

**Report of the**

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**THE EXPERT CONSULTATION ON THE DEVELOPMENT OF A  
COMPREHENSIVE GLOBAL RECORD OF FISHING VESSELS**

**Rome, 25–28 February 2008**



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## PREPARATION OF THIS DOCUMENT

This document contains the report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels<sup>1</sup>, which was held in Rome, Italy, from 25 to 28 February 2008.

### **Distribution:**

Participants at the meeting

FAO Members

International organizations interested

FAO Fisheries and Aquaculture Department

FAO Regional and Subregional Offices

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<sup>1</sup> The 2005 Rome Declaration on Illegal, Unreported and Unregulated (IUU) Fishing, adopted by the FAO Ministerial Meeting on Fisheries, initially called for the development of a comprehensive record of fishing vessels within FAO including refrigerated transport vessel and supply vessels given their frequent involvement with IUU activities. It is intended throughout these Expert Consultation proceedings that the reference to fishing vessels is to include these other categories of vessels.

**FAO.**

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**ABSTRACT**

This document contains the report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, which was held at FAO headquarters in Rome, Italy, from 25 to 28 February 2008. The Director-General of FAO convened the Expert Consultation to provide guidance to FAO regarding the future development of a comprehensive Global Record (including guidance on the scope of the record, criteria for inclusion in the record, goals of the record, the sources of data and how to obtain accurate, comprehensive and current data, the need for a unique vessel identifier, the special needs of developing countries, and any special considerations), and to identify appropriate next steps, including how technical development should progress.

The experts expressed both a sense of urgency about the need for this tool and their belief that market forces could spur compliance prior to any mandatory legal requirement imposed on countries to provide information. The Expert Consultation noted that the Global Record would be an essential tool to ensure the effectiveness of port State measures. Links to other databases were foreseen. The experts raised concerns about how to best convince countries to provide the needed data.

In addition to providing information to fisheries enforcement agencies, the Global Record could: improve the traceability of vessels and products regarding illegal, unreported and unregulated (IUU) detection; enhance transparency of vessel information and operation; strengthen risk assessment for both governments and industry at all levels; and support decision-making on a broad range of topics including fleet capacity, management, safety, pollution, security, statistics and related issues.

Further analysis into the viability of the Global Record is likely to occur during the remainder of 2008. In March 2009, proposals regarding its further advancement will be put before the FAO Committee on Fisheries (COFI). In the event that the COFI endorses the proposals, development and implementation of the Global Record will remain conditional on the availability of the significant funds required to ensure viability of the project. Funds will also be required and employed to assist some countries in the development of their national registries/records.

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**LIST OF ACRONYMS**

|                 |  |
|-----------------|--|
| <b>COFI</b>     | Committee on Fisheries   |
| <b>EC</b>       | European Commission  |
| <b>EU</b>       | European Union   |
| <b>FishViz</b>  | Fishing Vessel Information Systems   |
| <b>HSVAR</b>    | High Seas Vessels Authorization Record   |
| <b>IMO</b>      | International Maritime Organization  |
| <b>IOTC</b>     | Indian Ocean Tuna Commission   |
| <b>IPOA-IUU</b> | International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing |
| <b>ISPS</b>     | International Ship and Port Facility Security  |
| <b>IUU</b>      | Illegal, unreported and unregulated  |
| <b>LRF</b>      | Lloyd's Register – Fairplay Ltd.   |
| <b>MCS</b>      | Monitoring, control and surveillance   |
| <b>NGO</b>      | Non-governmental organization  |
| <b>RFB</b>      | Regional fishery body  |
| <b>RFMO</b>     | Regional fisheries management organization   |
| <b>UNEP</b>     | United Nations Environment Programme   |



## **OPENING OF THE SESSION**

1. The Director-General of the Food and Agriculture Organization of the United Nations (FAO), Mr Jacques Diouf, convened an Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels.<sup>1</sup> The Expert Consultation was held at FAO headquarters, Rome, from 25 to 28 February 2008.
2. Eleven of the 14 invited experts participated in the Expert Consultation in their personal capacities, together with seven resource persons. Three invited experts were unable to attend (those from China, Mexico and Oman). A list of the participants (experts, resource persons and FAO secretariat) is attached as Appendix B. The documents placed before the Expert Consultation are listed in Appendix C. Funding for the Expert Consultation was provided by the Governments of Australia and the United Kingdom.
3. The technical secretary, Mrs Michele Kuruc, called the Expert Consultation to order and reviewed the logistical arrangements for the session. She then introduced Mr Ichiro Nomura, the FAO Assistant Director-General for Fisheries and Aquaculture, who made the opening statement. Mr Nomura welcomed participants to FAO and Rome, and explained the FAO process for the selection of experts. He stressed the ongoing search for new tools in the fight against illegal, unreported and unregulated (IUU) fishing. A comprehensive Global Record of fishing vessels was first identified as a desirable new tool by Ministers in the 2005 Rome Declaration on IUU Fishing (hereafter, the Rome Declaration). Mr Nomura summarized the task of the Expert Consultation, following the guidance given by the twenty-seventh session of the Committee on Fisheries (COFI) held in 2007. The major conclusions of the feasibility study that FAO conducted on a Global Record were previewed, in particular the need for a unique vessel identifier and its determination that a Global Record was technically feasible subject to satisfaction of a number of prerequisites. He emphasized that the Expert Consultation should review these conclusions, independently make their own determination regarding the feasibility of a Global Record, and give advice on how such a large undertaking could be progressed successfully. He acknowledged that the challenges would be significant but the experts were encouraged to explore the issues fully and to provide advice. The outcome of the Expert Consultation would be forwarded to COFI 2009. Mr Nomura's opening statement is attached as Appendix D.

## **ELECTION OF THE CHAIR**

4. Mr Stephen Stuart, former National Manager of Fisheries Compliance for the Ministry of Fisheries in New Zealand, was elected chairperson. He expressed his gratitude to the experts for their confidence in electing him to the chair. He urged the Expert Consultation to consider the broadest range of views possible and to develop strong recommendations as it considered how to advise FAO to move forward on the development of a Global Record.

## **BACKGROUND AND SCOPE OF THE EXPERT CONSULTATION**

5. Mrs Kuruc introduced the session by describing the basic characteristics of an expert consultation and the background of this Expert Consultation. She summarized the questions that the Expert Consultation needed to consider: (i) can a Global Record be developed and implemented successfully; and (ii) if so, how can this success be maximized and maintained?
6. Recalling the decision of the twenty-seventh session of COFI (2007) to support an expert consultation, she pointed out the following direction from COFI: to develop further the

<sup>1</sup> The 2005 Rome Declaration on Illegal, Unreported and Unregulated (IUU) Fishing, adopted by the FAO Ministerial Meeting on Fisheries, initially called for the development of a comprehensive record of fishing vessels within FAO including refrigerated transport vessels and supply vessels given their frequent involvement with IUU activities. It is intended throughout this Expert Consultation report that the reference to fishing vessels is to include these other categories of vessels.

concept of a comprehensive Global Record of fishing vessels as described in the FAO feasibility study, mindful of the need to clarify the project's objectives, sensitivity to costs, confidentiality requirements and the need to link it to other reliable information sources, such as national registers and regional fisheries management organization (RFMO) lists.

7. She said that there was no intention behind the Global Record to create "blacklists". However, it was expected that a Global Record would be neutral and used in a variety of ways as a tool to assist many different users as they work to identify IUU fishing and related activities.

8. Attention was drawn to a parallel study, Fishing Vessel Information Systems (FishViz), undertaken by Australia and New Zealand with the support of the United Kingdom as a part of their High Seas Task Force activities. The FAO and the FishViz studies reached broadly similar conclusions in terms of costs and both found that a Global Record was technically feasible.

9. Finally, it was stressed that it was not the intention to delve into a great degree of technical detail at the Expert Consultation but that advice regarding how the technical details could be progressed was desired. The Expert Consultation was encouraged to plan for the future and not be limited by what is currently possible.

#### **ADOPTION OF THE AGENDA**

10. The Expert Consultation adopted the agenda attached as Appendix A.

#### **LEGAL ASPECTS**

11. Relevant legal issues were addressed by in-house FAO legal staff and by an external consultant who authored a paper for the Expert Consultation. Legal consultant Dr Gail Lugten presented a summary of the paper titled *Development of a comprehensive Global Record of fishing vessels, refrigerated transport vessels and support vessels*, which she had prepared for the Expert Consultation. After describing the historical legal background in order to set the issues in context, distinctions were drawn between "record", as a database, and "registry", as a process that accords legal personality.

12. In examining the legal basis for establishing a Global Record, the legal consultant concluded that FAO does have an implicit mandate for proceeding with a Global Record based on the FAO Constitution, Articles 1.2 and 1.3.<sup>2</sup>

13. The FAO Compliance Agreement was examined closely as potentially the most relevant international instrument in which the development of the Global Record could be addressed; FAO's feasibility study had considered its database, the High Seas Vessels Authorization Record (HSVAR), to populate the initial phase of a Global Record. However, the Compliance Agreement has clear weaknesses as a basis for a Global Record, specifically:

- It applies only to the high seas, whereas IUU fishing is most prolific in zones of national jurisdiction.
- It relates primarily to vessels of 24 m or longer.
- The exchange of all relevant data is not mandatory.
- There is poor support for developing states.
- It has no review mechanism.

<sup>2</sup> FAO powers from the Constitution of the Food and Agriculture Organization are described *inter alia* in Articles 1.2 and 1.3 and they include the ability to promote research, improve education and public knowledge, provide assistance to governments, encourage the adoption of international policies, and make recommendations on the conservation of natural resources. It is submitted that these provisions may not expressly authorize the creation of a Global Record within FAO, but they do permit, by implication, the establishment of the record.

14. The legal consultant gave particular attention to whether a Global Record should have a legal instrument at its base. She presented four options:

- Option One: Retain the status quo. The Compliance Agreement will be the legal instrument, and the HSVAR will be the Global Record.
- Option Two: Develop the HSVAR database by adding data from EQUASIS, Lloyd's Register – Fairplay Ltd. (LRF), readily compliant states and RFMOs. This option will not have a legal instrument as its base.
- Option Three: Amend the Compliance Agreement and extend the HSVAR to address the shortcomings described above.
- Option Four: Attach the Global Record to a new legally binding instrument, such as the Agreement on Port State Measures, fast-tracked and currently in draft. This particular draft agreement addresses the weaknesses of the Compliance Agreement raised above.

15. The above four legal options were discussed repeatedly throughout the Expert Consultation. There were differences of opinion about which option might best achieve the goals of a comprehensive Global Record. The Expert Consultation benefited from the informative presentations made by representatives of RFMOs, the LRF, the European Commission (EC), the International Maritime Organization (IMO) and the HSVAR regarding their experiences in collecting data of this type and in managing mandatory unique identifier numbering schemes under various regimes. The Expert Consultation considered the following:

- mandatory vs voluntary data submission requirements;
- the incentives available;
- the existence and limitations of binding instruments, and the time needed to negotiate or amend such instruments successfully;
- the risks associated with this process;
- the limitation of application of binding instruments to parties;
- the existence and limitations of current mechanisms;
- the possibility of including the Global Record requirements in discussing the draft legally-binding instrument for port State measures.

16. Confidentiality issues do not arise if a Global Record contains information already in the public domain. Liability concerns can be addressed by a disclaimer of liability. The legal consultant presented a sample text that was considered appropriate.

17. The FAO secretariat confirmed that it could be inferred from the provisions of the FAO Constitution that FAO could establish information systems such as a Global Record. Examples of current FAO information systems were given where the current databases contained information supplied by countries. The nature of information submitted to these databases is such that it can be placed in the public domain, with the exception of the HSVAR.

18. The Expert Consultation considered that some states may not be meeting their responsibility as flag states with regard to fishing vessels owing to a lack of sufficient awareness of their obligations and responsibilities. It was suggested for consideration that FAO provide more information to states regarding their role and responsibilities as flag states with regard to their fishing vessels.

19. The issue of dual registrations was discussed. After consideration, it was determined that no practical problems existed as there was a distinction between the owners and operators under demise charters, and the flag of the demise charterer is recognized as the responsible flag state.

20. On the issue of genuine link, the Expert Consultation considered that focusing on genuine link as a condition of registration may be difficult. A greater focus should be on how the flag state exercises more effective controls to ensure that these vessels operate in compliance with applicable measures.

