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ARTICLE

Interactions between International Law and Private Fisheries Certification

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Abstract
The management of fisheries at the international level is no longer the exclusive preserve of states and international organizations. The proliferation of private certification initiatives – the reach of which defies territorial boundaries – has heralded an era of transnational fisheries governance. Whereas the interactions between private standards and national regulation have attracted scholarly attention, the function of international law in the context of transnational fisheries governance is largely unexplored. This article maps the interactions between international fisheries law and the most prominent among private certification standards, namely the Marine Stewardship Council Fisheries Standard and Guidance (MSC FSG). The article proposes a methodology to assess such interactions at the stage of norm development and argues that the interactions between the two regimes are multidirectional and complex. International law serves as a model for private standard setting and as a yardstick for private decision making. Conversely, the MSC FSG has acted as a model for the Food and Agriculture Organization of the United Nations Ecolabelling Guidelines. Moreover, the MSC FSG may constitute a benchmark for resolutions adopted by regional fisheries management organizations. The MSC FSG, in incorporating international fisheries law, affirms the latter's resilience as a global point of reference for the management of fisheries globally. Yet, at the same time, by prompting states to comply with their international obligations in order to secure market access for their fishing industry, the MSC FSG may be exposing the inability of international law to generate compliance autonomously.

Keywords: International fisheries law, Transnational fisheries governance, Marine Stewardship Council (MSC), Indian Ocean Tuna Commission (IOTC), Private fisheries certification

1. INTRODUCTION

Never before have people consumed so much fish or relied so much on fishery. World per capita fish consumption has spiked from an average of 9.9 kilograms (kg) in the

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1960s to 19.7 kg in 2013,[1] and fish now accounts for about 17% of the global population's intake of animal protein.[2] Correspondingly, the global total capture fishery production in marine waters amounted to 81.5 million tonnes in 2014.[3] Such production would have been impossible without key advancements in the technology of catching and processing fish, ranging from the use of sonars and satellites, freezer/processing vessels, to nylon fishnets.

These developments have taken their toll on the health of the oceans' fish stocks. According to the Food and Agriculture Organization of the United Nations (FAO), the number of stocks fished at unsustainable levels has seen a constant increase since 1990, peaking at 32.5% of the assessed stocks in 2008, before declining slightly to 31.4% in 2013.[4] The picture is even bleaker if one considers the wider impact of overfishing on marine biodiversity. Scientists have noted an alarming decline in sea turtles, marine mammals, sharks, and seabirds that are caught and discarded as bycatch.[5] The situation is further complicated by phenomena associated with climate change, such as ocean acidification and rise in sea temperatures, which result in exacerbating the stress placed on the growth, reproduction, and behaviour of fish stocks.[6]

The critical state of the world's fish stocks reveals a lack of resolve – and in some cases of capacity – on behalf of both coastal and flag states to enact and implement the requisite management and conservation measures.[7] If anything, the treatment of fish as an open-access common property resource, most aptly reflected in the long-established freedom of fishing on the high seas, has acted as a disincentive to tackle the problem through international law.[8] It should come as no surprise, then, that international law rules on fisheries, reflecting this lack of resolve, have met with criticism.[9]

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1 Food and Agriculture Organization of the United Nations (FAO), *The Status of World Fisheries and Aquaculture 2016: Contributing to Food Security and Nutrition for All* (FAO, 2016), p. 2. This surge in fish consumption is especially notable in developing regions and low-income food-deficit countries, and it can be attributed to a variety of factors, such as improved distribution channels, growing demand linked to population growth, rising incomes, and urbanization.

2 Ibid., p. 4.

3 Ibid.

4 Ibid., p. 5.

5 For a definition of 'bycatch' and relevant data, see E. Gilman, K. Passfield & K. Nakamura, *Performance Assessment of Bycatch and Discards Governance by Regional Fisheries Management Organizations* (International Union for Conservation of Nature, 2012), pp. 1–3.

6 See P. Munday et al., 'Replenishment of Fish Populations is Threatened by Ocean Acidification' (2010) 107(29) *Proceedings of the National Academy of Sciences*, pp. 12930–34.

7 Y. Tanaka, *The International Law of the Sea*, 2nd edn (Cambridge University Press, 2015), p. 232.

8 For an analysis of the implications of treating fish as a common property natural resource, see R. Churchill & V. Lowe, *The Law of the Sea*, 3rd edn (Manchester University Press, 1999), pp. 281–2.

9 Tanaka, n. 7 above, p. 265. It is now accepted, with a measure of hindsight, that 'fisheries conservation is probably the least successful part of the 1982 UN Convention on the Law of the Sea [UNCLOS, n. 57 below]: a triumph at best of hope over experience': P. Birnie, A. Boyle & C. Redgwell, *International Law and the Environment*, 3rd edn (Oxford University Press, 2009), p. 704. In the same vein, Churchill has highlighted that UNCLOS does not 'sufficiently [recognize] the migratory nature of fish. Very few fish stocks are confined to the [Exclusive Economic Zone] EEZ of one state'. Nonetheless, when it comes to the conservation of marine resources in the EEZ, UNCLOS imposes upon coastal states obligations that are 'too vague' and which allow states 'too much discretion': R. Churchill, '10 Years of the UN Convention on the Law of the Sea: Towards a Global Ocean Regime? A General Appraisal' (2005) 48 *German Yearbook of International Law*, pp. 81–116, at 108. Following the adoption of UNCLOS, a number of problems arose, which 'brought to the fore shortcomings in the global fisheries regime provided by the [Convention]. The result was the adoption, during

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The failure of governments to guarantee the conservation of fish resources has rallied private actors to the cause. Since the mid-1990s a constellation of non-governmental organizations (NGOs) and industry associations have sought to effect change in the management of fisheries, by conditioning consumer choice or putting pressure on governments, using a variety of methods such as ecolabels, boycotts, and seafood awareness campaigns.[10] Fisheries management on the international plane has ceased to be the exclusive preserve of governments and international organizations. States, international organizations and regional fisheries management bodies coexist and operate in parallel with private certification and sustainability programmes, as do international and regional treaties, non-binding international instruments, and private certification standards. Thus, conventional distinctions between the 'international/global' and the 'domestic/local', the 'state' and the 'non-state', the 'rule-bound' and the 'free' come under increasing pressure.[11] We are gradually moving from fisheries management on the international plane to global[12] or transnational fisheries governance.[13]

The problem with fisheries, then, does not stem from a 'governance void', understood as the absence of rules or actors, whether international or other. On the contrary, the key challenge is to make sense of the complexities and fractures in the decentralized architecture of transnational fisheries governance with a view to rendering such governance more effective. Responding to this need, scholars have shifted their focus to the interactions between private fisheries' sustainability initiatives and domestic law.[14] Yet, little research has been undertaken on the interactions between public international law and said initiatives. The purpose of this article is to fill this gap by shedding light on the interactions between international law on fisheries and the most prominent private fisheries certification standard in terms of coverage – namely, the Marine Stewardship Council Fisheries Standard and Guidance (MSC FSG).

