

# **Gold Standard for Sustainable Aquaculture Ecolabel Design**

## **Appendix: Descriptions of Labeling Programs**

**Environmental Law Institute®  
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#### **Fairtrade Labelling Organizations International**

The Fairtrade Labelling Organizations International (FLO) is the most prominent outgrowth of the fair trade movement. The fair trade movement seeks “trade justice” between the developed and developing world by reducing tariffs and subsidies, ensuring adequate workers’ rights and fair prices for developing-world workers, and encouraging sustainable environmental and social policy.<sup>1</sup> Since its origin during the 1950s, the fair trade movement has spawned a variety of organizations. Notably, a variety of fair trade labeling initiatives were founded on the national level beginning in 1988 to assist developing-world agricultural producers by leveraging consumer preference for fairly traded products. In 1997, these labeling initiatives joined together to create an international body to establish a single fair trade labeling and certification system. FLO, the resultant organization, thus grew organically and evolutionarily from smaller bodies with overlapping missions and expertise. These bodies created FLO to leverage economies of scale and to respond to their shared need for effective international governance.<sup>2</sup> To a large extent, FLO remains decentralized and nonstandardized, as its national initiatives retain a large degree of heterogeneity in their roles and methodologies. The primacy of FLO’s labeling initiatives largely controls FLO’s funding mechanisms, governance structure, and implementation mechanisms and explains many of the differences between FLO and its peers.

In its current incarnation, FLO is a membership-based, international governance body overseeing a supply chain that spans continents and includes both developing world producers and developed world purchasers. FLO’s structure and the roles of its members are organized around the supply chain. FLO is governed by an assembly composed of national initiatives and producer networks; the assembly directs the actions of the FLO Board, which in turn oversees the standard-setting process. FLO standards apply to cooperative groups of small producers and to larger plantations, each of which is certified to FLO standards by FLO’s third party certifier, FLO-Cert. FLO-Cert also certifies transactions between traders in certified products throughout the intermediate parts of the supply chain, including exporters, importers, processors and manufacturers, and distributors. National labeling initiatives are generally responsible only for the final stage in the supply chain – provision of labeled goods to consumers. Labeling initiatives are the sole entities that can authorize use of the label. FLO’s chain of custody system is thus split into two partitions to preserve the historic role of the labeling initiatives while ensuring transparency through third party certification of most goods. FLO provides technical support and inspection services to producer communities both to assist those producer

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\* This appendix provides in-depth descriptions of the ecolabeling programs described in Gold Standard for Sustainable Aquaculture Ecolabel Design: Technical Report. The appendix has not been subjected to external review and is provided as a courtesy for researchers seeking more information.

<sup>1</sup> See ANDY REDFERN & PAUL SNEDKER, CREATING MARKET OPPORTUNITIES FOR SMALL ENTERPRISES: EXPERIENCES OF THE FAIR TRADE MOVEMENT (Int’l Labor Org., SEED Working Paper No. 30, 2002).

<sup>2</sup> The story of FLO’s development contrasts with groups such as MSC, RFA, FSC, and others, which were originally conceived and developed in a centralized, international form.

organizations in meeting FLO standards and to ensure proper use of the funds obtained from participation in the FLO system.

### *Funding*

Unlike most other social and environmental labeling programs, FLO's economic model is built around direct payments to producers of labeled goods. While most labeling systems seek to provide market benefits through price premiums, the amount and allocation of those price premiums across the supply chain is left to market forces. Because FLO is built on the premise that these market forces are inequitable, however, its labeling system takes a more direct role by controlling the amount of the price premium that reaches producers and local communities.

Producer organizations receive two forms of payment in the FLO system: a guaranteed minimum price for products and a "Fairtrade premium." FLO sets prices for certified products based on the cost of sustainable production;<sup>3</sup> when market prices rise above the price floor, the market price applies, but when prices fall below the FLO price floor, traders must remit payments equal to the differential between the market price and the price floor. Payments for goods sold at FLO prices by each producer organization are apportioned equally among the organization's members.<sup>4</sup> Fairtrade premiums are paid based on the amount of certified product that the producer organization sells; for example, each pound of coffee sold requires payment of a 10 cent premium.<sup>5</sup> Unlike the minimum price, the Fairtrade premium is not distributed to individual farmers by the producer organization. Instead, FLO requires that the premium be used to improving living and working conditions in the community as a whole. Producer organizations, as democratic institutions, collectively determine how to use the premium.

Payments to producer organizations are provided directly by traders (importers or exporters of certified goods). Traders (including processors and other intermediaries in the supply chain) in turn sell certified product to "licensees." Licensees label the certified product and sell it to consumers. Licensees must be certified by the applicable national initiative to use the national initiative's label; although it owns the international label, FLO itself does not license its use.<sup>6</sup> Licensees thus must extract sufficient price premiums from the consumer in order to both pay the national initiative for logo use and pay the trader sufficient amount to underwrite the eventual payment of the Fairtrade price and premium to the producer.

FLO's funding is dependent on the success of its initiatives in collecting licensing fees. Unlike in other labeling systems, these fees comprise the majority of the income for both FLO

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<sup>3</sup> See FLO, SHAPING GLOBAL PARTNERSHIPS: FAIRTRADE LABELLING ORGANIZATIONS INTERNATIONAL ANNUAL REPORT 2006/07 (2007). The price differs for conventional and organic production and from country to country.

<sup>4</sup> In most cases, not all product grown by the members of a producer organization can be sold at Fairtrade prices. The use of producer organizations for joint marketing and sales allows the benefits of certification to be shared among a large group rather than apportioned unequally in a community. This system promotes equity and cooperation among members.

<sup>5</sup> FLO, SHAPING GLOBAL PARTNERSHIPS, *supra* note 3, at 20.

<sup>6</sup> The international label was created in 2002, several years after FLO's creation. Before its creation, each national initiative used its own label; remnants of this prior system remain in Canada, the United States, and Switzerland, which continue to use distinct labels. This lack of harmonization is a continuing remnant of FLO's origin that may affect economies of scale in product design and international recognition of the label.

and its labeling initiatives. In the United States, for example, FLO's labeling initiative (Transfair USA) collected more than \$2.9 million in 2005, which comprised 70 percent of its income for the year. The remainder was derived from grants and other income.<sup>7</sup> Similarly, FLO's UK initiative collected £2.6 million in licensing fees in 2006 – a total that made up 74 percent of its annual income.<sup>8</sup> While other initiatives obtain lesser amounts from licensing (in France, for example, the initiative collected only 56 percent of its funding from licensing<sup>9</sup>), these differences probably reflect the relative development of the market for Fairtrade goods and license fees can be expected to increase more quickly than sales of certified products.

The licensing fees collected by the labeling initiatives are used for each initiative's internal certification and auditing, management, and other purposes, notably including membership payments to FLO and payments to FLO-Cert for certification services.<sup>10</sup> Each initiative's contributions to FLO depend on the amount of fees collected; while the UK initiative delivered more than £500,000 to FLO (20 percent of its license fees), Transfair Canada delivered only C\$38,476 (13 percent of its license fees).<sup>11</sup> These contributions make up the majority of FLO's income; external grants and other income comprise the remainder.<sup>12</sup>

In comparison with the other systems discussed in this report, FLO has managed to establish a sustainable, self-driven source of funding that is based on broad market penetration for selected key products, which it is using as the basis for expansion of its range of certified products. The sustainability of this economic model is admirable, and its crop-based, stepwise approach to licensing and certification could be used in other contexts that rely on a variety of products.

The FLO funding structure is relatively complex due to its decentralization. Each country collects funds separately and uses those funds to support third-party certification, national outreach activities, and FLO itself. Other programs described in this report (e.g. MSC) are more centralized, funneling all funds to the principal authority that uses them to support certification and fund national initiatives. FLO's contrary system results from the historic primacy over and ongoing oversight of FLO's central body by its national initiatives. In this system, FLO exists to serve the initiatives, not to govern them. Thus, initiative control over the purse is understandable.

The existence of separate certification programs for different aspects of the supply chain offers an efficiency rationale for decentralized funding. Initiatives certify and audit transactions

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<sup>7</sup> TRANSFAIR USA, TRANSFAIR USA 2005 ANNUAL REPORT 37 (2005).

<sup>8</sup> THE FAIRTRADE FOUNDATION, ANNUAL REPORT AND FINANCIAL STATEMENTS 2006 5 (2007).

<sup>9</sup> Association Max Havelaar France, *Rapport Financier 2005*, at <http://www.maxhavelaarfrance.org/ressources/rapport-financier-05.htm> (2006).

<sup>10</sup> See THE FAIRTRADE FOUNDATION, *supra* note 8, at 21. As FLO-Cert is an independent certifier, payments are presumably made to it by contract for actual services rendered.

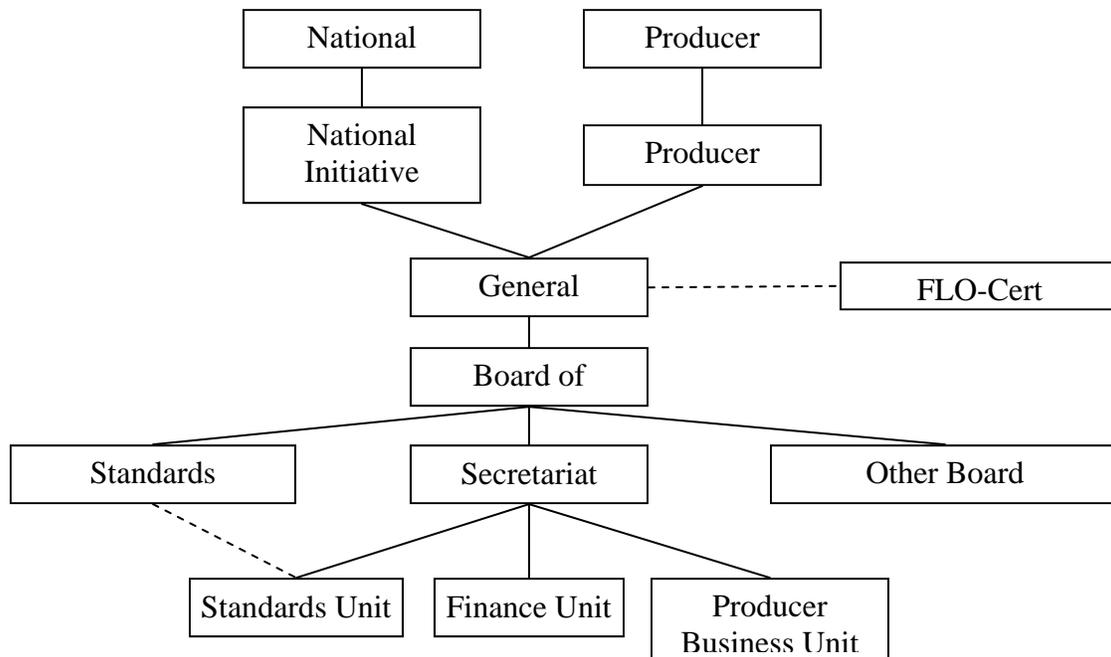
<sup>11</sup> *Id.* at 12, 21; TRANSFAIR CANADA, 2004-2005 ANNUAL REPORT 12 (2005). Max Havelaar France provided 22 percent of its license fees to FLO (€394,000). Association Max Havelaar France, *supra* note 9. The reasoning for the variations in contribution percentages is unclear, as the terms of membership in FLO are not publicly available.

<sup>12</sup> *Id.* at 24. In 2006, member contributions comprised approximately 58 percent of FLO's budget. The numbers for 2005 reflect an even higher percentage from membership contributions, with 67 percent of FLO's revenue originating with members.

on the local level and must work with FLO-Cert to ensure that the entire supply chain is certified to handle certified products. This system mandates the development of a working relationship between these bodies. In this context, direct funding of FLO-Cert by the initiatives may be expedient.

*Governance*

FLO uses a participatory, membership-based governance structure similar to but distinguishable from that implemented by FSC. FLO’s governance is reasonably tied to its purposes of standard-setting and international harmonization. Its stakeholders include national initiatives and producer networks, both of which must be considered to develop a cohesive sense of FLO’s governance. National initiatives are also worthy of discussion because they directly control aspects of FLO’s labeling system. As a result, this section considers the institutional structure not only of FLO but also of its members.



**Figure 1: Governance Flowchart**

From its founding, FLO has been governed as a membership organization. Originally, the national initiatives comprised the organization’s entire membership; together, they governed FLO through a General Assembly (“Assembly”). This governance structure allowed maximum input from the national initiatives, but excluded producers, licensees, certification bodies, and external stakeholders from FLO membership. This limitation excluded a wide variety of stakeholders from active inclusion in decision-making, giving rise to concerns about participation and transparency in FLO governance. FLO has begun to respond to these concerns by allowing producer networks to join FLO as full members. This reform is a recent development, however, and does not yet fully address the limitations of the FLO governance system.

Concerns about participation and transparency may be partly mitigated by the institutional characteristics of the national initiatives themselves: limitations on participation in FLO itself are irrelevant if FLO members are each participatory. The national initiatives – especially newly-formed initiatives – are subject to some institutional controls that support accessible governance structures. FLO sets forth the following requirements for accession of new members to FLO membership:

In order to qualify for full membership, initiatives need to demonstrate in a business plan that they have the potential and organisational capacity to license products in their country and have the mandate from a balanced representation of stakeholders, including NGOs and business. Initiatives need to be non-profit organisations and be structurally independent in terms of decision-making, from their supporters in order to strengthen their role as an independent licensing body for Fairtrade products.<sup>13</sup>

Without full documentation of FLO's membership standards, it is difficult to establish with precision the practical definition of "balanced representation." It is, however, likely that the definition comports with the definition used in the ISEAL Code, with which FLO complies. If so, it is likely that new labeling initiatives must consider the perspectives of all stakeholder groups, presumably including economic, social, and environmental interests. While this requirement provides a safeguard against exclusion of stakeholders, there are a variety of ways to consider stakeholder input, and new initiatives can be expected to vary in institutional structure beyond their compliance with FLO's general requirements. In addition, FLO's founding initiatives may not be required to satisfy these requirements. To the contrary, the founding initiatives created FLO to support their activities. As a result, local variations in governance and institutional design are tolerated and expected.

A comparison of the affiliation of initiative board members in the United States and UK reveal that a variety of stakeholder perspectives are represented in practice.<sup>14</sup> Unfortunately, the internal governance of the initiatives – like FLO's – lacks transparency due to a lack of public documentation of internal structures. While existing initiatives may be participatory and include balanced decision-making structures, this lack of transparency and persistent inconsistencies originating from the founding of each initiative undermine reliance on these bodies to satisfy concerns about participation, accountability, and transparency at the FLO level.<sup>15</sup>

Regardless of their governance structures, initiatives both new and old share an inherent weakness based on geography. Initiatives are almost exclusively located and governed in the developed world, and thus are subject to criticisms that they primarily represent developed world interests.<sup>16</sup> While they incorporate some participation by producer representatives, this

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<sup>13</sup> FLO, *Labelling Initiatives*, at [http://www.fairtrade.net/labelling\\_initiatives.html](http://www.fairtrade.net/labelling_initiatives.html) (2007).

<sup>14</sup> Compare Transfair USA, *Board Members*, at <http://www.transfairusa.org/content/about/board.php> (2007) with Fairtrade Foundation, *About Us*, at [http://www.fairtrade.org.uk/about\\_us.htm](http://www.fairtrade.org.uk/about_us.htm) (2007). The Fairtrade Foundation Board includes representatives from several of its original founders in addition to members representing a more diverse group of stakeholders. The Transfair Board also contains a mix of academic, economic, and NGO representatives.

<sup>15</sup> Compare Appendix A, ISO.

<sup>16</sup> The sole "developing world" initiative is located in Mexico.

representation may be insufficient to overcome perceived domination of FLO by developed-world initiatives. Such domination would run counter to FLO’s intent to remedy trade imbalance and could undermine the legitimacy of FLO with the NGO community – even if initiatives are maximally participatory at the local level.

**Table 1: Governance Body Responsibilities**

<b>Body</b>	<b>Responsibilities</b>
General Assembly	<ul style="list-style-type: none"> <li>• Consists of 20 National Initiatives and 3 Producer Networks</li> <li>• Elects Board of Directors</li> <li>• Considers changes to FLO Constitution</li> </ul>
Board of Directors	<ul style="list-style-type: none"> <li>• Consists of 13 members: 5 labeling initiatives, 4 producers, 2 certified traders, 2 independent</li> <li>• Appoints committee members</li> <li>• Guides FLO’s strategic direction</li> <li>• Oversees secretariat</li> </ul>
Standards Committee	<ul style="list-style-type: none"> <li>• Consists of 5-11 members</li> <li>• Supervises and guides standard-setting process</li> <li>• Sets prices and premiums</li> <li>• Develops fair-trade principles</li> </ul>
Secretariat	<ul style="list-style-type: none"> <li>• Consists of Standards, Finance, and Producer Business Units</li> <li>• Manages daily operations</li> </ul>
Standards Unit	<ul style="list-style-type: none"> <li>• Part of secretariat</li> <li>• Works with Standards Committee to implement standard-setting and revision processes</li> <li>• Ensures compliance with ISEAL code</li> </ul>
National Initiatives	<ul style="list-style-type: none"> <li>• Non-profit member labeling organizations</li> <li>• Require balanced stakeholder representation</li> <li>• Authorizes use of consumer labels</li> </ul>

FLO addressed transparency and distributional equity criticisms by expanding membership eligibility to include direct representation of producer interests. By unanimous vote, the initiatives amended the FLO constitution in November, 2006, to permit producer networks to join FLO. Three producer networks joined FLO in May, 2007, representing African, Asian, and Central and South American producers. In its newly-amended form, FLO membership is open to labeling initiatives and to producer networks. FLO describes these networks as “organisations which Fairtrade Certified Producer Organisations may join if they so wish and which are recognised by FLO as the representative body of farmers, workers and others belonging to Fairtrade Certified Producer Organisations.”<sup>17</sup> The inclusion of producer networks – assuming that they are sufficiently accepting of diverse stakeholder perspectives and opinions – may be effective in countering the argument that FLO is dominated by interests in the developed world. There are two problems with this argument however: the producer networks are not all equally representative, and they are limited in numbers when compared to the labeling initiatives.

<sup>17</sup> FLO, *Producer Networks*, at <http://www.fairtrade.net/302.html> (2007).

Membership in the Africa Fairtrade Network “is open to all Fairtrade Certified Producer Organizations and potential applicants, AFN founding organizations that have business relations with Fairtrade Certified Groups and African trade companies which are registered with FLO-CERT. In addition to this, agencies and other organizations promoting fair trade may gain eligibility for AFN membership.”<sup>18</sup> AFN is thus accepting of a variety of stakeholders, including those without a direct economic stake in FLO’s success. The Coordinadora Latinoamericana y del Caribe de Comercio Justo (CLAC) offers a contrasting example: its membership is open only to FLO-certified small farmer operations. It thus excludes major stakeholder groups such as larger farms and unaffiliated interested parties that are explicitly welcomed in the AFN. Like initiatives, producer networks lack standardization in terms of membership and governance, and arguably should not be relied upon to provide a consensus from a developing world perspective.

The balance of power in the Assembly is a second issue of concern. With only three producer networks negotiating with twenty national initiatives, power in the Assembly remains skewed in favor of the initiatives. It is true that the ISEAL Alliance Code requires that decisions be taken by consensus, but consensus does not require unanimity, and the labeling initiatives control well more than the two-thirds majority that is generally required to achieve technical consensus. This concern could be eliminated by instituting sector-based voting – that is, requiring a two-thirds majority of both initiatives and producer networks to achieve consensus. Unfortunately, FLO’s constitution and other internal documents are not publicly accessible, so determination of its actual voting structures is impossible. A second method for resolving the issue would be to create producer networks on a regional, rather than continental, scale. The AFN, for example, is broken down into four regional networks, which permits closer consideration of issues or crops of particular concern on a sub-continental level. The nascence of the producer networks and the development of these regional entities suggest that additional networks could be included in the FLO membership as their institutional capacities develop.

It is too soon to draw conclusions about the impacts of FLO’s recent change in membership policies – efforts at regional standardization, development of producer networks, and other factors will strongly influence how participatory the organization is in practice. The amendment, however, should be viewed positively as a first step towards creating a truly inclusive, stakeholder-governed labeling system. While substantial questions remain, the inclusion of developing-world perspectives represents a watershed for the organization.

FLO’s modification of its membership criteria did not affect FLO’s fundamental governance mechanisms. The Assembly remains FLO’s fundamental governance body. The Assembly’s members include the 20 national initiatives and the three producer networks. In addition to the General Assembly, each type of group participates in the National Initiative Assembly or Producer Network Assembly, respectively, to address items of special interest. The Assembly meets annually to fulfill its duties, which include election of FLO’s Board of Directors and consideration of changes to the FLO constitution, which governs the relationships of FLO members and the internal structure of the organization. Unlike in the FSC, however, FLO lacks a foundational set of principles and criteria. As a result, Assembly action is not required to alter either FLO’s general or its specific standards, and the Assembly’s role is comparatively limited.

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<sup>18</sup> FLO, *Africa Fairtrade Network (AFN)*, at <http://www.fairtrade.net/304.html> (2007).

The Assembly's limited authority frees the Board to implement a relatively broad governance role. Membership on the 13-member FLO Board is balanced by explicit apportionment among interest groups. The FLO constitution requires that the Board be composed of five labeling initiative representatives, four producer representatives, two certified trader representatives, and two independent, external members. Board decisions must be taken by consensus, pursuant to the ISEAL Code. In addition to guiding FLO's strategic direction and overseeing the operation of the FLO executive, the Board fulfills its primary governance role by appointing the members of the FLO standards, finance, and nominations committees. While the finance and nominations committees play important roles in assuring FLO's financial stability and reviewing institutional performance, respectively, the standards committee (SC) is substantively the most important of the Board-level committees because it supervises and guides the standard-setting process that gives life to the FLO label.

The SC operates according to explicit terms of reference that establishes its competence in relation to that of the Board.<sup>19</sup> The SC guides the development of production standards, sets prices and premiums for certified products, develops fairtrade principles for the Board in an advisory capacity, develops standard-setting procedures for Board approval, and provides appellate dispute resolution for procedural complaints.<sup>20</sup> The SC must include between five and eleven members who are appointed for three-year terms during which they meet between four and six times per year.<sup>21</sup> While it must balance supplier and user interests, the SC's composition is unlike the Board's insofar as the numbers of particular stakeholder group representatives are not explicitly allocated. Some limits apply, however: in addition to external experts, the committee should ideally include a member nominated by the producer networks, a member representing producers as a whole, and a member representing workers (together, supplier interests), as well as a labeling initiative member and a trader member (the user interests).<sup>22</sup> Currently, the SC is composed of eight members: two labeling initiative members, three producer representatives (one from each of Asia, Africa, and Latin America), two trader representatives, and one external expert.<sup>23</sup> Observers and experts – whether or not substantively contributing to SC work – are also welcome for most topics. Committee members are not permitted to participate in matters in which they have a conflict of interest. Like the Board, the SC seeks unanimity for its decisions. If no consensus is possible, however, decisions are made by vote, with only simple majority required to proceed.

In addition to its strategic work and committee oversight roles, the Board also oversees FLO's secretariat (executive staff). The FLO executive manages FLO on a day-to-day basis through its standards unit, producer business unit (PBU), and finance unit. The standards unit works with the SC to implement standard-setting and -revision processes. As a result, the standards unit is primarily responsible for implementing FLO's standard-setting procedures and for ensuring compliance with the ISEAL Code.<sup>24</sup> The standards unit also provides support for

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<sup>19</sup> See FLO, TERMS OF REFERENCE: FLO STANDARDS COMMITTEE (2006).

<sup>20</sup> *Id.* at 1.

<sup>21</sup> *Id.* at 2.

<sup>22</sup> *Id.*

<sup>23</sup> FLO, FLO STANDARDS COMMITTEE MEMBERS (2007).

<sup>24</sup> See FLO, STANDARD OPERATING PROCEDURE ('SOP') (SUMMARY): DEVELOPMENT OF FAIRTRADE STANDARDS (2006).

the SC during meetings.<sup>25</sup> The PBU was established in 2005 to implement FLO’s duty to assist producers in strengthening their organizations and increasing their market access. In addition to facilitating the development of trade networks in certified products, the PBU uses local liaisons to assist producer organizations in seeking certification and in the proper and effective use of Fairtrade premiums. Local liaisons implement these duties at the local level, taking the special conditions of each producer organization into account. Finally, the PBU assists the SC in setting prices and premiums for certified crops.

### *Standard-Setting Procedures*

FLO has developed several types of standards that are used to certify its stakeholders and to set prices. FLO’s standards differ for producers and traders,<sup>26</sup> but both use standards of general applicability and specific standards that apply to production of only certain products or in certain areas. Specific standards may not only set forth requirements for certification, but also include statements of the applicable minimum prices and fairtrade premiums that are payable to producers in a given area.

FLO’s procedures for setting and reviewing standards and for dispute resolution were not delineated until 2006, when FLO adopted explicit procedures in order to comply with the ISEAL Code. Prior to adopting these explicit standards, FLO not only proceeded in an *ad hoc* fashion, but its processes also lacked transparency. The adoption of explicit procedures – and their subsequent release to the public – are clear signs that the ISEAL Code has resulted in concrete improvements in FLO’s governance processes.<sup>27</sup> Nonetheless, FLO has retained a significant amount of confidentiality, releasing only summaries of the procedures instead of the entire text of the procedures. Thus, its systems still lack transparency, and it remains to be seen whether this limited public disclosure is sufficient to comply with the ISEAL Code.

**Table 2: Types of FLO Standards and Guidance**

<b>Standard Type</b>	<b>Standard Characteristics</b>	<b>Responsible Unit</b>
International Crop Standard	Generic principles and criteria governing all crops	SU
Specific Crop Standard	Specific criteria to implement international standard for specific crop	SU
Price-Premium Standard	Establishes Free Trade price and premium	PBU

The newly-adopted procedures for setting production standards establish a complex process in which each of the Board, the SC, and the standards unit plays a role. The most succinct statement establishing the relationships of these parties is the Board-established “principle of subsidiarity:” “[M]ajor decisions of policies related to standards shall be taken by the FLO Board, major decisions of standards shall be taken by the SC and minor decisions of

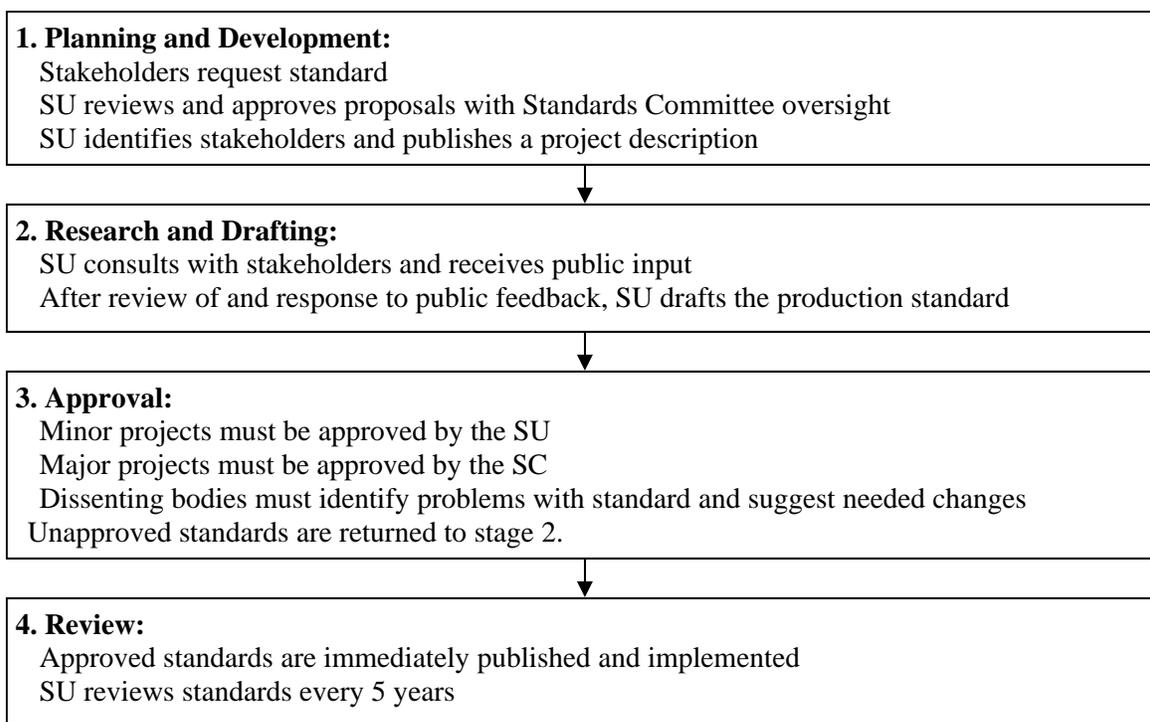
<sup>25</sup> FLO, *supra* note 19, at 5.

<sup>26</sup> Currently, trader standards are integrated into the producer product standards. Independent trade standards are currently under development. FLO, *Trader Standards*, at [http://www.fairtrade.net/trade\\_standards.html](http://www.fairtrade.net/trade_standards.html) (2007)

<sup>27</sup> See FLO, ISEAL REFERENCE (2006).

standards shall be taken by the standards unit.” Thus, the Board governs the standard-setting process from a policy perspective, while the SC independently makes the substantive decisions about the content of standards, and the standards unit ensures that the SC-driven policies are properly described and implemented in the standards.

In general, the standards unit does a majority of the work to develop a production standard, and the SC provides some oversight and is the final decision-maker for major projects. The standard-setting process is identical for both general and crop-specific standards and begins with a request for a standard initiated by an FLO stakeholder.<sup>28</sup> The standards unit reviews standard proposals for which there is a “substantial need” to determine whether the production standard would fit FLO’s strategic direction, as established by the Board. The standards unit (with SC assistance, if necessary) determine the scope of the standard-setting process that would be required and classify it as a “major” or “minor” project. Decisions on whether to initiate minor projects are left to the discretion of the standards unit, while decisions on major projects are made by the SC.



**Figure 2: Production standard process**

Once approved, the standards unit plans the standard-setting process, including designation of budgets, work plans, timelines, responsibilities, and – most importantly – minimum criteria for performance indicators. The standards unit is also required to identify all stakeholder groups during the planning stage, both within the Fairtrade system and external to it. External stakeholders are identified by internal entities, including producers, initiatives, traders,

<sup>28</sup> “Stakeholders” include the Board, SC, standards unit, PBU, labeling initiatives, trader networks, producer networks, or FLO-Cert. Although individual stakeholders (producers, traders, and consumers) and external, unaffiliated parties are not listed, they may initiate the standard-setting process through the PBU to request price-setting under specific standards. See FLO, SOP STANDARD-SETTING, at 2.

and FLO-Cert. When planning is complete, the standards unit releases a project description to the public.<sup>29</sup>

Next, the standards unit initiates consultation with stakeholders in the “research” phase. This consultation generally includes questionnaires, collection of scientific information, and workshops. The resulting information is used to create a draft production standard. Completion of this draft standard initiates the first of at least two official consultations.<sup>30</sup> During each consultation, the production standard is sent to stakeholders directly and is released to the public at large for comment. The standards unit reviews and responds to the feedback in revisions to the standard. Each consultation period lasts for 60 days.<sup>31</sup>

When the standards unit completes its final draft standard, it seeks approval. Minor project standards are subject to approval by the director of the standards unit, while major project standards require SC approval. Failure to obtain approval requires the disapproving body to identify amendments and further research that is required for approval, at which point the standards unit re-initiates the research stage. Once approved, production standards are published and applied.<sup>32</sup>

Standards are subject to continuing monitoring and feedback. Revisions are undertaken every 5 years by the standards unit, relying on the comments received during the preceding period and on those obtained during a formal comment period. If warranted, the standards unit will then issue a project proposal. If accepted, the review process follows the same procedures used during the establishment of initial standards.<sup>33</sup>

FLO has established an independent set of procedures for setting fairtrade minimum prices and premiums. Prices and Premiums may be set globally, regionally, or nationally, depending on the market factors affecting production costs and other factors. The allocation of responsibility for setting prices is similar to that used for production standards, with the standards unit and SC working together to draft the standard. The PBU, however, plays a larger role in setting price standards due to its expertise with local economic conditions. While many aspects of the FLO price standard procedures echo those for production standards, they differ in one important respect: price procedures do not fully comply with the ISEAL Code because, according to FLO, price-setting standards are outside the intended scope of that code.<sup>34</sup> Nonetheless, FLO claims that the price-setting standard complies with ISEAL “principles.”

Development of price standards begins with submission of a pricing proposal to the PBU, which collects and monitors such requests. As with production standards, proposals can be made by any eligible stakeholder. The PBU recommends whether action on the proposal is warranted and assigns the proposal a priority. The standards unit considers proposals for which there is a substantial need, as indicated by PBU. The director of the standards unit makes a final decision

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<sup>29</sup> *Id.* at 2-3.

<sup>30</sup> In the absence of disputes in comments, the SU can conduct a single round of consultation.