21. On the issue of beneficial ownership, it was considered that it could be difficult to obtain reliable information on beneficial owners, and that identifying sources of operational control of a vessel should be regarded as the more significant issue.

22. The experts balanced these views with their sense of urgency about the need for this tool and their belief that market forces could spur compliance prior to any mandatory requirement. The Expert Consultation agreed that mandatory and incentive-driven approaches moving in parallel might be preferred.

23. The Expert Consultation recognized the distinction between what can be achieved through international instruments and by domestic law. The Expert Consultation drew attention to the possible need to amend national and international legislation to ensure the provision of data for insertion in a Global Record and the adoption of a unique vessel identifier while complying with existing mandatory schemes.

#### **CONTEXT OF THE EXPERT CONSULTATION – THE FAO FEASIBILITY STUDY**

24. Mr John Fitzpatrick, resource person, outlined the FAO feasibility study on the development of a Global Record of fishing vessels, refrigerated transport vessels and support vessels. The study examined national and regional practices concerning the registration of a vessel, the authorization to fish, and the maintenance of pertinent records. Not all states have a requirement to register vessels that are not intended to engage in international voyages. Most countries do require fishing vessels to be licensed to fish, and both certificates of registry and licenses hold similar information on a vessel as well as on its ownership.

25. Other existing databases that included a portion of the global fishing fleet had been studied. However, it was noted that currently there is no single source of information from which it would be possible to obtain the information identified by the Rome Declaration.

26. The study proposed a phased approach to developing a Global Record, commencing with vessels of 100 GT or more, followed by vessels of 55 GT or more but less than 100 GT, and then finally by vessels of 10 GT or more but less than 55 GT. It was explained that the study had not attempted to provide a definition of the term “support vessels” for the purpose of a Global Record as, in terms of IUU fishing, the activities of such vessels are not limited to the support of actual fishing operations.

27. The study reached a number of significant conclusions for the development of a Global Record:

- There is strong justification for it.
- It should be held in the public domain and be transparent.
- It is technically feasible subject to key issues being addressed, including cooperation from flag states, resolution of unique vessel identifier, and provision of financial resources.

28. Adequate funding for the development phases over a period of about 3.5 years as well as for the long-term maintenance would have to be assured. The estimates given in the study, US\$2.5 million for the development phase and US\$600 000 annually for the long-term maintenance of a record, were calculated at 2006 values for the United States dollar and would need upwards revision.

#### **DEVELOPMENT OF THE GLOBAL RECORD**

##### **Goals of a Global Record**

29. The Expert Consultation agreed that the goals of a Global Record should be easily understood and simple. The main goal of a record would be as a tool to prevent, deter and eliminate IUU fishing and related activities, making it more difficult and expensive for vessels and companies acting illegally to do business. However, it was recognized that developing and implementing a

comprehensive record successfully would be no simple task. The Expert Consultation appreciated that a truly comprehensive Global Record would be a long-term undertaking but that a phased approach was appropriate, so that high-level goals could be achieved over time. Aspirational goals were very fitting for the future, and the record should not be designed around the current low levels of state compliance with reporting requirements.

30. After discussing various potential users and the types of uses they might have for a Global Record, additional goals were also readily identified, such as:

- improving the traceability of vessels and products regarding IUU detection;
- transparency of vessel information and operation;
- strengthening risk assessment for both governments and industry at all levels;
- supporting decision-making on a broad range of topics including fleet capacity, management, safety, pollution, security, statistics and related issues.

31. Eventually, a Global Record would be a publicly available “one-stop shop” with many linkages to data sources such as international, regional, national and other databases.

32. The Expert Consultation further noted that the Global Record would be an essential tool to ensure the effectiveness of port State measures and of binding and non-binding instruments designed to prevent, deter and eliminate IUU fishing. The Expert Consultation agreed that every opportunity should be taken to raise awareness of the Global Record, and in particular to draw the attention of the Technical Consultation to Draft a Legally-binding Instrument on Port State Measures to Prevent, Deter and Eliminate IUU Fishing in June 2008 to the report of this Expert Consultation.

### **Scope of a Global Record**

33. The scope of a Global Record is intended to describe its parameters and what should be included within the record. It was agreed that the scope should be broad so that the record can achieve its goal as a comprehensive, effective tool and not be duplicative of other existing databases and mandatory unique identifiers. In this context, the Expert Consultation considered the need for unique identifiers, i.e. vessel identification and company and registered owner identification. The Expert Consultation believed that the scope of the record should capture data on all vessels in the supply chain. Following a robust discussion, it was suggested that it would be useful to rely on other pre-existing instruments for their definitions of the key terms “fishing”, “vessel”, and “fishing related activities” in order to define the scope of coverage of the Global Record. Several definitions found in the draft legally-binding instrument on port state measures were identified as particularly useful, noting the need to exclude recreational fishing vessels. This draft instrument provides that:

- “Fishing” means:
  - the actual or attempted searching for, catching, taking or harvesting of fish;
  - engaging in any activity that can reasonably be expected to result in the locating, catching, taking or harvesting of fish.
- “Fishing-related activities” means any operation in support of, or in preparation for, fishing, including the processing, transshipment or transport of fish that have not been previously landed and offloaded at a port, as well as the provision of personnel, fuel, gear and other supplies at sea.
- “Vessel” means any vessel, ship of another type, boat and other craft used for, equipped to be used for, or intended to be used for, fishing or fishing-related activities.

34. These definitions are based on commonly used text, and they clearly encompass fishing vessels of all types and refrigerated transport vessels and supply vessels on all waters. They eliminate the need to rely on other criteria, such as such as tonnage, length or other factors, where standards are applied inconsistently in some states. As the record is to be comprehensive, utilizing

these pre-existing definitions was seen to eliminate possible confusion over the use of other specific criteria for determining inclusion in the record. Moreover, these criteria may be useful in formulating a phased approach to the record. In addition to a phased approach, periodic reviews of the record were seen as necessary in order to account for future developments in fields that would affect the record.

35. One expert did not concur with such a wide definition, preferring to limit the scope to vessels engaged in fishing and fishing-related activities beyond the areas under the respective national jurisdiction of their flag state.

36. One expert stressed that it might be difficult for some contributors to supply data to the Global Record on vessel ownership and agent information owing to existing laws and regulations.

### **Sources of data**

37. The Expert Consultation was informed about a number of existing regimes, including the HSVAR. The presentation provided by the FAO secretariat highlighted lessons to be drawn from the operation of the HSVAR. Although the Compliance Agreement established a sound basis for the global sharing of information on vessels authorized to fish on the high seas, the HSVAR has largely failed to fulfil its goals. A relatively small number of acceptances of the Compliance Agreement coupled with a low and infrequent submission rate of data to FAO by parties, restriction on access to the data, lack of resources allocation and the lack of a long-term maintenance plan were identified as problems. The binding nature of the agreement was not proved to be necessarily a powerful tool (unless adequate review mechanisms are established).

38. The Expert Consultation focused its discussion on how comprehensive and accurate vessel data could be collected and incorporated into the Global Record, with the understanding that detailed specifications on data should be addressed by separate meetings focusing on technical issues. After considering the weaknesses and limitations associated with that HSVAR (noting that, in contrast, RFMOs have enforcement mechanisms to establish effective systems), the Expert Consultation agreed that efforts would be better directed towards a new and more comprehensive system rather than trying to modify the scope of the HSVAR.

39. The Expert Consultation discussed the need to ensure that the Global Record would be able to capture information from a range of sources on vessel activity and historical behaviour. Such information, for example, from monitoring, control and surveillance (MCS) and port state records, RFMOs and others would play an important role in informing decisions and judgements by users of the Global Record, specifically port and MCS authorities.

40. The resource person from the Indian Ocean Tuna Commission (IOTC) provided an informative presentation on the problems encountered regarding data acquisition and maintenance. He presented a description of the problems related to the listing of vessels from Taiwan Province of China. The extensive nature of this fleet and the potential difficulties that may be encountered when gathering data for a Global Record were a concern to the Expert Consultation.

41. The Expert Consultation considered alternative means of recording vessels, where difficulties may be experienced in encompassing them within official records, and proposals such as annexes to the Global Record were considered feasible. Sources for such data might include commercial databases, such as the LRF.

### **Unique vessel identifier**

42. Mr Trevor Downing, a resource person from the LRF, described the management of both the IMO Ship Numbering Scheme and the IMO Registered Owner and Company Numbering

Scheme on behalf of the IMO, which, in LRF practice, have been extended to include fishing-activity-related records. Both schemes provide a mechanism for sourcing comprehensive fishing vessel data from flag administrations. Currently, about 26 000 fishing vessels of more than 100 GT and corresponding registered owners have LR numbers (within the unique number range of the IMO Ship Numbering Schemes).

43. With regard to vessels of less than 100 GT, the Expert Consultation was advised that they could not be accommodated with the LRF numbering scheme, which is basically limited to vessels of more than 100 GT. For vessels of less than 100 GT, it was recommended that a unique number, allocated through FAO, be provided. Such a scheme would need to be developed avoiding duplication with other schemes and taking advantage of best practices identified from other vessel numbering regimes.

44. After informative presentations by the LRF and the IMO, the Expert Consultation agreed that a system to provide a unique identifier that would not change even if the vessel changed flag, owner or name was essential. This might be accomplished through a combination of the LRF for vessels of 100 GT and more and those issued by FAO for vessels of less than 100 GT. Close cooperation between FAO and the IMO on these issues was strongly encouraged. Further work on unique vessel identification schemes was identified as needed by a more specialized workgroup.

45. On the basis of the management of existing IMO identification options and their limitations, the Expert Consultation was presented with options for future development in the context of the Global Record, as set out in Appendix E.

46. Regarding the application of requirements contained in the International Ship and Port Facility Security (ISPS) Code to fishing vessels, the IMO resource person indicated that the IMO had not reached any agreement at this stage and that the matter was being considered by a correspondence group to report to the Maritime Safety Committee in 2009.

#### **Special needs of developing countries**

47. Consideration should be given to establishing mechanisms that can provide financial assistance and expertise to developing countries for capacity building. These could be similar to the Article 7 Trust Fund established by the UN Fish Stocks Agreement or Article 22 of the draft binding legal instrument on port state measures. A UN system-wide approach for funding and support among other specialized UN Agencies such as the World Bank and United Nations Environment Programme (UNEP) should be considered.

48. The willingness of developing countries to perform the necessary functions, such as registration and data gathering, should not be underestimated, but provision of appropriate training, assistance with technology, financial resources and cooperative relationships would be needed.

#### **Any special considerations**

49. An industry expert informed the Expert Consultation that 65 percent of all fish consumed in the European Union (EU) is now imported from third countries. Illegal, unreported and unregulated fishing is becoming an increasingly important issue in the commercial fish processing and marketing industry and in the eyes of the media, non-governmental organizations (NGOs) and consumers. In some instances, major fish buyers are withdrawing from traditional but now suspect fisheries, while governments are also expecting fish processors to take adequate measures to avoid purchasing IUU fish products.

50. The European processing industry is convinced that it should take its own action to avoid IUU products. It has developed control documents that buyers should incorporate into their purchasing

policies. Fish buyers and processors need public access to up-to-date data, which could be linked to a Global Record so they can adequately assess risk and manage their supply basis. He concluded that if a vessel were not on the Global Record it would be presumed to be an IUU vessel.

51. He predicted that a transparent Global Record would certainly be invaluable in bringing confidence to the consumer market and the corporate world; this in itself should be a market driver and incentive to keep records up to date.

52. The Expert Consultation largely concurred with these views and added that this is a growing trend likely to increase with time. Traceability of products to the source is now a well-established requirement by retailers, which underpins the importance of the Global Record. In addition, traceability is an essential requirement of all ecolabelling schemes for fishery products.

### **Operational prerequisites**

53. For the successful development and implementation of the Global Record, the Expert Consultation considered that a strong degree of political support was required and that cooperation by FAO and other UN bodies and their members, RFMOs, MCS personnel and other data providers would be essential.

54. In this respect and without prejudice to any other potential initiative at the national or regional level (e.g. in the ASEAN region and countries), the Expert Consultation welcomed the offer made by Tim Bostock (resource person) to explore the possibility that the United Kingdom might facilitate activities in response to recommendations of the consultation, such as hosting consultations with stakeholders and representatives of anticipated Global Record users including governments, RFMOs, industry (catching, processing and retail), NGOs and others. The aims of these consultations would be to: (i) raise awareness and support for the Global Record concept; (ii) explore in detail the particular needs of stakeholders; and (iii) identify the extent and type of data contributions to, and uses of, the Global Record.