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the first half of the 1990s, of a number of global instruments for regulating fishing activities': E. Hey, 'Global Fisheries Instruments Adopted in the Post-UNCLOS III Period', in E. Hey (ed.), *Developments in International Fisheries Law* (Kluwer Law International, 1999), pp. 3–10, at 3.

10 For a comprehensive overview of market-based seafood sustainability initiatives, see J. Jacquet et al., 'Conserving Wild Fish in a Sea of Market-Based Efforts' (2009) 44(1) *Oryx – The Journal of International Conservation*, pp. 45–56.

11 On these distinctions in the field of environmental protection, see V. Heyvaert & T.F.M. Etty, 'Introducing Transnational Environmental Law' (2012) 1(1) *Transnational Environmental Law*, pp. 1–11, at 2–7.

12 On the emergence of global fisheries governance, see M.G. Schechter & N.J. Leonard, 'Global Fisheries Governance', in M.G. Schechter, N.J. Leonard & W.W. Taylor (eds), *International Governance of Fisheries Ecosystems: Learning from the Past, Finding Solutions for the Future* (American Fisheries Society, 2008), pp. 3–33.

13 A. Kalfagianni & P. Pattberg, 'Exploring the Output Legitimacy of Transnational Fisheries Governance' (2014) 11(3) *Globalizations*, pp. 385–400.

14 See L. Gulbrandsen, *Transnational Environmental Governance: The Emergence and Effects of the Certification of Forests and Fisheries* (Edward Elgar, 2010), pp. 112–51; G. Auld, *Constructing Private Governance: The Rise and Evolution of Forest, Coffee, and Fisheries Certification* (Yale University Press, 2014), pp. 169–218, as well as the detailed case studies presented in D. Agnew, 'Case Study 1: Toothfish – An MSC-Certified Fishery', in T. Ward & B. Phillips (eds), *Seafood Ecolabelling: Principles and Practice* (Wiley-Blackwell, 2008), pp. 247–58; B. Phillips, L. Bourillón & M. Ramade, 'Case Study 2: The Baja California, Mexico, Lobster Fishery' in Ward & Phillips, ibid., pp. 259–68; J. Gilmore, 'Case Study 3: MSC Certification of the Alaska Pollock Fishery', in Ward & Phillips, ibid., pp. 269–86; F. Gale & M. Haward, *Global Commodity Governance: State Responses to Sustainable Forest and Fisheries Certification* (Palgrave Macmillan, 2011), pp. 161–72, 192–206, 223–32.

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The article starts by fleshing out the reasons behind the emergence of private fisheries certification, as well as describing the central role held by the MSC. It will then propose a methodology for examining the interactions between international law and private standards and apply it to assess the extent and nature of interactions between international law on fisheries and the MSC FSG. The key question is whether international law on fisheries acts as a model or a benchmark for the MSC FSG, and vice versa. Having examined the reciprocal impact between the two sets of norms, I will formulate hypotheses concerning the impact of private fisheries certification on international law. The key claim is that the MSC FSG draws substantially on pre-existing international rules, which arguably affirms the centrality of international law as a global benchmark, yet at the same time potentially highlights its shortcomings in effecting changes in state behaviour.

2. THE EMERGENCE OF PRIVATE FISHERIES CERTIFICATION

Over the last two decades, international environmental law and policy have grappled with a 'turn to the market'. Such turn has manifested itself in two inter-related developments: (i) the increasing use of market-oriented policy instruments in domestic and international law;[15] and (ii) the emergence of a constellation of private actors with a transnational reach that operate in the global market and seek to partake in environmental governance through the adoption and implementation of regulatory standards.[16] Both developments seem to reflect a belief that market mechanisms contribute to environmental protection with cost-effective solutions, which traditional state-led command-and-control approaches have failed to deliver.[17] At the same time, the market acts as the *locus* of those private actors' authority, which is granted through the supply chain.[18] The constitution of private authority on the international plane suggests that sovereign states – willingly or unwillingly – yield their monopoly on regulatory power to private actors, whose reach defies territorially bounded political constituencies.[19] The proliferation of private regulatory initiatives in the field of environmental protection heralds the advent of what has been termed

[15] For a taxonomy and analysis of the characteristics of the policy instruments used in respect of environmental protection, see P.H. Sand, 'Sticks, Carrots, and Games', in M. Bothe & P.H. Sand (eds), *Environmental Policy: From Regulation to Economic Instruments* (Martinus Nijhoff, 2003), pp. 3–36; R. Stewart, 'Instrument Choice', in D. Bodansky, J. Brunnée & E. Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), pp. 147–81; D. Bodansky, *The Art and Craft of International Law* (Harvard University Press, 2010), pp. 71–84; P. Sands & J. Peel, *Principles of International Environmental Law*, 3rd edn (Cambridge University Press, 2012), pp. 121–31.

[16] On the distinction between regulatory and non-regulatory private standards, see J. Morrison & N. Roht-Arriaza, 'Private and Quasi-Private Standard Setting', in Bodansky, Brunnée & Hey, ibid., pp. 498–527, at 498–9.

[17] On the correlation between dissatisfaction with command-and-control approaches and the turn to supplementary market-based mechanisms, see U. Beyerlin & T. Marauhn, *International Environmental Law* (Hart, 2011), p. 303.

[18] See B. Cashore et al., 'Can Non-State Governance "Ratchet Up" Global Environmental Standards? Lessons from the Forest Sector' (2007) 16(2) *Review of European Community and International Environmental Law*, pp. 158–72, at 161–2. See also S. Bernstein & B. Cashore, 'Nonstate Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?', in J. Kirton & M. Trebilcock (eds), *Hard Choices, Soft Law* (Ashgate, 2004), pp. 33–63, at 36.

[19] E. Benvenisti, *The Law of Global Governance* (Hague Academy of International Law, 2014), p. 36.

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'new governance' arrangements, at the core of which stand private actors operating on the basis of regulatory standards, which are non-legal from a formalistic point of view.[20]

The 'turn to the market' in fisheries governance was set in motion in 1996 by the decision of the World Wide Fund for Nature (WWF) to team up with Unilever to establish the MSC. In order to counter allegations that the WWF and Unilever essentially controlled the MSC, the latter established itself in 1997 as an independent charitable organization. The shift in governance structure was perceived as an essential step towards building the credibility of the MSC as a neutral body in a multi-stakeholder industry.[21]

The MSC is essentially a standard setter that offers a set of principles and criteria[22] against which fisheries[23] are evaluated by an independently accredited third-party body (known as the Conformity Assessment Body, or CAB). The certification of the fishery as MSC-compliant is the initial, crucial step, following which a third-party supply chain certification takes place,[24] which ensures the traceability of labelled certified seafood from fishery to final consumer.

At the heart of the MSC's operation lies the MSC FSG.[25] This represents the end product of an intensive consultation process involving more than 300 organizations and individuals, and is the benchmark against which the independent bodies assess applications for MSC certification. It comprises three Core Principles:[26]

- Principle 1: Sustainable target fish stocks
- Principle 2: Environmental impact of fishing
- Principle 3: Effective management

Each Principle is further broken down into a series of Performance Indicators (PIs), which represent the sustainability of the fishery. PIs in turn are based on three Scoring Guideposts (SGs). A score of between 80 and 100 makes for an unconditional pass; a score of between 60 and 75 marks a conditional pass (scoring can be assigned at five-unit intervals), whereas a fishery scoring under 60 fails the certification process.

