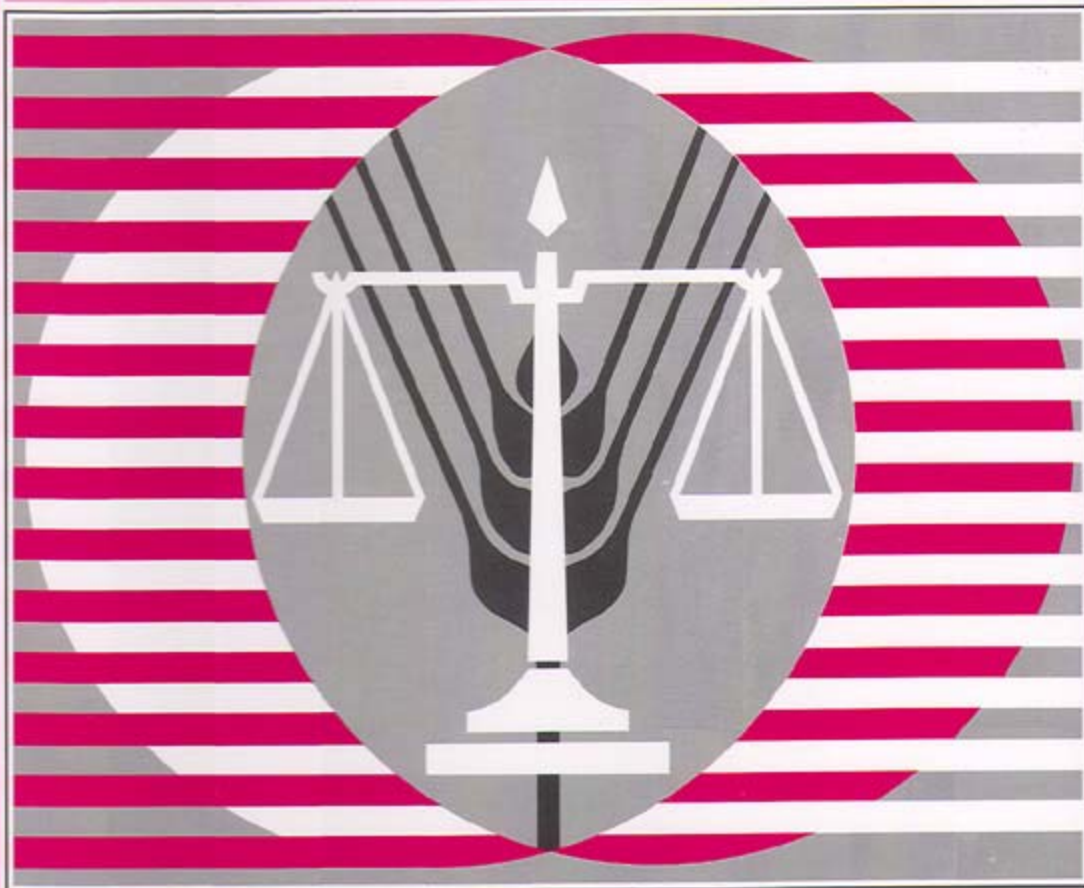


Fisheries enforcement

Related legal and institutional issues:
national, subregional or regional
perspectives

FAO
LEGISLATIVE
STUDY

71



Food
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FISHERIES ENFORCEMENT

RELATED LEGAL AND INSTITUTIONAL ISSUES NATIONAL, SUB-REGIONAL OR REGIONAL PERSPECTIVES

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71

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for the

Development Law Service

FAO Legal Office

Food and
Agriculture
Organization
of the
United Nations

Rome, 2001

FOREWORD

A number of international instruments, binding and non-binding, have recently been formulated to address the issues of responsible fishing and sustainable management of fish stocks. At the global level two important instruments have been adopted under the auspices of FAO and the United Nations. They are the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels (the 1993 FAO Compliance Agreement) and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the 1995 UN Fish Stocks Agreement). This study was written when neither of these Agreements had entered into force. At the time of publication, the Compliance Agreement had not entered into force, however, the UN Fish Stocks Agreement enters into force on 11 December 2001, 30 days after the receipt of the thirtieth instrument of ratification or accession, which was deposited by Malta. Nevertheless, some states have translated the basic provisions of the agreements into their national laws. Several regional fisheries bodies have also begun to implement these agreements in different ways.

