', Press Release.

the occasion of SGSs fourth audit review<sup>34</sup>. Although establishing a steering group adequately addressed the CAR with respect to the ecological risk assessment, the management system did not include internal audit procedures to verify compliance and ‘urgent attention’ was required to address seal by-catch. HFMC had also responded ‘promptly’ to the objection panel’s recommendations: although no further action was warranted in relation to stock genetic research the remainder were ‘being suitably addressed’ in preparation for the next surveillance audit during December 2003. Since the timetable for developing a fishery management plan proved to be overly optimistic, it was also expected to be completed during 2003.

Although SGS was not requested to re-consider certification during the objections procedure, it conceded that HFMC should not have been certified in 2001<sup>35</sup>. The observer programme was a ‘borderline pass’ and the failure to conduct an ecological risk assessment either implicitly confirmed that the fishery posed high ecosystem risks or that precautionary harvesting practices were warranted. HFMC acknowledged that contemporary fishery management practices were imperfect and undertook further effort<sup>36</sup>. More notably, MSC extended the ambit of consultation within its certification methodology such that stakeholders may formally raise concerns prior to a final determination being issued<sup>37</sup>. To summarise, three audits were conducted during the period in which the objection was considered and were taken into account by the objections panel. Although the fourth audit indicated continuing areas of difficulty for the hoki fishery, the MSCs certification procedure was amended as a consequence of the panel’s decision. The objections procedure is therefore not one of adjudication with respect to a prior infraction of the certification requirements but rather a continual process of negotiation, monitoring and supervision to identify action which brings the fishery into a position consistent with the MSC criteria.

#### **4. Subverting the Administration of Justice and the Consequences for Governance**

The above account illustrates the emergence and organisational growth of NGOs with the novel appendage of a dispute resolution forum enjoying ‘inherent jurisdiction’ over how successfully certification standards have been implemented by a particular client with a view to improving commercial management. Operating within a relative regulatory vacuum, NGOs are free to cherry-pick organisational attributes from elsewhere and evolve into more complex structures. This includes importing management systems or governing boards from the commercial sphere and invoking the institutional embodiment of the separation of powers ideal – standard-setting, policy-making and judicial enforcement undertaken by distinct entities – from the governmental one. Roles and responsibilities accordingly blur with NGOs regulating firms and peer competition or collaboration occurring between interested actors. Consistent with an audit explosion<sup>38</sup>, NGOs are also utilising and become part of the internal audit procedures for firms. However, representational mechanisms of participation, so as to exercise internal control within these organisations, is system rather than outcome-orientated. Inputs originate from a variety of

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<sup>34</sup> SGS, (2003) Fishery Surveillance Audit Report 4.

<sup>35</sup> RFBPS, (2002) Commentary on Response to Appeal against Certification of the New Zealand Hoki Fishery, Wellington (held on file).

<sup>36</sup> HFMC, (2002) ‘Hoki Certification confirmed by Independent Review’, Press Release.

<sup>37</sup> MSC, (2002) ‘New Zealand Hoki Dispute Panel Releases Its Findings on Certification of the Fishery to the MSC Standard’, Press Release.

<sup>38</sup> Power, M. (1999) *The Audit Society: rituals of verification*, Oxford University Press, Oxford, 2<sup>nd</sup> Ed.

sources including information independently held or commissioned by NGOs and industry-funded government research programmes. The data becomes accessible to firms as part of a feedback loop to adapt or refine managerial performance, identify best commercial practice and assist technological development. Such a process is evident not merely within the governing structure of the organisation but also its dispute resolution procedures. Within that environment justice is amenable to shift between universalist, relativist and instrumentalist conceptions. In this light the objections procedure is simply part of the process of further refining existing fishery management systems rather than fulfilling the environmental protection expectations of NGOs.

Initiatives within the public sphere intended to promote access to justice have included lowering the cost of legal services (legal aid), permitting aggregated public interest claims (class actions), instituting novel processes such as mediation and arbitration (alternative dispute resolution) and permitting legal advertising and services provided by non-lawyers (applying competition policy to the legal profession). However, given its coercive potential and amenability to subversion law can be a limited means for ensuring justice and hence community-based methods may be more effective<sup>39</sup>. On the other hand, private socially ordered arrangements need not achieve justice if they embed forms of domination and the protections available in public fora are absent<sup>40</sup>.