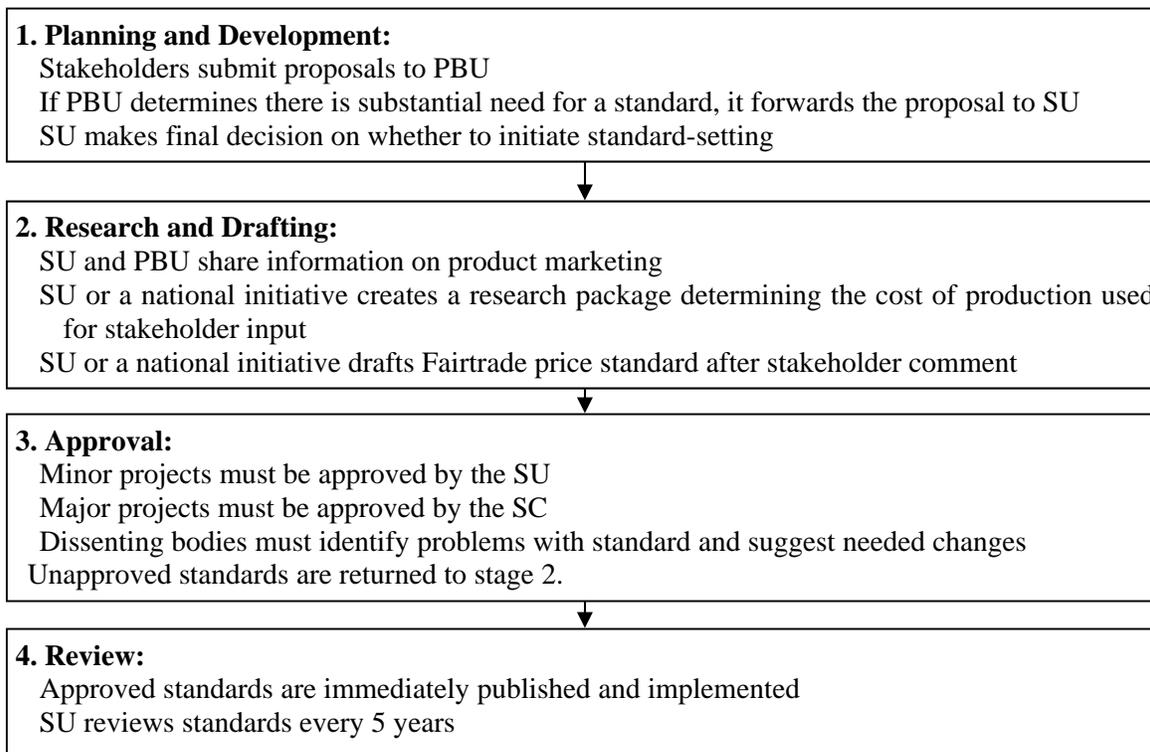
<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> FLO, STANDARD OPERATING PROCEDURE (‘SOP’) SUMMARY: DEVELOPMENT OF FAIRTRADE MINIMUM PRICES AND PREMIUMS 1 (2006).

on whether to initiate work on a standard and creates a work plan for the standard-setting project. As for production standards, the standards unit designates each project as major or minor; decision-making for minor projects rests with the standards unit while major projects require SC action.



**Figure 3: Process for Setting Price Standards**

Once a pricing project is approved, the planning stage commences with a meeting between the standards unit and PBU to allow information-sharing regarding the market for the product. The standards unit must use this information to develop a “research package” that will be used in soliciting stakeholder input to determine the elements making up the total cost of sustainable production, including but not limited to set-up costs, labor costs, harvest costs, and packing costs. This research may be carried out by either the SU or a national initiative.<sup>35</sup> The goal of the research project is to obtain a single, consensual price proposal upon which producers have jointly agreed. The researcher contacts producers and other internal and external stakeholders and creates a draft price based on producer input, data on cost of production from external sources, and market data.

Once a draft price is complete, the formal consultation phase begins. During consultation, the researcher sends the price proposal to producers, traders, labeling initiatives, and the PBU seeking comment on the impact of the price on producers and on the product market. The comment period for prices is only 30 days, rather than the 60 days required for comment on substantive standards. While only one round of consultation is required, the researcher may conduct additional rounds if needed before creating the final draft price proposal. Upon finalization of the draft, the price proposal is submitted to the standards unit.

<sup>35</sup> *Id.* at 2-3.

The standards unit's role in reviewing draft price proposals differs based on the identity of the researcher. If an initiative or an outside consultant researched and produced the draft, the standards unit must review the quality and quantity of the data collected and relied upon. If necessary, the standards unit contacts the researcher to request additional research or clarification. If the research is sufficient, however, the price is eligible for approval by either the director of the standards unit or the SC, as appropriate.

Along with establishment of standard-setting procedures, ISEAL members must establish grievance procedures for both procedural and substantive complaints pertaining to standard-setting. To comply with ISEAL, FLO published complaint procedures, effectively increasing the transparency of the standard-setting process and the accountability of its decision-makers. The complaint resolution policy allows complaints against both production standards and price standards for either procedural (failure to comply with the standard-setting procedures) or substantive (failure to conform to the official project description) reasons.

Any stakeholder may file a complaint with the standards unit. Within 30 days, the standards unit must determine whether the complaint is valid; it has 10 days to notify the plaintiff of the fact of and reasons for its decision. If accepted, the standards unit initiates a new standard-setting process to resolve the issue. If the standards unit rejects the complaint, the plaintiff may appeal, which requires amendment of the complaint to address shortcomings identified by the standards unit. The revised complaint is resubmitted to the standards unit, which responds and refers the complaint to the SC. The standards unit's response may include additional information from the complainant, external information, and a written response.

The SC then decides whether to accept or reject the complaint. Such steps initiate normal complaint-resolution procedures or eliminate the complaint, respectively. Instead of merely determining whether the complaint is valid, the SC is also empowered to directly resolve valid complaints. It may do so by declaring all or part of a standard to be invalid, altering the language of the standard, or declaring that while the complaint is valid, its success would not affect the standard's practical application, and therefore tabling the complaint until the next review of the standard.<sup>36</sup> No appeal from the SC decision is permitted.

Although FLO is the only body empowered to create standards, the demands of implementation have led to the development of interpretive guidance. FLO-Cert, FLO's dedicated certification body, has developed two types of guidance for evaluating producers and traders. First, certification policies govern FLO-Cert decision-making where FLO standards are absent or unclear – to date, most notably for trader certification. Second, compliance criteria are tied to specific provisions of the FLO standards and offer specific and measurable criteria for determining producer compliance with those FLO standards. It does not appear that FLO has created explicit policies permitting or governing the creation of either type of guidance, nor does the guidance-creation process appear to be subject to the FLO complaint policy.

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<sup>36</sup> FLO, STANDARD OPERATING PROCEDURE ('SOP') (SUMMARY): COMPLAINTS AGAINST FAIRTRADE STANDARDS (2006).

Existing FLO-Cert certification policies are simple guidelines to guide traders, who are to date not covered by an FLO standard. For example, the policies identify traceability requirements, clarify when products may be purchased from certified producers, and offer other important information.<sup>37</sup> The compilation of this information is important for increasing the efficiency of certification but should become less necessary once FLO completes the trader standard that is currently in development.

In addition to these general certification policies, FLO-Cert has established a certification policy governing trade in coffee under the FLO standard for coffee production. Unlike the trader policies, which offer guidance in the absence of an applicable standard, the coffee policy supplements an existing FLO standard. This FLO-Cert policy is likely used due to inefficacy of FLO's existing standards. Regardless of the reasons for development of the certification policy, coffee trader certification now depends on language that was not subjected to FLO's transparency and participation protections, and its content is subject to credibility challenges as a result. While few would argue with the practical need for these policies, the specific standard-development process used by FLO is intended to avoid the need for such policies. As a result, FLO should consider the need for certification policies a signal that existing standards are flawed and should prioritize the development of standards to address the weaknesses that FLO-Cert has identified.

FLO-Cert also elaborates on FLO standards by adopting compliance criteria. Unlike policies, compliance criteria are specific provisions that are linked to specific FLO standards. These criteria are coded as major or minor and are associated with a specific timeline for fulfillment in the certification process. FLO-Cert has developed independent criteria for farmers' organizations and hired labor producers. For example, FLO standard 2.1.1.1 requires that small farmers' organizations administer and manage fairtrade premiums transparently and in accordance with other elements of the FLO standard. FLO-Cert has elaborated this through a number of criteria, including existence of a transparent administration system, independence of that system, no evidence of fraud or corruption in the management of the funds, and presentation of an annual report on the use of the funds to members.<sup>38</sup> Each of these requirements must be implemented from the moment of first receipt of fairtrade premiums; as a result, it is presumably evaluated only in renewal inspections. Failure to comply with any of the compliance criteria results in noncompliance with the underlying FLO standard.

The necessity for specific development of evaluation criteria by certification bodies is a common tool used by certification bodies across the ecolabeling world. FLO-Cert's system is most similar to the indicator system used by MSC certification bodies to evaluate fisheries, but it also bears similarities to the GAA and ISO systems.<sup>39</sup> The consistency with which certification bodies are empowered to adapt standards to evaluations suggests that development of standards for direct implementation is difficult or impossible in a third-party system. FLO uses standards

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<sup>37</sup> FLO-CERT, TRADE CERTIFICATION POLICY GENERAL v. 8.9; see also FLO-CERT, FLO-CERT EXCEPTIONS POLICY INCLUDING RETROACTIVE PRODUCT CERTIFICATION AND PRODUCT COMPENSATION v. 5.9; FLO-CERT, TRADE CERTIFICATION AND COMPOSITE PRODUCT POLICY v. 13; FLO-CERT, TRADE CERTIFICATION POLICY – COFFEE v. 2.0.

<sup>38</sup> FLO-CERT, PUBLIC COMPLIANCE CRITERIA LIST – SMALL FARMERS' ORGANIZATIONS.

<sup>39</sup> In the MSC system, the specific, measurable criteria developed by certification bodies are referred to as "indicators." This term appears synonymous with "compliance criteria."

that are specific to product and region, and in this sense is the ecolabel most likely to succeed in producing standards with sufficient particularity to permit direct implementation. If FLO has been unable to create such standards, it will prove difficult for any third-party ecolabel to do so.

### *Implementation Methodology*

Like most ecolabels, FLO uses a third-party certification methodology. FLO certification is performed almost exclusively throughout the supply chain by a single certification body, FLO-Cert. FLO-Cert is owned by FLO, but its independence from its parent is ensured through the maintenance of separate staff structures, internal policies against data sharing with FLO, compliance with ISO guidelines for certification bodies, stakeholder participation in governance, and oversight by an independent certification committee.<sup>40</sup> While FLO-Cert's role is thus reminiscent of the Global Aquaculture Alliance's certification body (the Aquaculture Certification Council) and Rainforest Alliance certification, FLO-Cert's internal structures are more protective than those used by its peers. Nonetheless, FLO-Cert retains the consistency benefits that inherently accompany monopolistic certification systems.

FLO's system also relies on its national initiative members for completion of supply chain certification. The initiatives' role harkens back to FLO's precursors, when each initiative was responsible for certification throughout the supply chain. With the advent of FLO-Cert, their role in the implementation process is now limited to certification of licensees for logo licensing.<sup>41</sup> This role is largely contractual and does not require auditing of transactions between producers and traders.

FLO-Cert's structure and processes are relatively simple. The organization is split into trade certification and producer certification components. The trade-certification staff is responsible for supply chains of specific product groups on a global basis, while the producer certification staff is divided by region. These differences are tailored to the relative similarity of supply chains for similar products on a global basis versus the importance of regional variation among producers in terms of climate, social and environmental conditions, and products.

The certification process is identical for producer and trade certification. The certification process begins when an applicant submits an application and filing fee, which is dependent on the size and type of the applicant producer or trader.<sup>42</sup> If the application is satisfactory, FLO-Cert performs an initial inspection, which evaluates the applicant against the relevant Fairtrade standards and FLO-Cert's certification criteria. Applicants then review and correct any deficiencies. FLO-Cert reviews any corrective measures, at which point the

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<sup>40</sup> The Committee meets every two months to review FLO-Cert decisions. FLO-Cert GmbH, *Independence of FLO-Cert*, at <http://www.flo-cert.net/flo-cert/main.php?lg=en> (2007). Note that the FLO-Cert website is under construction and may include more complete information at a later date.

<sup>41</sup> As noted above, FLO-Cert is responsible for the certification of entities through most of the supply chain, including both producers and a variety of traders, including exporters, importers, and processors. This includes all entities in the supply chain with the exception of licensees.

<sup>42</sup> For example, plantation producer fees include a €250 application fee, €150 for each additional product, and a €400 flat fee for initial certification. In addition, an additional payment is required based on the number of workers, products, and processing installations. See FLO-CERT, *FLO-CERT PRODUCER CERTIFICATION FEES: PLANTATION* (2006). Different (often lesser) fees apply to cooperatives, organic producers, and other groups.

application is forwarded to an independent staff member for a certification decision. Certification requires compliance with all standards. The use of certification staff who was not involved in the inspection or evaluation process increases the transparency of the final certification decision. If certification is found to be warranted, the applicant is certified for one year. Renewal inspections are carried out annually and require payment of additional fees.<sup>43</sup> The availability of grievance procedures upon denial of certification is unclear.

The unavailability of dispute resolution is compounded with similar failures to provide complete information on the methodology for setting compliance criteria and policies to raise unsettling questions about FLO-Cert's transparency and the degree of institutional control exerted by FLO. While there is much to commend the FLO-Cert system – from its effectiveness to the successful certification of small-scale producers – these governance questions undermine the utility of FLO-Cert's implementation methodology as a model for future ecolabels. Given FLO's current focus on standardization of its internal policies, however, these flaws may be resolved in the near future. Assuming such changes result in increased transparency and institutional control by FLO over its standards, the FLO-Cert model could prove effective in other contexts.

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<sup>43</sup> See FLO-Cert, *Certification Processes*, at <http://www.flo-cert.net/flo-cert/main.php?lg=en> (2007).

## Forest Stewardship Council

The Forest Stewardship Council (FSC) was founded through a multi-stakeholder, international, non-governmental process in response to concerns about the environmental and social harms of industrial forestry practices. The development of FSC began in 1990, and the organization was formalized in 1993 after the United Nations' failure to develop an international forestry convention at the 1992 Conference on Environment and Development (UNCED).<sup>44</sup> FSC's development was completed in 1994 after agreement on the FSC principles and criteria. Under the FSC standard, forests are certified to the FSC ecolabel through a third-party process if they practice sustainable forestry management practices. FSC labeling thus represents a gold standard for forestry operations. In addition to its forestry management standard, FSC also operates a chain-of-custody (CoC) standard.

Unlike ecolabels in other issue areas, FSC competes with other ecolabels for market share. FSC's founding stimulated the development of both industry-led and government-backed forestry labeling systems in the United States, Canada, and Europe.<sup>45</sup> From an industry perspective, the most notable FSC competitor has been the Sustainable Forestry Initiative (SFI), which was created in 1994 by the American Forest & Paper Association (AF&PA), an industry group, to respond to FSC with a forester-friendly label.<sup>46</sup> AF&PA's Canadian counterpart, the Canadian Pulp and Paper Association (since renamed the Canadian Forest Products Association) responded differently, by initiating a standard-setting process through the ostensibly independent, but industry-dominated, Canadian Standards Association (CSA).<sup>47</sup> Similar certification schemes have also been developed in Australia, Brazil, Malaysia, and Chile.<sup>48</sup> European industry and landowners responded in a third way by creating the Pan-European Forest Certification (PEFC, since renamed Programme for the Endorsement of Forest Certification) label, which, like FSC, accredits national standards and has brought together the aforementioned industry-driven labels – notably PEFC accredited SFI as the United States national standard in 2006.<sup>49</sup> Each of the industry-driven responses to FSC initially instituted social and environmental standards that were much less stringent than those required by FSC, while minimizing stakeholder input, transparency, and accountability. The key feature of these systems was the elimination of performance-based evaluation, focusing instead on process requirements through certification of environmental management systems.

The proliferation of well-supported competitor ecolabels makes the FSC experience unique. FSC's continued growth depends on its success in legitimizing itself in the eyes of

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<sup>44</sup> Benjamin Cashore et al., *Legitimizing Political Consumerism: The Case of Forest Certification in North America and Europe*, in *POLITICS, PRODUCTS, AND MARKETS: EXPLORING PAST AND PRESENT* 181, 182 (Micheletti et al., eds. 2004); Lars H. Gulbrandsen, *Mark of Sustainability? Challenges for Fishery and Forestry Eco-labeling*, *ENVIRONMENT*, June 2005, at 8, 10.

<sup>45</sup> See Cashore et al., *supra* note 44.

<sup>46</sup> See SFI, *History*, at <http://www.sfiprogram.org/history.cfm>.

<sup>47</sup> Cashore et al., *supra* note 44; Gulbrandsen, *supra* note 44, at 14.

<sup>48</sup> See generally *FORESTS AND THE EUROPEAN UNION RESOURCE NETWORK (FERN), FOOTPRINTS IN THE FOREST: CURRENT PRACTICE AND FUTURE CHALLENGES IN FOREST CERTIFICATION* (2004); Olav Schram Stokke et al., *Ecolabelling and Sustainable Management of Forestry and Fisheries: Does it Work?*, in *POLITICAL CONSUMERISM: ITS MOTIVATIONS, POWER, AND CONDITIONS IN THE NORDIC COUNTRIES AND ELSEWHERE* 291 (M. Boström et al. eds., 2005).

<sup>49</sup> See Cashore et al., *supra* note 44, at 182-84 (discussing the emergence of forestry standards).

industry to increase its supply of labeled goods, while also increasing the value of the label by strengthening its support by environmental and social interests. These pressures alternately drive FSC towards and away from the policies adopted by its industry-supported peers, and they have likely caused internal controversy due to FSC's inclusive governance structure.<sup>50</sup> FSC's peers have an equal but opposite pressure to increase their legitimacy with the public; SFI, for example, became independent of its industry parent in part due to concerns about its perceived legitimacy with consumers and environmental groups. As part of that process, SFI strengthened its institutional governance protections for stakeholders, thereby increasing its legitimacy with environmental groups. Similar influences have occurred in the PEFC and can be expected in the CSA, both of which require continued support from the broader community to succeed.<sup>51</sup>

None of FSC or its rivals have been fully successful in creating a dominant ecolabel. FSC's certified forestland grew less quickly than its peers between 2001 and 2005,<sup>52</sup> for example, while SFI was labeled "a certification scheme by the forestry industry for the forestry industry" in 2004, several years after gaining independence from its parent.<sup>53</sup> Nonetheless, Gulbrandsen has characterized the inter-label dynamic as one of institutional convergence:

Rather than a "race to the top" or "race to the bottom," the FSC and PEFC rivalry in Sweden has resulted in some cross-fertilization and convergence of the two schemes. The FSC has responded by adjusting rules to better accommodate the needs of business; the PEFC has changed upward in an effort to boost credibility in the marketplace. These dynamics have been observed not only in Sweden but in a number of developed countries such as Germany, the United Kingdom, Canada, and the United States.<sup>54</sup>

The end result of this institutional convergence – a rough equalization of the power and market saturation among the competing labels – has stimulated discussion about ways to develop inter-label recognition and harmonization.<sup>55</sup> To date, FSC has remained aloof, but as one commentator has noted, "[w]hile the FSC remains hesitant to accept programmes originally designed to offer an alternative vision of governance, the market underpinnings of certification have at once moved the programmes closer together and made the FSC recognise that it, alone, will be unable to achieve global certification. As a result, the FSC is under pressure to find some accommodation with its competitors."<sup>56</sup> As a result, it is likely that while some particularities of the FSC system will remain intact in coming years, others will continue to adapt as a result of competition in the forestry labeling market. It is difficult to ascribe particular aspects of FSC's

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<sup>50</sup> One stakeholder, at least, has frustrated enough to avoid similarly-inclusive structures. WWF – a key founder of FSC – expressly used less-inclusive institutions when developing MSC.

<sup>51</sup> See Lars H. Gulbrandsen, *Sustainable Forestry in Sweden: The Effect of Competition Among Private Certification Schemes*, 14 J. ENV'T & DEV. 338, 350 (2005) (noting alteration of Swedish PEFC standard to seek increasing harmonization with the Swedish FSC standard).

<sup>52</sup> Gulbrandsen, *supra* note 44, at 47 Fig. 1. Some of this differential rate of increase may be attributed to the increasing practice of parallel certification among forest owners. Gulbrandsen, *supra* note 51, at 352.

<sup>53</sup> FERN, *supra* note 48, at 23.

<sup>54</sup> Gulbrandsen, *supra* note 51, at 352.

<sup>55</sup> Steven Bernstein and Benjamin Cashore, *Nonstate Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?*, in *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT, AND SOCIAL GOVERNANCE* 33, 39 (John J. Kirton & Michael J. Trebilcock eds., 2004).

<sup>56</sup> *Id.*

institutional characteristics to competitive pressures, but there is little doubt that these pressures have been an important factor influencing FSC's balance of stakeholder participation, accountability, and effectiveness. FSC's funding mechanisms, governance structures, standard-setting activities, and implementation methodology must therefore be evaluated bearing these pressures in mind both when assessing FSC's past and predicting its future.

### *Funding*

FSC may originally have been intended to serve as a global market-access label to replace an international legal agreement, but in practice it has followed a market fragmentation model. This result is not unexpected in the face of FSC's need to distinguish itself from competing labels and the need to increase forest management and chain-of-custody certification gradually over time. FSC has successfully distinguished itself from its peers by emphasizing sustainability and balanced decision-making,<sup>57</sup> which has likely allowed the system to maintain a high level of NGO and charitable involvement and support.

Like other sustainability ecolabeling programs, FSC is primarily funded by donations from foundations and other charitable sources. Lesser amounts of funding are derived from the accreditation program, fees paid by FSC members, and other sources. In 2004, for example, 66 percent of FSC revenues were donated, 27 percent were derived from accreditation, 4 percent from membership fees, and the remainder from unidentified sources.<sup>58</sup> While these relative percentages have been relatively consistent over time, FSC's total revenues have increased in all categories. This result is expected; as FSC became more entrenched it attracted more investment from foundations and its self-derived gross funding (accreditation and membership fees) increased as FSC attracted more members and has seen more lands certified to its standard.

FSC's self-created income depends on accreditation fees. FSC uses a third-party certification methodology (*see Implementation Methodology*) and therefore collects no direct fees from certified foresters. Similarly, FSC uses a third-party accreditation service to accredit its certification bodies, a process that costs approximately €30,000.<sup>59</sup> The amount of funding that reaches FSC through a pass-through is uncertain, as is FSC's income from accreditation of national initiatives and national standards (*see Standard-Setting Procedures*). Regardless, FSC's fees for "accreditation services" likely includes logo licensing fees and some amount of pass-through from its accreditor and from its national initiatives. Regardless, although FSC creates a healthy percentage of its revenue from its activities, it is clear that, like its peers, FSC will continue to rely on donations for the foreseeable future.

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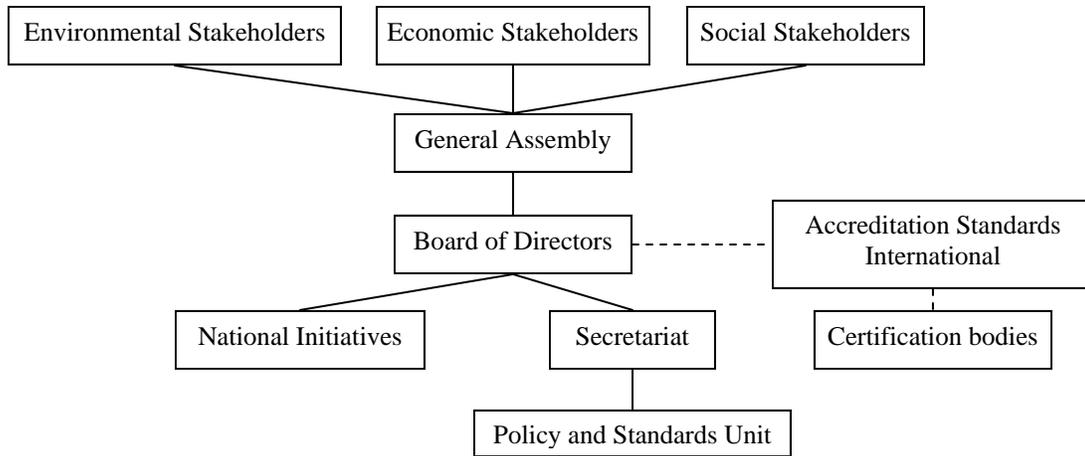
<sup>57</sup> See FERN, *supra* note 48, at 23.

<sup>58</sup> FSC, FSC FINANCIAL REPORT 2004 (2005). More recent financial reports are not readily available. The distribution of FSC revenues has deviated over time but the general pattern has remained relatively constant throughout FSC history. *Id.*

<sup>59</sup> ACCREDITATION SERVICES INTERNATIONAL GMBH, ASI ACCREDITATION COST ESTIMATES FOR FSC ACCREDITATION PROGRAMME (2006).

*FSC Governance*

FSC<sup>60</sup> uses a complex, “bottom-up” system of governance that derives power from a tricameral General Assembly. The Assembly is responsible for setting the global FSC standard and elects a balanced board of directors to guide the implementation of the standard along with the FSC executive staff. In most countries, accredited national initiatives implement the global standard to comport with local conditions. The resultant national standards are the basis for FSC’s third-party certification process. There are thus a variety of important players in FSC governance.



**Figure 4: FSC Governance**

FSC has always been a membership based organization, deriving credibility from its multi-stakeholder origin and processes. Membership in FSC is open to any interested party – other than a government body – that can demonstrate an active commitment to FSC’s mission, is sponsored by two current members, and pays the required membership fee.<sup>61</sup> All members are permitted to participate in the FSC General Assembly, which is the ultimate source of authority for the entire FSC system. At its founding, FSC was governed by a bicameral Assembly wherein the social, environmental, and indigenous group chamber controlled the majority of the overall voting power and the economic chamber held a minority vote.<sup>62</sup> The voting power in each

<sup>60</sup> A note on terminology: for the purpose of the following discussion, “FSC” refers to the FSC international center; “FSC Staff” refers to the executive director and professional staff of the international center; and “FSC standard” and “FSC policy” refer to the principles and criteria and subsidiary standards and policies promulgated by the FSC international center. By contrast, “national initiative” refers to any type of national body recognized by FSC international center, and “national or regional standard” refers to a standard promulgated by a national initiative to implement the principles and criteria.

<sup>61</sup> FSC, STATUTES (2005). Membership fees are based on a tiered scale depending on organization size, non-profit or for-profit status, and location (North or South). See FSC, FSC MEMBERSHIP FEE STRUCTURE (2004).

<sup>62</sup> The social and environmental chamber originally held 75 percent of the vote. FSC, FSC NATIONAL INITIATIVES MANUAL XIII (1998) [hereinafter NATIONAL INITIATIVES MANUAL]; see also Benjamin Cashore et al., The United States’ Race to Certify Sustainable Forestry: Non-State Environmental Governance and the Competition for Policy-Making Authority, 5 BUSINESS & POLITICS 219, 222 n.4 (2003); FRED GALE, THE POLITICISATION OF MARKET INSTRUMENTS FOR ECOLOGICAL SUSTAINABILITY: THE CASE OF VOLUNTARY FOREST CERTIFICATION IN CANADA 8 (2002) (agreeing that the social and environmental chamber controlled 75 percent of the vote).

chamber was additionally split between northern (developed nation) and southern (developing nation) members.<sup>63</sup>

The composition of the Assembly changed quickly. The General Assembly amended its structure during its first meeting in 1996, noting the complexity of achieving consensus in a multi-stakeholder environment as a particular difficulty in resolving contentious issues.<sup>64</sup> In the place of the bicameral assembly, FSC established a tricameral body that is divided into economic, environmental, and social chambers, each with equal voting power. Members are assigned to one of these chambers according to their interests. Membership in the social chamber is open to “non-profit, non-governmental organizations, indigenous peoples associations, [and] unions as well as research, academic, technical institutions and individuals that have a demonstrated commitment to socially beneficial forestry.”<sup>65</sup> Environmental chamber membership is similarly open to NGOs, research, academic, and technical institutions, and individuals with an interest in “environmentally viable forest stewardship.”<sup>66</sup> Finally, the economic chamber is open to organizations and individuals with a commercial interest in forestry and a “demonstrated active commitment to implementing” the FSC standards.<sup>67</sup> Eligibility for membership in the economic chamber is at once broader and narrower than that for the social and environmental chambers. While any entity with a commercial interest – from certification bodies to trade associations to retailers – is a potential member<sup>68</sup> (in contrast to the limitations on social and environmental chamber requirements), these entities must satisfy an explicit test of their commitment to FSC goals – implementation of the FSC standard – that does not apply to members of other chambers. Given the pressure to weaken the FSC exhibited by the global timber industry (as expressed most obviously by flooding the market with alternative, weaker labels), this balance of inclusion and institutional protection is a sensible means to ensure that FSC’s credibility with environmental and social groups remains strong. The system may, however, have led to – and certainly exacerbated – the flight from FSC by some forest owners and users.

The Assembly meets in full only once every three years or earlier in extraordinary cases. Its decisions are taken by consensus, as required by the ISEAL Code; in the FSC, consensus requires a two-thirds majority for all decisions, plus a majority in each membership chamber.<sup>69</sup> Voting power in each of the three Assembly chambers is equal, and voting in each chamber is further equally subdivided between developing and developed country interests. Each member receives a single vote, except that individual members (as opposed to organizational members) are limited to ten percent of each chamber’s total voting weight.<sup>70</sup> The General Assembly is the

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<sup>63</sup> Determination of whether a country is included in the northern or southern polity is determined in accordance with United Nations criteria using *per capita* GNP. FSC, FOREST STEWARDSHIP COUNCIL, A.C. BYLAWS 3 (2006) [hereinafter FSC BYLAWS].

<sup>64</sup> FSC, FIRST GENERAL ASSEMBLY OF THE FOREST STEWARDSHIP COUNCIL (1996).

<sup>65</sup> FSC, *Governance: Membership Chambers*, at [http://www.fsc.org/en/about/governance/membership\\_chambers](http://www.fsc.org/en/about/governance/membership_chambers).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* The Bylaws stipulate that certification body members be undergoing accreditation, that traders “have made a commitment to have a significant percentage of their sales in certified timber by a set date in the future, and that producers have a significant part of their production forests certified” within two years, plus an expectation that the entire operation will conform to FSC principles within a reasonable time. FSC Bylaws, *supra* note 63, at 4-5.

<sup>68</sup> This inclusiveness has been cited as a source of intra-chamber conflict. Cashore et al., *supra* note 62, at 222.

<sup>69</sup> FSC, STATUTES, *supra* note 18.

<sup>70</sup> FSC BYLAWS, *supra* note 63, at 2-3.

source of major policy decisions in the FSC system, most notably admitting and divesting members, setting and revising the FSC standard, and electing the Board of Directors.

The FSC global standard is organized into a set of ten principles and 57 associated criteria. The principles and criteria demand legal compliance, protection of workers' rights and community protections, and minimization of environmental impacts through management planning and on-the-ground monitoring, and they can be applied tropical, temperate, and boreal forests and to plantations. The criteria associated with these principles outline more specific types of activities required for certification.<sup>71</sup> Together, the FSC principles and criteria thus set forth a uniform, broadly applicable standard for protecting the social and environmental sustainability of forestry operations. The Assembly has sole responsibility for and authority over the development and revision of these principles and criteria; to date, it has made only a single change, to add the tenth principle to cover plantations.

The Assembly's second key task is election of the FSC Board of Directors. The Board consists of nine members, each of whom serves a three-year term. Three of the Board members are elected by each chamber, with the odd member switching between representation of the North and South after each election cycle.<sup>72</sup> Election to the Board is staggered, with three members appointed each year by the Assembly by postal ballot. Like the Assembly, Board decisions are made by vote, with 6 votes required to act. Board members are expected to represent the interests of their affinity group – but not their organization in particular – during their tenure on the Board.<sup>73</sup> The Board plays an active role in the functional governance of the FSC system, most notably through its oversight of the national initiatives and national standards and through approval of FSC international policies and standards.

While the Assembly has sole power to amend the global standard, its powers over the standard's application are limited. The principles and criteria are too broad to allow direct implementation at the local or national level due to divergent laws and regulations, sociocultural differences, ecosystem values, and other factors. As a result, the FSC global standard must be clarified for use in certification of particular forests. The work of applying the FSC standard on a national or regional level is left to national initiatives, which develop and implement the standards used during the certification process. FSC thus operates on a "federal" system, where the central body sets the standards for the operation of national initiatives and the national standards they produce, but cannot fully control the content of those standards or the processes used to create them.

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<sup>71</sup> See generally, FSC, FSC INTERNATIONAL STANDARD: FSC PRINCIPLES AND CRITERIA FOR FOREST STEWARDSHIP (1996).

<sup>72</sup> Certification bodies are prohibited from appointment to the Board due to potential conflicts of interest. FSC BYLAWS, *supra* note 63, at 7.

<sup>73</sup> *Id.* at 7.