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20 On the concept of new governance, K.W. Abbott & D. Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 *Vanderbilt Journal of Transnational Law*, pp. 501–78, at 503–12; J. Scott & D. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) 8(1) *European Law Journal*, pp. 1–18, at 5–6.

21 L. Gulbrandsen, 'The Emergence and Effectiveness of the Marine Stewardship Council' (2009) 33(4) *Marine Policy*, pp. 654–60, at 654.

22 T. Ward & B. Phillips, 'Ecolabelling of Seafood: Basic Concepts', in Ward & Phillips (eds), n. 14 above, pp. 1–37, at 16.

23 The fishery or Unit of Assessment (UoA) is defined as a target species captured using a specific fishing method in a geographical area.

24 The supply chain certification, which follows up on the fishery certification, is governed by the 'MSC Chain of Custody Standard: Default Version', Version 4.0, 20 Feb. 2015, available at: https://www.msc.org/documents/scheme-documents/msc-standards/msc-default-coc-standard-v4.

25 MSC FSG, Version 2.0, 1 Oct. 2014, available at: https://www.msc.org/documents/scheme-documents/fisheries-certification-scheme-documents/fisheries-standard-version-2.0.

26 Ibid., p. 6.

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In order for a fishery to become certified, the weighted average of the Performance Indicators must be 80 or more for each of the three Core Principles.

Sutton lucidly encapsulates the rationale behind the establishment of the MSC as follows: 'Governments, laws and treaties aside, the market itself will begin to determine the means of fish production'.[27] The key assumption here is that market forces can be harnessed for positive change in the management of fisheries. According to the MSC, its purpose is to 'create market initiatives to reward sustainable practices'.[28] By setting up a market for sustainable fish, the MSC conditions purchasing preferences and thus increases global demand and market access for certified seafood. In this manner, it provides 'the critical incentives needed for fisheries to undergo the … assessments required in the MSC program'.[29] Fisheries operating below the MSC standard, which nonetheless want to become certified in order to reap market rewards, are then required to improve their practices in order to become eligible for participation.

The success of certification hinges on the consumer. Indeed, without consumer demand there would be no market for certified products.[30] Yet, certification goes beyond consumer demand to reflect corporate social responsibility (CSR) considerations of fish producers and retailers. Businesses may have economic reasons to supply certified products, even when consumers do not have a pre-existing demand for them.[31] In this sense, certification creates a potential marketing advantage. Certification can provide evaluation and endorsement of a product; it can act as a consumer information and protection tool,[32] while having the potential to promote the objective of ecologically sustainable harvesting and fisheries management practice.[33] Finally, and perhaps more significantly, the MSC sees itself as complementary to the efforts of governments and environmental groups towards sustainability of fisheries.[34]

The MSC is not the sole private fisheries certification initiative. Nonetheless, it has paved the way for a proliferation of similar initiatives and it is widely regarded as the leader in the field: 283 fisheries in 30 states have been certified by the MSC, with 88 more in the process of certification, which translates into close to 10% of the annual

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27 M. Sutton, 'Harnessing Market Forces and Consumer Power in Favour of Sustainable Fisheries', in T. Pitcher, P. Hart & D. Pauly (eds), *Reinventing Fisheries Management* (Springer, 1998), pp. 125–36, at 133.

28 MSC, 'Harnessing Market Forces for Positive Environmental Change: The MSC Theory of Change', p. 1, available at: https://www.msc.org/documents/msc-brochures/msc-theory-of-change. See D. Constance & A. Bonnano, 'Regulating the Global Fisheries: The World Wide Fund, Unilever, and the Marine Stewardship Council' (2000) 17(2) *Agriculture and Human Values*, pp. 125–39, at 130.

29 MSC, ibid.

30 C. Roheim, 'The Economics of Ecolabelling' in Ward & Phillips (eds), n. 14 above, pp. 38–57, at 39.

31 See W. Martin, 'Marine Stewardship Council: A Case Study in Private Environmental Standard-Setting' (2014) 44(2) *Environmental Law Reporter News & Analysis*, pp. 10097–101, at 10098.

32 On the MSC specifically, see N.L. Gutiérrez et al., 'Eco-Label Conveys Reliable Information on Fish Stock Health to Seafood Consumers' (2012) 7(8) *PLoS ONE*, e43765.

33 C. Roheim & J. Sutinen, 'Trade and Marketplace Measures to Promote Sustainable Fishing Practices', International Centre for Trade and Sustainable Development, Issue Paper No. 3, May 2006, p. 18, available at: http://www.vliz.be/imisdocs/publications/113442.pdf.

34 MSC, n. 28 above.

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global harvest of wild capture fisheries carrying the MSC label.[35] The success of the MSC, as reflected in the size of its uptake, justifies it taking centre stage in an account of the interactions between international law and private certification standards.

3. INTERACTIONS BETWEEN INTERNATIONAL LAW AND PRIVATE STANDARDS: A METHODOLOGICAL PRIMER

A survey of the interactions between international law and private standards from the perspective of the former is bound to stumble across an obvious preliminary hurdle: standards promulgated by private entities devoid of international legal personality are not part of the traditionally recognized sources of international law.[36] Of course, this should not be taken to mean that private standards necessarily fall outside the ambit of existing international law rules. To name but one example, Article 4.1 of the Technical Barriers to Trade Agreement (TBT Agreement)[37] of the World Trade Organization (WTO) provides for the obligation of states to 'take such reasonable measures as may be available to them to ensure that … non-governmental standardizing bodies within their territories ... accept and comply with [the] Code of Good Practice', which is annexed to the Agreement.[38] In other words, international law may be used to 'discipline'[39] or regulate private standard-setting activities. Still, the dominant narrative in international legal scholarship reflects an attachment to the public/private divide, following which international legal rules are perceived as hard law and private standards constitute soft law. They occupy two parallel and distinct spaces of operation.[40]

It should come as no surprise, then, that international law theory is reticent regarding the potential interactions between international law rules and private standards.[41] Private standards are not a legal order with which international law can interact. On the contrary, the concept of interaction has been employed by international lawyers to describe the relationships between international and domestic law.[42] Such use of the concept could arguably be reprised as the

35 For current data, see: https://www.msc.org/global-impacts/key-facts-about-msc.

36 A. Peters, L. Koechlin & G. Fenner Zinkernagel, 'Non-State Actors as Standard Setters: Framing the Issue in an Interdisciplinary Fashion', in A. Peters et al. (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009), pp. 1–32, at 4, note that '[s]tandard setting by non-state actors has so far not been explicitly treated in international legal scholarship'.

37 Marrakesh (Morocco), 15 Apr. 1994, in force 1 Jan. 1995, available at: https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

38 Ibid.

39 See J. Wouters & D. Geraets, 'Private Food Standards and the World Trade Organization: Some Legal Considerations' (2012) 11(3) *World Trade Review*, pp. 479–89, at 486.