Justice could be said to arise in a procedural sense (adjudication by an impartial institution according to predetermined rules) or as a product (yielding a 'just' result). The former is a narrower aspect of the notion that all decisions originate in collective consent and differences are resolved satisfactorily for all. Decision-making is therefore legitimate if it is contestable in fora through acceptable procedures<sup>41</sup>. In terms of a 'just' result, justice embraces a multiplicity of interacting variables including entitlement, justification, equality, impartiality, proportionality, reciprocity, recertification, need and participation<sup>42</sup>. Although equality or security against interference may be an important objective, the notion of getting what is deserved is the more prevalent<sup>43</sup>.

Justice typically reflects the shared expectations of participants within a self-contained social system<sup>44</sup>. In short, justice is assumed to be the common outcome expected of all actors in pursuing the social good. Justice therefore involves striking a proper balance between competing claims in relation to distributing the burdens and benefits of social co-operation<sup>45</sup>. However, the concrete application of that normative ideal cannot detach the justness of an outcome from the idiosyncracies of its broader environment. Social factors including power, status and wealth undesirably intrude into the administration of justice as much as peace, order and stability can permissibly prevail over what justice would dictate in ordinary circumstances. Both consistent

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<sup>39</sup> Parker, C. (1999) *Just Lawyers: regulation and access to justice*, Oxford University Press, Oxford, 56.

<sup>40</sup> Galanter, M. (1981) 'Justice in Many Rooms' in Cappalletti, M. (Ed), *Access to Justice and the Welfare State*, Martinus Sijthoff Publishers, Netherlands, 147 at 170.

<sup>41</sup> Pettit, P. (1997) *Republicanism: a theory of freedom and government*, Oxford University Press, Oxford, 183- 200.

<sup>42</sup> Selznick, P. (1992) *The Moral Commonwealth*, University of California Press, Berkeley, 431- 2.

<sup>43</sup> Campbell, T. (1988) *Justice*, Macmillan Education, Basingstoke, 150.

<sup>44</sup> Eg Judge Owada, (2003) 'Some Reflections on Justice in a Globalising World,' Remarks made at the Proceedings of the American Society of International Law, (held on file).

<sup>45</sup> Rawls, J. (1972) *A Theory of Justice*, Oxford University Press, Oxford, 5.

and incompatible with the common will, justice has several opt-in characteristics (for example, choosing to initiate procedures) and coercive attributes (enforced decisions).

Access to justice involves first identifying the terms upon which an entity enjoys standing to invoke substantive and procedural guarantees and second what remedies are available to it. The underlying rationale is accordingly both instrumentalist (empowering a definable affected group to invoke an external standard) and purposive (to render decision makers accountable). The public model of access to justice entails clear information, fair, expeditious and inexpensive procedures, adequate and effective remedies, an independent and impartial review mechanism established in law and a legally binding publicly-accessible reasoned decision in writing<sup>46</sup>.

The MSC objections procedure ostensibly contemplates a challenge to a certification process. However, as illustrated by the hoki proceedings it does not afford access to justice within the private sphere. Information was either lacking or unclear, the panel proceedings were not conducted transparently, several evidentiary documents were not publicly available and although permitted to respond to a draft decision the complainant did not have any opportunity to address the panel directly<sup>47</sup>. It is uncertain if the panel consulted other bodies. Moreover, the proceedings could not be described as 'expeditious': initiated in March 2001, the procedure commenced six months late in January 2002 with the panel's decision finally rendered by years end. Although the decision is reasoned (albeit short), in writing and eventually publicly accessible, RFBPS received notification first through Greenpeace and then from the MSC two days after issuance. HFMC in contrast was sufficiently informed to organise publicity in advance. The process is also comparatively expensive for organisations with limited resource capacity: notwithstanding waiver of a £1000 fee in this instance, participation cost RFBPS several months work and around NZ \$15,000 in staff time. Although neither the objections procedure nor the panel's recommendations specify a timeframe for acceptable compliance, unlike arbitration awards the decision is not legally binding but, consistent with MSC certification, largely dependent upon self-enforcement.