**Table 3: Governance Body Responsibilities**

<b>Body</b>	<b>Responsibilities</b>
General Assembly	<ul style="list-style-type: none"> <li>• Contains economic, social, and environmental chambers composed of non-governmental stakeholders</li> <li>• Sets global standards</li> <li>• Elects Board of Directors</li> <li>• Approves amendment of FSC principles and criteria</li> </ul>
Board of Directors	<ul style="list-style-type: none"> <li>• 9 members, 3 elected by each of the three chambers</li> <li>• Guides standards implementation</li> <li>• Accredits national initiatives and national/regional standards</li> <li>• Approves international policies and standards</li> </ul>
National Initiatives	<ul style="list-style-type: none"> <li>• Consist of local stakeholders in a board-accredited structure</li> <li>• Develop and implement regional and national standards</li> </ul>
Secretariat	<ul style="list-style-type: none"> <li>• Houses FSC executive staff</li> <li>• Oversees the creation of international policies and standards through Policy and Standards Unit</li> </ul>

National initiatives may develop either a single national standard or, where necessary, may add an additional layer of specificity to address regional variations in social or environmental conditions. Regional standards do not stand alone, but rather are controlled by the relevant national standard. This system allows national initiatives to both address national laws on a nationwide level and to provide flexibility for regional diversity in countries with heterogenous ecological or social conditions. For example, FSC’s United States initiative (FSC-US) has developed both a national standard and regional standards that are more specific than the national requirements. Thus, while the Southwest and Great Lakes States are subject to the national standard with respect to US environmental and employment laws, they are not subject to identical management principles due to their distinct climatic conditions and indigenous peoples.<sup>74</sup>

National initiatives are subject not only to the substantive provisions set forth by the Assembly in the principles and criteria, but to both substantive and procedural oversight by the Board through accreditation processes. National initiatives cannot be officially affiliated with FSC until they are accredited by the Board based on their compliance with the FSC National Initiatives Manual and FSC standards. These authorities impose limits on the structure, decision-making methodology, and other institutional characteristics of national initiatives and their precursors.<sup>75</sup> In effect, these requirements compel national initiatives to resemble the FSC central body in terms of participation, consensus-based decision making, and other factors.

National initiatives evolve through several stages of institutional development. The first step is the designation of an individual contact person. Once the contact person has recruited sufficient support, she may organize a working group. Working groups are subject to constraints including decision-making by consensus, balance in representation of interest groups, the

<sup>74</sup> See FSC-US, *Principles and Criteria*, at [http://www.fscus.org/standards\\_criteria/flowchart.php](http://www.fscus.org/standards_criteria/flowchart.php).

<sup>75</sup> See generally NATIONAL INITIATIVES MANUAL, *supra* note 62.

creation of grievance procedures, and general requirements for open membership and transparency. Once they have created a grievance protocol, working groups are permitted to develop national and regional standards. Working groups may evolve into an advisory board or national office, both of which require the development of national standards prior to accreditation. While advisory boards are independent, a national office is eligible to operate as a branch of FSC. Although FSC does not prescribe the governance structure or practices of its national offices or advisory boards, it requires that initiatives be governed democratically through a balanced, consensual, participatory, transparent process.<sup>76</sup> The Manual suggests that these governance structures should be modeled on the FSC Assembly/Board structure, using economic, social, and environmental membership chambers.<sup>77</sup> Moreover, national offices must use operational procedures similar to FSC, and advisory boards and national offices must have full dispute resolution protocols modeled on those used by FSC. Accreditation decisions and disputes from members concerning the Board's or Executive's activities are subject to appeal on both procedural and substantive grounds under FSC's dispute resolution protocol.

Like most of its peers, FSC uses a third-party certification program. It nonetheless retains control over certification bodies through accreditation. Certification bodies are required to undergo accreditation prior to certifying entities to forest management or chain of custody standards,<sup>78</sup> but unlike national initiatives and national standards, FSC does not directly accredit certification bodies. Instead, it uses a third-party accreditor, Accreditation Standards International (ASI), to avoid conflicts of interest and increase transparency. The third party accredits certification bodies according to set procedures to ensure competency and independence.<sup>79</sup> When applying for accreditation, certification bodies must determine whether they seek accreditation for forest management and/or chain-of-custody certification and must select an appropriate geographic region for which they will be certified.<sup>80</sup> Accreditation decisions for both types of certification bodies are evaluated based on compliance with the FSC standard governing the operation of its certification bodies – a standard that adapts the relevant ISO Guide to the FSC system.<sup>81</sup>

After applying to ASI, certification bodies are first subjected to a document review based on checklists created by ASI in order to verify compliance with FSC accreditation standards. Remaining issues, as well as verification of findings from document review, are addressed through an office audit that follows the document review. Issues addressed in the office audit include compliance with local laws, confirmation of the certification body's technical and managerial expertise, and verification of the effectiveness of the certification body's internal

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<sup>76</sup> FSC members must comprise a majority of Board membership. NATIONAL INITIATIVES MANUAL, *supra* note 62, at 29-38.

<sup>77</sup> Certification bodies and their employees are banned from participation in national initiatives.

<sup>78</sup> Certification bodies must be accredited for both forest management and chain of custody in order to issue forest management certificates. Chain of custody certifiers are not, however, required to be accredited for forest management certification. ASI, PROCEDURES FOR FSC ACCREDITATION OF CERTIFICATION BODIES 5-6 (2006).

<sup>79</sup> *See id.* at 78. ASI also performs accreditation services for MSC and is considering membership in the ISEAL Alliance. *Id.* at 1.

<sup>80</sup> *Id.* at 6. Certification bodies can seek only chain of custody accreditation or both chain of custody and forest management accreditation. Forest management accreditation alone is not permitted.

<sup>81</sup> FSC, GENERAL REQUIREMENTS FOR FSC ACCREDITED CERTIFICATION BODIES: APPLICATION OF ISO/IEC GUIDE 65:1996 (E) (2004).

quality management procedures.<sup>82</sup> If the document review and office audit are successful, ASI performs a field audit of the certification body's implementation of the FSC standards. The field audit must evaluate the certification body's performance of an entire certification of an uncertified pilot forest, from preparation to reporting, including evaluation of performance. After the field audit, ASI drafts a report on which the certification body may comment; if the report reveals major non-compliance with FSC standards, ASI may require additional field audits.

After completion of the audit process, ASI creates an accreditation report that summarizes its findings and makes a recommendation on accreditation. The certification body has 30 days to review and comment on the report before it is released to an independent, external committee and to the public. The committee makes the final decision on accreditation, which can include disapproval, approval, or conditional approval.<sup>83</sup> Denial of accreditation may be lodged with ASI within 30 days. Appeals are adjudicated by an independent appeals committee pursuant to the same procedures used for disputes over standard-setting.<sup>84</sup> If accredited, the certification body and ASI sign an accreditation contract, which establishes limits on use of the FSC trademark and which finalizes the accreditation process.<sup>85</sup> All told, the accreditation process takes ten to twenty months. After accreditation, certification bodies are subject to annual surveillance audits and must be reaccredited in full after 5 years.<sup>86</sup>

Certification bodies are themselves subject to governance limitations designed to increase accountability and avoid conflicts of interest. These limitations relate to the use of partner organizations and provision of consultancy services to clients. Although noting that conflicts arise when certification bodies provide forest management consultancy services and later evaluate the same forest management unit, FSC does not ban such consulting. Instead, the organization notes the scarcity of expert forestry consultants in developing countries and makes the effectiveness-based decision to countenance some conflicts of interest in such areas. Instead of banning the practice, FSC relies on internal certification body procedures to manage conflicts of interest.<sup>87</sup>

Finally, accountability throughout the FSC governance system is assured through an explicit, formal dispute resolution process. All disputes are resolved under the generic FSC dispute resolution protocol.<sup>88</sup> FSC dispute resolution fora are open to members and nonmember certification bodies (for appeal of accreditation decisions); formal complaints require the participation of at least two members. Access to dispute resolution is further limited by time

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<sup>82</sup> *Id.* at 11.

<sup>83</sup> *Id.* at 13-14.

<sup>84</sup> *Id.* at 18. Certification bodies may also complain to the ASI director with regard to other sources of dissatisfaction with the accreditation process; such complaints are similarly evaluated by an independent committee. *Id.* FSC appears to offer a second avenue for appeal by certification bodies, offering appeal to a balanced, four-member, independent appeals committee appointed by the FSC director. Appeal decisions are taken by consensus and are final. FSC, PROCESSING APPEALS BY ACCREDITED OR APPLICANT CERTIFICATION BODIES (2006). *See also* FSC, INTERIM DISPUTE RESOLUTION PROTOCOL (1998) [hereinafter FSC, DISPUTE RESOLUTION].

<sup>85</sup> *See* FSC, FSC GUIDELINES FOR CERTIFICATION BODIES (2005) [hereinafter FSC, GUIDELINES].

<sup>86</sup> ASI, *supra* note 78, at 14-15.

<sup>87</sup> FSC, GUIDELINES, *supra* note 85, at 1.3.

<sup>88</sup> *See* FSC, DISPUTE RESOLUTION, *supra* note 84.

constraints and through a requirement that the plaintiff raise its concerns prior to the decision that is being challenged.<sup>89</sup> Complaints must be presented to the FSC executive, which administers the dispute resolution process.

Complaints that satisfy these prerequisites may be adjudicated under FSC's protocol. The protocol establishes a mandatory two-tiered system for dispute resolution. The first tier requires an attempt to reach consensus informally. This informal effort is facilitated by the chairman of the Board or the chairman of the Dispute Resolution and Accreditation Appeals Committee (DRAAC),<sup>90</sup> depending on which body will perform the initial formal review. If the informal process is unsuccessful, plaintiffs may choose to initiate the formal process. The formal process may include written submissions and oral hearings, at the adjudicator's discretion. The identity of the adjudicator, in turn, depends on the type of challenge. Unless a complaint challenges a Board decision, it is initially presented to the Board; the remaining challenges are presented to DRAAC in the first instance.

Most complaints are first evaluated by the Board. In this process, the Board determines whether to accept or reject the complaint as frivolous, assisted by an analysis of the complaint drafted by FSC staff. If the Board accepts the complaint, it must respond to it within a certain time. Board decisions may be appealed to the DRAAC. DRAAC decisions are based largely on written submissions and use the same procedures that apply before the Board. The DRAAC may overturn Board decisions only for a "clear error of judgment or a clear and substantial abuse of discretion."<sup>91</sup>

When DRAAC hears challenges to Board decisions in the first instance, it applies the same procedures used by the board. Like Board decisions, the DRAAC decisions are not final. Rather, if after examining the written submissions the DRAAC determines that a complaint has merit, it forwards the dispute to the Board, which proposes a resolution. If the plaintiff is unsatisfied with the proposal, it may appeal to the Assembly, which votes on the matter. In these cases, the Assembly's decision is final.<sup>92</sup>

In sum, FSC's governance systems are highly accessible, participatory, and transparent because FSC channels decision-making power through a well-established, democratic process. In this sense, FSC is unique: alone among the ecolabels studied in this report, FSC allocates both legislative and executive powers to bodies that are composed of external members of the organization. Similarly, the national initiative and national standard structures are designed to maximize opportunities for stakeholder input on the local level. FSC's governance structure thus represents an endpoint on the spectrum of participation, accountability, and transparency; stakeholders make final decisions regarding standard-setting and policy, the Board is fully stakeholder-elected, and decisions are made by consensus, so the end result of Assembly processes are extremely robust and result in a high degree of perceived legitimacy. It is not

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<sup>89</sup> FSC, DISPUTE RESOLUTION, *supra* note 84. FSC refers to this as the "prior participation" requirement.

<sup>90</sup> The DRAAC is a six-member panel that includes diverse interest group representation and is appointed by the Board. It has jurisdiction over all appeals and its decisions require unanimity. FSC, *supra* note 26.

<sup>91</sup> FSC, DISPUTE RESOLUTION, *supra* note 84.

<sup>92</sup> FSC, *supra* note 26. The dispute resolution protocol conflicts with this statement, however, stating that no appeal from DRAAC decisions is permitted. FSC, DISPUTE RESOLUTION, *supra* note 84.

surprising that FSC processes have resulted in forest management standards that are widely perceived as more sustainable than those created by other systems.<sup>93</sup>

Although FSC's democratic system has resulted in a high degree of credibility, especially in comparison to its industry-created forestry ecolabel peers, the inclusiveness of its system carries a price in effectiveness. The geographically disparate Assembly does not meet annually, as it does in other labeling systems, and its size and complexity may cause difficulty in the creation of consensus. The resultant conflicts between and within the membership chambers have been a factor driving the creation of alternative labeling systems.<sup>94</sup> Not only has the perceived dominance of the social and environmental interests proven troublesome to economic chamber members, but the inclusion in the economic chamber of both timber producers and of entities down the supply chain has created controversy and internal strife within that chamber, perhaps stimulating the growth of alternate certification mechanisms in which industry perspectives are given more priority and economic efficiency and ease of implementation are preferred to accessibility and transparency.<sup>95</sup>

The Assembly process is not the only area where participation and transparency are preferred to efficiency considerations. The accessibility of national initiative and national standard processes have also proven a significant drag on the development of implementable standards and have proven contentious, inhibiting FSC's expansion. Recent alterations to the FSC governance structures may reduce the cost and time required to implement FSC, however. The creation of a third-party accreditor for certification bodies, for example, is likely to reduce the costs of accreditation and potentially reduce the costs of certification by increasing the supply of certification bodies. Notwithstanding this and other changes (such as the addition of a third chamber in the Assembly), FSC's governance structure remains heavily weighted in favor of participation. Gulbrandsen concludes:

“Consultation with a broad range of stakeholders in standard development and rule making appears vital to the credibility of a certification scheme, but – as seen in the FSC – differences of opinion and clashes of interests slow decision making and may ultimately cause standardization processes to stall. Conversely, industry domination in standard-settings may facilitate flexibility and efficiency in rule making and implementation, but ignoring environmental organizations and other stakeholders may put the reputation of the scheme at risk – witnessed in the case of the PEFC.”<sup>96</sup>

### *Standard-Setting Processes*

The FSC standard-setting processes are complex due to the multi-tiered governance structure. Each of the Assembly, Board, FSC executive staff, and National Initiatives plays a

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<sup>93</sup> This perception is well-grounded; a comparison of PEFC and FSC standards in Sweden noted that in 2004, the FSC standard was more stringent than PEFC on 17 variables, whereas the PEFC standard was more stringent for only four variables. Gulbrandsen, *supra* note 51, at 350 (citing GUSTAV AULÉN & STEFAN BLECKERT, SKOGSDUVAN [THE STOCKDOVE] (2001).)

<sup>94</sup> Bernstein & Cashore, *supra* note 55, at 39-40.

<sup>95</sup> Cashore et al., *supra* note 62, at 222.

<sup>96</sup> Gulbrandsen, *supra* note 51, at 351.

role in setting standards. Due to the complexity of this system standard-setting processes at the international and national levels are discussed separately. This discussion relies on FSC's standards terminology.

**Table 4: FSC Deliverables**

<i>Type</i>	<i>Description</i>	<i>Scope</i>	<i>Approving Body</i>
Principles and Criteria	Basis for all FSC management standards	International	Assembly
International Policy	Specify course of action or guiding principle for future FSC activity	International	Board
International Standard	Procedures and requirements for direct implementation.	International	Board
National/Regional Standard	Provide specific indicators for implementing international standards at a national or local level	National/Regional	Board
Guidance Document	Provide supplementary information to facilitate the implementation of a standard or policy	International	PSU
Discussion Paper	Present issues of importance to FSC and its stakeholders and explore the implications of these issues for FSC	International	PSU
Advice Note	Formal note providing advice about the correct implementation of a specific aspect of a standard or FSC policy in response to a specific question	International	PSU

### International Policies and Standards

The FSC principles and criteria were originally established through an informal, multi-stakeholder process. In subsequent years, although the principles and criteria have changed relatively little, the standard-setting process has become significantly more formalized. The creation of any policy or standard at the international level is overseen by the FSC Policy and Standards Unit (PSU), a division of the FSC staff. The PSU operates differently according to the type of policy or standard under development. The PSU may itself develop guidance documents, advice notes, and discussion papers. These documents are not binding but provide assistance to members, national initiatives, or certification bodies or present issues that may result in future formal policymaking. More formal documents – FSC international policies and standards – are subject to more controls. The development of both policies and standards must follow explicit procedures.

FSC international policies are defined as guiding principles for FSC's future actions. They must be formally adopted by the Board,<sup>97</sup> but may be proposed by any of the Assembly, Board, FSC staff, members, or the public. Proposals are reviewed by the FSC executive, who

<sup>97</sup> FSC, FSC PROCEDURE: THE DEVELOPMENT AND APPROVAL OF FSC POLICIES (2006).

has the sole power to initiate policy development. The PSU develops a discussion paper exploring the proposal. Circulation of the discussion paper and announcement of the policy-development process is followed by a 30-day public comment period. Public comment is also encouraged by the creation of a Consultative Forum (CF) to ensure formal input from all applicable stakeholder groups; membership in the CF is open to any person, regardless of FSC membership status. Additionally, the PSU must be proactive in seeking comments from all stakeholder groups. After the public comment period, the PSU drafts a proposed standard based on the discussion paper, which is released to the public for an additional 30-day comment period.<sup>98</sup> Following the comment period, the PSU must respond to all formal comments and indicate how they were taken into account in the revised policy. The publication/comment process may be repeated at the discretion of the PSU. When finalized, the PSU forwards the final draft policy to the Board along with a report on the policy development process and other information relevant to the Board's decision. The Board or a committee may approve the policy, return it for further modification, or approve it with modifications.

FSC has a separate policy guiding the development of FSC international standards. Unlike policies, standards have restrictions on content: they must be clear and objective, must include guidance for implementation, including allowance for addressing deviations due to local conditions, and must include verifiable benchmarks and objectives.<sup>99</sup> These requirements are intended to ensure that FSC standards are effective, both in the sense that they are easy to apply in the field and that they require meaningful performance benefits, while still providing for flexibility in application for divergent local conditions and forestry operation types.

The standard-setting process begins with a proposal submitted by an FSC member, the Assembly, the Board, the FSC executive, a National Initiative, or ASI. This list includes all entities engaged in the FSC process except non-member stakeholders. Proposals must indicate how the standard enhances credibility, integrity, and efficiency as well as identifying the need for a new standard, the cost of the standard, affected stakeholders, and other information.<sup>100</sup> The FSC executive reviews all proposals and is authorized to make the decision to implement the standard-setting process. Approval requires immediate public disclosure and creation of a steering committee, working group, and CF under the PSU to guide the standard-setting process.<sup>101</sup> The steering groups serves an oversight role, including reviewing and approving the terms of reference and work plan of the working group, providing advice and support during the process, and reviewing the CF membership to ensure representation of all stakeholder groups.<sup>102</sup> The working group performs the actual work of drafting and developing the standard. Membership in the working group must be proposed and approved by the Board with the support of the Steering Committee, and members must declare any conflicts of interest.<sup>103</sup> Stakeholders also have input on working group representation through a 30-day public comment period. FSC

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<sup>98</sup> In addition to drafts for public comment, PSU may release interim drafts for technical comment only.

<sup>99</sup> See FSC, FSC PROCEDURE: THE DEVELOPMENT AND APPROVAL OF FSC SOCIAL AND ENVIRONMENTAL INTERNATIONAL STANDARDS (2007) [hereinafter FSC STANDARD-SETTING POLICY].

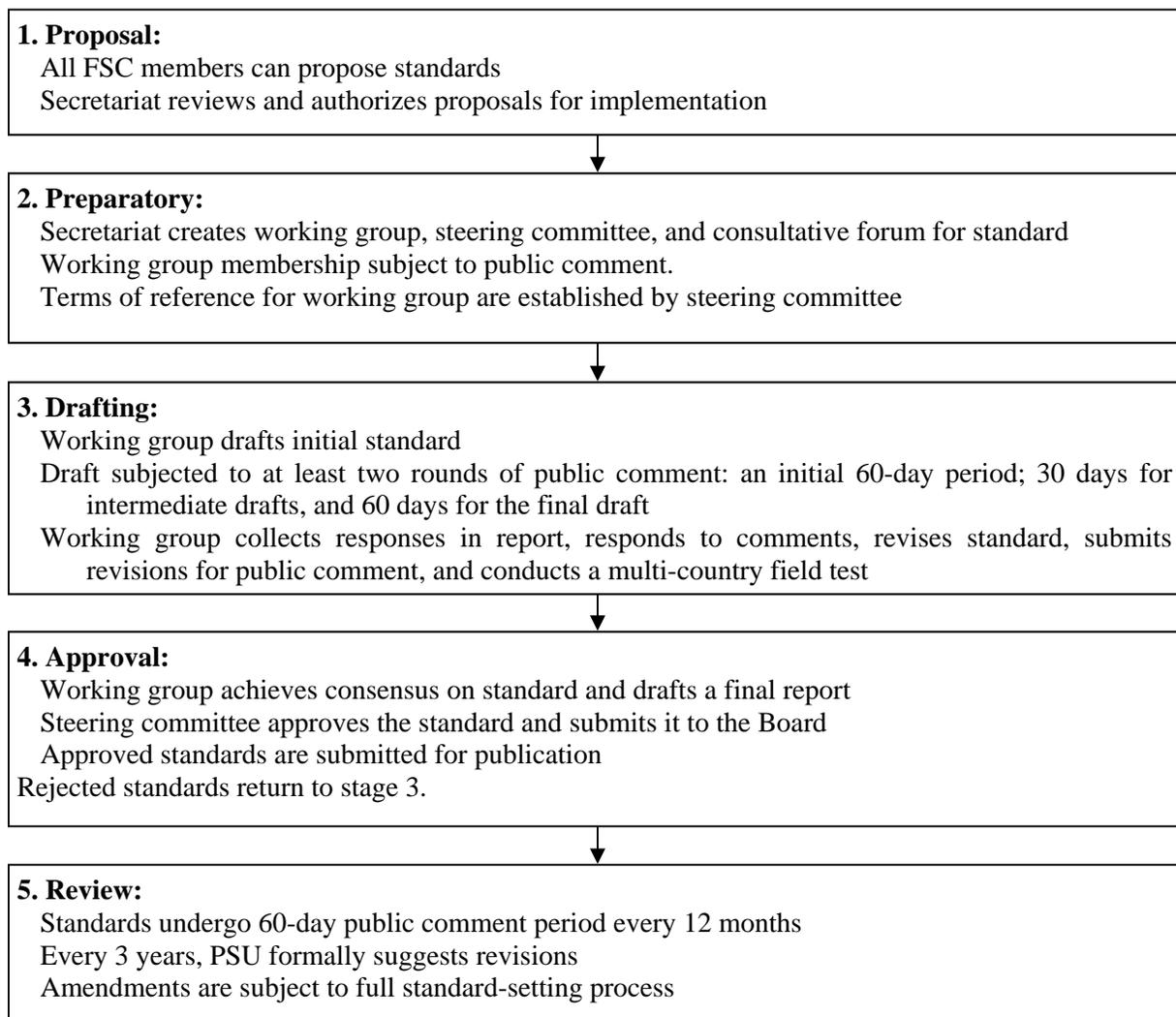
<sup>100</sup> *Id.* at 5-6.

<sup>101</sup> The steering committee is composed of the FSC executive director, the director of the PSU, and the facilitator of the working group, plus other members of the FSC staff or representatives of other standard-setting bodies. *Id.* at 7.

<sup>102</sup> *Id.* at 7-8.

<sup>103</sup> Conflicts of interest do not necessarily result in exclusion from the working group, as the intent is to balance the interests. *Id.* at 20.

and National initiative staff, Board members, and certification body staff are ineligible for membership in the working group, which is intended to be made up of FSC members drawn from each of the six interest groups in the Assembly.<sup>104</sup> Finally, the CF is open to any FSC stakeholder regardless of membership status, and its participants must encompass all interest groups.<sup>105</sup>



**Table 5: Process for setting international standards**

There is no set process for initial drafting of the standard; rather, the steering committee designates a process to be followed by the working group. Once drafted, the standard is released to the public for a 60-day comment period. Intermediate drafts require a 30-day comment period, and comment period for the final draft must be 60 days. Formal comments are collected and responded to in a report by the working group facilitator that echoes required reporting on comments related to FSC policies. The working group reviews the report and revises the

<sup>104</sup> FSC STANDARD-SETTING POLICY, *supra* note 56, at 9. The PSU may also appoint technical experts to assist the working group. These experts are not permitted to vote.

<sup>105</sup> *Id.* at 10.

standard accordingly; the report and the revised standard are then re-posted for public comment. Although the decision on completion of a standard is left to the working group's discretion, at least two rounds of comment are required prior to finalization of the standard.

Once the working group has completed a draft standard, it must conduct a multi-country pilot or field test of the standard prior to submission to the Board for approval.<sup>106</sup> After a successful pilot test, the Steering Committee may consider the standard ready for approval by the Board. Before the standard can be submitted to the Board, however, the working group must formally approve it. Working group approval requires consensus, followed by a final comment period.<sup>107</sup> At the close of the comment period, the working group prepares a report that includes details on the standard-setting process and substantive issues addressed during the standard development process. The steering committee then approves the report and submits it to the Board along with the standard and all comments received. The Board or a subcommittee then approves or rejects the standard.<sup>108</sup> Rejection requires the Board to provide reasons for its decision. Based on these reasons, the Steering Committee decides whether to resubmit the standard to the working group for revision.

Approval results in the immediate publication and implementation of the standard. Approved standards must be reviewed after 12 months based on comments received on the standard's operation. If the experience with the standard suggests that a modification may be needed, the PSU creates a report outlining prospective changes. After a 60-day public comment period, the Steering Committee decides whether to revise the standard and proposes a revision process. The revised standard is resubmitted to the Board for approval. In addition to the 12-month review, the PSU must create a report recommending revisions to the standard after three years. If amendment is required, the full standard-setting procedures must be followed.

The international FSC standard-setting process is thus subject to a complex, controlled development and revision process that incorporates stakeholders into the drafting process through the working group, CF, and Board (in addition to the normal provision for public comment) while relying on FSC staff for technical assistance and oversight. While this stakeholder input is remarkable, the Board and working group are relatively small groups that may raise questions among the larger member community. FSC has responded to this concern by creating a parallel avenue for standard-revision. The Assembly has the power to propose revision of FSC standards notwithstanding opposition by the Board through a motion. Similarly, an Assembly motion is required to amend the FSC principles and criteria.

Substantive or procedural disputes about policies and standards are addressed similarly by FSC. The PSU is responsible for the initial response to both the types of complaint. Substantive appeals on FSC policies are forwarded to the Board if the plaintiff remains

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<sup>106</sup> Pilot tests require the permission of the executive director and must follow a set policy; it may result in the issuance of an FSC certificate. FSC, FSC POLICY FOR PILOT TESTS OF DRAFT FSC STANDARDS (2004). Field testing requires no pre-approval and does not result in the issuance of a certificate. FSC STANDARD-SETTING POLICY, *supra* note 56, at 14.

<sup>107</sup> Consensus requires general agreement in the absence of sustained opposition, or a 66 percent approval by vote. If the working group cannot reach consensus, the Steering Committee must report to the Board proposing how to proceed. The Board's decision is final. FSC STANDARD-SETTING POLICY, *supra* note 56, at 15.

<sup>108</sup> *Id.* at 16. The Board may require minor amendments as a condition of approval.

unsatisfied, but no appeal is permitted with respect to standards. Procedural appeals of both policies and standards are treated equally; if the plaintiff is unsatisfied by the PSU response, it may appeal through the formal dispute resolution process.

### National Standard-Setting

National initiatives are responsible for implementing the FSC principles and criteria, international standards, and policies at the national and regional level. FSC's structure is designed to maximize local input and provide for institutional flexibility, so requirements issued through the international process often require further specification prior to implementation at a local level. National standards are used to bridge the gap between international policy statements and local application, and their development is one of the most important elements of the standard-setting process.

Analysis of national initiative standard-setting processes is difficult because initiatives operate independently and use different languages, governance structures, and procedures.<sup>109</sup> Nonetheless, the structure and development of national and regional standards is constrained because standards must be accredited by FSC prior to use in certification. Accreditation is determined through standards established in the National Initiative Manual and more recent standards specifically governing the structure and content of these standards.<sup>110</sup> These requirements are fairly comprehensive, referring "to both the content of the standards and the process used to draw up the standards, including compatibility with FSC Principles and Criteria, a local consultative process for their design and compatibility with local circumstances."<sup>111</sup>

The first step in the development of a national standard is the creation of a standard-setting body, whether internal or external. Although national and regional standards cannot be accredited except as the result of adoption by an accredited national initiative, initiatives are not required to actually draft the standards. While initiatives are permitted to initiate development of national standards, they may also merely evaluate and adopt standards created by other standard-setting bodies. If an initiative chooses to keep standard development internal, however, it must establish a standard-setting body for the purpose. The Manual warns initiatives against misuse of the FSC label and identification of draft standards by external standard-setting bodies, however. To address these concerns, in 1998 FSC proposed the development of guidelines for standards-development committees.<sup>112</sup> No final policy has to date been established, but the draft standard for development of national standards requires unaffiliated committees to contract with the applicable working group to ensure that the standards-development process comports with

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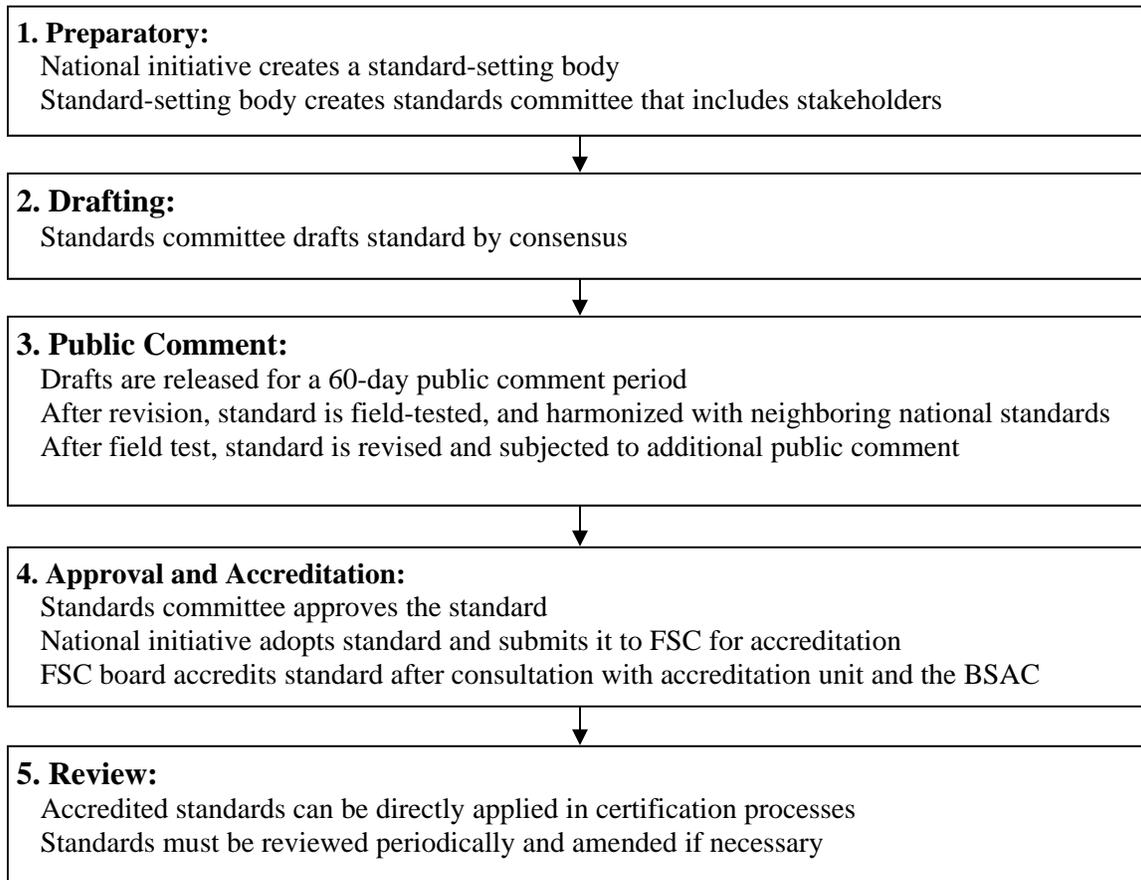
<sup>109</sup> FSC, STRUCTURE AND CONTENT OF FOREST STEWARDSHIP STANDARDS (2004) [hereinafter FSC, STRUCTURE AND CONTENT] ("It is very difficult to compare Forest Stewardship Standards that follow different approaches.").

<sup>110</sup> See *id.*; NATIONAL INITIATIVES MANUAL, *supra* note 62; FSC, PROCESS REQUIREMENTS FOR THE DEVELOPMENT OF NATIONAL OR SUB-NATIONAL FOREST STEWARDSHIP STANDARDS (DRAFT 3.0) 2005 [hereinafter FSC, PROCESS REQUIREMENTS]. The more recent standards for national initiatives have not been approved and remain in development. They are nonetheless considered due to the antiquity of the Manual and the likelihood that these standards will eventually be implemented.

<sup>111</sup> NATIONAL INITIATIVES MANUAL, *supra* note 62, at 59.