40 For a forceful criticism of this view, see N. Affolder, 'The Market for Treaties' (2010) 11(1) *Chicago Journal of International Law*, pp. 159–96.

41 Cf. K.W. Abbott & D. Snidal, 'Law, Legalization, and Politics: An Agenda for the Next Generation of IR/IL Scholars', in J.L. Dunoff & M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2013), pp. 33–56, at 48–9.

42 See H.F. van Panhuys, *Relations and Interactions between International and National Law* (Sijthoff, 1964); L. Erades, *Interactions between International and Municipal Law* (T.M.C. Asser Press, 1993).

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springboard for an interactional approach to the relationship between international law and private standards.

An interesting account of what is meant by 'interaction' between international and domestic law is provided by Arangio-Ruiz, according to whom the prima facie impression of an interaction is one of 'coexistence of … two sets of norms … within a single normative context'.[43] When an interaction 'occurs in practice … it manifests itself … in terms of a simultaneous impact of international and domestic norms'.[44] In similar terms, Ress suggests that a legal understanding of the concept of 'interaction' should include the actions and responses developed between different norms. For Ress the object of observation is not so much the development of causal linkages between the two norms, but of the existence of hermeneutical linkages.[45] Besides, an interaction should not be perceived as a simultaneous reciprocal impact 'frozen in time', but in a dynamic manner, extended to cover the consequences of such impact. Admittedly, the insight offered by international law theory to the concept of 'interaction' is somewhat limited, as it deals specifically with the actions and responses developed exclusively between formally legal norms, albeit stemming from different sources.

Regulation scholars have sought to provide a more dynamic take on the interactions between private regulatory standards and domestic and international law. Perhaps the most compelling framework in this respect is the one set forth by the Transnational Business Governance Interactions (TBGI) group.[46] At the heart of this framework lies the need to analyze how the myriads of non-state/private regulatory initiatives with a transnational reach interact with one another, as well as with public forms of regulation.[47] In the TBGI context:

> *Interactions* are mutual actions and responses of individuals, groups or institutions, structures or systems. … [These interactions] can be intentional or accidental, symmetrical or asymmetrical … they take many forms (eg competition, cooperation, meta-regulation), exploit different causal pathways (eg modeling, reciprocal adjustment, conditional rule referencing), produce different patterns … and have direct effects.[48]

In other words, the TBGI framework draws attention to the reasons, mechanics, and effects of interactions. Significantly, the TBGI framework further introduces the following two distinctions. Firstly, it stresses that interactions can be analyzed at various levels: namely, a micro-level (among individual actors or norms); a meso-level (among regulatory

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43 G. Arangio-Ruiz, 'International Law and Inter-Individual Law', in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide between National and International Law* (Oxford University Press, 2009), pp. 15–51, at 16.

44 Ibid.

45 G. Ress, 'Wechselwirkungen zwischen Völkerrecht und Verfassung bei der Auslegung völkerrechtlicher Verträge', in G. Ress & C. Schreuer (eds), *Wechselwirkungen zwischen Völkerrecht und Verfassung bei der Auslegung völkerrechtlicher Verträge* (Mueller, 1981), pp. 7–60, at 16.

46 B. Eberlein et al., 'Transnational Business Governance Interactions: Conceptualization and Framework for Analysis' (2014) 8(1) *Regulation and Governance*, pp. 1–21.

47 Ibid., p. 2.

48 S. Wood et al., 'The Interactive Dynamics of Transnational Business Governance: A Challenge for Transnational Legal Theory (2015) 6(2) *Transnational Legal Theory*, pp. 333–69, at 339 (emphasis in original).

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schemes or regimes); and a macro-level (among regime complexes).[49] Secondly, interactions can be studied at 'different points in regulatory governance processes [namely,] problem definition and agenda-setting; norm development; implementation; monitoring and information gathering; enforcement; and review and evaluation'.[50]

4. MAPPING THE INTERACTIONS BETWEEN INTERNATIONAL LAW ON FISHERIES AND THE MSC FISHERIES STANDARD AND GUIDANCE

The current analysis takes as its point of departure the need to identify and comprehend the nature, extent and function of interactions between the international law on fisheries and private fisheries certification standards, often overlooked in the literature. The focus rests on the MSC FSG as the most prominent among private fisheries certification standards, and on the international law on fisheries, including treaty law and secondary law of international organizations.[51] Moreover, the analysis examines interactions at the stage of norm development, addressing the question whether international law contributes to the formation of the MSC FSG, and vice versa. Of course, norms, whether international legal rules or private standards, are socially constructed. They are the result of choices made by their drafters. The interactions between the two sets of norms therefore also speak to the choices and, indeed, the parallel interactions between their drafters – namely, the MSC on the one hand, and states on the other, in their capacity as members of global or regional organizations, such as the FAO or regional fisheries management bodies. Indeed, it is submitted that, in order to comprehend the impact of one set of norms on the other, these parallel interactions between the relevant actors need to be taken into consideration.

4.1. *International Law as a Model for Private Standard Setting*

The adoption of the MSC FSG in 1998, following consultations with a wide range of stakeholders, constitutes a milestone in the history of the MSC. During these consultations, the FAO Code of Conduct for Responsible Fisheries (CCRF)[52] served as a source of inspiration.[53] The MSC acknowledges this relationship on its website, noting that the MSC FSG is 'consistent with' the FAO CCRF.[54] The reliance placed by the MSC FSG on the CCRF, at the time of the former's drafting, is actually in accord with the objective of the latter. In adopting the CCRF, the FAO sought to present a 'blueprint' of principles and standards for responsible fisheries to be used

49 Ibid.

50 Ibid., p. 340.

51 Secondary law of international organizations comprises the acts produced by those organizations. Such acts derive their legal effect from the founding treaty of the international organization in question, which allocates competence to the organization to pass said legal acts: see M. Benzing, 'International Organizations or Institutions, Secondary Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of International Law* (Oxford University Press, 2014), available at: http://opil.ouplaw.com/home/EPIL.

52 FAO Doc. C95/20 (Rev.1), 29 Sept. 1995, available at: http://www.fao.org/docrep/005/v9878e/v9878e00.htm.

53 M. Sutton, 'The Marine Stewardship Council: New Hope for Marine Fisheries' (1996) 19(3) *NAGA: The ICLARM Quarterly*, pp. 10–2, at 12.