The present study attempts to identify the approaches taken by national governments and by sub-regional and regional fisheries bodies to contribute towards the implementation of the agreements. A special focus is put on monitoring, control and surveillance. The study finds that, at national, sub-regional or regional level, there is no best or preferred method of implementation that would seem to fit all countries or all regional fisheries bodies. It is hoped that the analysis of different methods may provide guidance to governments in achieving the important objectives of the agreements.

The present study was prepared within the framework of the FAO/Norway Inter-regional Programme for Assistance to Developing Countries for Implementing the Code of Conduct for Responsible Fisheries (FISHCODE - GCP/INT/648/NOR).

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INTRODUCTION

This report deals with the study of fisheries control related legal and institutional issues at the national, sub-regional and regional level. It includes four parts.

Part 1 briefly sketches two crucial elements of the general **international legal setting** which form the backbone of the present study. It concerns first of all the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, which was concluded under the auspices of the Food and Agriculture Organisation (hereinafter cited as FAO).¹ The second document, which will be mentioned in this Part 1, is the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.²

Part 2 intends to identify, analyse and compare **national legal systems** governing fisheries control. In particular, Part 2 focuses on issues such as reporting, boarding and inspection, powers of authorised officers, prosecution procedures and the sanctions for illegal, unregulated and unreported fishing in the following countries: Australia, Namibia, New Zealand, Norway, United States of America and Canada. Moreover, Part 2 will highlight the respective characteristics of the aforementioned legal systems, determine their possible strengths and weaknesses, as well as the extent to which they allow for implementation of the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement.

Part 3 deals with the identification, analysis and comparison of some existing or proposed **sub-regional and regional agreements** establishing regional fishery organisations (hereinafter cited as RFOs) or other legal instruments covering fisheries reporting (and verification), inspection and boarding schemes, regional registers, observer schemes (for scientific or other purposes), as well as other enforcement provisions/schemes. The study covers the CCAMLR, EC, FFA, ICCAT, IOTC, NEAFC, NAFO, MHLA/WCPOFC, and SEAFO.³ Finally, Part 3 will highlight the respective characteristics of the above-mentioned sub-regional and regional arrangements, determine their possible strengths and weaknesses, as well as the extent to which they allow for implementation of the 1993 FAO Compliance Agreement and especially the 1995 Fish Stocks Agreement, which is totally centred around the RFO concept.

Part 4 of the report contains a number **recommendations** concerning possible efficient monitoring, control and surveillance systems relating to fishing vessels, as well as compliance

¹ Approved by Resolution 15/93 on 24 November 1993, reprinted in 10 *International Journal of Marine and Coastal Law* pp. 417-425 (1995) and available on Internet: <www.fao.org/Legal/default.htm>. This agreement has not yet entered into force (see *infra* note 5 and accompanying text). Hereinafter cited as 1993 FAO Compliance Agreement.

² UN Document A/CONF.164/37, signed on 8 September 1995, reprinted in 34 *International Legal Materials* pp. 1542-1580 (1995) and available on Internet: <www.un.org/Depts/los/convention_agreements/exts/fish_stocks_agreement/CONF164_37.htm>. This agreement has not yet entered into force (see *infra* note 13 and accompanying text). Hereinafter cited as 1995 UN Fish Stocks Agreement.

³ See Table 1 for more details on these different RFOs or other organizations covered. The table provides the following information: The meaning of the acronym, the year of establishment, the area of application, the species covered, as well as the full title of the founding document (including dates of signature and entry into force), together with a convenient Internet reference.

and enforcement mechanisms applicable to fisheries regulations, whether national, sub-regional or regional.