<sup>112</sup> NATIONAL INITIATIVES MANUAL, *supra* note 62, at 60.

FSC requirements.<sup>113</sup> The draft policy also requires all standard-setting bodies – whether internal or external – to follow identical rules, including a requirement that they all follow documented standard-setting procedures that comply with the FSC standard. These procedures must include dispute resolution; the standard-setting body itself responds to complaints.



**Table 6: Process for setting national standards**

The standard-setting body procedure begins with the establishment of a standards committee. Membership on the standards committee is based on expertise and support of the applicable stakeholder group; members need not be FSC members and the interests of all stakeholder groups should be represented.<sup>114</sup> Standards committees are divided, like the FSC Assembly, into economic, social, and environmental chambers for decision-making purposes. Each chamber must have at least two members, and membership in each chamber must be equal.<sup>115</sup> Decision-making on standards committees must be by consensus, defined as a 2/3

<sup>113</sup> FSC, PROCESS REQUIREMENTS, *supra* note 110, at 1. In addition, the standard anticipates the creation of an additional standard that establishes the content of these terms of reference, designated as FSC standard 60-004. *Id.* This standard is not currently available in any form.

<sup>114</sup> The FSC policy describes a variety of specific stakeholder groups that must be represented in each of the economic, social, and environmental interests. Certification bodies are not eligible for participation in standards committees. *Id.* at 6-7.

<sup>115</sup> *Id.* The specific division is left to the standard-setting body, as is the participation of governmental bodies. Standard-setting bodies are encouraged to design the committee to maximize the potential for consensus.

majority in favor and no votes against. Where consensus is impossible, a 2/3 majority and a simple majority of each chamber may also suffice, at the chairperson's discretion.

After creation of a standards committee, the standard development process begins. The first stage is notification of all stakeholders in the area that a standard is under development and inviting input. The standard-setting body then selects one or more people to draft the initial standard. After initial drafting, the standard must be released for a sixty-day public comment period. The second draft must be tested in a forest, then released to the public for the same period along with the results of field testing. The next draft may be reported to the national initiative for approval.<sup>116</sup> Forest testing must take account of the variety of forest areas where the standard will be implemented and should be performed by a certification body. Substantively, standards must be harmonized with national standards in neighboring countries except as required by national laws or other local social or environmental conditions or the priorities of stakeholders. After drafting is complete, the standards committee is required to formally approve or disapprove the standard. If not approved, the standards committee must indicate what is required before the standard can be resubmitted. Once approved by the standards committee, the national initiative may adopt the standard.

Once an accredited initiative has adopted a standard, it may submit the standard to the FSC accreditation unit for accreditation. Accreditation unit staff members are subject to protections against conflicts of interest; they cannot advise or consult during the development of national standards; in addition, the accreditation unit is financially independent of FSC.<sup>117</sup> The accreditation staff analyzes the standard for process and content, then presents the findings to the Board Standards Accreditation Committee (BSAC). The BSAC can accredit the standard,<sup>118</sup> deny it, or refer it to the full board for consideration. The Board can also object to the BSAC decision independently; an objection automatically results in referral of the decision to the full Board.<sup>119</sup> The national standard takes effect 12 months after approval by FSC.<sup>120</sup>

To obtain accreditation, national standards must comply with substantive requirements in addition to FSC's standard-setting procedures. FSC has developed a standard governing the structure and content of national standards designed to allow consistent auditing in geographically disparate areas. This standard requires national standards to comply with three principles:

- perfection is not required in implementing the FSC principles and criteria;
- a major failure in implementing any FSC principle must result in disqualification; and
- certification decisions must be made on the basis of the *extent* to which each FSC criterion is satisfied, tempered by the importance and consequences of any failures.<sup>121</sup>

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<sup>116</sup> *Id.* at 9. Standards for small and low-intensity managed forests may be subject to fewer drafts.

<sup>117</sup> FSC, FSC ACCREDITATION OF NATIONAL AND REGIONAL FOREST STEWARDSHIP STANDARDS 4 (2003). FSC indicates that it considered outsourcing accreditation decisions to fully shield itself from conflicts of interest. While this assuredly would have been maximally transparent, the organization has not chosen to follow this path to date.

*Id.*

<sup>118</sup> FSC previously used the term "endorse" to refer to the accreditation of national standards. *Id.* at 1n1.

<sup>119</sup> *Id.* at 5.

<sup>120</sup> FSC, STRUCTURE AND CONTENT, *supra* note 109, at 10.

<sup>121</sup> *Id.* at 3.

In addition to these global principles, the FSC standard contains requirements specific to the format of the standards. National standards must include indicators for every FSC criterion in addition to those developed to address additional criteria established by the standard-setting body. Indicators for FSC criteria may be excluded if inapplicable to the country or region, but exclusions must be justified.<sup>122</sup> Each indicator must specify measurable performance thresholds for use by certification bodies and should use objective language. Moreover, each indicator may evaluate only one aspect of performance and should be written so that the requirements for compliance are obvious – notably by providing examples of compliant systems and sources of information used for verification.<sup>123</sup>

Thresholds for process-based indicators – such as a requirement for a forest management plan – are based on the existence of the plan, evidence of its implementation, and its actual or expected outcomes. Performance-based indicators, by contrast, are quantifiable and thresholds can thus be set at a variety of levels and can explicitly consider local conditions. The standard must be cost effective and practical in small scale and low intensity forest units; if special standards apply to these or other producers, these standards and qualified producers must be clearly stipulated either in the standard or through guidance notes.<sup>124</sup>

Until 2002, standards were officially eligible for accreditation only if they fully complied with the FSC principles and criteria, as elaborated by the FSC standards on process and content.<sup>125</sup> Experience showed, however, that national initiatives had difficulty developing and agreeing upon standards due to a lack of scientific expertise, limited resources, lack of consensus, and other factors.<sup>126</sup> The resultant delays hindered the development of national standards and thereby limited the expansion of the FSC label into new countries and regions.<sup>127</sup> FSC accreditation unit adapted to this situation by providing for approval of national standards with preconditions.<sup>128</sup> In March 2003 the Board formalized preapproval by adopting an international policy for preliminary accreditation of national standards pending field testing of the standard.<sup>129</sup> The formalization of this mechanism eases the barriers to entry to the FSC system by facilitating the initial development of national standards. This change likely increased the transparency and effectiveness of the FSC system, at the cost of some potential loss of credibility due to the accreditation of national standards that are later found insufficient. The formalization of this requirement and the facilitation of the development of national standards

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<sup>122</sup> *Id.* at 6. Criteria needing no indicators for implementation must merely be restated as indicators.

<sup>123</sup> *See id.*

<sup>124</sup> *See id.*

<sup>125</sup> FSC, SUMMARY OF THE PROCESS FOR FSC ACCREDITATION OF NATIONAL AND REGIONAL FOREST STEWARDSHIP STANDARDS (2003).

<sup>126</sup> FSC, *supra* note 117, at 6.

<sup>127</sup> FSC ACCREDITATION BRIEFINGS: FSC ACCREDITATION OF NATIONAL AND REGIONAL FOREST STEWARDSHIP STANDARDS 6 (2003) (“[T]here has been a tension between the FSC Accreditation Business Unit’s remit to ensure that all FSC international standards and accreditation requirements are met, versus the desire of FSC National Initiatives to get a standard into the field, and respond to market demands and opportunities. Resulting delays in the standards development process can lead to a loss of momentum and enthusiasm amongst stakeholders and potential applicants.”).

<sup>128</sup> FSC, FSC POLICY FOR PRELIMINARY ACCREDITATION OF NATIONAL/REGIONAL FOREST STEWARDSHIP STANDARDS 3 (2003).

<sup>129</sup> *See id.*

has been an especially welcome improvement in light of controversy over the efficacy of FSC's implementation process in the absence of national standards (*see FSC Implementation*).

### Comprehensive Review of the FSC Standard-Setting Process

FSC's dispersed governance structure has troubling implications for its standard-setting processes. One of the most persistent criticisms of FSC has been the difficulty – in time and expense – required to establish national standards. Even in the United States – a country with significant institutional expertise, well-defined forestry laws, and strong environmental and industrial engagement in the standard-setting process – FSC-US has only in recent years been able to complete its initial standard-setting. These delays setting result from the participatory and consensual nature of standard development throughout FSC's institutional structure. The Assembly is so inclusive that it meets only once every three years to debate changes to the Principles and Criteria, making changes to FSC's foundational document difficult. While it is simpler to develop policies and standards at the Board level, the development process remains complex and subject to input from a wide variety of institutions, including the Board, the PSU, the working group, the working group steering committee, and the consultative forum – in addition to the public. FSC's standard-setting process, like its governance structure, represents a participatory, transparent endpoint: it is hard to conceive of a system that would be more inclusive of the full spectrum of public and stakeholder interests. Like in governance, however, FSC's standard-setting process pays the price in economic efficiency and ease of implementation, especially where stakeholder consensus is not forthcoming. Perhaps the clearest evidence of this failure is the ongoing absence of a finalized policy or standards clearly governing the operation of national initiatives or their standard-setting processes. While FSC has created the draft standards discussed in this section, these standards are not yet binding, leaving the organization's 1998 National Initiatives Manual as the last word governing national body standard-setting.

The draft FSC standards on the process, structure, and content of national standards promise to bring a welcome degree of standardization to the national initiative standard-setting process – particularly with respect to the structure and content of those standards. The draft standard seems clearly derivative of the MSC system, where indicators are used to clarify the application of global principles and criteria on a local level. This system is a good one for taking account of local variation in social, economic, and environmental conditions, and correlates well with FSC's goal of incorporating local bodies into the standard-setting process. Moreover, the requirement that national standards include objective, measurable performance criteria will simplify and ensure consistency in the auditing process, both within and across nations. On the other hand, the processes for setting standards remain extremely complex, even at the local level. The layers of institutional complexity mandated by FSC's process standard – including a separate national initiative, standard-setting body, standards committee, and consultative forum – promise to further extend the standard-setting process, once again championing participation and transparency over effectiveness, potentially decreasing FSC's market share, especially when compared to the comparatively loose standards for national standards adopted by PEFC.

## *Implementation Methodology*

National standards are applied on the forest management unit level through audits performed by accredited certification bodies. Certification at the forest management unit level can occur in two ways. The more common system relies on accredited national standards created by an accredited national initiative. Certification is also possible in the absence of an accredited national standard pursuant to an FSC standard.<sup>130</sup>

The certification process is simple when a relevant national or regional standard has been accredited by FSC. FSC describes the permissible scope of certification. The unit of certification for FSC purposes is the forest, defined as “any tract of land dominated by trees” – regardless of how those trees are exploited for resources – so long as the tract can maintain the ecological functions and values required by the principles and criteria. Thus, very short rotation tree crops (such as conifers for Christmas tree production) may qualify as forests but may have difficulty satisfying the principles and criteria as a result of the lack of mature trees in the forest. If so, these forests are ineligible for certification.<sup>131</sup> Assuming that a forest management unit satisfies this requirement, the certification body may proceed with its audit. In contrast to other implementation methodologies, certification bodies are not required to follow a set methodology except as required to evaluate the forest based on the national standard’s performance thresholds. As discussed above, these thresholds must be specific and measurable, simplifying the task of ensuring consistency between audits.

Regardless of the reason, FSC’s implementation methodology is simpler than many of the ecolabels considered in this report because it lacks an intricate scoring system to guide certification decisions. Instead, the certification body decision-making process for accreditation and other matters is constrained mainly by FSC’s standard requiring certification bodies to comply with ISO guidance for certification.<sup>132</sup> This standard is process-based, allowing certification bodies some discretion in making certification decisions. These decisions, as noted above, are based on identification of violations and characterization of noncompliance as either major or minor based on the thresholds in the standard. Major noncompliance, as defined by the FSC policy on national standard-setting, generally disqualifies a forest from certification. Minor noncompliance and “observations” (“very minor” violations that could develop into minor violations if not addressed) do not preclude certification unless continued over time, but may result in conditional certification. Performance thresholds thus represent the primary constraint on the implementation of FSC’s global and national standards. The certification report is also important, as it explains the certification body’s reasoning: they must include “specific observations, explanations and references that allow the reader to form an independent judgment as to whether the evaluation was rigorous and consistent in implementing the certification system, and whether the forest management observed meets the requirements of the applicable Forest Stewardship Standard.”<sup>133</sup> Certification reports thus provide a safety valve to constrain certification body discretion if a decision is disputed.<sup>134</sup>

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<sup>130</sup> FSC, LOCAL ADAPTATION OF CERTIFICATION BODY GENERIC FOREST STEWARDSHIP STANDARDS (2004).

<sup>131</sup> FSC, GUIDELINES, *supra* note 85, at 2.1.

<sup>132</sup> FSC, GENERAL REQUIREMENTS *supra* note 81.

<sup>133</sup> FSC, GUIDELINES, *supra* note 85, at 4.1.

<sup>134</sup> Disputes are adjudicated under the generic dispute resolution protocol.

Certification bodies may also certify forests in the absence of accredited (or preliminarily approved) national standards, despite the absence of performance thresholds in such cases. The certification process in the absence of a national standard instead relies on generic standards created by the certification body and adapted to local conditions on an *ad hoc* basis. FSC has created guidance and a standard for setting generic standards and adapting them in these cases.<sup>135</sup> FSC's guidance requires that generic standards be evaluated by FSC for compliance with the FSC Principles and Criteria.<sup>136</sup> The standard addresses the adaptation of generic standards to local conditions, subjecting them to protections for stakeholder input and other factors.

First, certification body standards, like national standards, must comply with applicable international, national, and local forestry and endangered species laws; final or draft national standards in the country or in similar areas must also be taken into account. The standard ensures stakeholder participation by requiring consultation with the applicable FSC national initiative or regional office, the national forestry agency, applicable NGOs, representatives of indigenous peoples, forest workers, and the forest industry.<sup>137</sup> Each of these bodies must be contacted prior to the audit and given the opportunity to comment on the draft standard. The generic standard must not only be adapted to take stakeholder perspectives into account but must also be altered if necessary to avoid conflict with legal requirements and to ensure compliance with those laws. This requirement is supported by a general mandate to “take account of the national context with regards to forest management” and other factors. This requirement is weakened, however, because consensus is explicitly not required prior to finalization of standards by certification bodies. Instead of consensus, certification bodies need only make “reasonable accommodation” for stakeholder concerns.<sup>138</sup> Instead of seeking consensus, the certification body must simply compile a report on areas of disagreement and include it as an annex to the locally-adapted standard.

While FSC's reporting requirement does not compel certification bodies to reach any particular decision, its transparency and accountability benefits are nonetheless important when compared to the requirements imposed by FSC's peer labels. As Gulbrandsen notes with regard to Swedish standards, “whereas FSC-accredited certifiers issue public summaries of certification and audit reports, there are no such publicly available reports from the PEFC. . . . This lack of transparency in the PEFC system makes it almost impossible to scrutinize and assess the effect of third-party auditing in Sweden.”<sup>139</sup> Thus, seen through the lens of interlabel competition, FSC's standard is not only understandable but comparatively notable.

Although its certification body standards are more stringent than those adopted by other forestry ecolabels, FSC's certification-body standard-setting process nonetheless contrasts with the remainder of its standards with respect to participation, transparency, and accountability. Most of FSC's governance structures empower stakeholders, especially on the local level, often

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<sup>135</sup> See generally FSC, LOCAL ADAPTATION OF CERTIFICATION BODY GENERIC FOREST STEWARDSHIP STANDARDS (2004).

<sup>136</sup> FSC, GUIDELINES, *supra* note 85, at 2.7.

<sup>137</sup> *Id.* at 5.

<sup>138</sup> *Id.* at 7.

<sup>139</sup> Gulbrandsen, *supra* note 51, at 346.

to the detriment of efficiency and effectiveness. The certification body procedures, however, clearly prefer efficiency to stakeholder empowerment. In addition to the relative lack of oversight of standard-setting or substance of generic standards, the local-adaptation requirements are generally characterized by a minimal specificity and objectivity, requiring only minimal transparency protections. Reduced administrative complexity in the development of standards by certification bodies may be proper because individual forest owners – particularly in developing countries that are more likely to lack national standards – cannot be expected to underwrite standard-setting with the degree of expertise and dedication that is required to create national standards. Despite the validity of the reasons for limiting open governance in this context, the degree of freedom granted to certification bodies has led to complaints that certification bodies are largely unaccountable and have ingrained incentives to minimize the cost of certification and maximize the success of audits. Concerns that certification bodies operate under conflicts of interest in this context have been borne out in practice, as forests certified under generic processes have experienced measurably inferior performance in comparison to forests certified to a national or regional standard.<sup>140</sup> As a result, FSC’s efforts to hasten the national-standard-setting process are welcome and likely to increase the legitimacy of the FSC system.

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<sup>140</sup> FERN, *supra* note 48, at 21, 46-47 (noting that most challenges to certification decisions have been based on locally-adapted standards adopted by certification bodies).

## Global Aquaculture Alliance

The Global Aquaculture Alliance (GAA) is a trade association representing the aquaculture industry. It was formed by an array of aquaculture producers in 1997. Membership and participation remain limited to industrial representatives. The GAA created its first aquaculture labeling standards for shrimp farming and processing, but more recently expanded the scope of this program to encompass all types of aquaculture products. Once this expanded standard has been implemented, the GAA system will be the first global aquaculture certification and labeling entity.

GAA does not itself apply its standards. Instead, GAA has contracted with the Aquaculture Certification Council (ACC) to serve as its sole certification body to implement GAA standards through certification and labeling. The ACC is an independent entity that was formed by aquaculture industry representatives in 2002. Although it remains independent, its activities have so far been limited to certifying processors, farms, and hatcheries to GAA standards. The relationship between GAA and ACC is thus similar to that between FLO and its certification body, FLOcert, and between SAN and SANcert.

### *Funding*

Like most other standard-setting organizations, logo licensing has been insufficient to fully support GAA's standard-setting activities. As a result, GAA appears to be largely funded through industry support, whether via membership or donation. The ACC has also relied on corporate support, stating that “[m]uch of ACC's early progress was accomplished by the largely volunteer efforts of the organization's staff, board of directors and associated supporters. Additional funds are still needed to support development costs associated with further program expansion, after which income from licensing fees will sustain the ACC effort.”<sup>141</sup> The ACC, like the GAA, targets corporate donation to support its efforts through a buyer's program (\$1,000 per year) and a founding supporter program (one-time \$10,000 fee). The ACC supplements its corporate support with income from classes for auditors and certification fees. Certification fees depend on facility type and amount of fish produced.<sup>142</sup> Part of these certification fees is passed through to the GAA. ACC also collects inspection fees, but pays them directly to its auditors, who are not full-time ACC employees.

### *Governance*

Participation in GAA governance activities requires the purchase of a “governing membership” with fees dependent on annual seafood sales. Although GAA does not explicitly exclude non-industry organizations, the focus on industry membership and its industry-specific mission indicate that GAA is not intended to be a multi-stakeholder group.<sup>143</sup> The makeup of the GAA Board of Directors substantiates this conclusion, as all of its twelve members are industry representatives. GAA's governance also lacks transparency; unlike the multi-stakeholder

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<sup>141</sup> ACC, *Founding Supporters*, at

[http://www.aquaculturecertification.org/index.php?option=com\\_content&task=view&id=19&Itemid=7](http://www.aquaculturecertification.org/index.php?option=com_content&task=view&id=19&Itemid=7) (2007).

<sup>142</sup> Processors must pay between \$2,000 to \$12,000 at a rate of \$2 per metric ton. Farms must pay between \$500 and \$4,000, at a rate of \$1 per metric tone. Hatcheries must pay a flat \$500 fee.

<sup>143</sup> See GAA, *Mission*, at <http://www.gaalliance.org/miss.html> (2007).

organizations considered in this report, GAA does not make its organizational documents available to the public.

The ACC, unlike the GAA, is not a membership-based organization. It is governed by a Board of Directors. The ACC Board is composed of representatives from “seafood producers, processors and buyers, universities and other entities.”<sup>144</sup> Each Board member serves a renewable two-year term, with half elected each year. The Board controls the ACC’s day-to-day operations and finances but does not govern standard-setting. Instead, standards are developed by a separate committee.

### *Standard-Setting Process*

The GAA ecolabel is based on “best management standards” developed through a process that includes some stakeholder input and transparency, but little accountability. The standards are the culmination of an ongoing effort to define management standards for responsible aquaculture production that GAA has carried out over several years. Some understanding of these non-binding antecedents to the GAA standards is thus useful to provide context for the final standards.

GAA first developed a set of guiding principles for responsible aquaculture production. The guiding principles combine specific environmental impacts and their drivers and address many of the considerations identified by the Marine Aquaculture Task Force, including:

- Cooperation in policy development and regulation;
- Siting;
- Conservation of water resources;
- Limitations on effluent;
- Improvements in feedstock usage and limitation in the use of therapeutic agents;
- Avoidance of disease outbreaks;
- Elimination of illegal introduction of exotic species;
- Cooperation for research and education; and
- Benefits to local communities<sup>145</sup>

The GAA then applied these principles by creating codes of practice for responsible shrimp farming. These codes establish management practices to address each of ten generally-applicable (e.g. effluent) and shrimp-specific (e.g. mangroves) categories.<sup>146</sup> These categories

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<sup>144</sup> ACC, *Governance*, at

[http://www.aquaculturecertification.org/index.php?option=com\\_content&task=view&id=18&Itemid=6](http://www.aquaculturecertification.org/index.php?option=com_content&task=view&id=18&Itemid=6) (2007).

<sup>145</sup> GAA, *Principles*, at <http://www.gaalliance.org/prin.html> (2007).

<sup>146</sup> In all, the GAA established codes for food safety, mangroves, site evaluation, design and construction, feeds and feed use, shrimp health management, therapeutic agents and other chemicals, general pond operations, effluents and solid wastes, and community and employee relations. GAA, *Codes of Practice*, at <http://www.gaalliance.org/code.html> (2007). Cf. Marine Aquaculture Task Force, *Sustainable Marine Aquaculture* (2007). Each code of practice includes a number of management practices. For example, the code of practice for “feeds and feed use” includes thirteen requirements for compliance, such as a requirement that feed should “should not contain excessive pesticides” and that “Feeding rates should be determined from standard feed curves and

did not correspond to the guiding principles, making it difficult to determine exactly how the guiding principles influenced the creation of the codes of practice. It is clear, however, that the codes of practice represent a logical expansion of the principles in the context of a specific production process. The codes of practice remain qualitative to allow the development of management that is tailored to “individual farm methods, goals and local conditions.”<sup>147</sup> For the same reason, the codes do not ban any specific production method. As a result, the codes of practice are insufficiently specific to serve as the basis for a consistent certification and labeling system.

After issuing its codes of practice, the GAA developed its specific – and in some cases quantitative – best management standards for use in its ecolabeling program. Separate standards have been developed for shrimp hatchery, farm, and processing operations, and similar best management standards are in development for other seafood products. Each facility type is subject to standards in four categories, including community impacts, environmental impacts, food safety, and traceability.<sup>148</sup>

Just as the codes of practice build upon but do not follow the specific guiding principles, these best management standard categories build upon but do not refer to specific codes of practice. Comparison of the best management standards and codes of practice indicates that most, but not all, of the management practices delineated in the codes of practice were translated into the best management standards. For example, the codes of practice for shrimp farming require evaluation for hydrologic features, water quality characteristics, suitability of the topography, soil, and ecosystem, preexisting contamination, the possibility of flooding and other severe climatological events, potential impacts on flora and fauna, and other community and regulatory considerations. The best management standards for farms, however, require only that facilities comply with environmental and labor laws and not be located in mangrove areas, seagrass beds, or coastal wetlands or reduce coastal ecosystem biodiversity. The best management standards thus require no consideration of topography, climatology, or hydrology, as identified in the codes of practice. On the other hand, the best management standards include elements not present in the codes of practice. Most notably, the best management standards require compliance with all local and national labor and environmental laws, whereas the codes of practice only require cooperation for policy and regulatory development and limited compliance (e.g., compliance with EIA laws) when designing and operating facilities.<sup>149</sup>

In practice, the GAA standards are relatively specific and in some cases include quantitative indicators, but most<sup>150</sup> nonetheless require the development of specific indicators for certification. To ease implementation, the ACC has created two forms of guidance: guidelines, which provide interpretive guidance for each GAA standard, and certification applications, which list the specific provisions needed to satisfy each element of the GAA standard and are

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adjusted for shrimp biomass, appetite, and pond conditions.” GAA, *Individual Codes of Practice: Feeds and Feed Use*, at <http://www.gaalliance.org/code4.html> (2007).

<sup>147</sup> GAA, *supra* note 146.

<sup>148</sup> GAA, *Best Aquaculture Practices*, at <http://www.gaalliance.org/bap.html> (2007).

<sup>149</sup> It is likely that in this case, the ACC has operationalized commands such as payment of “fair” wages to mean payment of at least the mandated minimum wage.

<sup>150</sup> The notable exception is the effluent standards, which are explicitly adopted by the GAA and require no further specification by the ACC.

directly applied during facility inspections. This structure echoes but is distinguishable from the MSC system, which uses a tiered set of standards based upon global principles, as developed through more specific criteria and guidance and implemented through specific indicators created by the certification body for application in a particular context. The GAA system can be distinguished from that used by the MSC, however, because while MSC itself creates criteria to elaborate on its general principles, GAA delegates this process to the ACC. The ACC therefore has a broader authority than most certification entities considered in this report. On the other hand, some of the GAA standards – effluent limitations, specifically – are far more specific than their ACC counterparts, and all ACC indicators are subject to GAA approval. This system thus may delegate less authority to ACC than suggested by first impressions.

As it formalized its standards for use as an ecolabel, the GAA has increased the transparency of its standard-setting procedures. For the first time, it published formal procedures for standard-setting that delegate substantive decision-making powers to technical committees but reserve the powers to commission new standards and to coordinate standards development to the GAA executive. GAA’s procedures are far less detailed than those used by other ecolabels – particularly those adopted by ISEAL members. Nonetheless, they establish a baseline level of transparency and substantively provide for stakeholder participation. From a governance perspective, they are most limited by their lack of grievance procedures, raising accountability concerns.

The standard-setting process begins with the acceptance of a preliminary draft standard. Draft standards can be created by GAA, submitted by outside parties, or previously adopted by other organizations. Once a preliminary draft is available, GAA creates a technical committee to consider the standard by selecting and inviting specific organizations to contribute.<sup>151</sup> GAA explicitly apportions representation among stakeholder groups. Each twelve-member technical committee includes:

- Four national industry association representatives;
- Two industry supplier association representatives;
- Two academic, regulatory, or financial representatives;
- Two conservation NGO representatives; and
- Two GAA representatives.<sup>152</sup>

Although technical committees include most recognized stakeholder groups, local community and social stakeholder organizations are not represented on technical committees, raising concerns about equity and access to GAA standard-setting activities. The balance of stakeholders on technical committees is a second concern because its allocation overwhelmingly favors industry stakeholders. Although technical committee processes operate by consensus, GAA defines consensus solely as an 80% agreement rate and does not appear to follow the ISO definition of consensus (shared by all ISEAL members) that is based on the “absence of sustained opposition.” As a result, technical committees can theoretically obtain consensus without the approval of either “conservation NGO” representative.

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<sup>151</sup> GAA, BEST AQUACULTURE PRACTICES STANDARDS DEVELOPMENT 2.

<sup>152</sup> GAA, BEST AQUACULTURE PRACTICES STANDARDS DEVELOPMENT: TECHNICAL COMMITTEE SELECTION, DUTIES, FUNCTION.

The technical committee structure also raises transparency and accountability concerns because GAA appoints each committee representative. GAA's appointment power results in a conflict of interest and limits the independence of the committee. GAA recognizes this concern and requires representatives to disclose conflicts of interest; withdrawal may occur but is not explicitly required as a result of conflicts. The lack of balance between stakeholder groups, and the absence of social stakeholders, and transparency and accountability issues are likely to reduce the perceived legitimacy of the resultant GAA standards among environmental and social stakeholders.

Once formed, technical committees develop and amend the preliminary standard to achieve a consensus on best practices. Once the committee has agreed upon the language of a "committee draft," the standard is published for a sixty-day public comment period.<sup>153</sup> Following the public comment phase, the committee revises and officially votes on a final draft. Unlike ISEAL member organizations, only a single comment period is required. For approval, final standards require at least 66 percent of the committee members to participate and at least 80 percent of the participants must vote to adopt the standard. Negative votes on final draft standards require a statement of the technical reasons for that vote, a disincentive to a negative vote but one that encourages members to raise concerns early in the standards-development process. After approval, the committee reviews the standard annually, or at shorter intervals at the committee's discretion.<sup>154</sup>

The GAA standard-setting process lacks any established grievance procedure, a significant limit on the accountability of the system as a whole. This contrasts with the ISEAL Code, which requires members to hear both procedural and substantive complaints about standards. Development of a grievance procedure would strengthen GAA's legitimacy.

The ACC develops audit criteria that implement GAA standards in coordination with and using similar processes as the GAA; as a result, ACC criteria and GAA standards are subject to similar criticisms. ACC criteria are based on the GAA standards and developed by a similar, twelve-member technical committee that includes a variety of interest groups and makes its decisions through consensus or vote. The ACC committee is open to environmental NGO representatives, but the ACC has been unsuccessful in attracting NGO participation due to conflicts over the committee structure.<sup>155</sup> Once drafted, ACC criteria are sent to the GAA for review and approval. Once approved by the GAA, the criteria are posted for a sixty-day comment period, are revised, and become final after GAA approval.

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<sup>153</sup> The GAA states that "most" standards are published on the GAA website. This language suggests that standards may be published without public comment, which would vitiate public access to the standard-setting process. Such a step would decrease the legitimacy of GAA standards, however, and in practice, GAA's proposed standards for all aquaculture products, however, have been published for comment. *See* GAA, *Submit Comments – Seafood Processing Plant Standards*, at <http://www.gaalliance.org/comment1.html> (2007).

<sup>154</sup> GAA, *supra* note 151.

<sup>155</sup> Interview with Betty More, Aquaculture Certification Council.

## *Implementation Methodology*

ACC certification is currently available only to shrimp hatcheries, farms, and processors, but will expand to other species and facility types if and when the broad GAA standard is approved. ACC certification is primarily process-based, so the organization “does not certify the condition, quality, or food safety status” of aquaculture products. Nonetheless, certification does require on-site inspection and auditing by an accredited inspector and also requires compliance with some performance indicators, most notably quantified effluent limits for a variety of pollutants.

ACC’s application forms identify the specific indicators required for certification under the GAA standards. The application lists a series of indicators split into two categories: critical and scored. To obtain certification, facilities must comply with each of the critical indicators and also achieve 70 percent of the total points. Both critical and scored questions are considered for scoring purposes; satisfaction of a critical question is worth 3.125 points. The remaining questions are scored between 1 and 3 points each, with the total scored value then multiplied by 0.393. The facility must receive a total score (the sum of the critical and scored values) greater than 70 percent of the total achievable points. After five years, facilities are required to score at an 80 percent level to remain certified. Recertification is required on an annual basis. The ACC certification takes approximately six months for first-time applicants from application to completion of the certification process.

As in other ecolabeling systems, certification audits are performed by independent auditors. Unlike in other certification systems, however, ACC itself – not the facility seeking certification – retains control over the auditor to be used.<sup>156</sup> Each auditor must have five years of work experience performing quality assurance for the seafood industry and must attend an ACC training course. Auditors may also be consultants but may not consult and inspect the same entity to minimize concerns regarding conflicts of interest.

Auditors may recommend improvements in the ACC indicators, but it does not appear that facilities, the ACC itself, or external stakeholders can challenge certification determinations. As in the standard-setting context, the ACC lacks dispute resolution structures.

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<sup>156</sup> The ACC previously accredited inspectors but allowed facilities to hire and pay them directly. The current system developed after the ACC determined that its original system created a conflict of interest between inspectors and the facilities that hired them. *Id.*

## International Social and Environmental Accreditation and Labeling Alliance

The International Social and Environmental Accreditation and Labeling Alliance (“ISEAL Alliance” or “ISEAL”) was established as a cooperative venture of eight founding social and environmental labeling programs, including the FSC, MSC, FLO, and RFA. ISEAL is not itself a labeling program, but rather serves as a tool to increase the credibility of its member institutions through capacity-building activities. As the ISEAL Code of practice for standard-setting<sup>157</sup> (“ISEAL Code” or “Code”) explains, “[b]y adhering to procedures that constitute good practices for setting standards, standard-setting organizations help to ensure that the application of their standard results in measurable progress towards their social and environmental objectives, without creating unnecessary hurdles to international trade.” Thus, by facilitating information-sharing and strengthening institutional tools, ISEAL seeks to ensure that each of its member institutions sets standards for certification and labeling that are fair and effective.