The certification process itself is not independent. The certification assessor has the subject fishery as its client, is accredited by the MSC to apply MSC methodology and is contracted by other fisheries on future occasions<sup>48</sup>. In particular, pre-assessment to determine certification prospects and flag contentious issues occurs confidentially between the assessment body and the fishery. To maximise consensus, the stakeholders council recommended that stakeholders enjoy early, genuine and meaningful opportunities to provide input<sup>49</sup>. Notwithstanding the modifications noted above, it remains true that this occurs only before final determinations are made and not during that decision, following which the objections procedure must be initiated.

Excluding the objections procedure, the MSCs certification process is analogous to the International Organisation for Standardisation (ISO) 14001 Environmental Management System

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<sup>46</sup> Arts 9 (1) & (4), Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) (entry into force 2001 with 23 Parties), UN/Economic Commission for Europe (ECE) Doc ECE/ CEP/ 43 (1998).

<sup>47</sup> Correspondence with Mr Barry Weeber, Senior Researcher, RFBPS, 22 April 2003.

<sup>48</sup> Such conflicts of interest are well-recognised: see eg Bortolotti, B. & Fiorentini, G. (1999) *Organized interests and self-regulation: an economic approach*, Oxford University Press, Oxford.

<sup>49</sup> MSC, (2002) Minutes from the Stakeholder Council Meeting 2, London.

template<sup>50</sup>. The ISO is a private standard-setting organisation composed of some 100 national standard organisations and delegations including producers, consumers, other stakeholders and government representatives. For example, the ISO 9001 quality management system standard communicates the fact that management is effectively controlling the production process. As an assurance of product quality for use throughout the supply chain, it is primarily a tool for establishing credibility, thereby facilitating inter-firm trade, and does not seek to satisfy public interest or consumer concerns. ISO 14001 involves a commitment by management to self-define and pursue an organisation's environmental objectives and targets. Both the ISO 9001 and 14001 series of standards focus upon the processes by which organisational policies are established and do not establish common performance measures. Hence the systems are generic enough to be adapted to accommodate specific organisational characteristics with feedback loops for improving these management systems. Certification by an independent third party offers an additional degree of credibility to organisational claims by warranting to the public that the product complies with certain content or production standards. Whether continuous improvement relates to the existing management system or the environmental outcome remains ambiguous<sup>51</sup>. Hence, both MSC certification and ISO 14001 carry a strong public interest dimension which is not sufficiently addressed – nor intended to be – by the nature of those frameworks.

The independence of review bodies such as national courts is typically embedded legislatively if not constitutionally<sup>52</sup>. Judicial independence is ensured under national law whereby individuals of personal integrity and appropriate ability are selected to tenured positions following the application of proper procedures in a non-discriminatory manner<sup>53</sup>. The properly discharged judicial function is moreover guaranteed by governments notwithstanding the latter's ability to influence particular factors. The MSC objections panel is 'established in law' only to the extent that charities registered under English law are competent to create tribunals enjoying jurisdiction over certification schemes having extra-territorial implications<sup>54</sup>. Panel members are expected to possess scientific or technical backgrounds including prior experience with fishery certification. Independence is defined as having no commercial or other involvement with the candidate fishery, any business handling its products, any organisation opposed to certification or any other reason deemed by the board of trustees to constitute a conflict of interest. However, independence from the MSC governance structure is not readily suggested when it appoints panel members, has a board member as chairperson and determines its budget.

More disconcerting is what remedies are available, whether they reflect a 'just' outcome and who possesses them. The panel either allows the determination to stand or remands it to the certification body with instructions to consider matters in light of MSC principles or procedural rules. If the latter, the response will be either sufficiently adequate to enable the determination to become final or a further response is permitted before a final decision is made by the panel. The

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<sup>50</sup> International Organisation for Standardisation, (1996) *Environmental Management Systems – Specification with Guidance for Use (ISO 14001)*, Geneva.

<sup>51</sup> Gunningham, N. & Sinclair, D. (1999) 'Environment Management Systems, Regulation and the Pulp and Paper Industry: ISO 14001 in Practice' 16 *Environmental and Planning L J* 5, 9.

<sup>52</sup> ECE, Workshop on Access to Justice in Environmental Matters under the Aarhus Convention, ECOSOC Doc CEP/WG.5/2001/5, para 34.

<sup>53</sup> Basic Principles on the Independence of the Judiciary, UNGA Resolutions 40/32 (1985) & 40/146 (1985), para 10.