54 See https://www.msc.org/about-us/our-history/1997-1999-how-it-all-began.

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not only by states, but also by virtually everyone in the fisheries industry.[55] Indeed, the CCRF expressly states that one of the Code's objectives is to:

> serve as an instrument of reference to help states to establish or to improve the legal and institutional framework required for the exercise of responsible fisheries …[as well as] to provide standards of conduct for all persons involved in the fisheries sector.[56]

These principles and standards were culled by the CCRF drafters from international fisheries law, as encapsulated in the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[57] and the 1995 Agreement for the Implementation of the Provisions of the UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement or FSA).[58] Yet, the aim here was not to recast these principles as international law obligations. On the contrary, the CCRF is a 'voluntary' instrument.[59] The FAO, in adopting the CCRF, sought to *transcribe* international law rules into a set of guidelines that could be applied beyond the traditional state-centric context.[60]

A cursory reading of the MSC FSG Core Principles[61] lays bare the fact that they are not only consistent with, but also modelled on the principles of the CCRF and, by implication, the UNCLOS and the FSA. Core Principle 1, entitled 'Sustainable target fish stocks', states that a 'fishery must be conducted in a manner that does not lead to over-fishing or depletion of the exploited populations and, for those populations that are depleted, the fishery must be conducted in a manner that demonstrably leads to their recovery'. The formulation of this Principle closely follows that of Article 6.3 FAO CCRF, as well as Articles 61(2) UNCLOS and 5(a) FSA. Similarly, Core Principle 2, entitled 'Environmental impact of fishing', essentially posits the 'ecosystem approach' as a basic rule of thumb in achieving sustainable fisheries, reflecting not only the wording of Article 6.2 FAO CCRF, but also Article 5(c) FSA. In sum, international fisheries law, as transcribed by the FAO in the CCRF, provides the model on which the formulation of the MSC FSG rests.

4.2. *International Law as a Set of Guidelines for Private Decision Making*

The modelling of private standards upon existing international rules is only part of the story. International law may further be incorporated *by explicit reference* into the text of private standards so as to serve as a guideline for private decision making.

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55 CCRF, n. 52 above, Art. 1.2.

56 Ibid., Art. 2(c) & (j).

57 Montego Bay (Jamaica), 10 Dec. 1982, in force 16 Nov. 1994, available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm.

58 New York, NY (United States), 4 Aug. 1995, in force 11 Dec. 2001, available at: http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm.

59 CCRF, n. 52 above, Art. 1.1.

60 J. Friedrich, *International Environmental 'Soft Law'* (Springer, 2013), pp. 345–6; G. Moore, 'The Code of Conduct for Responsible Fisheries', in Hey (ed.), n. 9 above, pp. 85–105, at 104–5; W. Edeson, 'Towards Long-Term Sustainable Use: Some Recent Developments in the Legal Regime of Fisheries', in A. Boyle & D. Freestone (eds), *International Law and Sustainable Development* (Oxford University Press, 1999), pp. 165–203, at 200.

61 MSC FSG, n. 25 above, p. 6.

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The referencing technique stands out in Core Principle 3, which states that the applicant fishery has to be 'subject to an effective management system that respects local, national and international laws and standards'. Core Principle 3 does not espouse the language of an international law rule; it includes a *renvoi* to 'international laws', suggesting that the latter should be used as a benchmark against which to measure whether the fishery should be certified. In order to come to a decision on certification, the independent assessment body is called upon to gauge whether

> [the] management system exists within an appropriate and effective legal and/or customary framework which ensures that it: (a) is capable of delivering sustainability in the [applicant fishery], (b) observes the legal rights created explicitly or established by custom of people dependent on fishing for food, and (c) incorporates an appropriate resolution framework.[62]

International law rules play a fundamental role in this assessment. Thus, a fishery subject to international cooperation for the management of the stock (shared, straddling, highly migratory, high seas non-highly migratory fish stock) may be certified only if there exists at a minimum a level of cooperation among the various authorities and actors involved in the management based on bilateral and/or multilateral arrangements, which meet the requirements of cooperation as stipulated under Articles 63(2), 64, 118, 119 UNCLOS and Article 8 FSA.[63] What is more, such cooperation 'shall at least deliver the intent of [Article 10 FSA] … relating to: (a) the collection and sharing of scientific data, (b) the scientific assessment of stock status, and (c) development of scientific advice'.[64] For a fishery to qualify as 'nearly perfect' and be certified unconditionally, the requirements are even more stringent. There has to be 'binding legislation governing comprehensive international cooperation under the obligations of UNCLOS Articles 63(2), 64, 118, 119 and FSA Articles 8 and 10', whereas cooperation in the management of the fishery has to take place under the auspices of an 'RFMO [regional fisheries management organization]/arrangement', the actions of which 'demonstrably and effectively deliver FSA Article 10'.[65]

A similar referencing takes place with regard to Core Principle 1 on sustainable target stocks. The Principle itself does not spell out how the sustainability of the stock is to be judged. If one turns to the relevant PIs, it becomes apparent that the MSC Standard adopts as a benchmark for fisheries management the principle that has for long dominated international law – namely, the principle of 'maximum sustainable yield' (MSY). In order for a fishery to be certified, the MSC Standard requires in principle that the respective fish stock is 'fluctuating around a level consistent with MSY'.[66] The MSY, which refers to the 'highest harvest that can be taken from a self-generating stock of animals year after year while still maintaining the average size of

62 Ibid., p. 66.
63 Ibid., p. 67.
64 Ibid., p. 68.
65 Ibid., p. 69
66 Ibid., p. 14. In this respect, see D.J. Agnew et al., 'The MSC Experience: Developing an Operational Certification Standard and a Market Incentive to Improve Fishery Sustainability' (2013) 71(2) *ICES Journal of Marine Science*, pp. 216–25.

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the stock',[67] aims at 'maintaining the productivity of the oceans by permitting taking of only that number of fish from a stock that is replaced by the annual rate of new recruits entering the stock'.[68] The MSY forms the backbone of fisheries management and is expressly referred to in Article 7.2 CCRF, and further in Articles 61(3), 119(1)(a) UNCLOS and 5(b) FSA.

4.3. *Private Standards as a Model for International Lawmaking*

The initial reactions by governments to the establishment of the MSC and the adoption of the MSC FSG were far from positive, despite the fact that the MSC FSG echoes pre-existing international law rules on fisheries. As noted in a report of the Organisation for Economic Co-operation and Development (OECD):

> Many governments and groups representing the fish-harvesting segment of the industry were initially highly skeptical of, and in a few cases actively hostile towards the MSC. The very notion that a single set of standards could be developed and applied to the diverse conditions under which fish were harvested around the world … was ridiculed, even though these standards had drawn heavily on an agreed set of international norms.[69]

As a response to the adoption of the MSC FSG, Nordic states petitioned the FAO to establish an FAO-led labelling scheme, whereas Latin American states argued that eco-labelling of fisheries should be dealt with under the auspices of the WTO.[70] Eventually, it was agreed that the FAO should commence developing a set of eco-labelling guidelines, which were adopted in 2005.

The FAO Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries (FAO Guidelines)[71] are admittedly a novelty. They constitute a non-binding instrument developed by an international organization, which establishes minimum procedural and substantive standards to be followed by private certification and eco-labelling schemes. In a sense, the FAO Guidelines may be considered an effort on behalf of states to reassert their authority over private certifiers and eco-labels.[72] At the same time, by creating an equal playing field for such certifiers and eco-labels, the FAO Guidelines, if anything, bolster their legitimacy on the international plane.[73] As documented in detail by Gulbrandsen, the adoption of the FAO Guidelines has, to a certain extent, curbed states' reservations towards private certification, while they have contributed to the marked growth of the MSC since 2005.[74]

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67 Birnie, Boyle & Redgwell, n. 9 above, pp. 590–1.