Each ISEAL member is required to apply the ISEAL Code when developing its individualized procedures for setting standards. Compliance with the Code is ISEAL's main tool for ensuring the credibility of its members; to this end, ISEAL has designed several institutional safeguards against dilution of its standard. First, procedures designed by members applying the ISEAL Code are subject to peer review by other member institutions. Institutions unaffiliated with ISEAL are free to apply the Code as well, but cannot advertise their compliance without meeting all of the requirements imposed by the Code. Peer-review processes may eventually be available to non-member institutions seeking to claim ISEAL compliance.<sup>158</sup> The second safeguard relates to the text of the Code rather than its use: the relevance and fairness of the Code is maintained through compliance with relevant standards for standard-setting promulgated by ISO and the World Trade Organization (WTO)<sup>159</sup> and through a formal review process.<sup>160</sup> These provisions ensure that the standards continue to evolve while remaining in compliance with international minimum standards.

The ISEAL Code is a process-based, best-practices standard. Like ISO, it does not require that the ultimate standards adopted result in actual social or environmental improvement, but rather that the processes used to develop those standards consider the fundamental elements of stakeholder participation, accountability, transparency, and effectiveness. In addition, ISEAL seeks global adoption of its standard rather than adoption only by a limited segment of the

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<sup>157</sup> ISEAL ALLIANCE, ISEAL CODE OF GOOD PRACTICE FOR SETTING SOCIAL AND ENVIRONMENTAL STANDARDS PUB. VERSION 4 (2006) [hereinafter ISEAL CODE]; *see also* ISEAL ALLIANCE, GUIDANCE ON THE APPLICATION OF THE ISEAL CODE OF GOOD PRACTICE FOR SETTING SOCIAL AND ENVIRONMENTAL STANDARDS, WORKING DRAFT 3 (2006) [hereinafter “ISEAL GUIDANCE”].

<sup>158</sup> The development of certification systems for evaluating compliance with the ISEAL Code would convert ISEAL into a full certification and labeling system similar to ISO, with attendant governance and funding constraints. To date, membership in ISEAL remains limited, so these aspects of the ISEAL system are not fully explored.

<sup>159</sup> These include the ISO/IEC Guide 59 Code of good practice for standardization and the WTO Technical Barriers to Trade (TBT) Agreement Annex 3 Code of good practice for the preparation, adoption and application of standards. ISEAL CODE, *supra* note 157.

<sup>160</sup> The ISEAL Code is reviewed not less than once every three years through a process that includes two rounds of public comment. ISEAL staff circulates a proposed amendment for public comment (90 days); following comment, the ISEAL board determines whether the revision is warranted. If so, the second round of public comment ensues (30 days); this round may be limited to those who commented on the initial draft. The board takes a final decision on the amendment following the second round of comment.

labeling industry. Although the Code is designed to apply broadly to standard-setting activities on the international, regional, national, or sub-national levels, its application is limited in two ways. First, the Code is relevant only to social or environmental certification. Second, the Code requires the use of consensus in standard-setting. As defined, consensus has both substantive and procedural components: (i) an absence of sustained opposition (but not unanimity) on substantial issues; and (ii) a process to take into account diverse views and reconcile conflicting arguments.

Four of the ecolabeling systems considered in this study have committed to adhere to the ISEAL Code. Notably, each of these systems has strengthened its institutional structures in the wake of ISEAL's creation. The laudable influence that ISEAL has played in improving governance capacity among ecolabels, combined with its popularity among multi-stakeholder ecolabels, suggests that its Code is likely to become an important marker of ecolabel legitimacy in the future and mandates a close consideration of Code provisions here as a precursor to recommendations about whether and when a Gold Standard-compliant aquaculture ecolabel should join ISEAL.

## **ISEAL Code Elements**

### *Governance Structures*

The ISEAL Code incorporates two overarching principles: consensus and balance. When combined, these principles require participatory governance structures as a prerequisite to adequate standard-setting processes.<sup>161</sup> These principles – especially due to the presence of balance – further require transparency and accessibility, with allowances made to promote effective governance. Thus, although the ISEAL Code is not primarily intended to shape governance structures, it does require minimum adherence to good governance principles.

The Code mandates consensual decision-making throughout the standard-development and revision processes. Consensus ensures that the interests of no single group can be sacrificed for the benefit of others and in so doing eliminates the incentive to engage in vote-counting or other intra-label power struggles that weaken non-consensual governance mechanisms such as the GAA. While the ISEAL Code thus ensures that the interests of minority groups may not be eliminated out of hand, it also recognizes that consensus is sometimes impossible to achieve – especially in ecolabeling programs designed on the sustainability model. The demands of effective governance mandate that in these cases some action be taken. To address this issue, the Code allows deviation from consensual processes (through votes or other means) in the face of disagreement provided that the labeling organization follows established procedures guiding decision-making under these conditions.<sup>162</sup>

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<sup>161</sup> Although the ISEAL Code is directed at standard-setting, it implicitly recognizes that the strength of standard-setting varies with the strength of the structures that evaluate the results of those procedures. Governance and standard-setting are not independent, and the ISEAL Code recognizes that minimum governance standards are required to ensure robust standard-setting activities. ISEAL CODE, *supra* note 157.

<sup>162</sup> ISEAL CODE, *supra* note 157. The Code does not mandate the form or content of such procedures. Most labeling programs have delineated voting procedures that would satisfy this requirement.

The Code recognizes that consensus is necessary but not sufficient to ensure the development of appropriate standards. A decision-making body that is not inclusive of all stakeholders, for example, might find it easy to reach consensus on issues that would be disputed by a more egalitarian regime. To avoid this issue, the Code requires “balance” with respect to both procedure and substance. First, balance requires that all standards be developed through a procedure that ensures diversity of both interests and geography. Participation by interested parties<sup>163</sup> must be meaningful and input from all parties should be proactively sought, ensuring transparency, accessibility, and participation. In addition, balance requires more than mere comment – the “structures” responsible for developing and approving standards must also be balanced. In most cases, this requirement appears to require balanced representation at the Board of Directors level.<sup>164</sup> Finally, in addition to balance at the decision-making level, the ISEAL Code also promotes balanced membership in the labeling system by requiring that the membership criteria and application process are transparent and non-discriminatory. Thus, the ISEAL Code protects against skewing of member interest groups, which could have detrimental impacts on the resultant makeup of the governing body.

Accountability and transparency are also inherent aspects of the ISEAL Code through its complaint resolution requirements. The Code and Guidance recognize that credible complaint resolution mechanisms are necessary to legitimate labeling systems. ISEAL also recognizes, however, that frivolous complaints may decrease the effectiveness of the complaint resolution system – and potentially of the labeling system as a whole. Thus, the Code attempts to balance accountability of the labeling system against the countervailing need for institutional effectiveness. ISEAL accomplishes this balance by first limiting the universe of potential complainants to “interested parties.” This sensible restriction eliminates parties who are not affected by or knowledgeable about the standard or process but does grant access to materially affected or expert members of the public. Thus, participation under the ISEAL Code is somewhat tailored but remains adequately broad. The Code also balances accountability and effectiveness by separating substantive and procedural complaints. ISEAL is more concerned with the challenges to the processes used to reach decisions, preferring to leave complaints about the ultimate decisions reached to the standard-development and revision process.<sup>165</sup> Procedural challenges are fundamental challenges to the fairness of the system as a whole and cannot be judged impartially by the very system that is being challenged. As a result, the ISEAL Code requires that the basic procedures for standard-setting establish a separate complaint-resolution

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<sup>163</sup> The ISEAL Code and Guidance define “interested parties” as those who will be materially (directly) affected by the standard or who have expertise relevant to the subject matter. ISEAL CODE, *supra* note 157.

<sup>164</sup> The studied labeling programs generally rely on their boards of directors to approve standards. This is expressly permitted by the ISEAL Guidance: “While some organizations devolve decision-making to their full membership, it is possible for a balance to be fulfilled or partially fulfilled by Boards of Directors or by Committees of the standard-setting organization. In either case, the emphasis needs to be on full transparency in the decision-making process, regardless of which group of stakeholders is making the decision.” ISEAL GUIDANCE, *supra* note 157, at 5.6. The strength of this provision must be questioned based on the acceptance of the MSC governing structure by the remaining members of ISEAL. The lack of consensus-based decision-making on the board level and the minimal representation of diverse interest groups on the MSC board appear to violate the ISEAL Code, yet MSC appears to have passed the peer review process. See MSC discussion, *infra*, for additional information.

<sup>165</sup> The Code’s sanguine approach to substantive complaints is probably justified, as most existing labeling systems use the same forum for dispute resolution of both substantive and procedural complaints, and all provide some forum for the resolution of those complaints.

mechanism to evaluate procedural complaints.<sup>166</sup> These complaint resolution requirements are relatively limited and do not address significant areas of variation among the ISEAL members – such as the independence of the dispute resolution body from the certification body – but they nonetheless establish a minimal level of accountability and participation in the fundamental workings of standard-setting in member organizations.

### *Procedural and Substantive Requirements*

In addition to the governance principles with which all standard-setting activities must comply, the ISEAL Code also mandates compliance with explicit minimum procedural requirements for the development, implementation, and revision of standards.

*Table 7: ISEAL Code Requirements*

<b>Standard</b>	<b>Requirements</b>
Procedural Requirements for Labeling System	<ul style="list-style-type: none"> <li>• Publish a bi-annual work program</li> <li>• Identify all ongoing and planned standards</li> <li>• Introduce standards with terms of reference that justify the need for and objectives of the new or revised standard</li> <li>• Be subject to two rounds of public comment</li> <li>• Consider all proposals for revision</li> <li>• Create a written synopsis               <ul style="list-style-type: none"> <li>■ include all public comments</li> <li>■ describe how decision-making body addresses issues</li> <li>■ make available to public</li> <li>■ publish standards and make electronically available</li> </ul> </li> </ul>
Sustentative Requirements for Standards	<ul style="list-style-type: none"> <li>• Minimally trade-restrictive</li> <li>• Committed to actual social or environmental improvement through labeling (process and performance)</li> <li>• Harmonized with existing international standards and other existing labeling standards</li> <li>• Unambiguous but still allow variations for local social or environmental conditions</li> <li>• Include criteria, indicators, and benchmarks</li> <li>• Reviewed and revised by ISEAL members every five years</li> </ul>

Standards cannot be set except pursuant to established procedures. These standard-setting procedures are likely to influence the substantive elements of resultant standards, so their content is particularly important. These procedures are established at the outset of the labeling program, however, so it may be difficult to ensure that they are themselves created through a

<sup>166</sup> The mechanism is not required to respond to all complaints, but rather is expected to set aside frivolous complaints on the basis of written criteria. ISEAL GUIDANCE, *supra* note 157, at 5.1. ISEAL members must also accept complaints alleging non-compliance with the ISEAL Code. ISEAL GUIDANCE, *supra* note 157, at 4.2. Presumably this type of challenge – challenges to the balance of the decision-making body, for example – would fall under the procedural category.

robust procedure. The ISEAL Code specifically recognizes this difficulty as it pertains to participation, noting that labeling organizations may find it difficult to gather diverse viewpoints during the elaboration of procedures for standard-setting. “Ultimately, current practice often sees an organization develop the procedures and then consult with stakeholders to determine whether there are any objections.”<sup>167</sup> The Code thus sanctions a process that is not fully consultative, relying on the fundamental values described in the Code itself and in the balance of the labeling program’s governing bodies to ensure that the initial draft of procedures is efficient while still reflecting fundamental elements of good governance.

The elaboration of substantive standards is possible once procedures for standard-setting are established. To encourage participation, each labeling system must publish a work program twice a year and must identify all of the ongoing and planned standard-development activities for that period. Each standard must also be introduced with terms of reference that clearly and explicitly justify the need for and objectives of the new or revised standard. Once begun, all standard-setting processes then require two rounds of public comment. These comment periods must be 60 days or longer, except that they may be as short as 30 days in exceptional circumstances. The labeling organization must create a written synopsis of all the public comments and describe how the decision-making body addressed each material issue in the comments. Like other standard-setting documents, this synopsis must be made available to the public. The standards themselves must also be published and made accessible electronically for no cost, where possible. These provisions ensure accountability of the decision-makers through a transparent process.

In addition to imposing procedural requirements, the ISEAL Code addresses substantive issues. For example, standards must be minimally trade-restrictive. The most important substantive provision from a governance perspective, however, addresses the process/performance issue. Unlike the ISO model, ISEAL mandates commitment to actual social or environmental improvement through labeling, so compliant standards must address both process and performance. This requirement introduces challenges not present in process-based labeling systems because it is more difficult to evaluate the effectiveness of performance-based standards than of their process-based counterparts.

In addition to containing performance standards, ISEAL standards must be harmonized with existing international standards and other existing labeling standards to the extent possible, while remaining relevant at the local level. The harmonization requirement is complicated by distinctions between standards intended for direct implementation and those needing interpretation at a local level prior to application. Standards intended for direct implementation are the simpler case: for these standards, the ISEAL Code requires only sufficient flexibility to account for local variation and adequate performance indicators to ensure effectiveness. On the other hand, more general standards intended for local or national interpretation must tread a fine line to be both unambiguous but to allow variations for local social or environmental conditions.<sup>168</sup>

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<sup>167</sup> See generally ISEAL GUIDANCE, *supra* note 157.

<sup>168</sup> In some cases, such as where local laws are more stringent than required by international standards, the Code recognizes that local conditions may preclude harmonization. ISEAL CODE, *supra* note 157. The Guidance also lists “fundamental climatic, geographic or technological factors, local economic conditions, . . . cultural factors, and

The Guidance responds to these challenges by discouraging the development of any standard unless there is a “strong likelihood” that it can be achieved. In addition, standards must include specific process, management, and performance criteria, indicators, and benchmarks to allow the evaluation of the standard’s environmental or social benefit.<sup>169</sup> These criteria, indicators, and benchmarks should be evaluated through an audit process to ensure effectiveness and transparency of each element of the standard.

ISEAL members must review and revise their existing standards at least every five years to ensure that they remain current and appropriate to the evolving governed industry. To safeguard against reluctance to consider revisions by the labeling organization, ISEAL requires its members to consider proposals for revisions submitted by any party, including both the regulated industry and unaffiliated environmental or social NGOs. The labeling program need not accept all such proposals, but it must consider them through a consistent, transparent process – presumably written. The ISEAL Code thereby mandates not only a participatory revision process but also a transparent, accessible one in which the labeling program’s governance structures are accountable for their decisions.

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special considerations for nascent industries” as appropriate criteria for deviations from the harmonization requirement. Deviations from harmonization due to local conditions must be evaluated and approved through a process developed in a written policy on the subject. ISEAL GUIDANCE, *supra* note 157, at 6.3.

<sup>169</sup> The Guidance clarifies what each of these terms entails: “The emphasis on including indicators and benchmarks is important as it requires that standards not only indicate what they measure (criteria), but also how the criteria are measured (indicators) and where the line is drawn between what is acceptable and what is not acceptable practice (benchmarks).” ISEAL GUIDANCE, *supra* note 157, at 6.4.

## International Organization for Standardization

The International Organization for Standardization (ISO) is a global coalition of 155 national standard-setting entities (national initiatives)<sup>170</sup> that creates standards for a wide variety of business purposes ranging from consumer electronics design to environmental management processes. ISO was created in 1947 “to facilitate the international coordination and unification of industrial standards.”<sup>171</sup> ISO’s central secretariat fulfills this purpose by managing an ongoing standard-setting process.

The ISO 14000 standards series sets environmental management standards that can be applied to the practices followed by any organization in any industry. ISO’s long history has allowed it to create robust internal governance and standard-setting structures, but those same origins as a standard-setting entity created by and for business has led to criticisms about the legitimacy of its standards in the environmental field – particularly with respect to stakeholder participation.

ISO is governed by a general assembly of its members -- each of which is a national initiative that is required to pay dues. These payments, along with profits from the sale of standards, are sufficient to finance ISO when combined with in-kind payments provided by members engaged in standards-development processes. The assembly selects a representative council, which is analogous to a Board of Directors and develops proposals adopted by the assembly. The ISO secretary-general in turn reports to the Council and governs ISO’s day-to-day operations in the manner of a chief executive. Standards are proposed by members and developed by technical committees. The technical committees are organized into national delegations and include both experts and stakeholders interested in the standard under development. The resultant, consensus-based standards are implemented through a third-party “conformity assessment” process that – at least in the ISO 14000 context – uses certification bodies to create the audit checklists necessary to apply the generic standard to the particular conditions applicable to the company seeking certification.

### *ISO Funding*

ISO’s central body – primarily the central secretariat that manages ISO’s activities but does not engage in actual standard-setting activity – is wholly internally funded through member subscriptions, sale of publications, and copyright royalties.<sup>172</sup> As a result, it does not depend on grants from foundations or other sources. ISO’s standard-setting activities are not conducted by ISO and are therefore not funded through these streams. Standard-setting funding is similarly internally produced through in-kind payments by members who convene and participate in technical committees. Thus, among the certification systems studied in this report, only ISO is exclusively internally funded.

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<sup>170</sup> For the remainder of this discussion, “national initiative” and “member” are used interchangeably. ISO does not use “national initiative” to refer to its members; the use of the term in this report was chosen for consistency in terminology between labeling systems.

<sup>171</sup> ISO, *Overview of the ISO System*, at <http://www.iso.org/iso/en/aboutiso/introduction/index.html> (2006).

<sup>172</sup> ISO, *DISCOVERING PLANET ISO: ISO ANNUAL REPORT 2006 17* (2006)

ISO membership is limited to one national initiative from each country. Members pay for the privilege of participating in the general assembly and on technical committees on one of three levels: full membership, correspondent membership, and subscriber membership. The required payments differ by level, as do the rights of the members. Full members – the most common type – may exercise voting rights on any technical or policy committee. Correspondent members are from countries which have not established full national standard-setting activity; they are not permitted to participate in technical or policy development but are informed about activity of interest. Subscriber members come from countries with very small economies, pay reduced fees, and – like correspondent members – do not directly participate in standard-setting.<sup>173</sup> In addition to differential payment by membership type, membership subscriptions vary based on the member country's gross income and trade.<sup>174</sup> National initiatives may obtain funding from different sources that echo their internal structures and the services they offer on a national level. They may be supported by government, but most are private and funded through membership, accreditation services, standards sales, and other sources.

ISO has a decentralized standard-setting structure, which obviates simple delineation of its funding streams. While this is true of all decentralized governance schemes – especially where national initiatives predate the creation of the international body (*see e.g., FLO*) – the ISO funding system is especially complex due to the broad authority retained by its members. ISO-related activity is only one aspect of the work carried out by national initiatives, so translation of income at the national level into ISO standards is difficult.

### *ISO Governance*

ISO uses a complex governance system that distributes power among a variety of organizations. While the majority of power resides with the national initiatives, the ISO Council and Technical Management Board (TMB) exert some control over ISO member actions.

As a membership organization, the ISO is governed by its national initiatives. Like other membership certification schemes, members participate in a General Assembly that meets annually. The Assembly is composed of delegates of all members, although only full members may vote; correspondent and subscriber members participate as observers only (*i.e.*, they may not vote) and are not represented on any ISO governance body. The Assembly reviews ISO's financial reports, elects Council members, and approves the ISO's multi-year strategic plan.<sup>175</sup> Generally, one day of each assembly meetings is open to the public.<sup>176</sup>

The ISO Council is responsible for the organizational governance of the ISO system, including tasks such as development of the strategic plan and annual budget and general operations.<sup>177</sup> It members meet twice a year in closed meetings. The Council's uses a complex organizational

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<sup>173</sup> ISO, *ISO Members*, at <http://www.iso.org/iso/en/aboutiso/isomembers/index.html>.

<sup>174</sup> ISO, *supra* note 171.

<sup>175</sup> See ISO, *ISO STRATEGIC PLAN 2005-2010: STANDARDS FOR A SUSTAINABLE WORLD* (2004).

<sup>176</sup> Bruce J. Farquhar, *Governance in the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC)*, in *DECISION MAKING IN THE GLOBAL MARKET: TRADE, STANDARDS AND THE CONSUMER* 43, 47 (Consumers Union, 2005).

<sup>177</sup> ANSI, *ISO Programs – Overview*, at

[http://www.ansi.org/standards\\_activities/iso\\_programs/overview.aspx?menuid=3](http://www.ansi.org/standards_activities/iso_programs/overview.aspx?menuid=3).

structure that includes five automatic<sup>178</sup> and thirteen elected member representatives and ISO's five principal officers, who sit as individuals. The Assembly selects member representatives to the Council through procedures proposed by the Council and approved by the Assembly. These procedures determine eligibility for election based on economy size and ISO activity, as measured by a weighted formula.<sup>179</sup> The top five ranked initiatives are automatically appointed to the council for a two-year term, while the thirteen remaining Council slots are filled by election. The election process splits members into groups based on the results in the scoring algorithm and requires each member to nominate countries for election from among both high- and low-scoring groups.<sup>180</sup> The Assembly then votes on a one-vote-per-country basis, with countries receiving at least 3 nominations being eligible for election.<sup>181</sup> ISO's structures are biased towards the empowerment of developed countries that can afford to participate in a wide variety of standard-setting activities, both through its limitations on the participation by correspondent and subscriber members and by automatically granting representation to five nations based in part on the strength of the member nation's economy. The allocation of seats on the council to low-income countries mitigates these inequalities.

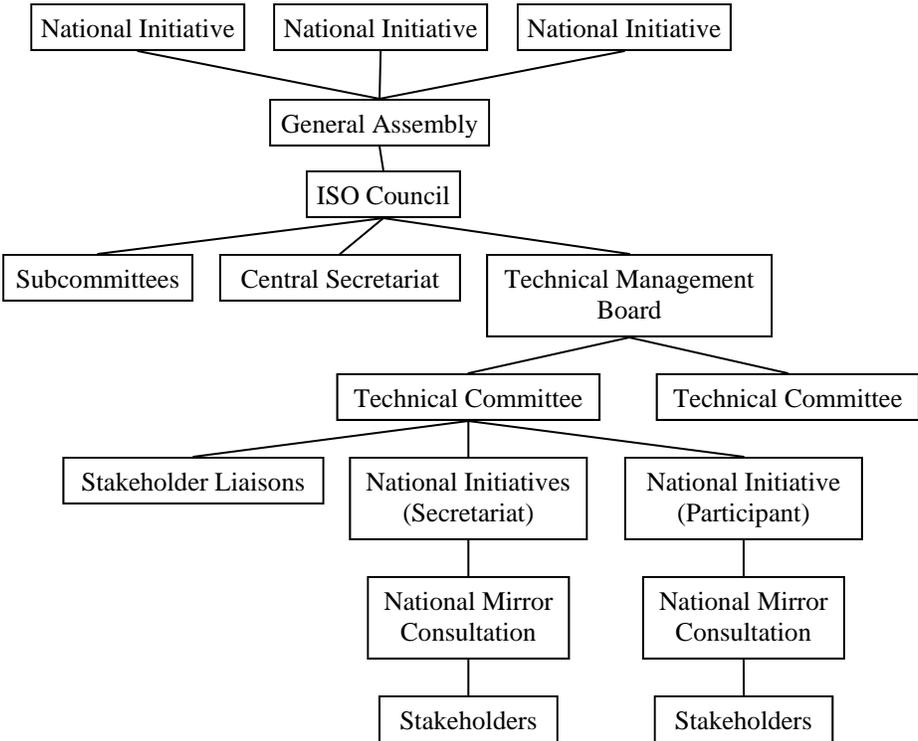


Figure 5: Governance Flow Chart

<sup>178</sup> These include the United States, Germany, Japan, the United Kingdom, and France. ISO, 29TH ISO GENERAL ASSEMBLY: WORKING DOCS 243 (2006).

<sup>179</sup> ISO, ISO/IEC DIRECTIVES, PART 1: PROCEDURES FOR THE TECHNICAL WORK (2004), at 241 [hereinafter ISO DIRECTIVES, PART 1].

<sup>180</sup> Correspondent and subscriber members are not eligible for election and may not vote.

<sup>181</sup> ISO DIRECTIVES, PART 1, *supra* note 10 at 247.

The Council has delegated many of its powers to subsidiary committees, including the TMB, policy development committees, and standing committees on finance and strategy. There are three policy development committees: the conformity assessment committee, the consumer policy committee, and the developing country matters committee. Each of these committees was created to address a perceived legitimacy failure resulting from ISO’s governance structure or policies. In addition, the Council is supported by the ISO Central Secretariat, which guides the development of standards and oversees other aspects of ISO’s day-to-day operations.

The Council authorizes the TMB to manage the structure and function of ISO’s standard-development process. The TMB thus creates and abolishes technical committees (TCs), establishes the scope of each TC’s authority, and coordinates their work.<sup>182</sup> It also hears appeals from members.<sup>183</sup> By governing which committees – and thus, which members – are responsible for setting particular standards, TMB influences the standards produced. Despite its broad importance in the ISO governance scheme, the TMB lacks the transparency and participation that are common in similar entities in the social and environmental labeling context. TMB is composed of twelve national initiatives and a chairman, including the four initiatives most active in ISO’s TC structure and eight initiatives elected from among ISO’s remaining membership. Two of the elected initiatives must hail from developing nations.<sup>184</sup> Each TMB member serves a three-year term. TMB’s membership is not public.

**Table 8: Governance Body Responsibilities**

<b>Body</b>	<b>Responsibilities</b>
General Assembly	<ul style="list-style-type: none"> <li>• Consists of all full, observer, and subscriber members</li> <li>• Elects Council members</li> <li>• Reviews and approves financial and strategic plans</li> </ul>
ISO Council	<ul style="list-style-type: none"> <li>• Composed of 18 automatic and elected member representatives</li> <li>• Oversees ISO policy and financial committees and the TMB</li> <li>• Develops strategic plan and budget</li> </ul>
Technical Management Board (TMB)	<ul style="list-style-type: none"> <li>• Consists of automatic and elected member representatives</li> <li>• Creates and abolishes technical committees (TCs)</li> <li>• Establishes the scope of TCs and assigns their work</li> <li>• Hears appeals from TC members</li> </ul>
Technical Committees (TC)	<ul style="list-style-type: none"> <li>• Composed of all interested ISO members and liaisons</li> <li>• Draft and develop standards for ISO approval</li> <li>• Establish subcommittees and working groups for particular issues</li> </ul>
Central Secretariat	<ul style="list-style-type: none"> <li>• Composed of the Secretary General and staff</li> <li>• Guides the development of standards</li> <li>• Oversees daily operations</li> <li>• Publishes finalized standards and other outputs</li> </ul>

<sup>182</sup> TMB does not have unfettered discretion to create TCs; rather, the Secretary-general and members are given input, and a variety of internal ISO bodies and certification bodies can propose their establishment. *Id.* at 8-9.

<sup>183</sup> *Id.* at 7.

<sup>184</sup> Farquhar, *supra* note **Error! Bookmark not defined.**, at 47, 53.

TMB's subsidiary bodies most notably include the TCs. Each TC develops standards within its defined scope and can establish subcommittees to assist them in that task.<sup>185</sup> TCs are headed by a member, which serves as the TC secretariat. The remainder of the TC is composed of "P-members" and "O-members" (participating and observer members, respectively); P-members are required to vote and remain active in the TC's work.<sup>186</sup> Any full ISO member can participate as a P-member in any TC. TCs operations are based on consensus both at the ISO and national level. That is, each member develops a consensus position on the standard through a "mirror" negotiation process at the national level and negotiates with other ISO members based on that consensus position. Stakeholders who participate in TCs must do so through their national delegation. Therefore, the processes used at the national level control stakeholder access to and transparency of ISO processes. The participation characteristics of ISO processes are thus a *mélange* of the governance characteristics adopted by the TC's members. Notably, this process fully excludes stakeholders from countries that are not members of the TC – primarily those in the developing world – and limits stakeholder access for stakeholders from O-member countries. In addition, the use of double-consensus processes (at ISO and the national level) may effectively silence minority voices such as those from developing nations and NGOs, especially as participants in national "mirror" negotiations do not have the right to see documents from the TC at the ISO level, which are not public.<sup>187</sup>

The governance disadvantages of the TC system may be balanced through the availability of liaison status for non-member stakeholders. NGOs and other entities may be named as TC liaisons by applying for that status to the ISO central secretariat, which forwards the request to the TC.<sup>188</sup> If the TC P-members approve, the TC files a proposal for liaison status with the ISO secretary-general and the application is approved. Once an organization has been granted liaison status, it may participate in TC meetings and receives the TC's documents.<sup>189</sup> While liaison status is a good opportunity for stakeholder participation and increases the transparency of ISO's TC structure and operations, it is problematic for several reasons. First, each stakeholder organization must apply separately to each TC, raising a barrier to entry for organizations that desire to participate in multiple standards-negotiations.<sup>190</sup> More importantly, the liaison approval process lacks transparency and accountability. It appears that the TC has unfettered discretion to approve or disapprove liaison applications, and ISO does not allow non-members to use its complaint resolution system, so no appeal of TC decisions is possible. This weakness may, however, be unimportant in practice, as a 2005 study found that no international or regional organization had been denied liaison status after TC consultation.<sup>191</sup>

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<sup>185</sup> ISO DIRECTIVES, PART 1, *supra* note 179, at 10. Subcommittees are established by a two-thirds vote of TC participating members.

<sup>186</sup> *Id.*

<sup>187</sup> Farquhar, *supra* note **Error! Bookmark not defined.**, at 47.

<sup>188</sup> ISO defines the specific standards that liaisons must attain: "Liaison organizations can include manufacturer associations, commercial associations, industrial consortia, user groups and professional and scientific societies. Liaison organizations shall be multinational (in their objectives and standards development activities) with individual, company or country membership and may be permanent or transient in nature . . . A liaison organization shall have a sufficient degree of representativity [*sic*] within its defined area of competence within a sector or subsector of the relevant technical or industrial field." ISO DIRECTIVES, PART 1, *supra* note 179, at 18.

<sup>189</sup> Farquhar, *supra* note 176, at 47.

<sup>190</sup> While environmental management standards are addressed by a single TC, general-interest NGOs (such as consumers' rights groups) could find this an impediment to full engagement with the ISO.

<sup>191</sup> *Id.* at 55.

Overall, criticisms that ISO governance lacks participatory and transparent governance appear to be well-founded. The lack of public access to ISO's general management documents – as well as working documents of the TC, TMB, Council, and Assembly – is troubling for both NGO and developing country participation.<sup>192</sup> Moreover, the disparate governance characteristics of national bodies and lack of access to accountability mechanisms to enforce ISO's few provisions reinforce the overarching transparency concerns. These issues have led to significant criticism by NGOs and developing country representatives, both have historically been underrepresented in governance and standard-setting.<sup>193</sup>

These governance concerns may be mitigated by several factors. First, some ISO member bodies are more transparent and inclusive of a broad range of stakeholders. Because the national initiatives are autonomous and are not standardized, reliance on these bodies is unlikely to remedy the ISO's weaknesses on a global scale.<sup>194</sup> Second, increasing stakeholder criticism of ISO's governance provisions and competition from the WTO and other international standard-setting bodies may eventually drive substantive changes in ISO governance in order to increase the legitimacy of ISO standards. Such reforms could strengthen ISO's governance characteristics from a social and environmental labeling perspective.<sup>195</sup>

ISO's governance weaknesses are particularly troubling in the context of ISO's environmental labeling standards (ISO 14000), which are developed by TC 207. Stakeholder participation in TC 207 negotiations has been highly unbalanced in favor of economic interests, despite the importance of the ISO 14000 standards to industry engagement with environmental issues.<sup>196</sup> TC 207 moved to address the under-representation of non-economic stakeholders through the creation of a task force on the subject in 2003. As part of this effort, TC 207 surveyed its members to determine the extent of stakeholder involvement, and found relatively widespread failures to address balanced representation on the national body level.<sup>197</sup> In response, the task force has suggested the creation of guidance on the role of sustained opposition and consensus within the negotiation process, guidance for national bodies on stakeholder balance and the presentation of minority positions, clarification of the role of NGO

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<sup>192</sup> *But see* ISO DIRECTIVES, PART 1, *supra* note 179; ISO, ISO/IEC DIRECTIVES, PART 2: RULES FOR THE STRUCTURE AND DRAFTING OF INTERNATIONAL STANDARDS (2004).

<sup>193</sup> *See* MARI MORIKAWA & JASON MORRISON, WHO DEVELOPS ISO STANDARDS? A SURVEY OF PARTICIPATION IN ISO'S INTERNATIONAL STANDARDS DEVELOPMENT PROCESS 12 (2004) (noting ISO initiatives to support developing country participation).

<sup>194</sup> Of 41 national bodies that responded to a 1997 survey, 16 had a consumer committee, 18 had consumer participation in governance, and 37 had consumer participation in TCs. Farquhar, *supra* note 176, at 57. MORIKAWA & MORRISON, *supra* note 24.

<sup>195</sup> MORIKAWA & MORRISON, *supra* note 24 (noting relative lack of participation in ISO processes relative to other international economic standard-setting bodies).

<sup>196</sup> *Id.* at 17 *et seq.*

<sup>197</sup> NGO-CAG TASK FORCE, STAKEHOLDER INVOLVEMENT EFFORTS AT THE NATIONAL LEVEL: SUMMARY AND ANALYSIS OF THE NSB SURVEY RESULTS (2007). This study found that of 17 respondents, only 12 had instituted measures to ensure balance in national negotiations. The measures included recruitment and outreach, lowering barriers to entry, and removal of rules restricting participation. Only ten members had explicit policies governing how the national body proceeds in the absence of consensus, and only four had appeals policies. While more respondents used written procedures, only five stated that they included all stakeholder groups in their mirror committee.

liaisons, and establishment of an appeals procedure within TC 207 that would be accessible to both P-members and participating liaisons.<sup>198</sup> Such recommendations, if adopted, would impose needed controls on the processes used by national bodies and would increase participation, transparency, and accountability in both governance and standard-setting. Similar provisions are unlikely to be adopted at the global ISO level, so it is notable that they have been recommended by an ISO body in the environmental labeling context. In sum, these recommendations suggest that extreme examples of stakeholder imbalance and lack of transparency and accountability result in legitimacy failures in social and environmental labeling contexts, even in systems that originated in industry processes.