55. It was also clear to the Expert Consultation that implementation of a Global Record would need to be progressed in phases, and supported by adequate funding and resources to ensure the long-term sustainability of the Global Record. To this end, the experts agreed that an updated project plan including costs for the proposed system as now envisaged should be developed subject to endorsement by the COFI.

56. The Expert Consultation considered that a major constraint on deterring IUU fishing was the lack of transparency together with the absence of information. The Expert Consultation considered that a binding instrument was desirable in order to ensure the capture of global information on flags of non-compliance. However, in the interim, noting the time requirement to achieve a binding instrument, the Expert Consultation sought other alternatives, including soft law and market or incentive-based mechanisms to progress the development of the Global Record.

### **Identification of appropriate next steps and recommendations**

#### *Next steps*

57. Convinced that progress towards the development of the Global Record should be made without delay and that the COFI should be well informed on areas that were beyond the scope of and time available to the Expert Consultation, the Expert Consultation agreed that:

- a correspondence group coordinated by João Neves (resource person) and in conjunction with FAO would be established in order to facilitate communication and further consideration of various technical issues (terms of reference for the group were agreed – attached as Appendix F).
- subject to the availability of resources, FAO would host a workshop in late 2008 to consider any relevant developments, including the work done within the framework of



the correspondence group as well as the results of the initiatives referred to above and report to the next session of COFI in 2009.

### *Recommendations*

58. The Expert Consultation noted the broad range of benefits that might be derived by a variety of users from the Global Record, in particular in respect of the prevention and deterrence of IUU fishing, but also in respect of aspects related to the needs of industry (traceability and certification), fisheries management, national MCS efforts, RFMOs, fishing vessel safety, and marine pollution. It recommended that the development of the Global Record should be pursued as a matter of high priority and be implemented as soon as possible.

59. Notwithstanding the formidable task of developing the Global Record, the Expert Consultation decided to adopt from the outset a long-term vision, and recommended (noting the reservation above) that the Global Record should aspire to include all vessels (excluding recreational vessels) as defined in the draft port State measures agreement EC:GRFV/2008/Inf.3. However, the Expert Consultation recommended a phased approach to project development and implementation, highlighting the need to ensure regular review of progress.

60. The Expert Consultation saw as an initial step the value in combining all existing information into one place in a consolidated way in order to enable global searches.

61. The Expert Consultation is optimistic that the provision and use of the data in the Global Record will be stimulated by political will and incentivized by the desire of flag states and the harvesting industry to demonstrate transparency in non-confidential fishing operations including information and data of their fleets and by the desire of the retail market to meet the demands of consumers in respect of non-IUU products. The Expert Consultation recommended that the COFI should consider progressing the Global Record through both mandatory and market-driven approaches:

- through the use of an international binding instrument;
- in the interim, through the use of “soft” instruments such as the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU);
- pursue in parallel through any other means available to the COFI, e.g. catch certification, trade documentation and port state measures as appropriate;
- recommending to relevant organizations the extending of the application of mandatory identification number schemes.

62. It was recommended that all of these approaches be fully supported by FAO, including developing technical guidelines and other forms of support as required.

63. The Expert Consultation recognized the requirement for a unique vessel and company identifier and recommended their further development taking full account of existing numbering schemes such as those employed by the IMO, EC, LRF, etc., for harmonization purposes.

64. Experts recommended that development by FAO of the Global Record should be undertaken in close consultation and cooperation with all stakeholders, including with fisheries/maritime administrations and organizations.

65. The Expert Consultation recommended that COFI as a matter of priority identify resources for the development, implementation and long-term sustainability of the Global Record and emphasized the requirement for additional funding to ensure the provision of assistance to meet the special needs of developing countries.

**ANY OTHER MATTERS**

66. The attention of the Expert Consultation was drawn to another effort that may have implications for the development of a Global Record. A Technical Consultation on the International Guidelines for the Management of Deep-Sea Fisheries in the High Seas was held from 4 to 8 February 2008 at FAO headquarters in Rome. Draft guidelines for the Management of Deep-sea Fisheries on the High Seas were considered by the Technical Consultation. These guidelines include provisions containing reporting obligations for states to make publicly available, through FAO, a list of vessels flying their flag and authorized to conduct deep-sea fisheries. The Technical Consultation did not complete its review of the guidelines, and it will reconvene in August 2008. It has not been determined whether or how such vessel data might be collected under the guidelines. The data included in the HSVAR were seen as inadequate for this purpose, largely owing to limited submissions and incomplete data making it difficult to differentiate between deep-sea fishing vessels, and for many of the same reasons as recognized by the Expert Consultation on the Global Record.

**ADOPTION OF THE REPORT**

67. The above report was adopted by the Expert Consultation, and after thanking the experts and resource persons for their conscientious and valuable contribution, the chairperson closed the Expert Consultation.

**APPENDIX A****Agenda**

1. Opening of session
2. Welcome by Mr Nomura
3. Election of chair
4. Background/scope of the consultation
5. Adoption of agenda
6. Legal aspects
7. Context of the consultation
  - FAO feasibility study
8. Development of the Global Record
  - goals of the record
  - scope of the record
  - criteria for inclusion in the record
  - the sources of data:
    - how to obtain accurate, comprehensive and current data
  - the need for a unique vessel identifier
  - the special needs of developing countries
  - any special considerations
  - operational prerequisites
  - identify appropriate next steps and recommendations
9. Any other matters
10. Adoption of the report



## APPENDIX B

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## APPENDIX C

**List of documents**

| <b>Code</b>         | <b>Document</b>   |
|---------------------|---|
| EC:GRFV/2008/1      | Provisional agenda  |
| EC:GRF/2008/2       | Prospectus  |
| EC:GRFV/2008/3      | Comprehensive record of fishing vessels, refrigerated transport vessels, supply vessels and beneficial ownership. Report of a study by the FAO Fisheries Department, 2007<br>Annex I: Matters concerning the register of ships and fishing vessels<br>Annex II: High seas fishing vessel authorization record (HSVAR)<br>Annex III: Other existing global registers/records<br>Annex IV: Existing regional registers/records of ships/fishing vessels<br>Annex V: Initiatives to deter IUU fishing<br>Annex VI: Selection of vessel categories for the development of a Global Record |
| EC:GRFV/2008/Inf.1  | List of documents   |
| EC:GRFV/2008/Inf.2  | List of participants  |
| EC:GRFV/2008/Inf.3  | Report of the Expert Consultation to Draft a Legally-binding Instrument on Port State Measures, 2007  |
| EC:GRFV/2008/Inf.4  | Information paper for the EC on the global register of fishing vessels  |
| EC:GRFV/2008/Inf.5  | Input to the feasibility study on international high seas fishing vessel information system, 2006   |
| EC:GRFV/2008/Inf.6  | Strategy note on the proposed development of a Global Record of fishing vessels   |
| EC:GRFV/2008/Inf.7  | Paper by Angelo Mouzouropoulos, policy advice   |
| EC:GRFV/2008/Inf.8  | Summary of reform of Belize's high seas fishing activities, August 2001 – December 2007   |
| EC:GRFV/2008/Inf.9  | Executive summary "Belize – The Friendly Flag of Quality", The International Merchant Marine Registry of Belize (IMMARBE)   |
| EC:GRFV/2008/Inf.10 | Outline, "Development of a comprehensive Global Record of fishing vessels, refrigerated carriers and support vessels", Trevor Downing, Lloyd's Register – Fairplay Ltd.   |
| EC:GRFV/2008/Inf.11 | Fishing Vessel Data Record, Lloyd's Register – Fairplay Ltd.  |
| EC:GRFV/2008/Inf.12 | Implementation of Resolution A.600 (15) – IMO Ship Identification Number Scheme   |
| EC:GRFV/2008/Inf.13 | Implementation of IMO Unique Company and Registered Owner Identification Number Scheme (resolution MSC.160 (78))  |
| EC:GRFV/2008/Inf.14 | Implementation of IMO Unique Company and Registered Owner Identification Number Scheme (resolution MSC.160 (78)), Corrigendum   |
| EC:GRFV/2008/Inf.15 | Lloyd's Register – Fairplay Ltd.: Owner/Manager Definitions   |
| EC:GRFV/2008/Inf.16 | Lloyd's Register – Fairplay Ltd. Fishing Vessel Shiptype Coding   |

| <b>Code</b>         | <b>Document</b>  |
|---------------------|--|
| EC:GRFV/2008/Inf.17 | The development of a comprehensive Global Record for fishing vessels, refrigerated transport vessels and supply vessels: an analysis of the practice of regional fisheries bodies – Rachel Baird |
| EC:GRFV/2008/Inf.18 | Legal Consultation for the FAO – Development of a comprehensive Global Record of fishing vessels, refrigerated carriers and support vessels – Gail Lugten  |

**APPENDIX D****Opening statement by Mr Ichiro Nomura, Assistant Director-General, FAO Fisheries and Aquaculture Department**

Distinguished delegates, friends and colleagues,

On behalf of the Director-General of FAO, Mr Jacques Diouf, it gives me great pleasure to welcome you to FAO and to Rome for this Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, including refrigerated transport vessels and supply vessels. You are taking part in an important process and have been specially selected to participate in this consultation. As you know, the problem of illegal, unreported and unregulated (IUU) fishing continues to threaten sustainable fisheries and, has many economic, biological, social and environmental consequences.

We continue to search for new tools that may be useful in the fight against IUU fishing. When fisheries ministers met in 2005, they issued a declaration against IUU fishing. It emphasized that effective monitoring, control and surveillance (MCS) is essential to combat IUU fishing, and that integrated MCS, including vessel monitoring systems and a comprehensive Global Record of fishing vessels, are key tools in this endeavour. This new Global Record was to incorporate information on beneficial ownership subject to confidentiality requirements in accordance with national laws. Later that year, FAO conducted a feasibility study on the development of a Global Record and concluded that a record was technically feasible but that certain conditions would need to be satisfied. For example, some states do not currently have a vessel registration system or have one that is inadequate. Besides capacity building on vessel registration, other adjustments were also suggested, such as the adoption of a unique vessel identifier that remains with a vessel throughout its life. We have with us a number of resource people, including those from Lloyd's Fairplay and the International Maritime Organization who will describe their experiences and provide you with advice as you consider how this issue and others could be progressed. You will hear more about that later.

The twenty-seventh session of the Committee on Fisheries 2007 supported the convening of an Expert Consultation to further develop the concept of a comprehensive Global Record of fishing vessels as described in FAO's feasibility study, mindful of the need to clarify the project's objectives, sensitivity to costs, confidentiality requirements and the need to link it to other reliable information sources such as national registers and RFMO lists.

Your goal in this Expert Consultation is to provide FAO with advice and recommendations about whether and how to move forward. These will be summarized in a report that you will need to approve before the consultation concludes on Thursday. If you recommend moving forward, the formation of a Global Record here at FAO will be a major undertaking with implications in terms of financial and human resources.

This consultation is designed to further explore the feasibility of a Global Record and to give FAO advice. It is not intended to explore the technical details necessary to move this project forward. Technical expertise exists here at the meeting and you should draw on it to verify that what you recommend is feasible. Given the amount of time available and the large number of topics to be discussed, technical details can certainly be addressed later. In addition, FAO would appreciate your suggestions on what format might be best used in the future to address the technical issues.

At this consultation, you are expected to provide your recommendations on the scope of a Global Record. FAO staff have considered this issue, and various concerns have already been identified, such as those dealing with vessels and what sorts of vessels should be included in the record, and what criteria should be used, and then there is the issue of beneficial ownership to consider as well as others. Careful consideration must be given to how data will be gathered, their quality, and obtaining cooperation from member states to try and maximize the usefulness of this tool. The types of uses you believe this tool will be put to and the users may guide some of your decisions. A number of these issues are included in the proposed agenda. You may feel there are other essential issues that need to be sorted out. We encourage this, and this is why we have sought your advice.

As you consider the details of a formation of Global Record you must also take account of a number of legal issues dealing with the legal basis for establishing a record and how that might be reconciled with existing legal instruments and, of course, confidentiality of data. Here you will be guided by our legal resource person and FAO legal staff.