The author is very much indebted to Cédric Van Assche and Dries Vervoort for their participation in the present study, as well as to Dinh Ngoc Linh who also provided assistance. They are all researchers at the Centre for International Law of the Free University of Brussels (VUB). Their contributions related to particular entries in Parts 2 and 3, i.e. those parts of the study containing country and RFO reports. Also the people of the FAO Legal Office, and in particular Annick Van Houtte who served as contact person for the present study, deserve a special word of thanks for their most useful comments and suggestions on a first draft of this study, as well as for sharing their thoughts with us on recent developments. Nevertheless, the final responsibility of this study remains solely with the present author.

PART 1 - INTERNATIONAL LEGAL SETTING

The present part intends to highlight especially those provisions of the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement relating to monitoring, control and surveillance of fishing vessels, as well as compliance and enforcement mechanisms found in fisheries regulations in order to provide the reader the general background against which this study is undertaken. Instead of trying to be exhaustive, only the key provisions of the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement will be mentioned by means of which these two instruments attempt to introduce new mechanisms to curb the illegal, unregulated and unreported fishing on the high seas. Special attention will thereby be given to those provisions relating to monitoring, control and surveillance of fishing vessels, as well as compliance and enforcement mechanisms applicable to fisheries regulations. This part ends up with highlighting some particular distinguishing factors between the 1993 FAO Compliance Agreement and the 1995 UN Fish Stocks Agreement *inter se*, which will help the reader in better understanding the following parts of the present study.

I. THE 1993 FAO COMPLIANCE AGREEMENT

As indicated by its abbreviated title, this agreement was concluded under the auspices of the FAO. The agreement is open to acceptance by any member or associate member of the FAO and to any non-Member State that is a member of the United Nations, or of any of the specialized agencies of the United Nations or of the International Atomic Energy Agency.⁴ It has not yet entered into force, but is approaching the required threshold.⁵ The area of application is the high seas, without any restrictions as to species.

In simplified terms, one could state that this agreement tries to tackle the problem of overfishing on the high seas by means of the introduction of new rights, but foremost new obligations in the head of one single actor, namely the flag state.⁶ The latter is required to exercise control over all vessels⁷ flying its flag, which fish on the high seas by means of a system of obligatory licensing. No such licence should be granted if the flag state is not able to exercise effective control in order to fulfil its obligations under the agreement, or if a vessel, previously registered in the territory of another state, has undermined the effectiveness of international conservation and management measures. A record of fishing vessels has to be maintained by the flag state, which is moreover required to ensure that all its vessels fishing on the high seas are properly marked and provide detailed information about catches (amount as well as area where caught) and landings.

Since one of the main objectives of the agreement is to try to limit the practice of shopping around for a convenient flag, these national registers can only become effective if they are

⁴ 1993 FAO Compliance Agreement, Article X(1).

⁵ The agreement needs 25 instruments of acceptance before it enters into force. At the time of writing, that number was 22. *Ibid.*, Article XI(1). Information available on Internet: <www.fao.org/Legal/default.htm>.

⁶ It is therefore not surprising that the first article containing substantive rules is entitled 'Flag State Responsibility'. *Ibid.*, Article III. This paragraph describes the content of the said article.

⁷ Vessels less than 24 meters long may nevertheless be exempted. *Ibid.*, Article II(2).

merged into a global register, covering the whole world. Detailed provisions have therefore been included in the agreement entrusting the FAO with this task.⁸

As far as compliance and enforcement is concerned, it is noteworthy that the agreement contains no specific part bearing this title. This can be explained by the fact that, as mentioned above, the whole agreement centred on the Flag State.⁹ The only compliance and enforcement provisions are therefore to be found in the article governing the responsibilities of the Flag State, where one can read in the last paragraph:

'Each Party shall take enforcement measures in respect of fishing vessels entitled to fly its flag which act in contravention of the provisions of this Agreement, including, where appropriate, making the contravention of such provisions an offence under national legislation. Sanctions applicable in respect of such contraventions shall be of sufficient gravity as to be effective in securing compliance with the requirements of this Agreement and to deprive offenders of the benefits accruing from their illegal activities. Such sanctions shall, for serious offences, include refusal, suspension or withdrawal of the authorization to fish on the high seas'.¹⁰

Ensuring the compliance with this agreement as well as securing its enforcement, in other words, are both issues completely left in the hands of the Flag State.