### *ISO Standard-Setting*

ISO's standard-setting procedures are based on national delegation and consensus. All standards are developed by ISO member bodies, each of which must base its position on a consensus position negotiated by that country's various stakeholders. The ISO negotiation is also based on consensus drawn from each participating member's positions. Although the principle of consensus is simple and consistent with other labeling systems, the ISO system differs from the remainder of the certification systems discussed in this report in the amount of standard-setting authority vested in the members. In the ISO system, the national initiatives have retained the power to develop standards without ISO control. By contrast, in other labeling systems the international body was created to centralize and control the standard-setting process, leaving the national initiatives to focus on the adaptation and implementation of those standards in their region or country (*see, e.g.* Appendix C: FSC, FLO). In this sense, ISO is the most decentralized standard-setting entity considered in this report – and it is representative of both the advantages and problems inherent to such systems.

As noted above, the first step towards creation of a new ISO standard is the proposal.<sup>199</sup> Proposals can be made for new standards, new additions to existing standards, revision of existing standards, or specification for implementation of standards. Regardless of proposal type, proposals can be made by a national body, the secretariat of the applicable TC, a liaison organization, the TMB or its advisors, or the Council, through ISO's secretary-general.<sup>200</sup> Thus, while a multitude of players within the ISO system are permitted to propose standard-setting activity, external organizations must either be accredited as a liaison or must coax their national body into proposing action. This appears to limit the access of external stakeholders to the standard-setting process, with attendant costs to the transparency of that process. In practice, however, ISO claims that industry sectors – a particular type of external stakeholder – “usually”

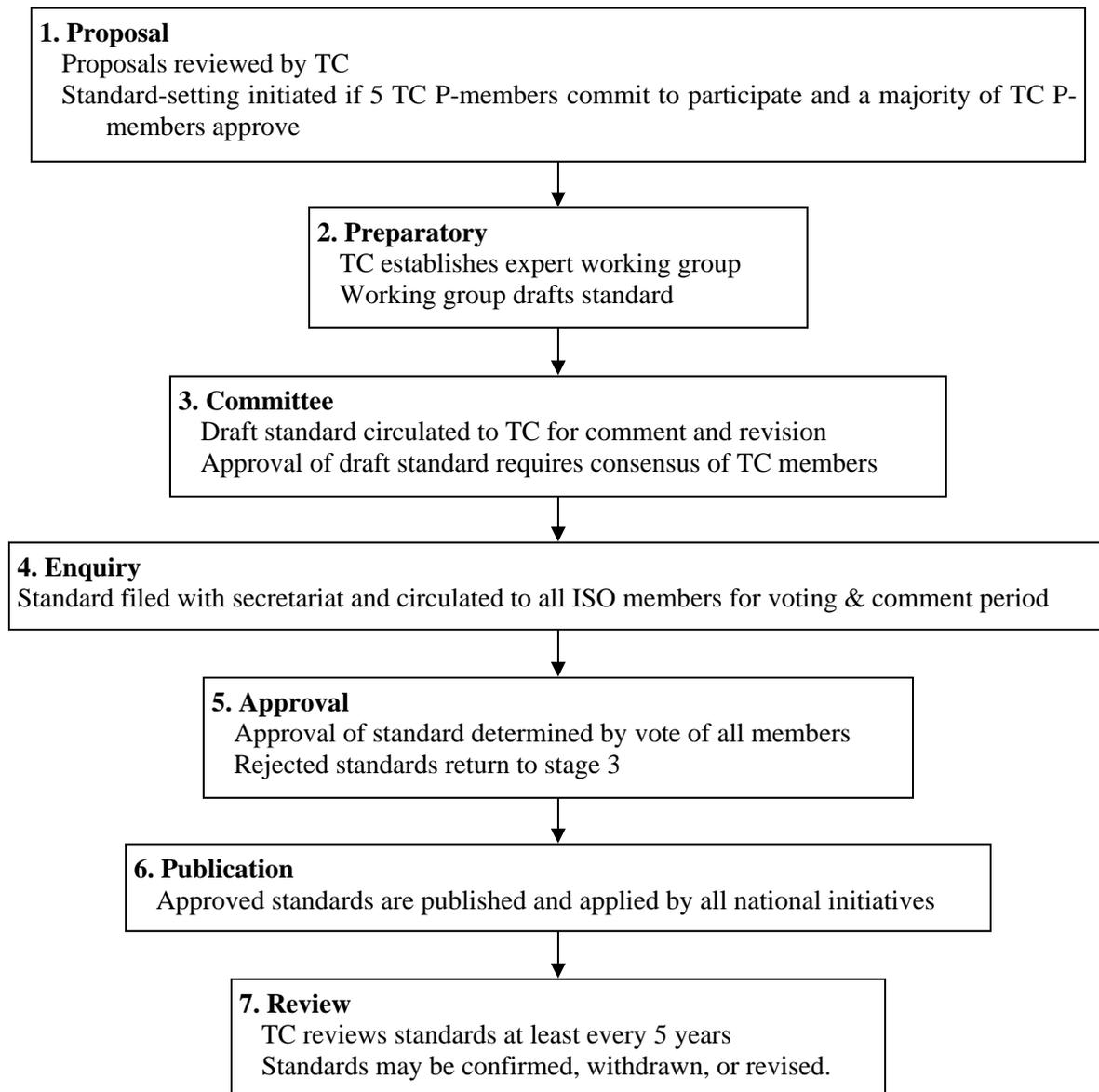
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<sup>198</sup> ISO TC 207 NGO/CAG TASK FORCE, DRAFT: RECOMMENDATIONS FOR AN IMPROVED BALANCE OF STAKEHOLDER PARTICIPATION IN ISO TC 207 (2007).

<sup>199</sup> Two alternative routes may be used to create ISO standards. First, “fast-track” standard-setting omits the proposal, working group development, and TC stages, skipping directly to enquiry and approval. Standards drafted by outside entities are eligible for fast track processing. Second, other international standard-setting bodies recognized by the Council are permitted to submit standards as final draft standards requiring only final approval. ISO, *ISO Standard*, at [http://www.iso.org/iso/en/stdsdevelopment/whowhenhow/proc/deliverables/iso\\_stan.html](http://www.iso.org/iso/en/stdsdevelopment/whowhenhow/proc/deliverables/iso_stan.html) (2007).

<sup>200</sup> ISO DIRECTIVES, PART 1, *supra* note 179, at 23.

drive ISO members to propose standards.<sup>201</sup> Once proposed, approval of standard-setting requires five of the TC's P-members to commit to participation in the standard-setting process and a simple majority of the TC's P-members to approve the activity.<sup>202</sup>



**Figure 6: Standard-Setting Process**

<sup>201</sup> ISO, *How are ISO Standards Developed*, at <http://www.iso.org/iso/en/stdsdevelopment/whowhenhow/how.html> (2007).

<sup>202</sup> Farquhar, *supra* note 176, at 56; P-members must commit “to make an effective contribution at the preparatory stage, by nominating technical experts and by commenting on working drafts.” ISO DIRECTIVES, PART 1, *supra* note 182, at 24.

After a proposal has been accepted, the TC initiates preparatory work by establishing a working group composed of experts nominated by participating P-members. Liaisons and O-members may also nominate experts. Unlike other certification systems, the working group nomination process is not transparent or participatory -- there appear to be no balance or comment period requirements that the TC must follow when creating the working group, and working groups are to remain small in size to enhance efficiency.<sup>203</sup> The working group creates the initial draft of the standard. The completed draft is circulated to the TC members.<sup>204</sup> While ISO's choice to prefer efficiency over participation at the working group stage was intentional and may be justified, it is nonetheless troubling because the initial draft of the standard may frame the debate during the remainder of the standards-development process.

The committee stage commences upon circulation of the working draft standard and is intended to develop consensus on the standard's provisions. During this stage, the TC consults for three months, taking into account comments from all participating and observing members. After the comment period is complete, the compiled comments are circulated to all TC members. The TC secretariat may then arrange for discussion of the comments at the next regular TC meeting, circulate a revised draft, or register the draft for the next stage. The appropriate action depends on comments received; additional drafts may follow until the TC reaches consensus on the standard's technical content.<sup>205</sup> Consensus, as in other ecolabeling programs, requires the absence of sustained opposition but can also be reached based on a two-thirds majority vote of P-members.<sup>206</sup>

When consensus has been achieved, the standard is filed with the ISO secretariat and circulated to all ISO members for a five-month voting and comment period (the "enquiry stage"). Approval of the draft standard requires both approval by two-thirds of the members, and rejection by no more than one quarter of the members. Negative votes require explanation of the technical reasons for that vote; other comments may also be submitted and are addressed by the TC.<sup>207</sup> If the standard is not approved, it must be resubmitted to the TC for further consultation. Draft standards that pass the member vote must still be resubmitted for a final vote after technical comments are addressed. The final vote uses the same standards for approval as the enquiry stage, except that two-thirds of the P-members of the TC must vote affirmatively and no more than one quarter of the total membership can register a negative vote.<sup>208</sup> Approved standards are published by ISO as official international standards to be applied by all national initiatives.

ISO procedures require that new standards be reviewed by all ISO members a minimum of three years after publication. After this initial review, the standards must be re-reviewed every five years thereafter. During review, the TC decides whether to confirm, revise, or withdraw a given standard by majority vote. Revision of a standard follows the same procedures used for initial standard-development.<sup>209</sup>

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<sup>203</sup> ISO DIRECTIVES, PART 1, *supra* note 179, at 15.

<sup>204</sup> *Id.* at 24-25.

<sup>205</sup> *Id.* at 25.

<sup>206</sup> *Id.* at 26.

<sup>207</sup> *Id.* at 26-27.

<sup>208</sup> ISO DIRECTIVES, PART 1, *supra* note 179, at 28.

<sup>209</sup> *Id.* at 29.

Despite their length,<sup>210</sup> the foregoing ISO procedures leave little room for stakeholder participation through public comment or other means – other than for registered liaison organizations. The processes, moreover, are largely opaque. Because the standard-setting process is lengthy and may not be suitable for all standardization activities, ISO established other types of ISO “deliverables” that remedy participation failures (whether by accident or design) by offering broader opportunities for access.<sup>211</sup> These new types of ISO products include publicly available specifications (PAS), technical specifications (TS), technical reports (TR), and international workshop agreements (IWA).<sup>212</sup> Each of the first three of these work in parallel to the existing TC/working group structure used to create ISO standards, while IWA development proceeds through an independent workshop process.

**Table 9: ISO Deliverables**

<b>Product Name</b>	<b>Product Characteristics</b>	<b>How Product is Created</b>
International Standards	<ul style="list-style-type: none"> <li>• Specify official standards used for compliance assessment</li> </ul>	<ul style="list-style-type: none"> <li>• Approval by full ISO membership</li> </ul>
Technical Specification (TS):	<ul style="list-style-type: none"> <li>• Used where it is too early to produce a full international standard or where TC cannot achieve consensus</li> </ul>	<ul style="list-style-type: none"> <li>• Reflects working group consensus</li> <li>• Approval by TC consensus</li> </ul>
Publicly Available Specification (PAS):	<ul style="list-style-type: none"> <li>• Intermediate specifications created in anticipation of full standard-setting</li> <li>• Can be submitted by external liaisons</li> </ul>	<ul style="list-style-type: none"> <li>• Reflects working group consensus</li> <li>• Approval by a majority of TC</li> </ul>
Technical Report (TR):	<ul style="list-style-type: none"> <li>• Informational, not normative</li> <li>• Used to present information warranting publication but not standard-setting</li> </ul>	<ul style="list-style-type: none"> <li>• Reflects working group consensus</li> <li>• Approval by TC consensus</li> </ul>
International Workshop Agreement (IWA)	<ul style="list-style-type: none"> <li>• Used for rapid creation of frameworks to address new developments warranting ISO attention</li> </ul>	<ul style="list-style-type: none"> <li>• Negotiated directly by stakeholders, not ISO members</li> <li>• Created through workshop process separate from other standard-setting activity</li> </ul>

PAS and TS, like ISO standards, are normative documents that are created at the behest of the TC to respond to a proposal that does not warrant full standard-setting. They do not, however, proceed through the standard-setting process and thus can conflict and have only persuasive authority. PAS represent the consensus of a working group and require only the approval of a majority of the TC for publication. PAS are thus subject to the lowest level of approval within the ISO standard-setting system. They are used as intermediate specifications to

<sup>210</sup> Standard-setting is expected to take three years before publication of standards. *Id.* at 21.

<sup>211</sup> *See id.* at 31 *et seq.*

<sup>212</sup> Each of the current PAS, TS, and TR were originally referred to as different types of technical reports. The distinguishing titles and abbreviations are a recent addition. *See ISO, ISO/TR Technical Report*, at [http://www.iso.org/iso/en/stdsdevelopment/whowhenhow/proc/deliverables/iso\\_tr.html](http://www.iso.org/iso/en/stdsdevelopment/whowhenhow/proc/deliverables/iso_tr.html) (2007).

lead up to full standard-setting and can be submitted by external liaison organizations.<sup>213</sup> TS continue through the consensus phase of the standard-setting process, at which point the TC can accept them through a two-thirds vote. TS are created where a standard could be created in the future but is not immediately possible or where consensus proves impossible to create a final draft international standard. ISO describes TS as “prospective standard[s] for provisional application.”<sup>214</sup> Unlike PAS and TS, technical reports are purely informational, relying on data or other material that may warrant publication. TRs similarly pass through the working-group and committee stages.<sup>215</sup>

Finally, IWA, a newly-created form of standard, uses a wholly separate procedure wherein “market players” themselves negotiate the content of normative standards. In ISO’s language, an IWA is thus simply “a technical document developed by a workshop outside of the technical structure of ISO with administrative support from a designated member body.”<sup>216</sup> Not only is the informal IWA structure intended to provide a rapid-response framework for standards-development, but it also offers opportunities for direct participation by stakeholders and more robust transparency provisions.

ISO procedures provide for appeals from standard-setting decisions. The ISO directives give the right of appeal only to national bodies – not to liaisons or external stakeholders. ISO members have the right of appeal to the next higher body within the ISO system – thus, subcommittee decisions can be appealed to the TC, TC decisions to the TMB, and TMB decisions to the Council.<sup>217</sup> The Council’s decision on all appeals is final. The right of appeal at the subcommittee and TC levels is both procedural and substantive: P-members may appeal any action or inaction that is taken in violation of either ISO’s (non-public) statutes and rules of procedure or its (public) directives, or they may claim that an action or inaction is “not in the best interests of international trade and commerce, or such public factors as safety, health or environment.”<sup>218</sup> At the enquiry and approval levels, appeal is more limited; members may appeal based on “questions of principle” or a belief that the contents of a draft may harm ISO’s reputation.<sup>219</sup>

Appeals are resolved differently based on the level at which they are heard. Appeals heard by the TC are resolved informally by consensus of P-members. On the other hand, appeals to the TMB, if heard,<sup>220</sup> require creation of a conciliation panel that seeks a negotiated settlement. If unsuccessful, the panel recommends action to the TMB, which itself renders the decision. Appeals from the TMB are not subject to similar complications – the Council merely makes its decision independently within a three-month time span.<sup>221</sup>

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<sup>213</sup> ISO DIRECTIVES, PART 1, *supra* note 179, at 32.

<sup>214</sup> *Id.* at 31.

<sup>215</sup> *Id.* at 31-32.

<sup>216</sup> ISO, *International Workshop Agreement (IWA)*, at

<http://www.iso.org/iso/en/stdsdevelopment/whowhenhow/proc/deliverables/iwa.html> (2007).

<sup>217</sup> These rights are tiered – thus, a subcommittee decision can be appealed to the TC. If upheld, the decision can then be appealed to the TMB, and from there to the Council.

<sup>218</sup> ISO DIRECTIVES, PART 1, *supra* note 179, at 34-35.

<sup>219</sup> *Id.*

<sup>220</sup> The TMB has the discretion to decide whether to hear appeals from the TC.

<sup>221</sup> ISO DIRECTIVES, PART 1, *supra* note 179, at 35-36.

## *ISO Implementation*

ISO standards are implemented through a “conformity assessment” process. Conformity assessment involves evaluation of an entity to determine compliance with ISO standards. All ISO standards are voluntary, and any entity is permitted to self-assess. Self-assessment, however, does not permit the entity to claim ISO certification. As a result, all relevant ISO assessments are made through an independent, third-party assessor. Third-party certification allows companies to advertise their compliance with ISO standards and is common.<sup>222</sup>

Third-party certification requires assessment by an independent body, but unlike other systems, does not require the use of an accredited certification body. This distinction from ISO’s peers is possible because ISO obtains none of its funding through logo licensing – and indeed does not permit use of its logo by certified entities – rather, certified entities use the logo of the certification body.<sup>223</sup> Because ISO does not itself accredit certification bodies or itself engage in certification activities, it has no standards for accreditation or certification, leaving it to the independent bodies to determine how to evaluate conformity with ISO standards.<sup>224</sup>

Although it is fully independent of the accreditation and certification processes, ISO has nonetheless published voluntary codes of good practice for carrying out conformance assessment to aid in the provision of consistent certification procedures.<sup>225</sup> As the ISO code of practice states, “Different conformity assessment procedures and requirements, and the lack of recognition of conformity assessment results, can constrain the exchange of goods and services. Efforts are required to ensure that all conformity assessment systems and procedures attempt to involve all interested parties, are nondiscriminatory, transparent and avoid unnecessary obstacles to trade.”<sup>226</sup> Encouraging compliance with guidance for conformity assessment is part of ISO’s strategic plan,<sup>227</sup> and these efforts appear to be effective, as accreditation bodies generally require adherence to the ISO guidance, at least in the environmental management context.<sup>228</sup> ISO’s guide to accreditation requires respect for the fundamental elements of environmental governance – certification bodies must be nondiscriminatory and must ensure legal compliance. They must also be impartial and independent,<sup>229</sup> permitting the balanced participation of all “significantly concerned parties” throughout the assessment process, including strategic decisions, audits, and final decisions.<sup>230</sup>

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<sup>222</sup> For ISO 9000 and 14000 compliance, such claims are complicated because these standards are limited to process. As a result, no products can be labeled based on compliance with these standards: claims of certification must be limited to the company’s processes. *See generally* ISO, PUBLICIZING YOUR ISO 9001:2000 OR ISO 14001:2004 CERTIFICATION (2005).

<sup>223</sup> *Id.*

<sup>224</sup> *See* ISO, *ISO 9000 and ISO 14000*, at

[http://www.iso.org/iso/en/iso9000-14000/understand/basics/general/basics\\_8.html](http://www.iso.org/iso/en/iso9000-14000/understand/basics/general/basics_8.html) (2007).

<sup>225</sup> ISO, ISO/IEC GUIDE 60:2004, CODE OF GOOD PRACTICE (2004).

<sup>226</sup> *Id.* at iv.

<sup>227</sup> *See generally* ISO, *supra* note 175.

<sup>228</sup> *See* INTERNATIONAL ACCREDITATION FORUM, INC., IAF GUIDANCE ON THE APPLICATION OF ISO/IEC GUIDE 66: GENERAL REQUIREMENTS FOR BODIES OPERATING ASSESSMENT AND CERTIFICATION/REGISTRATION OF ENVIRONMENTAL MANAGEMENT SYSTEMS (EMS) (2003).

<sup>229</sup> Notably, certification bodies are limited in their provision of consultancy services to applicants. *Id.*

<sup>230</sup> *Id.*

Assessment itself should occur in stages. The first stage includes an on-site document review and evaluation of the context of the applicant for applying the ISO standard. The second stage requires development of an audit plan to confirm that the applicant complies with its internal management provisions and that those provisions comply with ISO standards. Development of an audit plan requires adaptation of the ISO standard requirements to the applicant's business. After assessment, the certification body must produce an assessment report explaining the audit findings, but not providing prescriptive advice on compliance. Certification decisions must be made on the basis of this report and cannot be granted until all nonconformities have been addressed by the applicant.<sup>231</sup>

Although ISO does not exert any power over the use of its standards by certification bodies, its guidance is persuasive in the environmental labeling context. While this section has discussed solely the accreditation and certification processes for the ISO 14000 series, it is important to note that its influence has also been strong in the related area of social and environmental labeling and certification. ISO standards – for example, defined concepts such as consensus – and processes – such as independent third-party accreditation and certification – are the foundation of the ISEAL Alliance Code of Practice and of the structures and processes used by individual labeling organizations. Thus, while ISO's governance structures and standard-setting processes are extremely insular by ecolabeling standards, the results of those structures and processes possess sufficient legitimacy that more inclusive, transparent standard-setting entities have relied on them as models of effective international structures. While ironic, this is perhaps not surprising, as it reflects both the compounded expertise and legitimacy of fifty years and the generality and process-based content of ISO's environmental standards.<sup>232</sup>

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<sup>231</sup> *Id.*

<sup>232</sup> Further research is needed to determine whether legitimacy is affected differentially based on the generality of standards. Regardless of whether lesser levels of participation, transparency, and accountability are in fact required to create process-based certification systems, however, such general standards are clearly insufficient to address aquaculture ecolabeling. The answer to this question is thus beyond the scope of this report.

## Marine Stewardship Council

The Marine Stewardship Council (MSC) encourages sustainable exploitation of marine capture fisheries by allowing certified fisheries to use its label on their products. MSC was founded in 1997 by WWF and Unilever, the world's largest seafood purchaser, in response to a failure to adequately address overfishing through domestic or international governmental regulation. Unilever initially pledged to source all of its fish from MSC-certified fisheries by 2005, suggesting that MSC was intended as a market-access labeling system. In practice, however, MSC has primarily acted as a market-fragmentation ecolabel due to difficulties in recruiting fisheries for certification.<sup>233</sup>

In response to these difficulties and criticisms from stakeholders, MSC became independent in 1999 and has since extensively liberalized its governance and standard-setting procedure and has joined the ISEAL Alliance. As a result, MSC must be evaluated through a historical lens.

### *Funding*

At its inception, MSC was funded by its founders. After becoming independent, it was forced to attract investment by foundations and other charitable sources. As a result, in the last fiscal year, 75 percent of MSC funding was based on charitable grants. Other major income was derived from government agencies and corporations.

MSC also receives some income from licensing its logo to sellers of labeled seafood products.<sup>234</sup> Logo licensing provided only seven percent of MSC's income, a particularly low figure in comparison to the other ecolabels considered in this report.<sup>235</sup> The reasons for the relatively minimal contribution by the label are poorly resolved and complex, but a few likely causes can be identified. First, in light of the length and cost of certification MSC likely intentionally minimizes the fees it charges to participating seafood sellers to encourage certification of fisheries and sale of labeled goods from those fisheries. Second, relatively few products carry the MSC label; the 100<sup>th</sup> MSC-labeled product was not introduced in stores until 2002. The number of labeled products has since risen to 332, and more than 50 fisheries are now certified or in assessment. These developments led to 76 percent growth in retail sales of labeled products during the last fiscal year.<sup>236</sup> Logo licensing fees are tied to sales, so licensing fees are likely to increase in future years as MSC is accepted more broadly.<sup>237</sup> Additional hope for increases in MSC's programmatic income result from Wal-Mart's commitment to fully source its frozen and fresh seafood from MSC fisheries in coming years.<sup>238</sup> This partnership with a major

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<sup>233</sup> For a discussion of market-access versus market-fragmentation systems, see *Economics*, Chapter 2, *supra*.

<sup>234</sup> Although fisheries must pay for certification, the proceeds of certification accrue to independent certifiers, not MSC. MSC's programmatic income thus derives only from the eventual sale of certified fish that carry the label, both at wholesale and to consumers. See MSC, LOGO LICENSING SYSTEM – CATEGORIES OF LOGO USE AND CHARGES.

<sup>235</sup> MSC, ANNUAL REPORT 2005/06 20 (2006).

<sup>236</sup> *Id.* at 8.

<sup>237</sup> MSC, *supra* note 2. MSC's logo pricing system includes an annual fee that applies to all products. Consumer-facing products are subject to an additional volume royalty.

<sup>238</sup> *Id.* at 6.

retailer may reflect renewed emphasis on market access, but it is unlikely that MSC will be economically self-sufficient in the foreseeable future.

### Governance

MSC's governance structure has changed significantly since the program's inception. The organization's decisions – including decisions on standard adoption and revision – are made by the Board of Trustees. In its original form, the Board was completely self-selected, and did not include representatives from stakeholder groups. Instead, WWF and Unilever recruited high-profile individuals from outside the marine sector to serve on the board in order to raise awareness of MSC's existence. In addition, its experiences and frustrations with FSC led WWF to design MSC's governance and standard-setting structures to contrast with the ultra-inclusive, “hyper-democratic” FSC system.<sup>239</sup> This strategy thus championed effectiveness while clearly and intentionally minimizing participation, transparency, and accessibility. Lack of attention to these values did not immediately attract censure from stakeholders, however, because MSC convened a transparent and participatory process for decision-making when designing its initial standard.<sup>240</sup> Once the standard was developed, however, the NGO community's lack of continuing access to decision-making processes engendered significant criticism and undercut the perceived legitimacy of the label. The resultant lack of support for the MSC label by environmental stakeholders contributed at least in part to MSC's decision to become independent from its founders.

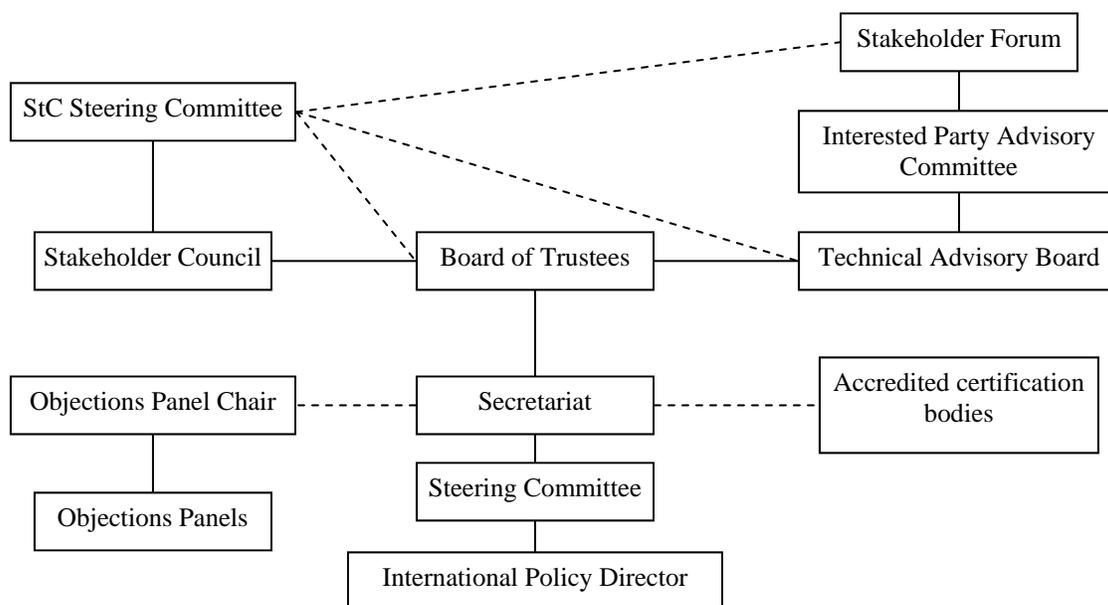


Figure 7: MSC Governance

<sup>239</sup> SCOTT HIGHLEYMAN ET AL., WILDHAVENS: AN INDEPENDENT ASSESSMENT OF THE MARINE STEWARDSHIP COUNCIL, at § 3 (2004) [hereinafter WILDHAVENS REPORT].

<sup>240</sup> *Id.* at § 3.

In 2001, MSC liberalized the makeup of the board and allowed for enhanced stakeholder input in MSC processes.<sup>241</sup> MSC's Board currently consists of 15 members, 12 of whom are self-elected. The remaining three slots on the board are filled by the co-chairmen of the stakeholder council (StC) and the chairman of the technical advisory board (TAB).

The stakeholder council's 29 members<sup>242</sup> are split into "public interest" and "commercial and socio-economic" categories, each of which is further subdivided by stakeholder group. Of the 12 members of the public interest faction, 3 are from scientific, academic, and resource management interests, 3 from general conservation NGOs, 4 from NGOs specializing in marine conservation issues, and 2 from general interest organizations, such as MSC funders or consumer groups.<sup>243</sup> The commercial faction includes 17 members, including 7 representatives from the catch sector, 2 from supply chain and processing interests, 5 from the retail, catering, and distribution sector, and 3 from developing nation and fishing community interests.<sup>244</sup> Half of the StC is appointed by the Board, and half selected by the StC's members. The StC is governed by two co-chairmen who are elected by the public interest and commercial categories, respectively. These co-chairmen lead the StC and serve on the board to represent the interests of the stakeholders.

Table 10: Governance Body Responsibilities

<b>Body</b>	<b>Responsibilities</b>
Board of Trustees	<ul style="list-style-type: none"> <li>• Consists of 15 members: (12) self-elected individuals, (2) co-chairmen of StC, and (1) Chairman of TAB</li> <li>• Makes decisions on standard adoption and revision</li> <li>• Appoints and removes half of the StC members</li> </ul>
Stakeholder Council (StC)	<ul style="list-style-type: none"> <li>• Consists of 29 members: (12) public interest and (17) commercial representatives</li> <li>• Comments on TAC drafts prior to board review</li> <li>• Represents stakeholders</li> </ul>
Technical Advisory Board (TAB)	<ul style="list-style-type: none"> <li>• Consists of 14 members appointed by the board and one TAB-appointed chair</li> <li>• Provides board with input on standards implementation</li> </ul>
Stakeholder Council Steering Committee	<ul style="list-style-type: none"> <li>• Consists of 8 members from StC</li> <li>• Maintains ongoing relations with stakeholders, board, and TAB</li> </ul>
Interested Party Advisory Committee (IPAC)	<ul style="list-style-type: none"> <li>• Consists of 12 members selected by TAB</li> <li>• Determines whether sustained opposition to standards remains in the Stakeholder Forum</li> </ul>
Stakeholder Forum	<ul style="list-style-type: none"> <li>• Consists of any parties interested in the participatory body</li> <li>• Provides comments on proposed standards</li> </ul>

<sup>241</sup> See THE BRIDGESPAN GROUP, FISHERY CERTIFICATION: SUMMARY OF ANALYSIS AND RECOMMENDATIONS (2004) [hereinafter BRIDGESPAN REPORT].

<sup>242</sup> The StC is intended to range in size from 30 to 50 individuals.

<sup>243</sup> MSC, MSC STAKEHOLDER COUNCIL (2007). For example, the Seafood Choices Alliance is one of the current general interest representatives.

<sup>244</sup> *Id.*

The StC's duties are primarily policy-oriented and focused on strategy. Thus, the StC can provide input to both the Board and TAB on the wording or interpretation of the MSC standards, accreditation and certification methodology, or other aspects of the labeling system. Importantly, the StC is permitted to submit unsolicited views to the Board, and the Board is explicitly required to consider them.<sup>245</sup> Thus, although MSC is generally a “top-down” organization wherein the Board directs the substantive activities, the StC has some “bottom-up” power to direct the activities of the governance body.

Unlike the StC, the TAB is not segregated by interest because its role is non-partisan and executive; instead of advocating for decisions in favor of an interest group, the TAB provides input into how MSC standards can be implemented. Thus, its tasks include, for example, creating certification manuals, providing advice to the Board on the development, modification, and interpretation of the MSC standards, and participating in the objections procedures.<sup>246</sup> On matters on which the TAB has provided its advice, the Board must set out its reasons for any deviation from that advice. Significantly, the StC may see and comment on the TAC's draft recommendations prior to their submission to the Board. In addition, one of the StC co-chairs can participate in TAB meetings as a member/observer.<sup>247</sup> Thus, the StC in turn has some power over the TAB's decisions, and, like the StC, the TAB has some legitimate power over Board decision-making.

While the creation of the StC and TAB enhanced the organization's participation, transparency, and accountability, criticisms of the new system remain. First, stakeholder interests make up a distinct minority of the Board, so their presence there can be construed as a formality. In the absence of functional power to affect decision making, MSC remains subject to criticisms based on transparency and the adequacy of stakeholder participation. This difficulty is compounded by the fact that the StC has no say whatsoever in the selection of the remaining board members, which stimulated an independent assessment to suggest that the StC select eight members of the Board.<sup>248</sup> In addition, the Board retains the authority to appoint or remove fully half of the StC's members. This authority provides the Board with significant persuasive power to affect the formal positions taken by the StC. MSC could address these concerns by making stakeholder participation both more meaningful at the board level and by reducing the Board's power over StC members. Such changes would improve MSC's compliance with the ISEAL Code and increase participation and transparency while potentially sacrificing little effectiveness. Although MSC has engaged in continual self-assessment, no additional changes have been implemented to date.