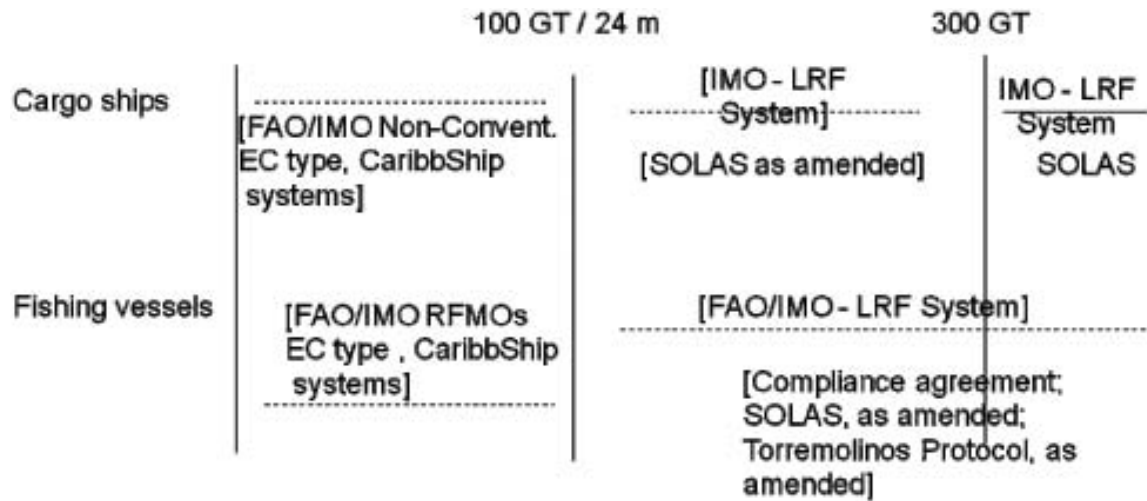
Given the time available and the full agenda, you have a challenging task. However, you have been sent to participate in this meeting because of your expertise and proficiency in these issues and because you are familiar with short deadlines. I am confident that you can achieve the objectives set for this meeting.

Let me conclude by wishing you a productive and enjoyable meeting. If I or my colleagues can be of help to you, please do not hesitate to call on us.

Thank you very much.

## APPENDIX E

## Options for future development in the context of the Global Record





**APPENDIX F****Terms of reference for GRFV TI (Technical Issues)  
Correspondence Group**

Under the coordination of João Neves, the Correspondence Group will further consider a variety of technical issues related to the development of the Global Record and offer guidance on means of progressing them. These should include:

- the unique fishing vessel identifier and company identifier, taking account of the coverage of existing systems;
- Global Record database architecture and related IT issues;
- data provision, verification, control, entry and access;
- uses requirements, including industry, and monitoring, control and surveillance (MCS).

The Correspondence Group will take into account as appropriate the findings and conclusions of the independent consultations with anticipated Global Record stakeholders, which should include governments, RFMOs, industry representatives, NGOs and others, and which will raise awareness of the Global Record concept, explore and identify the particular needs of stakeholders, and the extent and type of anticipated data contributions to and uses of the Global Record.

The Correspondence Group will prepare a report of its findings by the end of September 2008.





## APPENDIX G

## The development of a comprehensive Global Record for fishing vessels, refrigerated transport vessels and supply vessels: an analysis of the practice of regional fishery bodies

By Dr Rachel Baird, TC Beirne School of Law, University of Queensland

### BACKGROUND

The Fisheries Department of FAO has undertaken a study to determine the feasibility and viability of developing a comprehensive Global Record for fishing vessels, refrigerated transport vessels and supply vessels<sup>1</sup> making a number of recommendations.<sup>2</sup> One line of inquiry to assist in determining how the record might be implemented is to investigate the use of authorized vessel records or lists by regional fishery bodies (RFBs).<sup>3</sup>

Many RFBs have established records or lists (hereafter referred to as records) of authorized vessels to assist in regulating fishing activities<sup>4</sup> within their area of competence.<sup>5</sup> The experiences of RFBs are insightful in considering the development of a comprehensive Global Record of fishing vessels. The review conducted in preparing this report revealed a critical commonality in all RFB records. That is, the record is not used in isolation by RFBs. The record and information therein is supplemented by other monitoring, control and surveillance (MCS) measures such as a vessel monitoring system (VMS), catch documentation system (CDS), port and market state controls, and lists of illegal, unreported and unregulated IUU vessels<sup>6</sup> (the so-called blacklists).

This finding underscores the need for a global authorized vessel record to be integrated with other MCS methods. The record needs to be dynamic in the sense that the data collected are of little value unless they are taken and used. For example, the data can be used to determine which fishing or refrigerated transport vessels can legally engage in trade and which vessels should be excluded.<sup>7</sup>

This report has been prepared to inform the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, Rome, 25–28 February 2008. It examines RFB practice in requiring contracting parties to submit information in relation to those vessels they have authorized or licensed to fish within the RFB area or for a particular species. The report inquires into the type of information required by each RFB, the frequency of update of records and their accessibility. It also identifies weaknesses in the system, the fundamental one being the complete dependency upon flag states to submit information that is accurate, complete and timely.

<sup>1</sup> FAO Committee on Fisheries, *Report on the Development of a Comprehensive Record of Fishing Vessels*, 27th Session, 5–9 March 2007. COFI/227/Inf.12. (hereafter the FAO Feasibility Study).

<sup>2</sup> *Ibid*, paragraphs 28–34.

<sup>3</sup> In this report, the term RFB is used inclusively to include regional fisheries management organizations (RFMOs).

<sup>4</sup> FAO Committee on Fisheries, *Report on the Development of a Comprehensive Record of Fishing Vessels*, above no. 14. The report refers to a Global Record not just for fishing vessels but also refrigerated carriers and support vessels. The term “fishing activities” is used in this report to include the activities associated with the actual capture of marine fish.

<sup>5</sup> Or, as the case may be, to regulate a particular species.

<sup>6</sup> It is noted here that there is a legal distinction between unauthorized (which may still be legal on the high seas) and illegal fishing.

<sup>7</sup> In the wider sense, this means a record can inform port and trading states of the legitimacy of a fishing vessel.

TABLE 1  
Features of RFB fishing vessel registers

| RFB    | Date register implemented                    | System in place                              | Method of updating  | Availability  |
|--------|--|--|---|---|
| CCAMLR | 1997   | List of vessels authorized to fish           | Initial establishment then to communicate updates without delay                     | Public access online on CCAMLR Web site                             |
| CCSBT  | October 2003                                 | List of vessels authorized to fish           | Initial establishment then "at any time such changes occur"                         | Public access online on CCSBT Web site                              |
| WCPFC  | 1 July 2005                                  | Record of vessels authorized to fish         | Initial establishment then notification within 15 days of changes                   | Partially available to the public, limits on information disclosure |
| NAFO   | January 2004                                 | Record of vessels > 50 GT authorized to fish | Initial establishment, then each CP to promptly notify at any time changes occur.   | Available to CPs only with applicable confidentiality requirements  |
| SEAFO  | National records established from March 2004 | Record of vessels authorized to fish         | National records to be updated to Commission on a regular basis                     | Public access online on SEAFO Web site                              |
| ICCAT  | 3 June 2003                                  | Record of vessels > 24 m authorized to fish  | Initial establishment, then each CP to promptly notify at any time changes occur.   | Public access online on ICCAT Web site                              |
| NEAFC  | System for notification October 2007         | Notification of vessels authorized to fish   | Notification by 1 January yearly and modifications notified without delay           | Information available to all Contracting Parties                    |
| IOTC   | July 2003                                    | Record of fishing vessels > 24 m             | Initial establishment then prompt notification at the time changes occur            | Public access online on IOTC Web site                               |
| IATTC  | June 2000                                    | Regional vessel record                       | Initial establishment, then each party to promptly notify at any time changes occur | Public access online on IATTC Web site                              |
| FFA    |  | FFA vessel register                          | States can apply to register at any time  | Searchable by public online   |

## AIMS

This report examines the use of regional records of licensed fishing vessels. It explores the practice of ten RFBs and the management arrangements for the implementation of authorized fishing vessel records (Table 1). In doing so, the report necessarily looks beyond the mere registration of a vessel with a flag state, and the use of the term "register" in this report has been avoided in order to distinguish the act of registration from licensing.

The aims of the report are to inform the Expert Consultation of the requirements of RFBs when compiling fishing vessel records, and to provide a contextual and background framework for understanding what RFBs do in managing the records.

The RFBs examined are:

- Forum Fisheries Agency (FFA);
- Commission established under the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR);
- Commission for the Conservation of Southern Bluefin Tuna (CCSBT);
- Western and Central Pacific Fisheries Commission (WCPFC);
- Northwest Atlantic Fisheries Organization (NAFO);
- South East Atlantic Fisheries Organisation (SEAFO);
- International Commission for the Conservation of Atlantic Tunas (ICCAT);
- North East Atlantic Fisheries Commission (NEAFC);
- Indian Ocean Tuna Commission (IOTC);
- Inter-American Tropical Tuna Commission (IATTC).

The review consisted of a desktop review of documents available on the RFB websites, and where possible, direct telephone contact with secretariats.<sup>8</sup>

<sup>8</sup> The author made contact with the CCAMLR, IOTC, SEAFO, CCSBT, NEAFC, NAFO and FFA.

## NOTES ON RFBS

### CCAMLR

The CCAMLR came into force in 1982.

The information kept on the CCAMLR list of licensed vessels is more comprehensive than most other RFB lists. In addition to the details listed in Table 2, the CCAMLR list requires information from Contracting Parties (CPs) on:

- IMO number;<sup>9</sup>
- the area or subarea the vessel is licensed to fish in;
- the species targeted;
- the dates for which the vessel is authorized to fish;<sup>10</sup>
- name and address of any beneficial owner if known;
- where and when the vessel was built;
- the length of the vessel;
- colour photographs of the vessel;
- details of tamper-proof requirements on the vessel monitoring system (VMS) installed (where applicable in accordance with CM 10-02).

In addition, parties are required to the extent practicable, to provide the secretariat with the following additional information:

- name and address of operators/licensee if different to vessel owners;
- names and nationality of master and where relevant the fishing master;
- type of fishing method;
- beam of the vessel;
- vessel communications;
- normal crew complement;
- power of the main engine;
- carrying capacity, number of fish holds and capacity;
- any other information in respect of each licensed vessel they consider appropriate.

Contracting parties are also required to ensure that licensed fishing vessels are equipped with a satellite-linked vessel monitoring device that will allow the continuous reporting of the position of the vessel throughout the duration of the license.<sup>11</sup> This requirement adds another layer to MCS measures adopted by the CCAMLR.

### CCSBT

The CCSBT came into force in 1994. The authorized vessel list was initially limited to vessels of more than 24 m in length. In October 2004, the 24-m threshold was removed to cover small longliners.<sup>12</sup> The list can be searched or downloaded online.

In 2006, draft resolutions were adopted on further compliance measures, including a CDS, VMS and the regulation of transshipments by large-scale fishing vessels. These are aimed at implementing an integrated package of compliance measures.

### WCPFC

The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean was adopted in 2000.

<sup>9</sup> The collection of the IMO number is particularly relevant in tracking IUU vessels.

<sup>10</sup> The CCAMLR licensed list is valid for the fishing season (1 December – 30 November) only. A new fishing season requires a new license notification.

<sup>11</sup> Adopted 1998. Conservation Measure 10-04 (2007).

<sup>12</sup> Resolution adopted at CCSBT 11, updating the resolution on IUU fishing and establishment of a CCSBB record of vessels of more than 24 m authorized to fish for southern bluefin tuna, adopted CCSBT 10, paragraph 5.

The record of fishing vessels is more comprehensive than the majority of lists kept by the RFBs examined. It is similar to the CCAMLR list in the detail required. The information required in addition to that in Table 2 is:

- vessel communications;
- colour photographs;
- name and nationality of master;
- normal crew complement;
- where and when the vessel was built;
- length and beam;
- type of fishing method;
- moulded depth of vessel;
- power of main engine;
- carrying capacity, freezer type, capacity and number;
- fish hold capacity.

In 2006, the Ad Hoc Task Group considered a protocol on the release of information. Some information in the record is publicly available but some of the information is sanitized. This includes any private information, and information relating to the activities of any vessel company or person.

There is some evidence that not all commission members are complying with the information requirements. For example, the secretariat has reported that legible colour photographs have been submitted by fewer than half of the members or cooperating non-members. Furthermore, the WCPFC identification number has not been uniformly provided.