<sup>54</sup> *Charities Act* 1960 (UK) as amended 1992.

certification objective is to effect such behavioural modifications as necessary to render the fishery eligible for the MSC eco-label. A favourable determination is virtually assured where pre-assessment is positive. Certification is not contingent upon the fishery demonstrating a priori that it satisfies the MSC principles either during the main assessment or following the exhaustion of the objections procedure. Compliance with the standards of certification thus spills over from the oversight function performed by the auditor to the remedy selected by the tribunal. Consistent with 'continuous improvement', the certification process and the conflict resolution mechanism are both self-servingly designed to enable clients to adapt and improve fishery management. Rather than the merits of the fishery it is the manner by which certification bodies employ MSC methodology which is scrutinised. However, procedural objections are less likely to occur. Since the MSC can review the accreditation status of certification bodies, the certifier must demonstrate its reliability for assessing fisheries against the MSC Principles and Criteria. Fisheries may be certified to continue commercial relationships with resulting loss of credibility and relevance to the MSCs constituency. Responsibility for certification lies ultimately upon the certification body rather than the panel and the certifier enjoys several opportunities during the objections procedure to amend or justify its assessment.

Such a moving target may not correspond with an NGO appreciation of justice for two reasons. Pointing to the inconclusive nature of continuous improvement, NGOs perceive that compliance should occur prior to certification. However two fisheries may qualify for MSC certification but pursue different standards of environmental performance. Individual firms can permit standards of 'deliberative democracy' - access to information, just remedies and adherence to voluntary commitments - to permeate throughout the organisation<sup>55</sup>. Indeed, business strategies for sustainable development include stakeholder engagement<sup>56</sup>. However, such approaches may be a means of containing dissent without actually modifying corporate behaviour ('business as usual'). They may simply be a public relations exercise to gather information which does not in fact improve existing management. Secondly, judicial-style mechanisms akin to administrative review seek to ensure that organisations adhere to predetermined policies or rules without adjudicating upon their inherent quality or purpose. They are also inappropriate for 'polycentric' tasks<sup>57</sup>. NGOs may not appreciate that a fora for improving fishery practices has been dressed up as an adversarial 'dispute resolution mechanism' with the certifier not party to proceedings and it's 'final' determination not without qualification.

The three principal issues of concern to RFBPS - inadequate ecosystem knowledge as a consequence of failing to conduct an ecological risk assessment, the delay in operationalising SEDs to mitigate seal and seabird by-catch and HFMCs inability to compel membership adherence to the MSC Principles for which it enjoyed certification - were contentious throughout the certification process and remained unresolved after the objections procedure. Contrary to the declared intent that no MSC certificate or logo licensing agreement will be issued until the objections procedure has been finalised, HFMCs conditional certification as affirmed by

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<sup>55</sup> Parker, C. (2002) *The Open Corporation: effective self-regulation and democracy*, Cambridge University Press, Cambridge.

<sup>56</sup> International Institute for Sustainable Development, (1992) *Business Strategy for Sustainable Development: leadership and accountability for the 90s*, Winnipeg, 116.

<sup>57</sup> Winston, K.I. (Ed), (1981) *The Principles of Social Order: selected essays of Lon L. Fuller*, Duke University Press, Durham, 111-21.

the panel was not held in abeyance. Hoki quota holders have reaped the full financial benefits arising through MSC certification since 14 March 2001 - almost one third of the certificate's duration - on little more than a good faith expectation that environmental studies will identify no adverse fishery impacts. For the panel to permit the ecological risk assessment to occur over several years is moreover alarming since MSC certification will expire when a sustainability risk to the fishery is predicted to occur and incompatible with the NZ government's decision to reduce the TACC. Recognition of HFMC as a sustainable fishery is undeserved if the depletion of hoki resources is accelerated and only discredits MSC certification and the objections procedure. Additionally noteworthy is that MSC accounts suggest continuing operational losses notwithstanding greater dependency upon commercial contributions relative to charitable donations.<sup>58</sup> The MSC is increasing outreach activity to elevate its profile and generate industry interest in accreditation. It also promotes voluntary certification to intergovernmental organisations as a credible market solution.<sup>59</sup> Hence, MSCs reliance upon member revenue gives rise to a conflict of interest to the extent that there are competing pressures to certify a greater number of fisheries.