The StC's has also recognized that it is ineffective in some cases, undermining its intended purpose of improving participation and transparency. The StC has had difficulty effectively performing its governance function of representing stakeholders for a variety of logistical and systemic problems. Among others, StC self-criticisms include:

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<sup>245</sup> MSC, STAKEHOLDER COUNCIL TERMS OF REFERENCE (2002).

<sup>246</sup> MSC, TECHNICAL ADVISORY BOARD TERMS OF REFERENCE (2002).

<sup>247</sup> MSC, Stakeholder Council (StC) Summary Minutes, Meeting No. 6. 11-12 April 2007, Seattle USA (2007).

<sup>248</sup> WILDHAVENS REPORT, *supra* note 239 , at table 2.

- Lack of the StC’s sense of purpose or role
- Board’s expectations of the StC are unclear and feedback is lacking, leading to a perceived lack of influence on Board activities and agenda
- StC lacks balance in interest group representation and expertise
- Meetings are not useful due to geographic, time, language, and cost constraints
- StC lacks cohesion because members do not interact between the too-rare meetings.<sup>249</sup>

The StC indicated specific ways in which its role could be improved. StC recommendations include but are not limited to:

- Clarifying StC role by increasing formal links with the Board and requiring explicit Board feedback
- Establishing more effective regional stakeholder bodies to provide input into the StC to mitigate the geographical, language, and other constraints on global governance
- Clarifying the role of the StC vis-à-vis the TAB through revisions to the Terms of Reference pertaining to each body, specifically clarifying the StC’s stated duty to provide “strategic advice” to the Board; and
- Amending the interest group structure on the StC to better reflect actual interest groups and to integrate developing-country interests throughout the interest groups.<sup>250</sup>

Similar concerns led to the establishment, in 2004, of the StC Steering Committee. The Steering Committee is composed of one representative from each StC interest group, for a total of eight members drawn from the StC. The Steering Committee meets at least on a quarterly basis and seeks to maintain ongoing relationships both among stakeholders (including assisting with the content and logistics of StC meetings) and between stakeholders and the Board and TAB in order to effectively present StC views to those bodies. The Steering Committee, though formally established as part of the MSC governance structure, has no explicit powers to affect the actions of either the Board or the StC and must exert influence through persuasion alone.<sup>251</sup> It is difficult to reach any conclusions about the efficacy of the Steering Committee because neither its quarterly meeting minutes nor records of its interactions with the Board or TAB are publicly available. As a result, it is difficult to determine whether its formation will enhance MSC's credibility with the stakeholder community. The StC’s ongoing dissatisfaction with its role and relationship to other elements of the MSC governance structure indicate, however, that the Steering Committee may not have yet achieved its intended goals. If effective, however, the Steering Committee promises to strengthen stakeholder involvement in decision-making, at the cost of accessibility.

### *Standard-Setting Process*

MSC certification is built on a tiered global sustainability standard consisting of three principles and twenty-three associated criteria.<sup>252</sup> The principles are broad statements requiring that certified fisheries must: (i) not be overfished, or if already depleted, must be demonstrably

<sup>249</sup> MSC, Stakeholder Council (StC) Summary Minutes, *supra* note 247.

<sup>250</sup> *Id.*

<sup>251</sup> MSC, MSC STAKEHOLDER COUNCIL STEERING GROUP TERMS OF REFERENCE (2004).

<sup>252</sup> In this chapter the term “standard” refers to both principles and criteria. Specific reference to “principles” or “criteria” refers only to the listed subset of the MSC standard.

managed for recovery; (ii) maintain the ecological structure, productivity, function, and diversity; and (iii) use an environmental management system that respects laws and requires sustainable practices. Each criterion applies to one of these three principles and adds specific requirements for certification under each principle. In addition to the global principles and criteria, the consultative process also created a certification standard for use in evaluating fisheries. This process permitted certification bodies to develop specific “performance indicators” to translate the global standard into a form suitable for assessing the unique characteristics of particular fisheries.<sup>253</sup> The certification bodies apply these indicators to each fishery based on a global assessment methodology (*see* Implementation Methodology, *infra*).

The MSC standards were initially established through a multi-stakeholder, consultative process that included both industry and environmental representatives.<sup>254</sup> Like most other ecolabels, MSC did not initially establish a written procedure or timelines for setting or revising its principles and criteria or implementation methodology. As a result, the standards have been revised through *ad hoc* processes in response to external criticism rather than through a measured, iterative process.<sup>255</sup> With MSC’s accession to the ISEAL Alliance, however, MSC initiated development of procedures for setting and revising its standards.<sup>256</sup> The TAB approved the procedures in May, 2007 after a public comment period.<sup>257</sup>

The standard-setting procedures include roles for both MSC’s established governance bodies and additional bodies created specifically for the process. Proposals for initiation of standard-setting or review of existing standards must originate with the Board, StC, TAB, or MSC staff. The Board reviews and approves written proposals that delineate the justification, need, objective, and expected benefits of the standard. Board approval initiates the standard-setting process.

The MSC secretariat – specifically, the International Policy Director (IPD) and the MSC Steering Committee – manage and administer the standard-setting process by drafting terms of reference and a work plan for the standard-setting activity.<sup>258</sup> After the Board initiates the standard-setting activity, the IPD produces an initial draft of the standard. The draft standard is

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<sup>253</sup> This delegation of responsibility to certification bodies is similar to that used by the ISO, wherein certification bodies develop audit criteria specifically for each ISO assessment.

<sup>254</sup> *See* DAVID & LUCILE PACKARD FOUND., MEMORANDUM: REPORT OF FISHERIES CERTIFICATION REVIEW WORKSHOP, AIRLIE HOUSE, VIRGINIA, JANUARY 26-28 2004 (2004) [hereinafter AIRLIE HOUSE REPORT].

<sup>255</sup> *See, e.g.* BRIDGESPAN REPORT, *supra* note 241; WILDHAVENS REPORT, *supra* note 239; AIRLIE HOUSE REPORT, *supra* note 22.

<sup>256</sup> MSC, DEVELOPMENT AND APPROVAL OF MSC INTERNATIONAL STANDARDS (VERSION 1.0) (2007) [hereinafter MSC STANDARDS DEVELOPMENT PROCEDURES].

<sup>257</sup> *See* MSC, *MSC Fishery Standard Setting and Review*, available at [http://www.msc.org/assets/docs/Resources/MSC\\_Fishery\\_Standard\\_Setting\\_and\\_Review\\_August2007\(1\).pdf](http://www.msc.org/assets/docs/Resources/MSC_Fishery_Standard_Setting_and_Review_August2007(1).pdf) (2007); MSC, *Summary of Public Comment on [sic] Response on [sic] MSC’s Standard Setting Procedure*, available at [http://www.msc.org/assets/docs/Resources/Summary\\_PublicComment\\_on\\_ResponsetoMSC\\_SSP\\_May2007.pdf](http://www.msc.org/assets/docs/Resources/Summary_PublicComment_on_ResponsetoMSC_SSP_May2007.pdf) (2007).

<sup>258</sup> The IPD has authority over standard-setting both individually and as a member of the Steering Committee, which also includes the chief executive, director of operations, and other MSC staff. The Steering Committee “oversee[s] implementation of the standard development process,” which appears similar to TAB’s duty to “ensur[e] that the standard setting procedure is implemented according to its intent.” The specific roles of these entities may thus require further elaboration. *Id.*

then delivered to the TAB, which oversees the implementation of the standard-setting procedures and performs the remaining substantive drafting for public comment.

**1. Proposal:**

Proposals originate with board, StC, TAB, or secretariat  
Board reviews and approves proposals

**2. Preparatory:**

Secretariat drafts terms of reference and a work plan for standard-setting

**3. Drafting:**

IPD produces initial draft  
TAB further drafts for public comment and releases for comment: 60 days initially, 30 days for intermediate drafts, and 60 days for the final draft  
IPD summarizes and responds to comments  
Revision continues until IPAC determines that the Stakeholder Forum has reached consensus.

**4. Approval:**

TAB votes on draft standard after receiving StC comments and forwards standard to the board  
Board approves standard if it adheres to MSC principles and criteria and the ISEAL Code  
After dispute resolution period is finalized, standard takes effect

**5. Review/Revision:**

Approved standards subject to public comment and formal review every five years  
IPD can make changes at earlier intervals with TAB, StC, and board consent

Figure 8: MSC standard-setting procedure

All drafts of the standard must be published for public comment. The initial comment period is 60 days, and subsequent intermediate comment periods last 30 days. The final comment period is expanded to 60 days, unless the Steering Committee determines that the changes in the final version were minor or non-controversial.<sup>259</sup> To be formally considered, comments cannot be anonymous and must be provided in English on MSC's comment form.<sup>260</sup> IPD summarizes the issues raised in all formal comments and responds to comments by indicating how they were taken into account in the draft standard. The IPD is also responsible for analyzing the types of stakeholders who commented; if it determines that the full range of stakeholders is not represented, it must proactively seek input from underrepresented groups.

<sup>259</sup> The Steering Committee is also permitted to limit the comment period if delay until the next MSC Board meeting would be detrimental to the social or environmental goals of the standard. *Id.*

<sup>260</sup> Electronic comments are accepted. MSC is bound to reply only to these formal comments, although it may also respond to attributed informal comments.

The number of TAB-driven drafting/comment phases is left to TAB's discretion,<sup>261</sup> although the TAB must seek input from the Interested Party Advisory Committee (IPAC) before finalizing the standard to determine whether consensus has been achieved as required by the ISEAL Code.<sup>262</sup> The IPAC is generally a 12 member group whose membership is selected by the TAB in consultation with the StC and MSC staff.<sup>263</sup> Eligibility for the IPAC is based on expertise in the subject area, diversity of interest group representation, and other factors. The Board must approve IPAC membership. IPAC is charged with determining whether sustained opposition to the standard remains in the Stakeholder Forum. The Stakeholder Forum is a participatory body, open to any interested party upon request, which provides interested parties the opportunity to comment on proposed standards.<sup>264</sup> Forum member comment opportunities may not be consistent across standards, but rather are based on IPAC's guidance to the TAB on the incorporation of stakeholder involvement into the drafting process.

Once IPAC reports that the Stakeholder Forum has reached consensus on the standard, TAB forwards the standard to the StC for review and comment. After considering the StC's comments, TAB must determine that the standard has undergone sufficient consultation, fulfills the intended purpose of the Board's initial authorization for standard-setting, and reflects a consensus view that merits approval by the Board. To forward the standard to the Board, the TAB must itself reach consensus, defined as a 75 percent approval for the standard and a lack of votes against the proposed standard. Thus, each individual member of the TAB has veto power over the standard. If approved, TAB forwards the standard to the Board along with a summary of the standard-setting process prepared by the IPD. The Board approves the standard if it determines that the established procedures for standard-setting (including both MSC's standard-setting policy and the ISEAL Code) were adequately followed.<sup>265</sup>

If TAB determines, in accord with the IPAC, that consensus cannot be reached among the members of the Stakeholder Forum with respect to the standard, the IPD must produce a report summarizing the standard-setting process followed and the substantive issues addressed, including a summary of comments on disputed areas. The StC reviews and comments on this report, followed by a TAB draft standard for the disputed issues based on the input from the IPD and StC. The non-consensual standard may then be forwarded to the Board for review in the same manner as for consensus standards.

MSC has also determined standards for initiating the review and revision of existing standards. The IPD is permitted to propose minor substantive changes to standards and to remedy typographical errors. IPD must circulate its justification for substantive changes to the Board, TAB, StC, and all certification bodies. After a 30-day period, IPD may make the change,

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<sup>261</sup> New standards require at least two rounds of drafts and comments.

<sup>262</sup> As indicated in both the ISEAL Code and the MSC Standard-development procedures, a lack of sustained opposition indicates that consensus has been achieved.

<sup>263</sup> MSC rejected a comment seeking to increase stakeholder input into IPAC membership through consultation with the Stakeholder Forum because it deemed consultation with the StC to be sufficient to ensure that all interests are represented and because the Executive is required to solicit stakeholder input on categories of expertise and nominations for IPAC members. MSC, *Comments, supra* note 257.

<sup>264</sup> The IPC must ensure that all affected interest groups are represented on the Stakeholder Forum. *Id.*

<sup>265</sup> Standards may additionally be pilot-tested prior to full implementation.

taking into account any comments received. More thorough revisions must occur on a five-year cycle. This process requires a 60-day public comment period. MSC policy staff review the comments received and prepare a report to the Chief Executive recommending whether the standards should be revised and specifying the procedure to be followed. The Chief Executive has discretionary power to accept or reject the report. If accepted, revision occurs following the procedures described above for new standards.

Finally, the MSC procedures for standard-setting include provisions for dispute resolution. Any stakeholder is permitted to submit a complaint about the standard-setting process or the substance of the standard. The IPD responds to substantive comments by explaining why the point of view identified in the complaint was not incorporated into the standard. There is no appeal from the IPD, but complaints are documented for review during the next review of the standard at issue. The IPD is also the initial contact for procedural complaints. If the complainant is not satisfied with the IPD's response to a procedural complaint, however, she may take recourse to the independent Objections Panel Chair (OPC), who may dismiss the complaint, convene informal mediation, or render a formal decision.<sup>266</sup>

With MSC's accession to the ISEAL Alliance, it was required to formalize its standard-setting procedures, both as they apply to the global sustainability standard and to the implementation methodology. The absence of formalized procedures prior to those currently in development and discussed above led to frustrations by some stakeholder groups due to a lack of accessibility or transparency in the standard-setting and revision process. Environmental NGOs in particular were frustrated with a perceived laxity in the required degree of sustainability permitted to obtain certification under the implementation methodology, but were unable to demand revisions to the standard because of a lack of access to MSC governance.<sup>267</sup>

The development of the proposed standard remedies this issue by clarifying the processes for standard-setting and revision and by delineating the rights of stakeholders to participate in these activities. As a result, despite their complexity, the standard-setting procedures must be considered an improvement that is likely to increase the legitimacy of the MSC label in the eyes of environmental interest groups. Nonetheless, significant questions remain about the balance of the governance institutions – particularly the Board and the TAB – that make decisions on whether and how to set or revise standards and that adjudicate disputes. It is questionable, in fact, whether the proposed MSC procedures for standard-setting comply with the stakeholder protections that are inherent to the ISEAL Code.<sup>268</sup> The ISEAL Code requires that the body that makes standard-setting decisions be balanced and that labeling systems solicit input from all interested parties. While the MSC standard-setting procedures do require balanced input through the Stakeholder Forum, neither the Board nor the TAB is balanced. While the IPAC-driven consensus determinations do limit TAB's discretion in approving standards, it can approve non-

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<sup>266</sup> MSC instituted the OPC system following the FAO's promulgation of its marine capture fisheries ecolabeling guidelines. See FAO, GUIDELINES FOR THE ECOLABELLING OF FISH AND FISHERY PRODUCTS FROM MARINE CAPTURE FISHERIES (2005). The OPC is appointed for a three-year term. MSC, *Objections Procedure*, at [http://www.msc.org/html/content\\_511.htm](http://www.msc.org/html/content_511.htm).

<sup>267</sup> This problem has likely been mitigated in the wake of the establishment of the StC, but even after the StC, the right of non-StC members to propose changes would remain in question without established procedures in contravention of the ISEAL Code.

<sup>268</sup> See ISEAL ALLIANCE, *supra* at Appendix C.

consensual standards that avoid these limitations. Further, the Board retains wide discretion to determine whether to initiate standard-setting and to guide the drafting of the first draft of new or revised standards. These powers could undermine the utility of the Stakeholder Forum for ensuring balanced standard-setting.

### *Implementation Methodology*

Implementation of the MSC global standard is a fully third-party process that requires independent accreditation of certification bodies and a three-stage assessment and certification process performed by certification bodies. MSC permits these certification bodies to operate independently and exerts little oversight over certification decisions, although its certification methodology is complete and quantifiable.

Certification bodies are independent but must be accredited prior to performing fishery or chain-of-custody assessments for MSC. Accreditation ensures that certification bodies are competent to implement MSC's principles and criteria.<sup>269</sup> The MSC does not itself accredit certification bodies, but instead uses an independent accreditor for this purpose. The accreditation body evaluates certification bodies for compliance with an accreditation manual maintained by the TAB;<sup>270</sup> ISO Guide 65;<sup>271</sup> the MSC certification methodology; and all legal requirements in countries where they operate.<sup>272</sup> The accreditation manual establishes several key elements that are prerequisites to accreditation, including:

- Providing for annual independent review of certification body actions and by requiring the disclosure of conflicts of interests through a written policy;
- Requiring employees who engage in decision-making to be sufficiently expert to evaluate assessment reports;
- Establishing management policies used to apply MSC's principles and criteria during assessment; and
- Establishing policies requiring contracts for assessment to provide full information to clients, with full disclosure of the certification body's confidentiality policy.<sup>273</sup>

These protections are designed to ensure that certification bodies are well-managed and have assessment processes that will lead to reliable certification decisions. Many of these requirements also serve to protect MSC clients by ensuring the transparency of the certification process through full disclosure of the expected costs and conditions of certification.

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<sup>269</sup> MSC, ACCREDITATION MANUAL (REQUIREMENTS FOR CERTIFICATION BODIES) (2005) [hereinafter ACCREDITATION MANUAL].

<sup>270</sup> *See id.*

<sup>271</sup> ISO, ISO GUIDE 65 – GENERAL REQUIREMENTS FOR BODIES OPERATING PRODUCT CERTIFICATION SYSTEMS (1996) [hereinafter GUIDE 65]. MSC also uses a standard guidance document for the implementation of Guide 65. *See* INTERNATIONAL ACCREDITATION FORUM, INC., IAF GUIDANCE ON THE APPLICATION OF ISO/IEC GUIDE 65:1996, IAF GD 5:2006 (2006).

<sup>272</sup> MSC, MARINE STEWARDSHIP COUNCIL FISHERIES CERTIFICATION METHODOLOGY (2006) [hereinafter CERTIFICATION METHODOLOGY].

<sup>273</sup> ACCREDITATION MANUAL, *supra* note 269.

Once accredited, the certification body may be retained by a fishery for assessment and eventual certification.<sup>274</sup> Certification proceeds through three phases: preassessment, assessment, and certification pursuant to a written Certification Methodology maintained by the TAB.<sup>275</sup> Over time, the Certification Methodology and its associated processes have been revised in response to concerns about the adequacy of public access to the assessment process.<sup>276</sup> As a result, the assessment process includes a variety of protections for stakeholder participation and is largely transparent and accountable. As noted below, however, some issues remain unresolved.

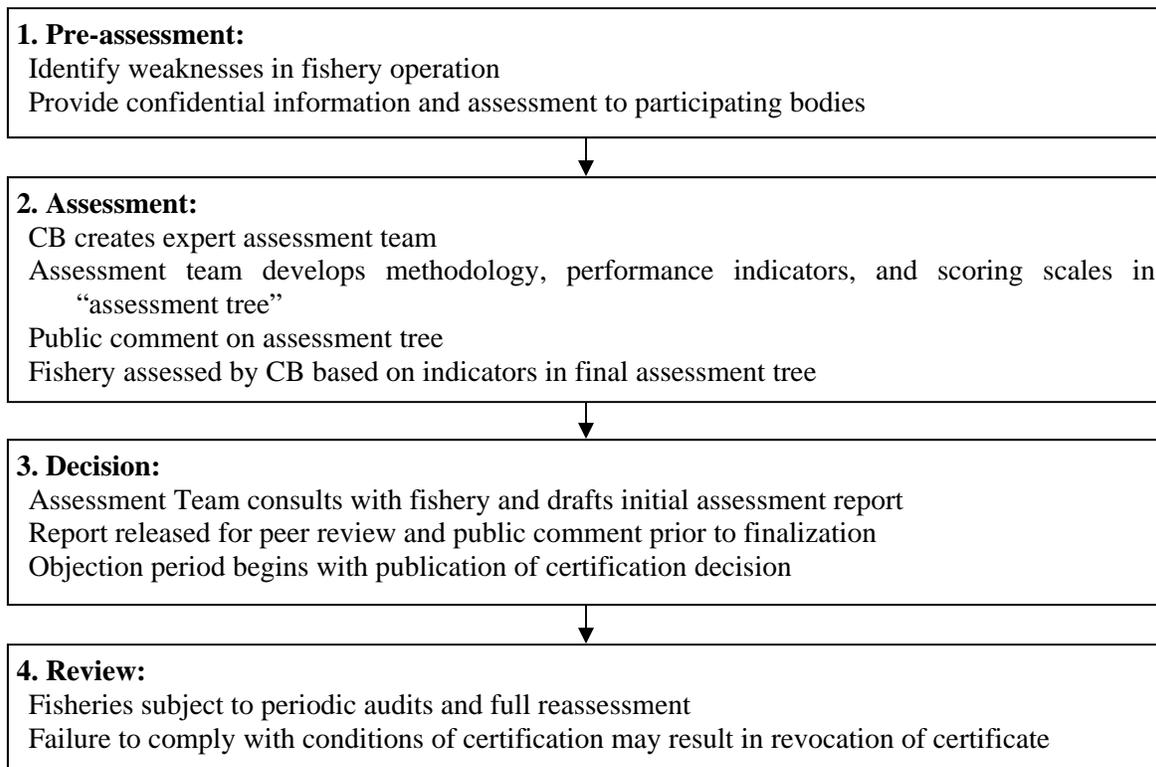


Figure 9: Certification Methodology

Preassessment is used to determine the likelihood that the fishery could pass a full assessment by identifying the weaknesses in the fishery's management systems, data collection, and other variables that could preclude certification.<sup>277</sup> In contrast to the public nature of full

<sup>274</sup> Fishery or fishing sectors generally comprise the unit of assessment and certification in the MSC system. Single vessels such as processors, however, may be certified for chain-of-custody. See MSC, GUIDANCE TO CLIENTS: THE MSC FISHERY ASSESSMENT AND CERTIFICATION PROCESS: INFORMATION SHEET 3 – THE UNIT OF CERTIFICATION EXPLAINED (2005) (“The fishery or fish stock (biologically distinct unit) combined with the fishing method/gear and practice (vessel(s) pursuing that stock). At its simplest, a single vessel could be the unit of certification, more likely a number of vessels in the same fishery will probably be assessed.”).

<sup>275</sup> For diagrammatic representation of the MSC certification process, see AIRLIE HOUSE REPORT, *supra* note 254, at App. E; MSC, GUIDANCE TO CLIENTS: THE MSC FISHERY ASSESSMENT & CERTIFICATION PROCESS 5 (2005); MSC, *Outline of Process to be Followed During Last Stages of MSC Assessment*, available at [http://www.msc.org/assets/docs/fishery\\_certification/End\\_stages\\_Flowchart.pdf](http://www.msc.org/assets/docs/fishery_certification/End_stages_Flowchart.pdf).

<sup>276</sup> See MSC, LESSONS LEARNED IN FISHERIES CERTIFICATION: THE FIRST FOUR YEARS OF THE INDEPENDENT MARINE STEWARDSHIP COUNCIL (2003).

<sup>277</sup> CERTIFICATION METHODOLOGY, *supra* note 272, at 8.

assessment, the existence, process, and outcome of fisheries preassessment are confidential to encourage participation and to protect applicants from unwanted publicity. In addition to providing information to the client fishery, preassessment aids the certification body in preparing for full assessment. Certification bodies must establish an individual or team to assess the fishery. This individual or team is likely to participate in the eventual full assessment, allowing the certification body to gain expertise in the fishery prior to full assessment. Preassessment results in a report based on the certification body's study of the fishery's history, governance, consumption and exports, and management practices; a clear definition of the unit of certification; other fisheries or factors that impact the fishery under assessment; identification of key stakeholders; and applicable regulations.<sup>278</sup> After analyzing these factors, the report informs the client fishery of the necessary steps to certification, including: contacts with regulators, environmental groups and other stakeholders; hurdles to certification presented by existing management; the types and extent of data needed for full assessment; and the process required to move to full assessment.<sup>279</sup>

If the fishery decides to move on to full assessment, the certification body must immediately notify both MSC and invite key stakeholders to participate in the assessment process. The assessment begins with the certification body's creation of an expert assessment team. The makeup of the team is left to the discretion of the certification body; team members may or may not be employed on a full-time basis by the certification body, and the team need not be balanced in terms of interest groups, geography, or other factors. Team members must, however, have expertise in an array of relevant issue areas.<sup>280</sup>

The assessment team is charged with developing a methodology to determine whether the fishery merits certification. The diversity of fishing targets (invertebrates and marine, freshwater, and anadromous fish) and the generality of the MSC's global principles and criteria demand that certification be independently tailored to the demands of each fishery, and sometimes to each fishing sector. The assessment team is responsible for developing the performance indicators and scoring guideposts that translate the global MSC principles and criteria into measurable standards that are tailored to the particular fishery in assessment. Together, these specific provisions are referred to as the assessment tree. Indicators are weighted according to performance, and scoring guideposts are established for each performance indicator for scores of 100, 80, and 60. A 100 score "represents the level of performance . . . that would be expected in a theoretically 'perfect' fishery."<sup>281</sup> An 80 represents the unconditional pass mark, and 60 represents the minimum, conditional-pass mark. Scores below 60 for any criterion are unsatisfactory. After the team has produced the initial draft of the assessment tree, MSC can provide feedback but cannot mandate revisions. Stakeholders have a similar opportunity to provide input during a 30-day public comment period prior to on-site assessment. These comments are considered prior to the promulgation of the final indicators. The certification body

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<sup>278</sup> *Id.* at 15-16.

<sup>279</sup> *Id.* at 16.

<sup>280</sup> These areas include fish stock assessment, fish stock biology/ecology, fishing impacts on aquatic ecosystems, fishery management and operations, current knowledge of the local fishery context, and knowledge of third-party assessment techniques. *Id.* at 18.

<sup>281</sup> *Id.* at 19.

must also develop a written rationale for each indicator and guidepost to ensure that comments are considered and to increase transparency.

Although MSC has an advisory role in the assessment tree development process, it cannot veto the assessment's team's substantive judgments or otherwise demand changes to the proposed guidelines. The self-imposed limits on MSC's power have led to consistent criticism from some members of the stakeholder community because the resultant, decentralized assessment process has led to uneven interpretation of the global principles and criteria. This result is unsurprising, since the principles and criteria are intentionally generic because they are to be applied in a diverse array of fisheries. Regardless, critics charge that this deviation means that certification is an unreliable indicator of sustainability, an unacceptable condition for maintaining the legitimacy of an ecolabel. To its credit, MSC has recognized the validity of this complaint and has recently initiated action to address it by implementing a "quality and consistency" project.

The quality and consistency project includes two phases: first, MSC seeks to articulate the clear intent of MSC's Criteria, and it thereafter plans to "establish specific operational guidance to CBs [certification bodies] regarding the content of fishery assessment trees, which could take the form of default performance indicators and scoring guideposts for various species groups and/or fishery types."<sup>282</sup> When complete, the project should more clearly define how certification bodies should implement the principles and criteria during assessment and may eliminate or significantly reduce the certification body discretion that has caused conflicts in past fishery assessments.<sup>283</sup> The promulgation of default indicators and scoring guideposts will also represent a notable regression towards a more centralized assessment model.

MSC's lack of oversight over the indicators and guideposts used for certification clearly contrasts with the centralized-oversight model used by the majority of ecolabels, including but not limited to FLO, FSC, RFA, and GAA. These systems sacrifice little in independence or accountability due to this oversight role, while obtaining significant efficiency benefits. Not only can consistency of approach between fisheries be expected to lead to increased legitimacy by stakeholders, but the availability of default rules should minimize certification costs to fisheries in time and expense – a particularly desirous goal for developing-world fisheries which may be capital-poor – and decrease the demand for expert certification bodies.<sup>284</sup>

Once the indicators have been developed, the certification body evaluates the fishery through site visits (accompanied by MSC staff), document review, and stakeholder interviews and meetings.<sup>285</sup> The evaluation process allows the assessment team to quantify the fishery's performance on each performance indicator in accordance with the scoring guideposts.<sup>286</sup> To achieve certification, the fishery must receive an average score of 80 for each of MSC's three

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<sup>282</sup> See MSC, CONSULTATION DOCUMENT: ARTICULATING THE INTENT OF MSC'S CRITERIA (2007).

<sup>283</sup> *Id.*

<sup>284</sup> On the other hand, MSC's work to develop default assessment indicators and guideposts represents a significant expenditure of institutional resources. This expenditure, however, should not be ongoing other than through the normal review.

<sup>285</sup> There is no requirement for public comment during the evaluation phase, but the assessment team is required to seek out all stakeholder groups and interview them to determine the concerns each group has about the certification.

<sup>286</sup> CERTIFICATION METHODOLOGY, *supra* note 272272, at 20.

principles. The average is based on the weighted mean of all performance indicators that apply to each criterion under that principle. In addition, the fishery must achieve a score of 60 for every indicator and criterion. The failure to meet either condition disqualifies the fishery from certification. In addition, any score of 60 requires the certification body to condition certification by requiring the fishery to improve its practices to the 80 level within a set time period that may not exceed the length of the certification.<sup>287</sup> Any conditions set by the certification body must be auditable and verifiable to increase accountability, imposed after consultation with the fishery and regulators, and imposed through a detailed agreement disclosing how the fishery will comply.<sup>288</sup>

After assessment, the team produces a draft report that may include conditions for certification. The report is delivered to the client for comments, which can be based only on lack of information to support the team's conclusions or errors in the report. The assessment team may revise the draft report in response to these comments but is not required to do so. It must, however, provide justifications for its responses which are eventually available (along with the comments themselves) to the public.<sup>289</sup> After client consultation, the report is peer reviewed and revised once again. The identities of the members of the peer review panel<sup>290</sup> are public and stakeholders may submit input on the panel's composition during a ten-day comment period. MSC may not interfere in the certification body's choice of experts, nor is the certification body's decision appealable. The assessment team must consider the peer review comments and explicitly address issues raised by the reviewers. After peer review is complete, the full report is released to the public and comments are again accepted during a 30-day window.<sup>291</sup> Stakeholder comments that are based on objective fact are taken into account in the final report, which is delivered to the certification body. The certification body then makes the ultimate certification determination and releases a final report.<sup>292</sup>

If the fishery failed the assessment process, the certification process halts unless and until the fishery makes improvements and reinitiates assessment. If, however, the certification body determines that the fishery should be certified, its decision may be challenged within 21 days based on substantive ("merits objection") or procedural ("procedural objection") grounds.<sup>293</sup> Parties may only initiate merits objections if they submitted written comments during the assessment process or attended stakeholder meetings by invitation. Procedural objections are subject to the same limitation, except that non-participant stakeholders may object if the procedural violation impaired the objector's participation earlier in the assessment process.

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<sup>287</sup> *Id.* at 21.

<sup>288</sup> *Id.* at 22.

<sup>289</sup> *Id.* at 23.

<sup>290</sup> The panel must be made up of at least three individuals, including the OPC. *Id.* at 23. At least one member of the panel must have participated in a prior assessment either as part of the assessment team or as a peer reviewer.

<sup>291</sup> Client comments need to be disclosed as part of the draft report for public comment, but peer review comments must be disclosed. Client comments must be included in the peer review draft. CERTIFICATION METHODOLOGY y, *supra* note 272, at 23-24.

<sup>292</sup> *Id.* at 25.

<sup>293</sup> Any challenge precludes licensing of MSC-labeled products until the completion of the objections procedure. *Id.* at 25. This does not apply, however, to fisheries undergoing recertification. See MSC, *Objections Procedure*, at [http://www.msc.org/html/content\\_511.htm](http://www.msc.org/html/content_511.htm).

The objections procedure first requires the objector to declare its intent to object with both the certification body and MSC, then to submit a detailed objection within 30 days thereafter. The certification body must submit a detailed response to both the objecting party and MSC within 30 days explaining how the objection was considered in the assessment process and certification decision. If the objecting party is not satisfied by the response, it may appeal to the independent Objections Panel Chair (OPC) within 14 days along with its grounds for continuing the objection.<sup>294</sup> The OPC must respond within 5 days, and may reject spurious complaints without further consideration.

If the objection is legitimate, the OPC must establish an independent objections panel within 30 days.<sup>295</sup> The panel may uphold the certification body determination or may remand to the certification body for consideration of issues that were omitted or inadequately considered, accompanied by a written determination that connects these failures to specific portions of the MSC principles and criteria or procedural rules.<sup>296</sup> In the case of a remand, the certification body has 30 days to reply. The panel may accept the reply or determine that the reply is inadequate to address the issues presented. In the latter case, the certification body has an additional opportunity to redress the objection before the panel makes its final decision. Panel decisions are made by majority vote and may not be appealed. Decisions are written and explain how the certification body decision met or failed to meet the principles and criteria or procedural rules and (if the latter) includes the corrective action required of the certification body.

The objection procedure is designed to balance the demands of accountability and access while protecting the efficiency of the certification process. It implements this balance by, for example, allowing the OPC – but not the certification body – to summarily dismiss frivolous objections and by requiring written explanations subject to clear timetables. Similarly the process encourages broad stakeholder participation during assessment by eliminating the possibility of appeal for stakeholders who did not participate in assessment, while maintaining the MSC's independence from the assessment process. Ultimately, this balance of values is similar to that adopted by other ecolabels.