## **NAFO**

The Convention on the Future Multilateral Cooperation in the Northwest Atlantic Fisheries was adopted in 1979 as a successor to the International Commission of the Northwest Atlantic Fisheries.

The NAFO vessel record<sup>13</sup> applies to all fishing vessels of more than 50 GT that have been authorized to fish within the Regulatory Area.<sup>14</sup> There is also a requirement under the applicable NAFO Conservation and Enforcement Measure to notify the executive secretary of vessels subject to bare boat chartering and vessels authorized to conduct research in the Regulatory Area.<sup>15</sup>

The record is to be made available to all contracting parties in accordance with applicable confidentiality requirements. Furthermore, the Executive Secretary shall delete any vessels that have not been active in the Regulatory Area for two consecutive years.<sup>16</sup>

The use of the record is enhanced by other strategies. The requirement for contracting parties to ensure fishing vessels are equipped with a satellite monitoring device,<sup>17</sup> and the obligation on the secretariat to make that information available as soon as possible after the information is received;<sup>18</sup> assists with verifying vessels within the Regulatory Area. In terms of landings or port state activity, contracting parties are required to verify that a vessel is in the record of authorized vessels before authorizing port entry or unloading.<sup>19</sup>

<sup>13</sup> NAFO Conservation and Enforcement Measures, Chapter II, Article 19.

<sup>14</sup> The NAFO Regulatory Area is that part of the Convention Area that lies beyond the areas in which coastal states exercise fisheries jurisdiction. *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries* 1978, Article 1(2).

<sup>15</sup> *Ibid*, Article 19(2) and (3).

<sup>16</sup> NAFO Conservation and Enforcement Measures, Chapter II, Article 19(7).

<sup>17</sup> *Ibid*, Chapter III, Article 25.

<sup>18</sup> *Ibid*, Article 25(8).

<sup>19</sup> *Ibid*, Article 50(1) and (2).

TABLE 2  
Information included on RFB records

| Information included                                 | FFA | CCAMLR | CCSBT | WCPFC | NAFO | SEAFO | ICCAT | NEAFC | IOTC | IATTC |
|--|-----|--------|-------|-------|------|-------|-------|-------|------|-------|
| Name of vessel                                       | •   | •      | •     | •     | •    | •     | •     | •     | •    | •     |
| Prior names  |     | •      | •     | •     |      |       | •     |       | •    | •     |
| Prior flags  |     | •      | •     | •     |      |       | •     |       | •    | •     |
| Register number (i.e. number on RFB register)*       | •   | •      | •     | •     | •    | •     | •     | •     | •    | •     |
| Port of registry                                     |     | •      |       | •     | •    |       |       | •     | •    | •     |
| Prior deletions from other registers**               |     |        | •     |       |      |       | •     |       | •    |       |
| International radio call sign                        | •   | •      | •     | •     | •    |       | •     | •     | •    | •     |
| Type of vessel/ GRT                                  |     | •      | •     | •     | •    | •     | •     | •     | •    | •     |
| Name and address of owner or operator                | •   | •      | •     | •     | •    |       | •     | •     | •    | •     |
| Fishing gear used                                    |     | •      | •     | •     | •    |       | •     | •     | •    | •     |
| Detail on authorization for fishing or transshipment |     | •      | •     | •     | •    |       | •     | •     | •    |       |

\* This number varies. For the CCAMLR and the WCPFC it is the domestic registration number. The WCPFC has an identification number as well.

\*\* These three RFBs use identical wording and it is not clear whether registers in this context means flag registers or RFB authorized vessel records.

The information included on the record does not include past names or flags of the vessel or whether the vessel has been deleted from other registers.

### SEAFO

The Convention on the Conservation and Management of Fishery Resources in the South East Atlantic entered into force 30 April 2003. There is no actual conservation measure that addresses a fishing vessel list, but the SEAFO maintains a record that is available publicly, online. This record contains minimal information. Under Article 14 of the convention, contracting parties are to establish a national record of fishing vessels authorized to fish in the Convention Area and are to make provision to share this information with the commission on a regular basis.

While there is a conclusion by the Scientific Committee in its 2007 report that contracting parties are not accurately reporting catch data, there is no information on the level of compliance with Article 14 in terms of establishing national records.

### ICCAT

The ICCAT entered into force in 1969. The ICCAT maintain a number of lists. A list of vessels of more than 24 m authorized to operate in the Convention Area was adopted in 2002 and entered into force on 3 June 2003.<sup>20</sup> A list of carrier vessels authorized to receive transshipments from longline vessels in the Convention Area was adopted in 2005 and updated in 2006. It entered into force on 13 June 2007. In 2006, the ICCAT adopted a resolution (06-05) aimed at implementing a recovery plan for bluefin tuna in the East Atlantic and the Mediterranean. Under this resolution

<sup>20</sup> Recommendation 02-22.

(in force on 13 June 2007), the ICCAT is to establish and maintain an ICCAT record of all fishing vessels authorized to fish actively for bluefin tuna in the East Atlantic and the Mediterranean.

With respect to the list of vessels of more than 24 m in length, contracting parties, non-contracting parties, entity or fishing entity (CPs) are to promptly notify the ICCAT Executive Secretary of any addition to, any deletion from and/or any modification of the ICCAT record at any time such changes occur.

### **NEAFC**

The NEAFC was established in its current form in 1980, and the convention was amended in 2004 and 2006.<sup>21</sup> Contracting parties are required under the Scheme of Control and Enforcement to notify the secretary prior to 1 January each year if possible (or in any case before the vessel's entry into the Regulatory Area<sup>22</sup>) of all fishing vessels authorized by that party to fish. Modifications to the information are to be notified to the secretary without delay.<sup>23</sup> The information is to be made available by the secretariat to all contracting parties.<sup>24</sup>

### **IOTC**

The IOTC adopted a positive record of authorized vessels in 2002. The Conservation Measure was updated in 2005 and 2007.<sup>25</sup> The record includes fishing vessels of more than 24 m in length. Data were required by 1 July 2003. If the vessel was less than 24 m, operating in waters outside the exclusive economic zone (EEZ) of the flag state and authorized to fish for tuna and tuna-like species, then contracting parties were required to submit data electronically to the secretary by 1 July 2006 with updating as necessary.

The IOTC also maintains a record of active vessels. This includes all vessels that the flag state has determined to have been active the previous year.<sup>26</sup> This record contains additional information (to the IOTC record of authorized vessels) from the port and licensing states on vessels that have used their port or requested a license. The record of active vessels can be useful in obtaining information on the activities of IUU vessels.<sup>27</sup>

### **IATTC**

The IATTC was established in 1950. As with the CCAMLR and WCPFC, the IATCC regional vessel register (established by resolution in 2000) records more than the minimal information. The additional information includes:

- photographs of the vessel;
- where and when the vessel was built;
- the length, beam and moulded depth;
- fish hold capacity in cubic metres and carrying capacity in metric tonnes;
- name and address of operator (manager);
- power of main engine or engine.

<sup>21</sup> Convention on the Future Multilateral Co-operation in the North East Atlantic Fisheries 1980 entered into force 1982, as amended in 2004 and 2006. The parties have agreed to use the "new" convention on a provisional basis pending ratification

<sup>22</sup> NEAFC, Scheme of Control and Enforcement, May 2007. Regulatory Area means the waters of the Convention Area which lie beyond the waters under the fisheries jurisdiction of Contracting Parties. Article 1(b).

<sup>23</sup> Ibid, Article 5(1).

<sup>24</sup> Ibid, Article 5(2).

<sup>25</sup> Adopted at the 11th session of the IOTC, Resolution 07/02.

<sup>26</sup> Per e-mail exchange with the Executive Secretary of the IOTC, 18 February 2008.

<sup>27</sup> Ibid.

## FFA

The FFA was established in 1979 with the aim of helping states manage the fisheries resources within their EEZ. Therefore, the FFA vessel register operates differently to the records of authorized fishing vessels of the RFBs reviewed above. In this instance, the obligation is on the foreign fishing vessel to register on the FFA vessel register in order to apply for a national fishing licence from an FFA member state. Thus, the register is self-regulated. For example, any application that is incomplete, contains inaccurate information or is misleading is rejected. Registration is required on an annual basis upon payment of a substantial fee.

The FFA has reported<sup>28</sup> that information stored on the FFA vessel register is not always accurate. Details may have changed and not been updated, or incorrect information has been deliberately submitted. An example of the latter is the submission of photos that have been modified.

## IMPACT OF AUTHORIZED VESSEL LISTS

Generally, the authorized vessel records are regarded as an important tool in managing regional fisheries. One of the more important aims in establishing an authorized vessel record is greater transparency of vessels operating in the area. For example, IUU operators, aware that they are not on the applicable record, have their identity (and hence non-compliance) disclosed upon sighting.<sup>29</sup>

Enhanced visibility is crucial in fisheries management. It is akin to removing the clutter, and can be described as a pillar upon which effective management is built. Vessels cannot operate without being authorized and notified through the records. Many RFBs then require the vessels to report their position and catches via a VMS. This is then linked to a CDS and port and market state controls.

One further example of the impact of authorized vessel records can be seen with enforcement of the record by the SEAFO. Two non-member states to SEAFO, Japan and Republic of Korea, fish within the SEAFO area and their flagged fishing vessels are not on the authorized SEAFO record.<sup>30</sup> The SEAFO Commission has made the decision that the vessels can only be entered on the record if the non-member states commit to fully complying with the conservation and management measures.<sup>31</sup>

Where RFBs have a catch documentation scheme (CDS), there is evidence that the use of an authorized vessel record in conjunction with the CDS is affecting the ability of non-member states to trade. Member and cooperating non-member states are typically not permitted to trade with or accept fish stock from vessels that are not on the authorized vessel record. Hence, vessels not on the record (i.e. flagged to non-member states or flagged to a member state but not authorized to fish) lose access to valuable markets.

This impact is particularly felt with some of the tuna RFBs. For example, the CCSBT is species-specific.<sup>32</sup> Hence, wherever the fish has been caught in the world's oceans, if the vessel is not on the authorized vessel record, the master will (in theory) find difficulty selling or unloading in legal market. In practice, implementation of the system is not perfect. However, the use of authorized vessel records reduces the options for IUU vessels.

The excuse sometimes used by IUU operators when dealing with RFBs that are area-specific (such as the CCAMLR and NAFO) that fish have been caught outside the area of competence of the RFB

<sup>28</sup> Report of the 9th MCS Working Group, September 2006.

<sup>29</sup> Discussion with Secretariat of the SEAFO, Namibia, 14 February 2007.

<sup>30</sup> Report of the 4th Annual Meeting of the SEAFO Commission, 2007, paragraph 5.10.

<sup>31</sup> Ibid.

<sup>32</sup> Convention for the Conservation of Southern Bluefin Tuna, Article 1.

can undermine the efforts of the RFB and circumvent the aims of the record.<sup>33</sup> Southern bluefin tuna that has not been caught by an authorized vessel cannot be traded to member or cooperating non-member states (no matter where it has been caught). With the trade of bluefin tuna primarily to Japan,<sup>34</sup> the flagged vessels of non-members have been shut out of the legal market. There is evidence that this is directly influencing non-member states to take steps to comply with the Convention, its resolutions and become a member or cooperating non-member.<sup>35</sup>

In summary, the RFBs contacted noted that the records of authorized vessels were an invaluable tool in managing the fisheries within their area of competence. The obligation on members to update upon changes being made to any of the details of their authorized vessels is essential to the viability of the records.

### **INTEGRITY OF DATA AND INCOMPLETE DATA**

In some instances, data on the RFB authorized vessel records are incomplete. The FFA MCS Working Group noted that: “The accuracy of information stored on the FFA Vessel Register is only as good as the systems that are built to ensure the validity of the data and the frequency of their use.”