II. THE 1995 UN FISH STOCKS AGREEMENT

This agreement was the result of multilateral negotiations, which were concluded in December 1995. Since this agreement 'implements' the United Nations Convention on the Law of the Sea,¹¹ membership is open to all states and certain entities, which had already the authority to sign the latter convention.¹² The agreement has not yet entered into force, but is only lacking one more instrument of ratification or accession.¹³ As indicated by its full title, the field of application of this agreement is restricted to straddling stocks and highly migratory species. Nevertheless, a further restriction has to be made *ratione loci*, since these stocks, even though they also spend part of their existence in areas over which coastal states exercise functional jurisdiction, are only covered by the agreement as far as they find themselves on the high seas.¹⁴

To a large extent, the 1995 UN Fish Stocks Agreement covers similar ground as the 1993 FAO Fish Stocks Agreement, but unlike the latter it is not solely focused on the Flag State. A substantial part of the agreement indeed concerns international cooperation, of which the importance is underlined by the fact that it precedes the part on the duties of the Flag State in the structure of the agreement.¹⁵

⁸ The article entitled 'Exchange of Information', in which this transfer of information is regulated, is the second basic pillar, besides Article III (see *supra* note 6 and accompanying text), on which the agreement is based. *Ibid.*, Article VI.

⁹ See *supra* note 6 and accompanying text.

¹⁰ *Ibid.*, Article III(8).

¹¹ Signed on 10 December 1982, reprinted in 1833 *United Nations Treaty Series* (hereinafter cited as *UNTS*) 3 and available on Internet: <www.un.org/Depts/los/losconv1.htm>. The convention entered into force on 16 November 1994. Hereinafter cited as 1982 Convention.

¹² 1995 UN Fish Stocks Agreement, Article 37, referring back to Article 1 (2)(b).

¹³ *Ibid.*, Article 40. Of the required 30 ratifications, 29 were already deposited as at 27 August 2001. Information available on Internet: <www.un.org/Depts/los>.

¹⁴ *Ibid.*, Article 3 (1).

¹⁵ These mechanism for international cooperation are contained in Part III, the duties of the flag state only in Part V.

The obligations of the flag state, as a consequence, are quite similar to those already found in the 1993 FAO Compliance Agreement: States have to introduce a system of obligatory licences, exercise effective control, keep a record of fishing vessels, properly mark their fishing vessels, report catches and landings, e.a. No requirement has been included similar to Article VI of the 1993 FAO Compliance Agreement,¹⁶ which would oblige states to transmit information gathered from their fishing vessels to the FAO or any other global organisation.¹⁷ Nevertheless, it can safely be concluded that the 1995 UN Fish Stocks Agreement does not intend to downgrade the importance of flag-state enforcement. Instead it tries, as was the case with respect to the 1993 FAO Compliance Agreement, to strengthen the responsibilities of the Flag State in this respect. It only tries to enhance enforcement methods even further by involving other actors as well, thereby covering the eventuality that a flag state proves either unwilling or unable to discharge its obligations.

As far as international cooperation is concerned, the agreement attributes a central role to RFOs, whether already in existence, or still to be created. Conservation and management measures are conceived in the framework of these RFOs. States fishing in the area covered by a particular RFO are supposed to join that organisation or give at least effect to the measures taken by it. If one of these latter elements is lacking, the state in question may no longer licence its vessels to fish in the convention or regulatory area of that RFO.