Once the objections procedure is complete, the fishery can be officially certified for a five-year period. During the period, the fishery remains subject to surveillance, including a minimum annual on-site audit by the assessment team or adequate replacement individuals.<sup>297</sup> Stakeholder input is required during the audit but no objections may be made. The audit measures the continuing performance of the fishery, changes to the regulatory environment, and compliance with the certification conditions, if any. The surveillance report must evaluate the conditions of the fishery and progress towards completion of the conditions by rescoreing the fishery based on the assessment tree. Failure of an audit may result in suspension or withdrawal of certification and may be caused by failure to provide sufficient information to evaluate

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<sup>294</sup> FAO Guidelines require the objection procedure to be independent and that the objecting party is responsible for the costs of objection. FAO, *supra* note 266.

<sup>295</sup> Panel members may not have any commercial interest in the fishery, be involved in management, research, or lobbying with respect to the fishery, or be involved with any organization that has opposed certification of the fishery, nor may members have been involved in any aspect of the assessment process for the fishery. *Id.* at 29.

<sup>296</sup> The objections panel may convene an oral hearing but is not required to do so.

<sup>297</sup> Audits are also made if there are major changes to the fishery or if significant new information becomes available. *Id.* at 32.

conformance with conditions or failure to allow the audit to occur. Fisheries may appeal suspension or withdrawal provisions to the OPC, who independently adjudicates the matter through informal adjudication and, if that fails, a written decision.

Finally, certified products cannot immediately be sold with the MSC logo. Instead, as in other ecolabels, full chain of custody certification is required before fish from certified fisheries may be sold under the MSC label. MSC's chain of custody system requires certification throughout the supply chain. Certification requires separate storage, shipping, and processing of certified fish and fish products. Only when certified fish are delivered to end users through a certified supply chain may the fish be labeled. Thus, MSC does not collect a fee for its logo until both the fishery is certified and separate supply chains are in place to ensure the segregation of certified fish.<sup>298</sup>

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<sup>298</sup> See MSC, LESSONS LEARNED IN FISHERIES CERTIFICATION 20-22 (2003).

## The Rainforest Alliance-Sustainable Agriculture Network

The Rainforest Alliance (RFA) seeks to preserve global biodiversity and sustainable economic systems, primarily through three eco-labeling divisions: sustainable agriculture, forestry, and tourism.<sup>299</sup> Each of RFA's units operates separately. None of the three divisions is an independent ecolabel: the forestry division is a certification body for FSC, the ecotourism unit remains in its formative stages, and the agriculture division is a member of the Sustainable Agriculture Network (SAN).<sup>300</sup> The agriculture division is unique, however, in that it is the secretariat for SAN and the SAN uses the RFA logo. RFA and SAN are thus tightly intertwined, and together can be considered an integrated ecolabel.

SAN was created through a multi-party process during the 1990s as a certification and labeling system for sustainable agriculture in Latin America.<sup>301</sup> To this end, it creates international standards and standardizes the processes used by its members. Although it governs the international ecolabeling and certification standards, SAN has no logo of its own and is not a legal entity – it is a subsidiary of RFA. SAN uses existing RFA systems to implement its standard; thus RFA licenses certified products to its own label using SAN standards. RFA also serves as the SAN secretariat for both standard-setting and certification. RFA, as secretariat, has special powers within the SAN system, despite the fact that SAN is governed by its members and that standards are set by an independent committee. As a result, both RFA and SAN must be evaluated to obtain a complete picture of the SAN/RFA ecolabel. For example, RFA is technically a member of the ISEAL Alliance instead of SAN, so RFA funding and governance are important to an understanding of how the SAN system works. As a result, the following discussion focuses on both SAN and RFA where appropriate.

### *Funding*

As it is not an independent legal entity, SAN does not produce independent financial information. Instead, it is funded through RFA. Like other sustainability-model ecolabeling programs, RFA relies on grants for a large part of its operating revenue. During fiscal 2006, 50 percent of RFA's revenue was derived from foundations, corporations, and government grants. The remainder is self-generated. Thirty-one percent of RFA's 2006 income was from RFA's fee-for-service accreditation for FSC. Smaller income sources include membership and special events.<sup>302</sup> Thus, while RFA is not self-sustaining, its combination of labeling program administrator for agriculture and accreditation body for forestry allows the organization to rely significantly on its self-generated funding.

RFA's success at creating multiple revenue streams has raised questions about financial independence that other sustainability-labeling programs do not face. To ensure independence,

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<sup>299</sup> See Rainforest Alliance, *What We Do*, at <http://www.rainforest-alliance.org/programs/index.html>. RFA is primarily focused on the maintenance of tropical forests but its Smartwood program is an active certification body in other ecoregions as well.

<sup>300</sup> RFA is the secretariat for the Sustainable Tourism Certification Network of the Americas (STCNA), which is a multiparty organization which has developed criteria for sustainable tourism certification. These criteria are based on existing regional and national standards.

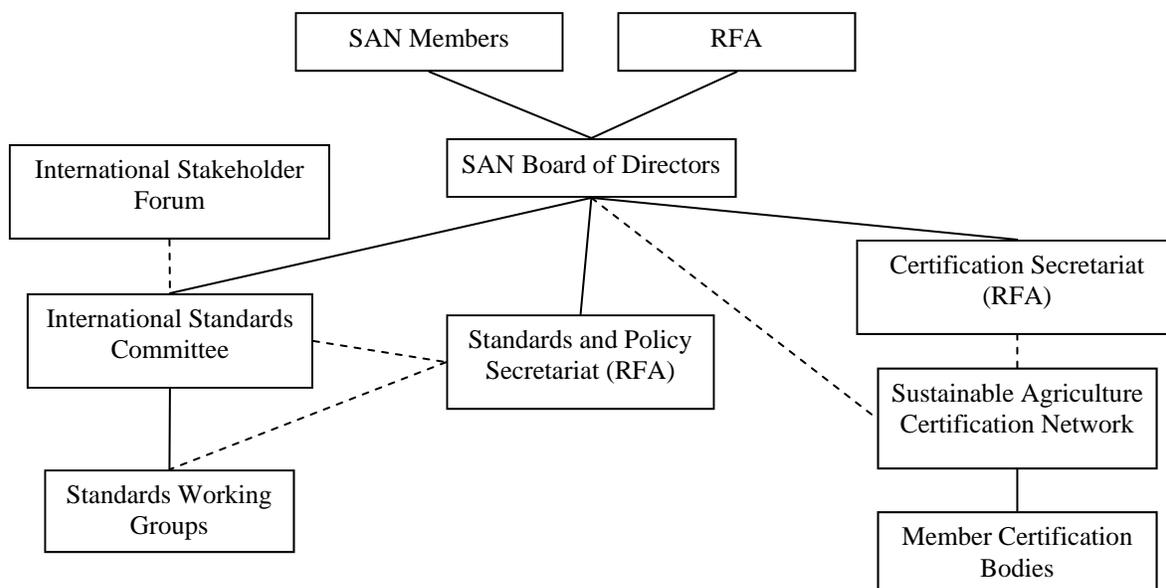
<sup>301</sup> Although discussions began in 1991, SAN was not formalized until 1998.

<sup>302</sup> RFA, 2006 ANNUAL REPORT 16 (2006).

RFA has established explicit policies by limiting monetary and in-kind contributions from entities eligible for certification or verification. These entities may contribute through payment of certification or verification fees, event sponsorship, and payment for educational, training, or outreach activities.

### Governance

Although it is not an independent organization, SAN has an established governance system that is independent of RFA. Until recently, however, its governance structures were informal and were not publicly available. In August, 2007, however, SAN adopted a handbook delineating its structures and its interaction with other entities, including RFA. These clarified standards form the basis of the following discussion, although RFA’s internal structures are also addressed.



**Figure 10: SAN Governance Structure**

SAN is governed by its members, each of which has agreed to implement the SAN standards and support its institutional objectives. SAN currently has ten members, primarily located in Latin America.<sup>303</sup> Without exception, SAN members are nonprofit organizations focusing on environmental or social issues. Unlike other member-governed systems, SAN does not currently rely on a general assembly or other democratic body, although it has made provisions for an assembly should the network grow. Instead, due to its small size, each of the members is represented directly on the SAN Board of Directors. If SAN grows beyond twelve members, however, Board elections from the membership will be required. RFA is guaranteed one representative on the Board in case of election, and at least thirty percent of the Board must

<sup>303</sup> RFA, THE SUSTAINABLE AGRICULTURE NETWORK: LATIN AMERICAN CONSERVATION GROUPS RAISING THE STANDARDS FOR EXPORT AGRICULTURE (2007). SAN membership also includes RFA, which is located in the United States, Europe, Guatemala, and Costa Rica, and Nepenthes, a Denmark-based NGO focusing on the tropical timber trade. See Nepenthes, *About Us*, at <http://www.nepenthes.dk> (2004).

have been “recruited” by the original SAN members.<sup>304</sup> Board members are elected for three years by a 75 percent vote.<sup>305</sup>

**Table 11: Governance Body Responsibilities**

<b>Body</b>	<b>Responsibilities</b>
Board of Directors	<ul style="list-style-type: none"> <li>• All members represented on board</li> <li>• Oversees and approves SAN products</li> <li>• Initiates/oversees standard-setting process</li> <li>• Determines procedural complaints</li> <li>• Determines membership of ISC and its working groups</li> </ul>
Standards and Policy Secretariat	<ul style="list-style-type: none"> <li>• Currently RFA</li> <li>• Provides technical and administrative assistance to board</li> <li>• Establishes ISC and working groups for standard-setting</li> <li>• Supervises standard-setting process</li> <li>• Assists ISC in developing content of standards and policies</li> </ul>
ISC & Working Groups	<ul style="list-style-type: none"> <li>• Consists of 12 elected officials: (8) SAN members, and (4) independent representatives</li> <li>• Creates standards and policies</li> </ul>

The SAN Board oversees and approves all SAN products, including strategy, policies, standards and criteria, and guidance. The Board has substantial powers in standard-setting, including initiation and oversight of standard-setting processes, approval of final standards, and determination of procedural complaints. In addition, the Board has approval powers over the membership of the International Standards Committee (ISC) and its workgroups.<sup>306</sup>

The SAN standards and policy secretariat – currently RFA – supports the Board by ensuring compliance with SAN procedures, providing technical and administrative assistance, and coordinating SAN activities.<sup>307</sup> In addition, the secretariat establishes the ISC and workgroups to assist in the production of particular standards or policies. Although the secretariat is responsible for convening standard-setting bodies, the actual work of creating standards and policies is left to the ISC and the workgroups, which report to the ISC.<sup>308</sup>

The ISC is a twelve-member, elected body that may include any member of the International Stakeholder Forum (ISF). The ISF is open to all stakeholders and is intended to encompass all interest groups.<sup>309</sup> In addition to participating as ISC members, ISF members are empowered to provide comments during standard-setting. ISF members are also permitted to file complaints against the ISC for procedural and substantive reasons.<sup>310</sup>

<sup>304</sup> SAN, STANDARDS & POLICY DEVELOPMENT HANDBOOK 8 (2007) [hereinafter, HANDBOOK].

<sup>305</sup> *Id.* at 12.

<sup>306</sup> *Id.* at 13.

<sup>307</sup> The secretariat must be located in a tropical country. RFA’s secretariat is located in Costa Rica. *Id.*

<sup>308</sup> *Id.*

<sup>309</sup> HANDBOOK, *supra* note 304, at 16-17. The ISC must review the ISF to ensure that all interest groups are represented.

<sup>310</sup> *Id.* at 13.

The ISC must represent a “wide range” of viewpoints, so membership is explicitly allocated by interest group and region. SANcert members (*i.e.*, certification bodies; see below) may not participate on the committee. SAN members occupy four positions on the ISC. The remaining eight slots are allocated to independent representatives from the technical (scientist, academic, or government), production, and NGO/community sectors, with “proportional” representation of each sector. In addition, a majority of ISC membership (including SAN representatives) must be drawn from tropical countries, and the Board may require specific standards for representation from Latin America, Africa, and Asia.<sup>311</sup> ISC’s independent members are recruited from the ISF by RFA and elected by the Board.<sup>312</sup>

The standards and policy secretariat assists the ISC in its tasks of developing the content of policies and standards. The ISC has final decision-making power over the content of SAN standards. It operates based on consensus, which is defined as a two-thirds majority. Should voting be required to formalize consensus, RFA may not participate because of its duty as secretariat to coordinate voting.

The ISC is not the sole standard-setting entity in the SAN system. Workgroups provide specific technical input for local indicators for implementation of international standards or specific crops. The secretariat creates and defines the scope of each workgroup and supervises their work. The ISC may assist workgroups if requested by the secretariat. Workgroups are representative and their composition differs based on their purpose. Workgroups created to develop local indicators may include one or two SANcert representatives, and at least one or two of each of the technical, industry, and NGO interest groups. Workgroups must contain at least four to six members. Workgroups aiding the creation of international standards, on the other hand, contain one to two SAN member representatives and one to two representatives from each of the technical, industry, and NGO sectors. In all cases, the Board must approve the composition of the workgroup.<sup>313</sup>

SAN’s certification unit is independent from its policy and standards structure, but in practice the two are linked through RFA. SAN has created an independent entity, the Sustainable Agriculture Certification Network (SANcert) and an associated certification secretariat – currently RFA. SANcert’s members are certification bodies accredited by RFA.<sup>314</sup>

RFA’s importance to SAN’s governance, standard-setting and certification processes require discussion of its governance structures. RFA’s role has created inescapable conflicts of

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<sup>311</sup> *Id.* at 14.

<sup>312</sup> ISC’s eight external members are elected as a group. For election, two-thirds of the Board must approve and none may dissent. To be eligible for the ISC, external representatives must not have a financial stake in the success of the SAN standards. Members are expected to participate as individuals rather than as representatives of their employers. *Id.* at 14-15.

<sup>313</sup> *Id.* at 15-16.

<sup>314</sup> The SAN handbook is not consistent with its use of the terms “accreditation” and “certification” – it states, for example, that RFA’s certification secretariat duties include “deciding on certifications.” In fact, RFA both accredits certification bodies and makes the certification decisions on audits carried out by accredited entities (see below). See UNEP, WORKING GROUP ON DEVELOPING SUSTAINABILITY CRITERIA AND STANDARDS FOR THE CULTIVATION OF BIOMASS USED FOR BIOFUELS, WORKING PAPER: COMPILATIONS OF EXISTING CERTIFICATION SCHEMES, POLICY MEASURES, ONGOING INITIATIVES AND CROPS USED FOR BIOENERGY 1.7.3 (2007). Nonetheless, the conflation of terms is confusing, both in the SAN Handbook and elsewhere.

interest, which RFA has explicitly recognized by incorporating transparent, accountable decision-making throughout the organization. RFA puts these values into practice through provisions for the construction of its Board of Directors and through an independent internal committee structure. The RFA Board is responsible for fiduciary oversight of the organization. The makeup of the Board, unlike several other ecolabeling systems, does not appear to be subject to specific guidelines. Instead of guaranteeing membership to stakeholders and other interested parties, RFA simply stipulates that the Board cannot be “dominated” by parties with an interest in RFA certified or verified operations.<sup>315</sup>

RFA’s primary transparency mechanism is the Audit and Independence Committee (AIC). The AIC is entirely composed of individuals who lack direct or indirect fiduciary interest in RFA and who are not involved in RFA certification or verification. The AIC’s duties include review of the reports on conflicts of interest prepared by RFA staff<sup>316</sup> and recommendation to the Board as to whether the RFA external auditor should be retained.

SAN’s governance structures include strong protections for participation and transparency. The system is fully inclusive of members at the Board level (and potentially through an assembly at a later date), uses a central secretariat to manage standard-setting and certification, and uses an established, representative committee to develop standards, with input from a stakeholder forum that is open to all interest groups. The largest governance question facing SAN is the lack of diverse interests among its official members – and therefore on the Board. In contrast, FLO – the program most similar to SAN – grants its producer networks all the rights of membership. Similarly, FSC – a system endorsed by RFA – allows external groups to join its assembly and board. On the other hand, the Handbook lists no criteria for membership, and there appear to be no barriers to entry should external stakeholders seek to join SAN as full members.<sup>317</sup> Nonetheless, the current lack of diversity in SAN membership could skew Board decisions on standard approval and other matters.<sup>318</sup> Transparency improvements to delineate the criteria and processes for obtaining SAN membership would shed further light on the reasons for this weakness.

### *Standard-Setting Procedures*

SAN creates the standards for sustainable agriculture that are implemented by its members. Until recently, international standards were created through an informal public process. In August, 2007, however, SAN standardized its procedures for standard-setting with the approval of a handbook.<sup>319</sup> These processes comply with the ISEAL Code and are

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<sup>315</sup> The meaning of both “dominated” and “interest” are uncertain. It is possible that “dominated” could refer to a majority, but this is far from certain. In addition, “interest” could refer to fiduciary interest or other interests, such as those held by NGOs.

<sup>316</sup> Every RFA staff member, director, and officer is required to file a conflict of interest disclosure when engaged by RFA and annually thereafter. An internal RFA committee reviews these disclosures and reports to the AIC quarterly and synthesizes them for the AIC.

<sup>317</sup> There is a good argument that the ISEAL Code would require SAN to admit members from other stakeholder groups.

<sup>318</sup> The lack of industry involvement in SAN is curious, and may reflect the availability of other avenues for certification, ranging from forestry certification to fair trade certification. While competition may be a factor, an in-depth consideration of the issue is beyond the scope of this report.

<sup>319</sup> See generally HANDBOOK, *supra* note 304.

undergoing ISO certification. The handbook did not alter the existing international standard, but will govern future revisions.

Until February, 2008, SAN operated under a universal standard for agriculture<sup>320</sup> and specific requirements for each crop certified by RFA, including coffee, bananas, cocoa, citrus, and ferns and cut flowers.<sup>321</sup> The universal standard was created in Latin America in 1993 and has since been revised frequently, most recently in 2005.<sup>322</sup> In 2008, a structural revision incorporated the crop-specific standards into a new universal standard.<sup>323</sup> The SAN standard is organized around ten principles of sustainability, including elements of both environmental protection and social responsibility.<sup>324</sup> Each of these principles incorporates criteria that describe best management practices. Criteria may in turn include “inserts” for clarification, but these elements are evaluated as part of the criteria. Certification audits measure compliance with the criteria, but additional guidance to farms is offered by the “indicators,” which describe examples and methods for measuring compliance during audits. The crop-specific standards supplement the universal principles and criteria in a manner closely analogous to the FLO system.

The SAN standard-setting procedure can be initiated by a proposal from any stakeholder, SAN member, or the standards secretariat. The secretariat develops terms of reference for the new standard and submits it to the ISC, which may approve, reject, or conditionally approve the terms of reference. The ISC then defines the composition of a workgroup to develop the proposal. The workgroup develops technical inputs and submits them to the secretariat under the ISC’s supervision. The secretariat itself drafts the standard based on the workgroup’s comments and submits it to the ISC. After the ISC approves the draft, the secretariat initiates a sixty-day public comment period.<sup>325</sup> It must actively seek comments to ensure that all interest groups are adequately represented. The secretariat then creates the second draft of the standard, again with workgroup assistance. The second draft must again be approved by the ISC. A second comment period follows.<sup>326</sup> Provided that no significant comments were made following the second revision, the secretariat makes final revisions and sends the standard to the ISC for approval. The secretariat drafts a public consultation report that summarizes the process followed (including ISEAL compliance and deviations from the Handbook procedures), issues identified, stakeholder involvement and comments, and other details. If the ISC approves the report, the secretariat forwards it to the Board along with the standard and a letter recommending approval. After considering the quality of the procedures used, breadth of public comment, and

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<sup>320</sup> SAN, SUSTAINABLE AGRICULTURE STANDARD 1 (2005) [hereinafter “SAN STANDARD”]. While SAN has heretofore established only a single standard, this does not foreclose the future development of additional standards for other purposes. For example, although chain-of-custody is a critical criterion under the current standard, SAN has not established a chain-of-custody although chain-of-custody is a critical criterion under the current standard. It is currently developing a separate chain-of-custody standard.

<sup>321</sup> The SAN standard refers to these as “modules” that contain “complementary criteria and indicators.” *Id.* at 2.

<sup>322</sup> *Id.* at 1.

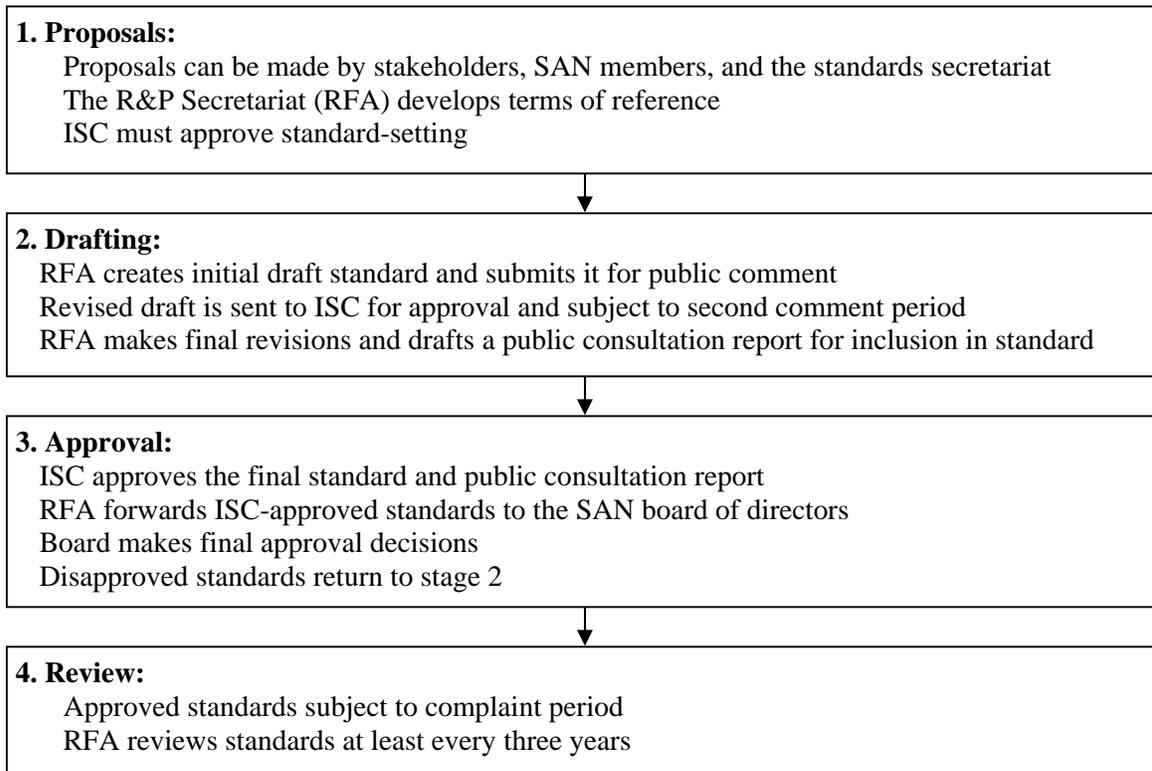
<sup>323</sup> SAN, SUSTAINABLE AQUACULTURE STANDARD (2008).

<sup>324</sup> The ten principles include: (i) social and environmental management system; (ii) ecosystem conservation; (iii) wildlife protection; (iv) water conservation; (v) fair treatment and good working conditions for workers; (vi) occupational health and safety; (vii) community relations; (viii) integrated crop management; (ix) soil management and conservation; (x) integrated waste management. *Id.* at 2.

<sup>325</sup> Comments must be submitted in the approved fashion to be considered “formal” comments. Other comments may be considered but are informal and impose lesser requirements on the secretariat.

<sup>326</sup> The second consultation period may be either thirty or sixty days, depending on the degree of revision.

consideration of comments, the Board determines whether to approve the standard.<sup>327</sup> If disapproved, the standard must be reconsidered. Once approved, standards must be revised every three years, or earlier at the Board’s discretion.<sup>328</sup>



**Figure 11: SAN standard-setting procedure**

It is not always clear whether particular crops are covered by SAN standards. When a certification application is received for such crops, the standards secretariat delegates an SAN member to analyze the application of existing standards to the crop. Based on this report, the secretariat issues a recommendation on standard-setting needs to the ISC. The ISC decides whether the crop is satisfactorily addressed by current standards or whether additional criteria or local indicators are required. If additional standards are required, Board approval is required, but indicators require only workgroup action rather than formal standard-setting. If the working group, however, determines that additional criteria are needed to implement the indicators, it may propose the needed criteria. Similarly, the secretariat may propose conversion of indicators into criteria for specific crops.<sup>329</sup>

The process for developing local indicators is less formalized than is the procedure for setting standards. The informality of the indicator-development process is justified because the indicators are not binding on certified producers in the same manner as standards and criteria, but rather are examples of compliance and methodologies for auditing. Indicators, also referred to as interpretive guidance, thus explain how standards apply to particular crops, provide guidance for

<sup>327</sup> A two-thirds vote is required, with no negative votes.

<sup>328</sup> HANDBOOK, *supra* note 304, at 20-22.

<sup>329</sup> *Id.* at 18, 23.

implementing standards, and explain how audits measure compliance with the standards. This guidance is produced by local workgroups coordinated by the secretariat and assisted by the local SAN member. Drafting of indicators is “coordinated” by the secretariat during at least two face-to-face workshops. When completed, indicators must be approved by the workgroup by a simple majority.<sup>330</sup>

In addition to standards and criteria and local indicators, SAN provides for the development of two types of policies. Internal policies deal with the structure and operation of the SAN system, and substantive policies impact the environmental, social, and agricultural performance of farms. Development of both types of policies is initiated by the Board, coordinated by the secretariat, and approved by the Board. Only the latter type, however, requires public consultation. The specifics of the policy development process also differ. Internal policy development requires the secretariat to collect information from all SAN members to use in recommending policy development or revision. If the Board agrees, it provides terms of reference for the policy. The secretariat then carries out a thirty-day consultation period with the full SAN membership and redrafts or finalizes the policy for Board approval. Substantive policies, because they affect stakeholders, follow the same procedures used to develop standards. Both types of policy must be revised once every three years.<sup>331</sup>

Finally, the Handbook addresses complaint resolution. Complaints by stakeholders (or SAN members, for internal policies) must be filed with the secretariat and can apply either to procedural or substantive matters. Substantive complaints are addressed through regular review and revision process – thus, there is no specialized grievance body to address such complaints. Procedural complaints about standard-setting, however, are dealt with through an established procedure. The secretariat reviews the complaint; if it is not justified, the secretariat replies directly to the complainant. There does not appear to be any appeal provision. If, however, the complaint describes a deviation from the procedures, the secretariat forwards the complaint to the Board. The Board can (but is not required to) consult the ISC in turn. The Board responds formally to the plaintiff and prescribes corrective actions to the secretariat. The secretariat then creates a complaint resolution progress report, which remains publicly available.<sup>332</sup> Finally, for complaints regarding SAN policies, the secretariat must respond to all complaints and include them for discussion in its reports to the Board. The Board then decides whether to initiate policy review.<sup>333</sup>

The development of the SAN handbook was undoubtedly positive for the clarification of standard-setting procedures, as it appears to have led to the creation of institutional protections for stakeholder input, transparency, and complaint resolution. Its creation appears to have been motivated by the ISEAL Code, providing another example of the positive impacts of ISEAL on institutional capacity. Despite the massive improvements in transparency and accountability that the handbook represents, its procedures lack some elements that are standard in other entities and which likely result from RFA’s influence on the SAN system.

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<sup>330</sup> *Id.* at 26.

<sup>331</sup> *Id.* at 28-29.

<sup>332</sup> *Id.* at 31.

<sup>333</sup> HANDBOOK, *supra* note 304, at 29.

First, RFA retains an immense amount of control over the standard-setting process because it is the sole entity empowered to draft standards. The ISC's powers in this system are largely formal because while it may revise the terms of reference, it can only approve or reject draft standards. It does not control drafting or technical contributions – those are the province of the workgroups. As a result, RFA, as secretariat, is the most influential player in the standard-setting process, rather than the stakeholder-dominated entity that putatively controls the content of standards. This structure limits both stakeholder input and transparency.

The lack of any appeal from the RFA decision on procedural complaints and the inability to effectively challenge substantive issues are also notable; while the ability to reject complaints without convening formal processes is important, most systems provide for appeals and/or the opportunity to resubmit an amended complaint based on the reasoned response from the initial review of the complaint. By contrast, the SAN system allows the very entity that supervised the standard-setting process (and drafted the standard itself) to decide whether its process was flawed. While RFA's institutional capacity to respond to complaints no doubt outpaces that of its partners, this conflict of interest is nonetheless troublesome. Many ecolabels have addressed this issue by providing for the convention of an independent dispute resolution panel. In addition, most systems respond to timely substantive complaints through some formal mechanism. It is important to note that despite the SAN system's important flaws, the complaint process does allow external stakeholders to complain, its complaint resolution process is transparent, and its procedure does provide a modicum of accountability, at least over standard-setting.

### *Implementation Methodology*

Certification to SAN standards is accomplished through SANcert, the independent, member-based analogue to SAN's standard-setting entities. Certification is managed through SANcert and its "certification secretariat" – the RFA. The SAN handbook does not explicitly address SANcert's makeup or operation, leaving very little information about accreditation or certification governance or processes. As a result, this section uses general information about RFA's certification process to outline how SAN's standards are implemented.

SANcert is officially independent of SAN from a governance perspective, as it is separately governed by its members. Nonetheless, RFA's is secretariat for both SAN and SANcert, and thus links the standard-setting and certification elements of the SAN system. As in the standard-setting context, the certification secretariat is endowed with substantial powers over certification decision-making, leaving little authority for the certification bodies that carry out on-site audits. SAN has not published membership criteria or accreditation requirements for SANcert members, but RFA, as certification secretariat, presumably plays a leading role in establishing the competence of SAN certification bodies.

Certification audits are carried out by either SANcert member organizations or, where no local member organization exists, by RFA itself. Certification audits follow the typical preassessment-assessment-report process. Once a farm has satisfied the preassessment inspection, a full audit is performed by a certification team, which documents its findings in an audit report. The audit itself is based both on observations of farm practices and interviews with

farm workers and management.<sup>334</sup> Performance in the audit is evaluated using the criteria in the SAN standard and the guidance for the crop at issue. Unlike many of the labeling systems discussed in this report, SAN does not allow its certification bodies to adapt its standards to local conditions, instead relying on its participatory workgroups to develop needed guidance. This centralized control may increase audit consistency while lowering costs.

At the outset of each audit, the certification body designates each criterion as critical or non-critical. To be certified, a farm must be in complete compliance with critical criteria. Non-compliance with non-critical criteria results in a “non-conformity,” and the farm may be instructed to take corrective action. The necessary corrective action depends on the seriousness of the non-conformity and on whether the failure to comply was a symptom of a systemic problem or was an isolated incident. In total, each farm must fully comply with at least 80 percent of all criteria, including at least fifty percent of the criteria for each of the ten principles identified in the SAN standard.

The results of on-site audits are compiled in a report that is delivered to a certification committee composed of independent, unpaid experts. The audit committee reviews the report “for quality and adherence to established procedures” and forwards its recommendation to RFA along with comments from the farm under review, stakeholder comments, and peer review. RFA makes final certification determination decisions, which may be appealed through an established dispute resolution process. Both stakeholders and businesses may challenge decisions by appealing to RFA staff, who document their responses and respond to the complainant; under the handbook, complaint resolution documents are publicly available.<sup>335</sup> Once certified, each farm must be reinspected annually and must make “continual improvement.” Farms are also subject to unannounced inspections by SAN members.

RFA’s certification methodology differs from the independent, third-party system used by most ecolabels. RFA argues that its auditing system is beneficial because SANcert’s members “understand the culture, ecology, farming traditions and governments” where they work. RFA also points to lower prices, increased cultural sensitivity, and increased availability of auditors to the farmers undergoing certification. RFA is likely comfortable with this arrangement because of its institutional history as certification body to the FSC, and feels that the advantages of centralized certification outweigh the dangers posed by its conflicts of interest. RFA counters concerns about independence by requiring all staff and outside experts who carry out verification and technical assistance to disclose any conflicts of interest.<sup>336</sup> Any conflicts must be reviewed and approved by RFA staff members who have declared their own independence in writing.<sup>337</sup> While these protections may ensure that individual auditors are independent, it does not address organizational incentives to certify farms to, for example, increase market access and consumer recognition of the label. This concern must be weighed against the efficiency and knowledge advantages of the RFA system.

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<sup>334</sup> SAN STANDARD, *supra* note 320, at 4.

<sup>335</sup> Forestry accreditation decision may also be appealed to FSC, since RFA is an accreditation body assessing forestry operations pursuant to FSC standards. This option is not available for agriculture certification complaints.

<sup>336</sup> These disclosures are in addition to the required annual disclosures made by RFA staff.

<sup>337</sup> The standards applied in these conflict reviews are not available electronically, except that potential auditors are explicitly barred from undertaking verification or certification if they have consulted with or provided technical assistance to the facility within the two years preceding the audit.