The MSCs objections procedure illustrates the difficulties encountered by virtue of the voluntary nature of collaborative self-regulatory arrangements between NGOs and firms. In particular, the MSC is dependent upon continuing NGO participation to preserve its credibility and legitimacy but cannot reconcile the fact that industry groups and environmental organisations possess a different appreciation of what constitutes a just outcome. The MSCs existing governance structure cannot be immunised against the desire of its constituent stakeholders to realise self-perceived notions of justice. Fisheries may volunteer for MSC certification at NGO insistence. The credibility, effectiveness and financial security of co-dependent voluntary systems are derived from participation and members cannot be prevented from exiting. The MSC has thus initiated an International Conservation Programme to preserve NGO relations. The challenge for MSC continues to be providing solutions which discourage parties from seeking short-term benefits outside existing arrangements.<sup>60</sup> This truism was variously illustrated during the hoki proceedings. For industry it involved the credibility of observer coverage for monitoring accidental by-catch and HFMCs ability to govern its commercial stakeholders. SGSs reliability was scrutinised with respect to its application of the MSC certification methodology and information dependency upon government research programmes opposed by industry. For the objections procedure it is the degree of independence enjoyed by the panel.

The ability of individuals to access those institutions which administer justice frequently mirrors their rights and entitlements within the broader governance structure. The marginalisation of NGO concerns during the objections procedure potentially reflects the influence of the stakeholders council within the MSC and the priority of sustainability relative to certification. NGOs must submit to the certification process from the outset if they wish to retain the possibility of objecting to the final determination. The burden lies upon them to provide the necessary ecosystem information and propose appropriate remedies. Obstacles to participation

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<sup>58</sup> MSC, (2001-2002) Annual Report, London.

<sup>59</sup> Eg MSC, (1999) Position Paper submitted to the Seventh Session of the UN Commission on Sustainable Development, New York, <[http://csdngo.igc.org/oceans/oceans\\_msc.htm](http://csdngo.igc.org/oceans/oceans_msc.htm)>

<sup>60</sup> Weir, A. 'Meeting Social and Environmental Objectives through Partnership: The Experience of Unilever' in Bendell, *Terms for Endearment*, *supra* n13, 118 at 123.

could include a lack of resources, no advanced notice of scheduled meetings, the loss of dissociated criticism, the perceived futility of self-judging mechanisms and an individualistic agenda. However, invoking conflict resolution procedures and continuing to lend their reputation to disputed certification processes will prove most challenging<sup>61</sup>.

## **Conclusions**

The MSCs objections procedure is incapable of producing an outcome which is consistent with the perception of 'justice' held by all of its participants. NGO participation and their environmental protection objectives are marginalised in favour of attracting industry support and enhancing internal commercial management procedures. Ostensibly adversarial in nature, in practice the procedure merely attempts to formalise dialogue between NGOs and corporations. However, these dialogues will not be constructive since the adjudicative process employed lacks credibility, independence and the ability to provide effective remedies. This is symptomatic of a broader self-governing system equally hamstrung by the notion of voluntariness. Moreover, adopting the adjudicative model creates false expectations for its participants which, when unrealised, threaten the continued viability of the arrangement from which it springs. For this reason the MSC and its objections procedure offers a valuable lesson on what an experimental model within the private sphere can achieve.