There were a number of instances of incomplete data. For example, although a vessel record may make provision for the inclusion of the international radio call signal or owner details, it should not be taken for granted that the information will actually be submitted.<sup>36</sup>

At the 2007 Session of the IOTC, the Commission adopted Resolution 07/02, which was specifically aimed at improving “the informational available to the Commission on the IOTC record of vessels authorized to fish in the IOTC area.”<sup>37</sup> The Secretariat of the WCPFC has noted incomplete data by contracting parties.<sup>38</sup>

The 2006/07 Compliance Committee for the ICCAT noted in particular that some contracting parties had not submitted information as required under the requirement to keep a record of vessels of more than 24 m in length.<sup>39</sup>

The 2007 report of the SEAFO Scientific Committee noted incomplete data submitted by members. However, it is unclear whether this relates to catch data or data for the authorized vessel record.<sup>40</sup>

Australia has raised issues with respect to the accuracy of data that it has provided to the IOTC. At the Fourth Session of the Compliance Committee, Australia noted that, owing to an overlap between the IOTC and WCPFC off the southern coast of Australia, not all vessels authorized to fish by Australia within the IOTC area appear on the IOTC list.<sup>41</sup>

<sup>33</sup> There is the duty to cooperate and act in good faith under the Convention on the Law of the Sea (Articles 116–119 and 300 and the UN Fish Stocks Agreement, Article 18).

<sup>34</sup> About 99 percent of the trade goes to Japan.

<sup>35</sup> This observation stems from a discussion with Mr Bob Kenney of the CCSBT Secretariat, Canberra, Australia on 13 February 2008.

<sup>36</sup> The author found incomplete data on some records, e.g. ICCAT (missing call sign); IOTC (lists incomplete in some of the detail); and CCSBT (some omissions relating to information on prior name and flag and whether previously deleted from another register).

<sup>37</sup> Report of the 11th Session of the IOTC, Mauritius 13–18 May 2007, paragraph 37.

<sup>38</sup> Technical and Compliance Committee, 3rd Regular Session, 2007, Item 4, paragraph 4.2. For example, only 7 of the 19 members had submitted legible colour photographs of authorized vessels.

<sup>39</sup> Report of the Meeting of the Conservation and Management Measures Compliance Committee, ICCAT 2006–07 Report, Annex 10, paragraph 6.2.

<sup>40</sup> Report of the SEAFO Scientific Committee 2007.

<sup>41</sup> The Report of the Fourth Session of the Compliance Committee given at the 11th Session of the IOTC Commission, May 2007, Appendix VII.



On this point, a global authorized vessel record would not have to address issues of overlapping jurisdiction. It is envisaged that all fishing vessels (and support vessels if required) that are authorized to fish would be recorded on the global register. This in itself is problematic for it relies on flag states having accurate records detailing:

- which vessels they grant a flag to;
- which vessels they have authorized to fish on the high seas.

It also relies on the flag state either being a member of an RFB (so that it submits data on its authorized fishing vessels) or, if not an RFB member, the state feeling inclined to support a Global Record and submitting data.

In this context, there will be two types of flag states:

- those incapable of supplying the information required because fishing is managed through local communities or villages (e.g. Indonesia);
- those unwilling to support a Global Record for whatever reason.

Both types are problematic.

### **LOST IN DETAIL**

It is worth noting that considerable detail will be loaded onto a global database of authorized fishing vessels. It is also noted that one of the recommendations of the FAO Feasibility Report is that a phased introduction of vessels will be adopted.<sup>42</sup> While worldwide numbers of fishing vessels run into millions, thought does need to be given to the mechanics of managing a merger of RFB records.

An indication of regional numbers is:

- The FFA register has more than 1 100 vessels.
- The IATTC regional vessel register has 4 520 vessels.
- The CCSBT has 1 687 vessels from 7 flags authorized.
- The ICCAT record of vessels of more than 24 m has 4 946 vessels.
- The WCPFC record has 8 643 vessels from 23 flags.
- The IOTC record has 3 221 vessels from 26 flags.

The challenge with a global register is to keep the lists accurate and current. Yearly currency checks would be needed in order to remove vessels no longer authorized. If this requirement operated in conjunction with the requirement to advise of changes as they occur throughout the year, then the data would be more reliable. Many RFBs already require parties to provide the RFB with the list of vessels authorized for the new fishing season, and the record is updated in this manner. All of the RFBs require notification of changes “promptly” or “without delay”.

### **SHARING OF DATA**

Several RFBs also maintain IUU vessel lists, the so-called “blacklists”. These include the CCAMLR, NAFO, NEAFC, IATCC, IOTC, ICCAT, WCPFC and the FFA. There is an indication that these lists are shared among RFBs as an information source or source of confirmation. The RFBs still undertake their own investigations into IUU vessels operating in their area. This sharing is part of the general goodwill and cooperation among RFBs, with many sending representatives to attending meetings of other commissions. The sharing of regional authorized vessel records is less apparent. This is presumably because the authorized vessels lists are often area-specific or species-specific.

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<sup>42</sup> Above fn. 1.

## COMMONALITIES BETWEEN RFB SYSTEMS

The type of information held on authorized fishing vessel lists is broadly similar. Some RFBs (the CCAMLR, WCPFC and IATTC) collect more comprehensive information than others. One common feature of the CCAMLR, WCPFC and IATTC is the requirement to submit photographs of the vessel. This addition to a global list would be useful in identifying the vessel during inspections, particularly IUU vessels that change names, flag and colour.

Another common feature is the publication of the records online. This facilitates searches by members of the RFB and the public where access is provided. This will also provide access to information by NGOs operating in regional areas (e.g. the Coalition of Legal Toothfish Operators (COLTO) and publicizing IUU vessel activity.

Other commonalities include the requirement to submit information electronically and the use of a VMS and CDS in conjunction with the regional record or list to enhance MSC efforts.

The FFA is the only regional body that requires registration with it before the national licence is sought. The other RFBs operate to coordinate a record of all vessels licensed to fish by the member states.

## CONCLUSIONS

While the use of regional records of authorized vessels has been beneficial to RFBs, they are only as good as the information contained therein. At a minimum, the detail to be stored on the record should be that listed in Table 2. The key is finding the right balance between sufficient information for the record to be useful to fisheries managers and not so much detail that it becomes burdensome on the licensing flag state.

Furthermore, as noted in the recommendations of the FAO Feasibility Study,<sup>43</sup> the information recorded must identify the owner of the fishing vessel (or refrigeration or supply vessel as these vessels are added to the record). The CCAMLR record of authorized vessels lists the IMO number. This is a unique identification number that stays with the vessel regardless of name change. It is recommended that this be included in a Global Record. The ten RFBs examined all require a registration number, but it is not apparent on the face of the records exactly what this number is. If it is simply the licence number from the flag state, then it is of little value for the number only authorizes activity for a defined period and does not attach to the individual vessel. An RFB registration number may be more unique. However, for a Global Record, the IMO number (if applicable) is preferable.

Mechanisms to ensure that a global authorized vessel record is accurate and current will need to be determined carefully. As mentioned, protocols for the regular updating or renewing of records are essential. Equally important is establishing an accurate base of information from the outset. Phased listing would facilitate the establishing of management protocols. A review period for the establishment of a Global Record should be set so that amendments to the process of listing and updating can be made as required.

There is the risk that states will not submit details of authorized fishing vessels to a Global Record, so making the data incomplete. It would be unrealistic to expect to be able to gather information on every licensed fishing vessel. However, it is worth investigating what level of support would be required in order to make the record viable.

Vessel records are also completely reliant on the submission of information by the flag states that are members of the RFB. While there have been some instances, when examining the RFBs, of

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<sup>43</sup> Above fn. 1.

contracting party failure to comply (most usually a partial failure), the obligation as a contracting party to comply would involve some pressure being brought to bear on members. Non-members have no compulsion to share information about their licensed fishing vessels. Similarly, flag-of-convenience states would generally not be expected to cooperate with the supply of information, if indeed they licensed flagged fishing vessels.

The issue of transferring regional information to a Global Record is potentially problematic. Gaining the consent of RFB members for information held regionally to be submitted to the global register would be required. In addition, there are some states that belong to none of the RFBs examined (e.g. Indonesia, although there are indications that this state is seeking to become a cooperating non-member state to the CCSBT) and that may not feel compelled to cooperate. Other states exercise no central control on their flag vessel registry. These states could not comply with vessel record requirements even if they were inclined to do so.

In conclusion, a Global Record needs to be established with accurate data and a mechanism for immediate and ongoing updating. It needs to be a “living” thing, one that is accessible and accurate. Anything less, and it will not achieve its aims.



## APPENDIX H

# Legal consultation for the Food and Agriculture Organization of the United Nations – Development of a comprehensive Global Record of fishing vessels, refrigerated carriers and support vessels<sup>1</sup>

By G.L. Lugten, Ph.D. Legal Consultant, University of Tasmania Law Faculty  
(Gail.Lugten@utas.edu.au).

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<sup>1</sup> This paper was prepared in order to provide a basis for and support the discussions in the course of the expert consultation and does not reflect the views of FAO.

## 1. INTRODUCTION

### 1.1 Background

Illegal, Unreported and Unregulated (IUU) fishing broadly refers to fishing without authorization in the waters of a coastal State, fishing without authorization in an area and for a species governed by a (multilateral) regional fishery body, or fishing where no regulatory regime applies.<sup>2</sup> IUU fishing is a global problem and it has been described by the former Secretary – General of the United Nations as the single major obstacle to achieving global sustainable fisheries in both areas under national jurisdiction and on the high seas.<sup>3</sup> Put simply, how can domestic governments legislate, or regional fishery bodies and international organizations regulate, to sustainably manage global fish stocks, if their management plans are constantly being undermined by an increasing number of operators who fish outside the legal regime?

In recent years the Organization for Economic Cooperation and Development (OECD) has sponsored a Ministerially led High Seas Task Force to investigate the extent of, cost of, and solutions for, IUU fishing both on the high seas, and within a State's 200 mile exclusive economic zone.

The final report “Closing the Net: Stopping Illegal Fishing on the High Seas” was released in March 2006.<sup>4</sup> The report stresses the ongoing severity of worldwide IUU fishing which has an estimated value of between US\$4.2 Billion and US\$9.5 Billion. The report emphasizes that IUU fishing is a serious global problem that operates beyond the enforcement capabilities of any one country, or even any single regional or international agency. It is clear from the report that there is an urgent need for States to take a global perspective in dealing with the problem of IUU fishing. It is that need which is pivotal to the FAO efforts to establish a global record of fishing vessels, refrigerated transport vessels, supply vessels and beneficial ownership (hereinafter referred to as the FAO Global Record).

This paper is written as a legal overview of matters that will be considered at the Expert Consultation on Development of a Comprehensive Global Record of Fishing Vessels, Refrigerated Carriers and Support Vessels. It considers the notion of flag State jurisdiction in customary, convention and case law; the duty of entities to cooperate on subjects such as the sharing of data; the process of vessel registration; the role of States and regional fishery management organizations (RFMOs) as contributors of data to a centralized record of vessels; the mandate of the UNFAO to be involved in the global record project; and issues of FAO liability for the release of incomplete or incorrect data.<sup>5</sup>

From the outset, it is important to distinguish between the meaning of the words “Record” and “Registry”.

The term “Record of fishing vessels” as defined in Article I(d) of the Agreement to Promote Compliance with International Conservation and Management measures by Fishing Vessels on the High Seas is as follows:

<sup>2</sup> This is a generalist explanation. The terms are defined in Article 3 of the United Nations Food and Agriculture Organization (FAO) *International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU)* and repeated in footnote 5 below. The IPOA –IUU was adopted by consensus at the Twenty-Fourth Session of COFI on 2 March 2001 and endorsed by the Hundred and Twentieth Session of the FAO Council on 23 June 2001. Available On line through Legal Materials at FAO homepage: <http://www.fao.org>

<sup>3</sup> Report of the Secretary General of the United Nations, “*Sustainable Fisheries, including through the 1995 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, and related instruments*” (UN publications: A/59/298).

<sup>4</sup> High Seas Task Force, “*Closing the Net: Stopping Illegal Fishing on the High Seas*” Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University. (2006)

<sup>5</sup> These subjects are in response to the Draft Terms of Reference for the Author of Legal Paper under Agenda Item 7.

(d) “record of fishing vessels” means a record of fishing vessels in which are recorded pertinent details of the fishing vessel. It may constitute a separate record for fishing vessels or form part of a general record of vessels.

This should be distinguished from a “Registry of fishing vessels”. At the national level, a registry of fishing vessels involves the issuance of a certificate of registry, the right to fly the flag of a country, and is a record of ownership and associated mortgages and liens. A Registry of fishing vessels can also exist at the regional level but with different parameters. There, the registry might be used to afford a vessel good standing or as a precondition for access to the RFMO area (obtaining an authorization to fish). Clearly, at the regional level, a registry of fishing vessels is more akin to a record of fishing vessels.

In lay terms, a record is akin to a database. A registry accords legal personality to a vessel.