Even though a specific part of the agreement concerns the monitoring, control and surveillance by the flag state of its vessels,¹⁸ it is clear that these national systems have to yield if they do not correspond with similar systems established by RFOs on a regional level.¹⁹ The latter forms part of a chapter of the agreement on compliance and enforcement,²⁰ which is not only a structural novelty when compared with the 1993 FAO Compliance Agreement,²¹ but also contains the crux of the substantially novel provisions introduced by this agreement.²² Not only must the flag state enforce conservation and management measures adopted by RFOs as against its own vessels, but also must it accept that the vessels flying its flag will be subjected to a system of regional surveillance and enforcement. The latter entails that all members of a regional body may board and inspect vessels flying the flag of any state being a party to the 1995 UN Fish Stocks Agreement. The Flag State certainly retains a pre-emptive right to investigate and take enforcement action, but it may as well allow the inspecting state to do so. If the violation has a certain minimum level of severity, as defined by the agreement, and the Flag State remains inactive, however, the vessel may be taken into port. Besides, port states have a general right, and even obligation to inspect documents, fishing gear and catches if vessels are voluntarily in their ports.

¹⁶ See *supra* note 8 and accompanying text.

¹⁷ 1995 UN Fish Stocks Agreement, Article 18 (3)(c), seems to limit such exchange of information to directly interested states, but even then only at the request of the latter and while taking into account the national laws of the flag state regarding the release of such information.

¹⁸ *Ibid.*, Article 18 (3)(g).

¹⁹ *Ibid.*, Article 18 (4).

²⁰ *Ibid.*, Part VI. This paragraph describes the content of the said part.

²¹ See *supra* note 9 and accompanying text.

²² As already stressed by the present author in another study prepared for the FAO. See Franckx, E., '*Pacta Tertiis* and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation & Management of Straddling Fish Stocks & Highly Migratory Fish Stocks', FAO Legal Papers Online # 8, pp. 7-9 (June 2000), as available on Internet: <www.fao.org/Legal/default.htm>. See also by the same author '*Pacta Tertiis* and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea', 8 *Tulane Journal of International and Comparative Law* pp. 49, 56-58 (2000).

As was the case with respect to the 1993 FAO Compliance Agreement,²³ sanctions to be imposed by the Flag State in case of violations should

'be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities. Measures applicable in respect of masters and other officers of fishing vessels shall include provisions which may permit, *inter alia*, refusal, withdrawal or suspension of authorizations to serve as masters or officers on such vessels.'²⁴

III. DISTINGUISHING FACTORS

Even though the two international agreements were both inspired by the same ultimate goal, i.e. to tackle the problem of overfishing on the high seas, a number of distinguishing features are nevertheless to be noted. For the purpose of the present study, the following differences deserve to be mentioned:

- First of all, the field of application of the 1993 FAO Compliance Agreement is not restricted to straddling stocks and highly migratory fish stocks as the 1995 UN Fish Stocks Agreement, but rather applies to all species;
- secondly, vessels of less than 24 meters may not normally be exempted from the operation of the 1995 UN Fish Stocks Agreement, as was the case with respect to the 1993 FAO Compliance Agreement;
- thirdly, the requirements to maintain records are much more developed under the FAO system than under the UN system;
- fourthly, if the Flag State is the main target of the 1993 FAO Compliance Agreement, the 1995 UN Fish Stocks Agreement involves other actors as well, such as coastal states, through the RFOs, and port states, in order to achieve its objectives. It can moreover be sustained that the RFO concept is the central element of the latter agreement;
- fifthly, the cornerstone of the 1995 UN Fish Stocks Agreement implementation mechanism, namely that ships may be boarded and inspected on the high seas by Member States of an existing RFO whether or not the flag state of the boarded or inspected vessel is a member of that organisation,²⁵ is totally absent in the 1993 FAO Compliance Agreement; and
- sixthly, a similar remark can be made with respect to another clear example of progressive development of international law introduced by the 1995 UN Fish Stocks Agreement, namely the creation of a system of port-state jurisdiction in the area of fisheries.²⁶

²³ See *supra* note 10 and accompanying text.

²⁴ 1995 UN Fish Stocks Agreement, Article 19 (2).

²⁵ *Ibid.*, Article 21 (1).

²⁶ Compare the 1995 UN Fish Stocks Agreement, Article 23 (1-3) with the 1993 FAO Compliance Agreement, Article V (2). In the latter hypothesis, port states simply have to forward reports of violations to the flag state for flag state action.