68 Ibid.

69 OECD, *Environmental Requirements and Market Access* (OECD, 2006), p. 254.

70 The reactions of states to the MSC FSG are documented in Gulbrandsen, n. 21 above, p. 657, R. Willmann, K. Cochrane & W. Emerson, 'FAO Guidelines for Ecolabelling in Wild-Capture Fisheries', in Ward & Phillips (eds), n. 14 above, pp. 58–80, at 59.

71 FAO Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries, 2005, revised in 2009, available at: http://www.fao.org/docrep/013/i1948e/i1948e08.pdf.

72 Gulbrandsen, n. 21 above, p. 657.

73 Willmann, Cochrane & Emerson, n. 70 above, p. 79; Martin, n. 31 above, p. 10098.

74 L. Gulbrandsen, 'Dynamic Governance Interactions: Evolutionary Effects of State Responses to Non-State Certification Programs' (2014) 8(1) *Regulation & Governance*, pp. 74–92, at 84–6.

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What is striking in respect of the FAO Guidelines is how closely they mirror the structure of the MSC Standard, as opposed to that of the CCRF. First of all, the FAO Guidelines affirm and validate the link between private eco-labelling and international law, by stating that eco-labelling and certification schemes for marine capture fisheries should be 'consistent' with the UNCLOS, the FSA and the FAO CCRF.[75] What is more, the Guidelines stipulate expressly that 'the normative basis of standards of sustainable fisheries *is given* by international fisheries instruments and applicable national legislation'.[76] Furthermore, the FAO Guidelines build on a set of minimum substantive requirements and criteria for eco-labels – namely, the existence of a management system, which operates in compliance with national and international laws;[77] the sustainability of the stocks in question;[78] and the prevention of adverse impacts of the fishery on the ecosystem,[79] which reflects an ecosystem approach. It is obvious that the three key substantive criteria of the FAO Guidelines correspond with the three Core Principles of the MSC FSG analyzed above. The similarities vindicate the view that there has been 'a lot of back and forth between the MSC and the international level'.[80]

4.4. *Private Standards as Potential Guidelines for International Decision Making*

One of the conditions of MSC certification is the existence of an effective fisheries management system that respects international law. International legal rules on fisheries in this sense pre-date any certification, and it is upon such rules that certification grafts. Nonetheless, the relationship between private certification and international law is not always linear. Indeed, the operation of MSC certification conversely may result in the creation of international legal rules. The potential impact of the MSC FSG on international rule making is clearly exhibited in the recent adoption on behalf of the intergovernmental Indian Ocean Tuna Commission (IOTC) of Resolution 16/02 'On Harvest Control Rules for Skipjack Tuna in the IOTC Area of Competence'.[81]

The roots of Resolution 16/02 can be traced back to the efforts on behalf of the Maldives Seafood Processors and Exporters Association (MSPEA) to have the Maldives pole-and-line skipjack tuna fishery certified by the MSC. The independent CAB set up to review the MSPEA application determined the fishery to be MSC-compliant, yet outlined a number of conditions, among others responding to the lack of 'explicit regional harvest control rules' on skipjack tuna. More specifically,

75 FAO Guidelines, n. 71 above, Guideline 2.1.

76 Ibid., Guideline 42 (emphasis added).

77 Ibid., Guidelines 28–29.

78 Ibid., Guideline 30.

79 Ibid., Guideline 31.

80 P. Santacoloma, 'Nexus between Public and Private Food Standards: Main Issues and Perspectives', in A. Meybeck & S. Redfern (eds), *Voluntary Standards for Sustainable Food Systems* (FAO, 2014), pp. 11–23, at 20.

81 IOTC Resolution 16/02, 26 Nov. 2016, available at: http://www.iotc.org/cmm/resolution-1602-harvest-control-rules-skipjack-tuna-iotc-area-competence.

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the CAB proposed that '[f]ormal appropriately precautionary harvest control rules (HCRs) must be adopted and implemented for the skipjack fishery by the IOTC'.[82]

The CAB Report goes on to lay out a detailed plan of action to be followed by the applicant client MSPEA and, surprisingly, the relevant Maldives state authorities. As is made clear in the Report, the client consulted 'both the Ministry of Fisheries and Agriculture and the [Marine Research Centre] and [has] secured commitment to meeting the […] plan'.[83] By the first annual audit, the client has to provide the Assessment Body with 'documented evidence that the client and representatives of the Government of the Maldives at the IOTC have promoted the need to define formal HCRs with IOTC related to the definition of interim biological reference points for skipjack tuna'.[84] In order to meet this milestone,

> Maldives shall: … consult with IOTC Secretariat … with the objective of establishing an agreed position on the adoption of harvest control rules … There will be a strong liaison between Maldives, other [Parties] who support the initiative to develop Harvest Control Rules and Strategies and the IOTC Secretariat.[85]

The fourth milestone to be reached is the provision by the certification client of documented evidence that HCRs have been implemented and there is a clear basis for considering that '*they will be successful in achieving the desired outcome and that they have taken into account the main uncertainties*'.[86] To this end, the Maldives authorities are called upon to 'contribute as required to IOTC meetings and workshops to promote the development of appropriate harvest control rules', 'lobby IOTC secretariat and members' with a view to providing 'implementation, through IOTC, of tested [HCRs]' designed to meet the minimum requirements of an SG80 score, in accordance with the MSC FSG.

In sum, the 2012 Final Report of the CAB requested the Maldives to lead an effort in the context of a regional fisheries body towards the adoption of HCRs for skipjack tuna, designed to meet the MSC requirements. The adoption of the aforementioned Resolution 16/02 is the culmination of such a Maldives-led effort since 2013.

The adoption of HCRs for skipjack tuna by the member states of the IOTC can be seen as forming part of the IOTC mandate, since the IOTC is tasked to 'adopt … conservation and management measures, to ensure the conservation of the stocks … and to promote the objective of their optimum utilization'.[87] Yet, it would be difficult to downplay the role of MSC certification in the adoption of Resolution 16/02. It was acknowledged early on that the Maldives' effort towards the adoption of HCRs was

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82 Intertek/Moody International, 'Pole and Line Skipjack Fishery in the Maldives', Public Certification Report, Version 5, Nov. 2012, p. 119, available at: https://fisheries.msc.org/en/fisheries/maldives-pole-line-tuna/@@assessments.

83 Ibid.

84 Ibid.

85 Ibid., p. 120.

86 Ibid., p. 119 (emphasis added).

87 Art. V 2(c) of the Agreement for the Establishment of the Indian Ocean Tuna Commission, Rome (Italy), 25 Nov. 1993, in force 27 Mar. 1996, available at: ftp://ftp.fao.org/Fi/DOCUMENT/iotc/Basic/IOTCA_E.pdf.