IUU fishing refers to Illegal, Unreported and Unregulated Fishing. The terms were defined in the International Plan of Action on Illegal, Unreported and Unregulated Fishing.<sup>6</sup>

A final preliminary point should be borne in mind. The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas<sup>7</sup> (the Compliance Agreement) was negotiated under Article XIV of the FAO Constitution and adopted by FAO Conference on 24 November 1993. The FAO Compliance Agreement was primarily negotiated as an instrument to address the increasing global problem of reflagged fishing vessels. (That is, unregulated fishing within the IUU acronym.)

The first appearance of the term “IUU” was in relation to Patagonian Toothfish fishing in the Southern Ocean, and it occurred in the 1997 annual meeting of the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR).<sup>8</sup>

The historical perspective is important, and it will be returned to later in the paper. It must be borne in mind that the Compliance Agreement predates recognition of the IUU problem by at least four years.

<sup>6</sup> *Supra*, footnote 2.

3.1 Illegal fishing refers to activities:

3.1.1. conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;

3.1.2 conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law, or

3.1.3 in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

3.2 Unreported fishing refers to fishing activities:

3.2.1 which have not been reported, or have been misreported, in contravention of national laws and regulations; or

3.2.2 undertaken in the area of competence of a relevant regional fisheries management organization which have not been reported or have been misreported, in contravention of the reporting procedures of that organization.

3.3 Unregulated fishing refers to fishing activities:

3.3.1 in the area of application of a relevant regional fisheries management organization that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

3.3.2 in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.

<sup>7</sup> FAO 1995, *Agreement to Promote Compliance with International Conservation and Management Measures By Fishing Vessels on the High Seas*, FAO Rome, 41. ISBN 92-5-103834-1.

<sup>8</sup> CCAMLR-XVI (1997) paragraphs 8.7-8.13.

## 2. INTERNATIONAL LAW: FLAG STATE RESPONSIBILITY AND THE DUTY TO EXCHANGE DATA

Article 38 of the Statute of the International Court of Justice<sup>9</sup> lists the sources of public international law. For the purposes of this paper on the proposed FAO Global Record particular attention will be given to the sources of international law in Article 38, paragraph (a) Conventions, (b) Custom and (d) Case Law.

### 2.1 Customary Law

#### 2.1.1 *The Freedom of the Seas*

Since the publication of *Mare Liberum* in 1609, the Grotian thesis that the high seas are free to all and incapable of acquisition by occupation, has been a dominant principle in the international law of the sea. International tribunals have always upheld the freedom of the high seas despite pressures for reform in areas such as conservation of fish stocks.<sup>10</sup>

#### 2.1.2 *The Lotus Case*<sup>11</sup>

In 1927, the Permanent Court of International Justice (PCIJ) in the *Lotus Case* confirmed that although the high seas are free to all, “vessels on the high seas are exclusively subject to the authority of the State whose flag they fly”.<sup>12</sup> The strict legal meaning of this principle is that only the state of nationality of a vessel may exercise criminal and civil jurisdiction in respect of a vessel on the high seas.

The contemporary problems of IUU fishing stem largely from the failure of flag States to exercise their authority over vessels which fly their flag.

### 2.2 Convention or Treaty Law

The customary law on the freedom of the high seas was first codified by Article 2 in the 1958 Convention on the High Seas.<sup>13</sup> These principles were later repeated and extended at the third United Nations Conference on the Law of the Sea (UNCLOS III).<sup>14</sup> The final product of UNCLOS III was a framework charter for all legal matters concerning oceans governance: the 1982 United Nations Law of the Sea Convention.<sup>15</sup>

#### 2.2.1 *1982 United Nations Law of the Sea Convention*

Part VII of the United Nations Law of the Sea Convention (hereafter referred to as the 1982 Convention) deals with the rights and obligations of ships and States on the high seas. The freedom of the high seas is recognized by Article 87. Flag State jurisdiction (from the *Lotus* case) is recognized by Articles 90 – 92. Of particular importance to this paper, Article 91(1) provides that:

<sup>9</sup> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.

<sup>10</sup> Refer for example the Bering Sea Fisheries Arbitrations (1893) Moore Digest I, para. 172.

<sup>11</sup> Judgment available on line at [http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus/](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/)

<sup>12</sup> *France v Turkey* (1927) PCIJ (Series A) No. 10 (the *SS Lotus* Case).

<sup>13</sup> 450 U.N.T.S. 82. The general principle of the customary law is elaborated by specific reference to the freedoms of the high seas for both coastal and non-coastal states. These freedoms comprise, *inter alia*, (1) freedom of navigation; (2) freedom of fishing; (3) freedom to lay submarine cables and pipelines; and (4) freedom to fly over the high seas.

<sup>14</sup> The above four freedoms were extended by further provisions providing for freedom of scientific research and freedom to construct artificial islands and installations (Article 87).

<sup>15</sup> UN Doc.A/CONF.62/122; 21 *International Legal Materials* 1261 (1982)



*Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.*<sup>16</sup>

An analysis of this provision, including the contentious words “genuine link”, was provided by the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Saiga* case (discussed below at 2.3.1).

Flag states are bound to exercise their jurisdiction in administrative, technical and social matters over ships which fly their flag. Flag States shall:

- (a) *maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and*
- (b) *assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.*<sup>17</sup>

There is no systematic obligation for States to exchange vessel data mentioned in the 1982 Convention. Article 119(2) dealing with the conservation of the living resources of the high seas, comes closest with an “in principle” exchange of data, rather than a systematic obligation. This provision provides,

*2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.*<sup>18</sup>

While signatures and ratifications of the 1982 Convention are high,<sup>19</sup> it is clear that not all States Parties are willing to, or able to, comply with all the provisions within the Convention. Accordingly, not all States can control their vessels,<sup>20</sup> not all States do maintain a register of ships,<sup>21</sup> and not all States do exchange data that is relevant to the conservation of fish stocks.<sup>22</sup>

### ***2.2.2 Agreement for the Implementation of the Provision 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 1995 (hereafter the UN Fish Stocks Agreement)***<sup>23</sup>

As the title of this international agreement makes clear, the UN Fish Stocks Agreement is limited to straddling and highly migratory fish stocks. However, its language is more forceful than the language in the 1982 Convention, and Flag State duties are set out in four articles. Article 18 provides that States are to establish a national record of fishing vessels which are authorized to fish on the high seas, and that this information is to be provided, on request, by other directly

<sup>16</sup> Emphasis by this author.

<sup>17</sup> 1982 Convention, Article 94 (2) (a) and (b).

<sup>18</sup> Emphasis by this author.

<sup>19</sup> 157 Signatures and 155 Ratifications at 1 February 2008.

<sup>20</sup> The nature and extent of illegal, unreported and unregulated fishing (IUU) is evidence of this fact. The web-site [www.flagsofconvenience.com](http://www.flagsofconvenience.com) provides simple instructions and bargain prices for flag registration in a jurisdiction that will ask no questions and impose no laws.

<sup>21</sup> FAO Department of Fisheries, Annex I “Matters concerning the register of ships and fishing vessels” in *Comprehensive record of fishing vessels, refrigerated transport vessels, supply vessels and beneficial ownership* (20 October 2007). The report provides a list of flag States which are known to require a fishing vessel to be registered or licensed. The list identifies 131 of the 192 UN member States – both coastal and land-locked.

<sup>22</sup> Note for example the lack of international support given to the High Seas Fishing Vessel Authorization Record (HSVAR). (Discussed further in 2.2.4)

<sup>23</sup> United Nations General Assembly, A/CONF. 164/37, 8<sup>th</sup> September, 1995. Since 1 February 2008, the Agreement has 68 States Parties

interested States, taking into account any national laws of the flag state regarding the release of such information. Of importance to the FAO Global Record, Article 18 does not mention that the national records on vessels are to be made available to international organizations (such as FAO) – only to other interested States.<sup>24</sup>

Article 19 examines the obligation of States to ensure that their vessels comply with subregional and regional conservation and management measures, and that these measures will be enforced by the flag State. This enforcement provision is extended by Article 20 which provides for international cooperation in enforcement of laws at the subregional or regional fisheries management organization level. Further obligations on the flag State are described under Article 22 which deals with enforcement procedures for boarding and inspection of vessels.

Annex 1 of the UN Fish Stocks Agreement elaborates the collection and sharing of data by describing the type of data which includes: vessel identification, flag and port of registry, vessel type, vessel specifications<sup>25</sup>, and fishing gear descriptions.

Furthermore, the potential FAO Global Record can be supported by a literal interpretation of the words in Article 2 of Annex 1:

*(c) States should compile fishery-related and other supporting scientific data and provide them in an agreed format and in a timely manner to the relevant subregional or regional fisheries management organization or arrangement where one exists. Otherwise, States should cooperate to exchange data either directly or through such other cooperative mechanisms as may be agreed among them.*

There is no doubt that the UNFSA prefers a regional, (as opposed to global,) approach to the resolution of fishery management problems. However, if the FAO membership could agree that the FAO Global Record constitutes a “cooperative mechanism for the compilation of fishery related data”, the Record would comply with Article 2 of Annex 1.

The abovementioned provisions from the 1982 Convention and the UN Fish Stocks Agreement, may not support a clear direction that vessel data is to be given to FAO, but they do clearly support a duty of cooperation at the State, regional and global levels. This duty to cooperate is elaborated below at 4.1.2.1.

### **2.2.3 FAO International Plan of Action – Illegal, Unreported and Unregulated Fishing<sup>26</sup>**

Unlike treaties which are hard law instruments, soft law instruments such as the FAO Code of Conduct for Responsible Fisheries<sup>27</sup>, (the Code) and the four International Plans of Action which were constructed under the framework of the Code<sup>28</sup>, are not intended to give rise to any legally binding obligations. They are classed as soft laws, and they make no provisions for state signature, entry into force, or any other final clauses that are found in hard law international agreements or treaties. The purpose of soft laws is to draw attention to a problem, suggest appropriate behaviour to deal with this problem, and provide a transition period for States to adopt behavioural change between the interstitial period of non-mandatory obligations of soft law, and the development

<sup>24</sup> Article 18(3)(c).

<sup>25</sup> For example, material of construction, date built, registered length, gross registered tonnage, power of main engines, hold capacity and catch storage methods.

<sup>26</sup> Article 3, United Nations Food and Agriculture Organization (FAO) International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA-IUU). The IPOA –IUU was adopted by consensus at the Twenty-Fourth Session of COFI on 2<sup>nd</sup> March 2001 and endorsed by the Hundred and Twentieth Session of the FAO Council on 23<sup>rd</sup> June 2001. Available On line through Legal Materials at FAO homepage: <http://www.fao.org>

<sup>27</sup> *Code of Conduct for Responsible Fisheries*, FAO, Rome. ISBN 92-5-103834-1.

<sup>28</sup> The International Plan of Action for the Conservation and Management of Sharks (IPOA-Sharks); The International Plan of Action for the Management of Fishing Capacity (IPOA-Capacity); The International Plan of Action on Illegal, Unreported and Unregulated Fishing (IPOA-IUU); and the International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA – Seabirds).

of hard law instruments. They can also operate without the secretariats or bureaucracies that frequently accompany legally-binding agreements and this makes soft law instruments a more feasible and appealing alternative to many developing States.

The FAO International Plan of Action – Illegal, Unreported and Unregulated Fishing (IPOA –IUU) gives detailed provisions on fishing vessel registration (Articles 34- 41) and a Record of Fishing Vessels (Articles 42 and 43) to be maintained by each flag state. The provisions relating to the Record of Fishing Vessels are directly relevant to the content of the FAO Global Record, and therefore worthy of elaboration:

42. *Each flag State should maintain a record of fishing vessels entitled to fly its flag. Each flag State's record of fishing vessels should include, for vessels authorized to fish on the high seas, all the information set out in paragraphs 1 and 2 of Article VI of the 1993 Compliance Agreement, and may also include inter alia:*
- (1) the previous names, if any and if known;*
  - (2) name, address and nationality of the natural or legal person in whose name the vessel is registered;*
  - (3) name, street address, mailing address and nationality of the natural or legal persons responsible for managing the operations of the vessel;*
  - (4) name, street address, mailing address and nationality of natural or legal persons with beneficial ownership of the vessel;*
  - (5) name and ownership history of the vessel, and, where this is known, the history of non-compliance by that vessel, in accordance with national laws, with conservation and management measures or provisions adopted at a national, regional or global level; and*
  - (6) vessel dimensions, and where appropriate, a photograph, taken at the time of the registration or at the conclusion of any more recent structural alterations, showing a side profile view of the vessel.*
43. *Flag states may also require the inclusion of the information in paragraph 42 in their record of fishing vessels that are not authorized to fish on the high seas.*

As with most provisions in the Code and all the FAO – IPOAs, the flag State requirements for a record of fishing vessels are comprehensive and far-reaching. However, the fact remains, that this is a soft law instrument, and despite initial rhetorical, international, support for the instrument, real levels of State compliance with the IPOA – IUU, (as with all the IPOAs) are low.