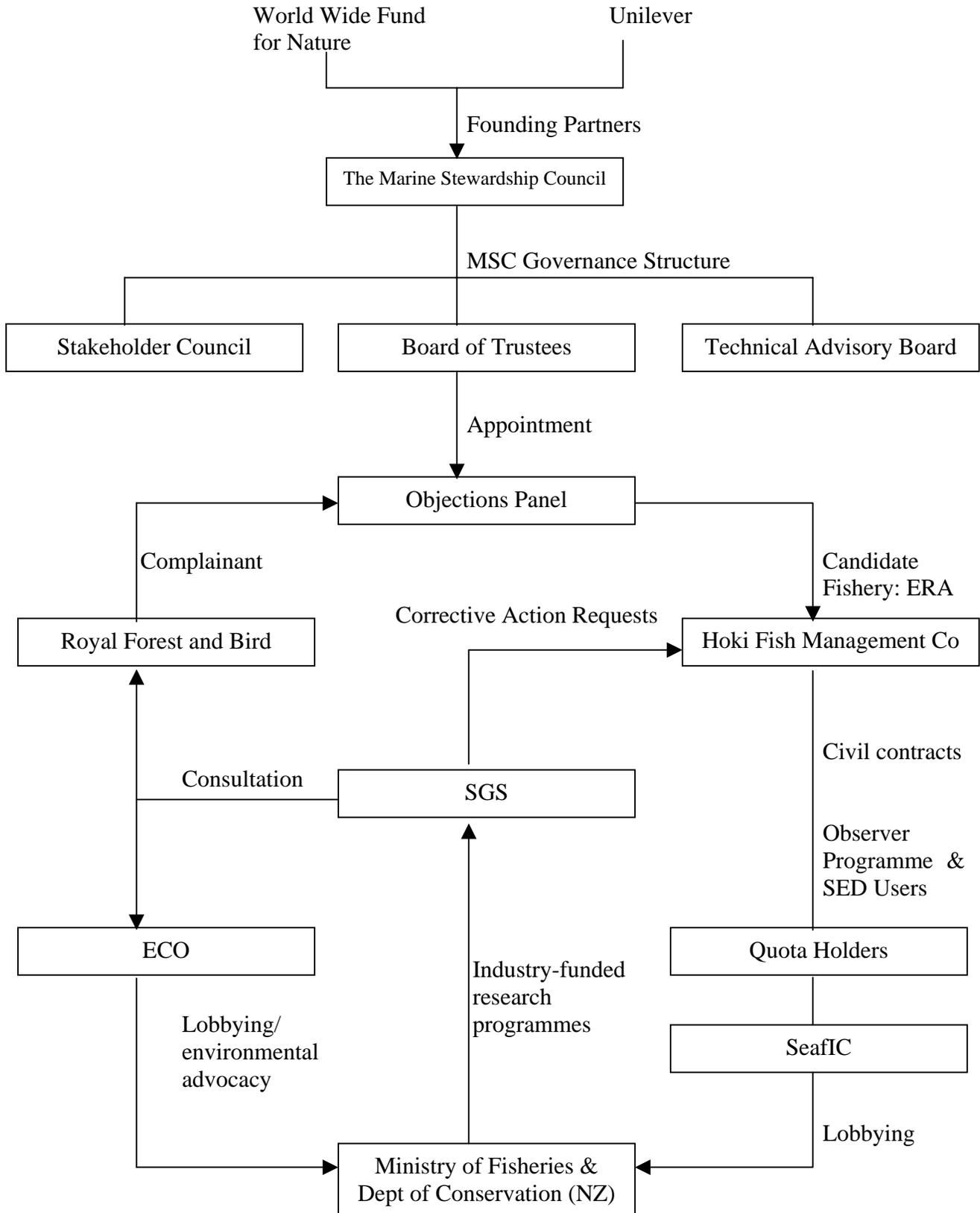
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<sup>61</sup> Correspondence with Ms Cath Wallace, Co-Chair, ECO, 30 April 2003.

## Table of Acronyms

CAR	Corrective Action Request
EC	European Community
ECE	Economic Commission for Europe
ECO	Environment and Conservation Organisations (NZ)
ERA	Ecological Risk Assessment
FAO	Food and Agriculture Organisation
GA	General Assembly of the United Nations
GATT	General Agreement on Tariffs and Trade
HFMC	Hoki Fishery Management Company Limited (NZ)
ISO	International Organisation for Standardisation
MSC	Marine Stewardship Council (UK)
NGOs	Non-Governmental Organisation
NZ	New Zealand
PPM	Process or production method
RFBPS	Royal Forest and Bird Protection Society (NZ)
SeafIC	Seafood Industry Council Limited (NZ)
SED	Seal Excluder Device
SGS	Societe Generale de Surveillance Group (Neth)
TACC	Total Allowable Commercial Catch
TBT	Technical Barriers to Trade (WTO Agreement)
UN	United Nations
UNDP	United Nations Development Programme
WTO	World Trade Organisation
WWF	World Wide Fund for Nature

**Annex 1**  
**Diagrammatic Representation of Case Study:**  
**Principal Actors, Activities and Information Flows**



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