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aimed at maintaining MSC certification.[88] The Management Strategy Evaluation for the skipjack tuna fishery submitted to the IOTC Scientific Committee was drawn up by the Maldives in association with a number of non-state partners, including the 'Maldives MSC client, MSPEA'.[89] Finally, the actual HCRs adopted in relation to the Maldives skipjack tuna fishery build on the default reference points set out by the MSC FSG. According to Articles 3 and 4 of Resolution 16/02, the biomass limit reference point is 20% of the unfished spawning biomass, whereas the biomass target reference point is 40% of the unfished spawning biomass. Thus, in adopting Resolution 16/02, the IOTC clothed the reference points espoused by the MSC[90] in an international law mantle, albeit implicitly.

5. THE SIGNIFICANCE OF INTERACTIONS FROM THE PERSPECTIVE OF INTERNATIONAL LAW

The preceding analysis reveals deep and intricate interactions between the MSC FSG and international law on fisheries. These interactions are the result of choices made by the MSC, the FAO, RFMOs, as well as states. These interactions first and foremost affirm that the divide between international law and private fisheries certification standards is a porous one, allowing room for reciprocal impact. As once remarked by Brownlie in the context of an analysis of corporate codes of conduct, '[t]here is no sharp line between hard law and other things'.[91] This means that private standards, such as the MSC FSG, neither constitute themselves nor operate in an airtight vacuum, independently of existing forms of public regulation, especially with respect to such a densely regulated social field as fisheries management.

5.1. *Affirming the Resilience of International Legal Rules*

The emergence of private standards does not give rise to a zero-sum relationship between private and public forms of regulation. Early analyses viewed the emergence of private standard setting on the international plane as a result of globalizing forces, which signalled the decay or retreat of the state.[92] In short, the exercise of regulatory authority on behalf of private actors was seen as a 'power shift' from states to non-state actors.[93] The above analysis challenges this assumption. Not only does the MSC FSG not erode the role of the state, but it also presupposes the existence and effective implementation of domestic and international law by state authorities, as exemplified

88 See M.S. Adam, R. Sharma & N. Bentley, 'Progress and Arrangements for Management Strategy Evaluation of Indian Ocean Skipjack Tuna', paper submitted to the 15th Working Party of Tropical Tuna, 23–28 Oct. 2013, IOTC-2013-WPTT15-33.

89 Report of the 18th Session of the IOTC Scientific Committee, Doc. IOTC–2015–SC18–R[E] (2015), p. 28.

90 Cf. the default reference points, MSC FSG, n. 25 above, pp. 153–6.

91 I. Brownlie, 'Legal Effects of Codes of Conduct for MNEs', in N. Horn (ed.), *Legal Problems of Codes of Conduct for Multinational Enterprises* (Kluwer, 1980), pp. 39–43, at 42.

92 See O. Schachter, 'The Decline of the Nation State and its Implications for International Law' (1997) 36(7) *Columbia Journal of Transnational Law*, pp. 7–23, at 8–12; more generally, S. Strange, *The Retreat of the State* (Cambridge University Press, 1996).

93 J. Matthews, 'Power Shift' (1997) 76(1) *Foreign Affairs*, pp. 50–66.

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by MSC FSG Core Principle 3. Moreover, the adoption of private certification standards in the field of fisheries management has in no way detracted from the need for international law rules or slowed down their production.[94] On the contrary, the adoption of the MSC FSG and the ensuing proliferation of fisheries certification standards throughout the 1990s have coincided with a marked increase in the number of international legal instruments in the same field.[95]

Private certification standards can be seen to reaffirm and amplify the centrality of international law with regard to the task of fisheries management. So much can be gleaned from the reliance placed by the MSC on the language of international law, which, in the case of the MSC FSG, not only provides the model upon which the latter is cast, but further acts as a benchmark or guideline for private decision making. Lowe has hinted at this development, arguing for:

> [the] protrusion of international law into the non-international world … [i]t is the concepts and norms of international law as they permeate the world *outside* the classical, State-centred world of international law that are likely to be of increasing significance to most people, most of the time, in the future. The conceptual framework of international law is likely to become diffused throughout the vast web of non-State international dealings.[96]

A similar argument has been put forward by Howse and Teitel, who argue that 'international law may create benchmarks for a wide range of private decision making, and this even when ... the rules in question have not been explicitly addressed, at least not traditionally to nonstate actors'.[97] The function of international law, cast in this light, is undergoing a diversification. International law continues to provide the vocabulary and grammar of interstate relations,[98] but it further emerges as a model and a yardstick in a polycentric system of governance, comprising a constellation of private and hybrid actors.

According to the traditional narratives of the theory of sources of international law, private standards do not produce legal, let alone international obligations. In a similar vein, one could argue that the modelling of private standards upon international legal rules is not sufficient to elevate the former to the status of the source of international law, as this would run counter to the voluntary nature of the

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94 According to Klabbers & Piiparinen, there is a more general paradox at play here. As they suggest, 'it is uncontested that law has come to be ever more fine-grained and pervasive in everyday life … with little being left unregulated … Yet, simultaneously, other normative orders have gained in practical prominence': J. Klabbers & T. Piiparinen, 'Normative Pluralism: An Exploration', in J. Klabbers & T. Piiparinen (eds), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge University Press, 2013), pp. 13–34, at 26.

95 See J. Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press, 2011), pp. 200–37.

96 V. Lowe, 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?', in M. Byers (ed.), *The Role of Law in International Politics* (Oxford University Press, 2001), pp. 207–26, at 225.

97 R. Howse & R. Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 1(2) *Global Policy*, pp. 127–36, at 131.

98 I. Brownlie, 'The Reality and Efficacy of International Law' (1981) 52(1) *British Yearbook of International Law*, pp. 1–8, at 1–2.

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standard, as well as the private nature of the organization promulgating the standard. While such an argument may be valid from a formalistic point of view, it forecloses alternative conceptualizations of the international legal order, which respond to the diversification in the function of international law. Standards like the MSC FSG do not simply add new rules for previously ungoverned phenomena. They can be considered an additional layer of rules embedded in complex legal and regulatory orders.[99] In this sense, private standards do not displace, but operate on top of pre-existing international and domestic law, without being subsumed by either of the two.[100]

Yet, the affirmation of international law's resilience gives rise to a first paradox. According to many accounts, the emergence of private and hybrid actors in the field of environmental protection is in principle a result of a growing frustration with traditional forms of public regulation.[101] International law, reflecting the lack of resolve on behalf of states to manage and conserve fisheries, has failed to reverse the depletion of the ocean's fish stocks. Yet, if international law is part of the problem, then why do private certification organizations such as the MSC choose to rely on the language of international law? Admittedly, such a choice entails the risk of reproducing concepts and rules with severe limitations.

One key hypothesis speaks to legitimacy considerations.[102] While the proliferation of international legal rules may not have yielded the expected results in achieving the conservation of fisheries, the MSC has nonetheless absorbed international rules and principles with a view to gaining legitimacy for its own standards.[103] Thus, the success of the MSC depends on the development of programmes that will both work on the ground and prove acceptable to various audiences.[104] Reliance on pre-existing international law rules can thus be viewed as a condition for the legitimation of the MSC FSG, especially within the context of interstate fora. What is more, the drafters of the MSC FSG realized at the stage of norm development the significance of rendering the Standard operationally compatible with existing basic tenets of international fisheries law. The underlying assumption ultimately is that the latter still holds normative sway as a body of rules reflecting international consensus. The emergence of the MSC highlights the role of international law as a fundamental

99 See T. Bartley, 'Transnational Governance as the Layering of Rules' (2011) 12(2) *Theoretical Inquiries in Law*, pp. 517–42, at 518.

100 Bethlehem, in a similar vein, has called for a *lex congregato*, or a law of society structured as follows: '[F]irst, an instrument of traditional inter-state law that would act as a platform on which would stand a second tier set of protocols and principles addressing the application and mutual recognition of rules and standards relevant to particular conduct; thirdly, a further tier of industry-driven and derived minimum standards of conduct': D. Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25(1) *European Journal of International Law*, pp. 9–24, at 24.

101 Z. Tzankova, 'Interactions between Private and Public Resource Governance: Key Insights from the Fisheries Case' (2015) 6(1) *William & Mary Policy Review*, pp. 1–25, at 5–6; Agnew et al., n. 66 above, p. 216.

102 See Gulbrandsen, n. 74 above, pp. 86–7.

103 Friedrich, n. 60 above, p. 359.

104 E. Meidinger, 'Competitive Supragovernmental Regulation: How Could It Be Democratic?' (2008) 8(2) *Chicago Journal of International Law*, pp. 513–34, at 530.

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pillar for fisheries management on a global scale, as well as a key source of legitimacy.[105]

5.2. *Incentivizing Compliance with International Legal Rules*

In accordance with MSC FSG Core Principle 3, an 'effective management system' has to be in place in relation to the fishery, the effectiveness of which hinges on the existence and enforcement of national and international legal rules. Compliance with national and international law is a *pre-requisite*, *rather than an outcome* of private certification. This is confirmed by the global MSC uptake. The majority of fisheries certified under the MSC are small-scale and large-scale fisheries in the developed world, whereas fisheries in developing states are somewhat under-represented.[106] MSC-certified fisheries are highly selective in their target species, have stocks that occur within known areas, are well regulated and often co-managed by governments, fishers, and scientists.[107]

Still, the increasing interest by fisheries in developing states to become certified may turn the tide. The Maldives-led effort towards the adoption of Resolution 16/02 appears as the first step in this direction. It is safe to assume that, absent the need to meet the conditions set by the CAB, the Maldives would not have pursued the establishment of formal HCRs for skipjack tuna with equal fervour. After all, the issue had lain dormant since the inception of the IOTC in 1996. MSC certification, then, may act as an incentive to create and comply with the necessary international legal rules, which constitute an 'effective management system', especially with respect to highly migratory fish stocks. States may adopt international legal rules in order to allow their industries to secure MSC certification, and in this way access the lucrative market for sustainable fish. The MSC certification process, then, may not only condition the behaviour of the actual client, but also of that of third parties privy to the certification, such as state authorities in the context of a regional fisheries management organization.[108]

The shifting of state behaviour on account of MSC considerations gives rise to a second paradox. States may push for the adoption of international legal rules and thus meet their international legal obligations vis-à-vis the management of fisheries. Yet, states do not comply with international law itself, but with international law rules as they have been transcribed into the MSC FSG and, moreover, as interpreted by a private CAB. It is thus not international law that exhibits the capacity to modify

105 Gulbrandsen (n. 74 above, p. 87) speaks of a 'mutual reinforcement of legitimacy'.

106 The reasons cited for this mixed picture often relate to the high costs of certification, lack of technical capacity, and the degree of organization, as well as the fact that the MSC process does not square with the complexity of small-scale fishing in the developing South: S. Ponte, 'The Marine Stewardship Council (MSC) and the Making of a Market for "Sustainable Fish"' (2012) 12(2–3) *Journal of Agrarian Change*, pp. 300–15, at 310.

107 M. Kaiser & G. Edward-Jones, 'The Role of Ecolabeling in Fisheries Management and Conservation' (2006) 20(2) *Conservation Biology*, pp. 392–8.

108 Kalfagianni and Pattberg speak of the 'regulatory effects' of the MSC: A. Kalfagianni & P. Pattberg, 'Global Fisheries Governance beyond the State: Unraveling the Effectiveness of the Marine Stewardship Council' (2013) 3(2) *Journal of Environmental Studies and Sciences*, pp. 184–93, at 190–1.

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state behaviour, but an exogenous factor – namely, the need to meet the MSC requirements. In sum, the transcription of international legal rules on fisheries in the MSC at the same time highlights the resilience of the rules content-wise and their potential inability, in and of themselves, to influence the behaviour of states towards compliance.

6. CONCLUSION

The proliferation of private environmental initiatives on the global plane, and consequently the constitution of private authority, have generated a feeling of angst among international lawyers, who witness the 'stagnation' of international lawmaking processes and the emergence of 'new, alternative forms of cross-border cooperation on the international plane'.[109] The assumption is that international law is losing normative ground as a form of social ordering as it is being sidelined by less formal, more flexible forms of regulation.

The analysis of the interactions between international law on fisheries and private certification, as exemplified by the MSC, offers a contrasting account. In the first place, dense interactions exist between the two sets of norms. The MSC FSG relies heavily on international law, which serves both as a model and a yardstick. Conversely, the FAO has taken cognizance of private certification as a regulatory instrument, and has promulgated its 2005 Ecolabelling Guidelines, thus boosting the visibility and legitimacy of private certifiers. The MSC thus does not operate in a distinct sphere in isolation from international law. On the contrary, it draws on international law and is validated by international law. International law on fisheries therefore retains its traditional function of regulating the conduct of states and international organizations; yet, at the same time, it serves as a frame of reference for private certification schemes. Indeed, the MSC gains legitimacy through its interactions with international law. To antagonize it, or seek to supplant it, would prove detrimental to its own existence.

In the same vein, the operation of the MSC presupposes state compliance with international law on fisheries. The lack of an effective management system for fish in a certain area defeats any attempt at certification. This evidently implies that certification has been more prevalent in well-regulated marine areas surrounding developed states with a capacity to comply with international law. Nonetheless, it does not mean that fisheries in the waters of developing states are wholly excluded from MSC certification. If anything, the market benefits to be reaped from private certification may spur developing states towards compliance with international law. Still, the shifting of state behaviour towards compliance may be owed to the need to receive or retain MSC certification, rather than a desire to comply with international legal obligations. The operation of the MSC then simultaneously affirms the resilience

[109] J. Pauwelyn, R. Wessel & J. Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(3) *European Journal of International Law*, pp. 733–63, at 762.

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of international law and exposes its potential shortcomings vis-à-vis generating compliance.

The image painted with regard to the field of fisheries may not be transposable to other fields of environmental concern with a different problem structure and international regulatory framework in place, such as deforestation or marine pollution. Indeed, more research needs to be undertaken to uncover the intricate synergies between the myriad forms of regulation – public, private and hybrid – across the board. Nevertheless, the present analysis alerts us to a synergistic mode of operation of international law and private standards, which casts light on the novel functions and roles assigned to these forms of social ordering on the global plane.

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