#### ***2.2.4 The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (hereafter referred to as the Compliance Agreement) and the High Seas Fishing Vessel Authorization Record (HSVAR)***

In accordance with Article XI.1, the Compliance Agreement entered into force on 24 April 2003 when the Republic of Korea became the twenty-fifth State to accept the Agreement. At the time of writing (February 2008) there are 35 instruments of acceptance.<sup>29</sup> Article III of the Agreement deals with flag State responsibility. Article IV requires each party to maintain a record of fishing vessels and ensure that all fishing vessels are entered on that record. Article V deals with international cooperation, and parties are required to exchange information, including evidentiary material. Of specific importance to the FAO Global Record, Article V(3) of the Compliance Agreement provides that parties are to enter into cooperative agreements of mutual assistance on a global, regional, subregional or bilateral basis so as to promote the achievement of the objectives of the Compliance Agreement. Article VI deals with the exchange of information whereby each party shall make available to FAO specific mandatory and discretionary data on each fishing vessel

<sup>29</sup> Albania, Angola, Argentina, Australia, Barbados, Belize, Benin, Canada, Cape Verde, Chile, Cook Islands, Cyprus, Egypt, European Community, Georgia, Ghana, Japan, Madagascar, Mauritius, Mexico, Morocco, Myanmar, Namibia, New Zealand, Norway, Peru, Republic of Korea, St. Kitts and Nevis, St. Lucia, Seychelles, Sweden, Syrian Arab Republic, Tanzania, United States of America and Uruguay.

domestically recorded under Article IV of the Agreement. This mandatory and discretionary data which is made available to FAO comprises the High Seas Fishing Vessel Authorization Record (HSVAR). Further provisions in Article VI provide that FAO will promptly circulate such information to all parties, and on request, individually to any party.<sup>30</sup>

The HSVAR is worthy of further discussion as it constitutes an already existing global record on fishing vessels which is housed at FAO. Annex II on the High Seas Fishing Vessel Authorization Record (HSVAR)<sup>31</sup> examines the content of the Record, plus more importantly, the quality of data that is entered on the Record. It is made clear that some States do not provide any data, and those that do, will often provide incomplete data. From a legal perspective, the lack of State support given to HSVAR; the lack of clear, accurate entries regarding the legal, operating and beneficial owners of a vessel; and the lack of clear data regarding a vessel's authorization to fish; are all major problems for accountability. Without this fundamental information, the HSVAR may have database benefits, but (from a legal perspective), it is useless as a tool to ensure compliance.

There is no doubt that in 1993 the FAO Compliance Agreement was drafted as a prompt response to a subject (reflagged fishing vessels) that threatened to become a serious global issue. In 1993 States could not foresee the damaging extent of IUU fishing both within and beyond zones of national jurisdiction. Nor could States accurately appreciate the full threat that IUU fishing would pose to sustainability of marine and inland capture fish stocks. The result of this is that comparatively few States have had the inclination or political will to accept the Compliance Agreement or to provide quality vessel data to the HSVAR housed at FAO. In the words of Cochrane and Doulman, "it has been noted in international fora that many countries are experiencing 'instrument implementation fatigue',<sup>32</sup> and the lack of State support given to both the Compliance Agreement and the HSVAR would support this view.

States are clearly asking, "what is in it for us" and their cost / benefit analysis is not weighted in favour of supporting the current legal regime. The potential FAO Global Record would be an opportune time to remind the international community of States, that the legal notion of Flag State responsibility is not open to a cost / benefit analysis. It is a legal obligation imposed historically and contemporarily on all States, not just those engaged in the reflagging of fishing vessels. Furthermore, the legal obligation must be met if the international community is to realize its goals of addressing IUU fishing in order to ensure sustainable marine and inland capture fish stocks.

The failings of the Compliance Agreement and the HSVAR are an important consideration for any new FAO Global Record. It is important that any new FAO record distinguishes its purpose, data content and data quality from HSVAR.

### 2.3 Case Law

Two important cases that are significant for the subject of this paper have been decided by the International Tribunal for the Law of the Sea. The first case aids in the legal interpretation of the words "genuine link" in Article 91(1) of the 1982 Law of the Sea Convention. The second case looks to an example where a State unsuccessfully tried to determine the identity of the legal and beneficial owners of a vessel.

<sup>30</sup> Article VI(10)

<sup>31</sup> FAO Department of Fisheries, Annex II "High Seas Fishing Vessel Authorization Record (HSVAR) in *Comprehensive record of fishing vessels, refrigerated transport vessels, supply vessels and beneficial ownership* (20 October 2007).

<sup>32</sup> Cochrane K. and Doulman D., "The rising tide of fisheries instruments and the struggle to keep afloat" in 2005 *Fisheries: a future* (Theme Issue of Philosophical Transactions of the Royal Society B: Biological Sciences), 80.

**2.3.1 *M/V Saiga* (no. 2) (*Saint Vincent and the Grenadines v Guinea*) (1999) 37 ILM 1202.<sup>33</sup>**

The *Saiga* was an oil tanker flying the flag of Saint Vincent and the Grenadines when it was fired upon by a Guinean patrol boat and then boarded by Guinean officers. The master and crew of the *Saiga* were all Ukrainian nationals. Three employees of Senegalese nationality were also on board. The vessel was owned by a Cypriot company and under charter to a Swiss company. After boarding the *Saiga* without resistance, the Guinean officers fired indiscriminately on the deck and used gunfire to stop the ship's engine. Two persons on board the *Saiga* were seriously injured and the vessel was extensively damaged.

(Several points of law were raised before the Tribunal. Paragraphs 75-88 are of some relevance to this paper as they deal with the 1982 Convention's Article 91(1) requirement that there must be a "genuine link" between the vessel and the Flag State.)

It was raised by Guinea that there was no genuine link between the *Saiga* and Saint Vincent and the Grenadines. Furthermore, that a State cannot fulfill its obligations as a flag State under the 1982 Convention with regard to a ship unless it exercises prescriptive and enforcement jurisdiction over the owner or, as the case may be, the operator of the ship. Guinea contended that, in the absence of such jurisdiction, there is no genuine link between the ship and Saint Vincent and the Grenadines and that, accordingly, Guinea is not obliged to recognize any claims by that State.

It was raised by Saint Vincent and the Grenadines that nothing in the 1982 Convention requires that a genuine link is a precondition for the granting of nationality. Furthermore, even if there is no genuine link, a State is not consequently deprived of the right to bring an international claim against another State in respect of illegal measures taken against their ship.

Saint Vincent and the Grenadines further challenged the allegation of no genuine link. It claimed that the owner of the *Saiga* was represented in Saint Vincent and the Grenadines by a company formed and established in their State and also that the *Saiga* was subject to the supervision of the Vincentian authorities for its compliance with a number of international conventions, including SOLAS<sup>34</sup> and MARPOL.<sup>35</sup>

The Tribunal noted that two questions required determination. First, whether the absence of a genuine link between a flag State and a ship entitles another State to refuse to recognize the nationality of the ship? The second question is whether or not there was a genuine link between the *Saiga* and Saint Vincent and the Grenadines?

On the first question, the Tribunal held that the purpose of Articles 91-94 in the Law of the Sea Convention is to secure more effective implementation of the duties of a flag State, and not to establish criteria by reference to which the validity of the registration of a ship in a flag State may be challenged by other States. Therefore Guinea had no legal basis to refuse to recognize the right of the *Saiga* to fly the flag of Saint Vincent and the Grenadines.

On the second question, the Tribunal held that the evidence adduced by Guinea was not sufficient to justify its contention that there was no genuine link between the *Saiga* and Saint Vincent and the Grenadines.

<sup>33</sup> Available on line at the ITLOS home page: [www.itlos.org](http://www.itlos.org)

<sup>34</sup> The International Convention for the Safety of Life at Sea (SOLAS) 1960 and 1974.

<sup>35</sup> The International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978.

### 2.3.2 *The Volga (Russian Federation v Australia), Case No. 11 of 23 December 2002*<sup>36</sup>

The *Volga* was arrested by Australian authorities on 7 February 2002 for illegally fishing Patagonian Toothfish in the waters off Heard and McDonald Islands. A total of 131 tonnes of toothfish were found on board at the time of the arrest. The *Volga* was escorted to port in Fremantle, and arrived on 19 February 2002. The vessel itself was detained, along with four crewmembers, one of whom died shortly afterwards.<sup>37</sup> The Toothfish were sold for AU\$1.9 million, and this amount was held in trust.

Two provisions within the 1982 Convention are relevant to the case of the *Volga*. First, Article 73 which deals with a coastal State's ability to enforce laws in its fishing zone, including Article 73(2) which provides for the prompt release of arrested vessels upon the posting of a "reasonable bond or other security". The second important provision is Article 292, which elaborates the prompt release of vessels and crew.

In the case of the *Volga*, Australia set a "reasonable bond" of approximately AU\$3.33million for the release of the vessel. However, furthermore, and of particular interest to this paper, Australia refused to release the vessel unless information was provided as to the:

- ultimate beneficial owners of the *Volga*;
- names and nationalities of directors of Olbers Co. Ltd (the legal owners) plus any parent company of Olbers;
- names, nationalities and location of the manager(s) of the *Volga* operations;
- insurers of the vessel; and
- financiers of the vessel (if any).

Over nine months later, on 2 December 2002 the Russian Federation filed an application against Australia in the International Tribunal for the Law of the Sea. Pursuant to Article 292 of the Law of the Sea Convention, the Russian Federation sought the immediate release of both the *Volga* and its crew.

The ITLOS decision of 23 December 2002 was that Australia had not complied with the provisions of the Law of the Sea Convention, which required prompt release upon the posting of a reasonable bond. Accordingly, Australia was required to promptly release the *Volga* in return for a bank guarantee of AU\$1.92m.

For the purposes of this paper, most attention in the ITLOS judgment must be given to the additional conditions that aimed to expose the beneficial owners behind the IUU industry. Here, the ITLOS judgment states:

"Besides requiring a bond, the Respondent [Australia] has made the release of the vessel conditional ... that information concerning particulars about the owner and ultimate beneficial owners of the ship be submitted to its authorities.

The Applicant [the Russian Federation] argues that such conditions find no basis in Article 73, paragraph 2, and in the Convention in general, because only conditions that relate to the provision of a bond or security in the pecuniary sense can be imposed. ....

[The Tribunal held that] the object and purpose of Article 73, paragraph 2, read in conjunction with Article 292 of the Convention, is to provide the flag State with a mechanism for obtaining the

<sup>36</sup> Available on line at <http://www.itlos.org>

<sup>37</sup> The ship's Master was a Russian national who died after consuming a bottle of cleaning fluid in the mistaken belief that it was alcohol. The three other crewmembers detained from the *Volga* were the Chief Mate, the Fishing Master and the Fishing Pilot, all of whom were Spanish nationals from the Galicia region of northern Spain. (Facts taken from the Australian Response to the *Volga* allegations, <http://www.itlos.org> 5-6.

prompt release of a vessel and crew arrested for alleged fisheries violations by posting a security of a financial nature whose reasonableness can be assessed in financial terms. The inclusion of additional non-financial conditions in such a security would defeat this object and purpose.”

### **Summary of Case Law:**

Both of these cases would seem to suggest that the 1982 Convention, (and other legal instruments on fisheries management), will be judicially interpreted from a strictly literal, narrow or conservative approach. If legal instruments are to be interpreted more broadly, or flexibly, or purposefully, in order to address important problems of fish stock sustainability, it will be necessary to pay careful attention to the wording that is used in any amended or new legal instruments.

## **3. DOMESTIC LAW**

### **3.1 Nature of Public and Private Law**

Most domestic legal systems can be broadly divided into Public and Private Law. Public Law deals with the relations between the government and the governed, the citizen and the state. The categories of Public Law include subjects such as criminal law, constitutional law, administrative law, taxation law, and planning / environmental law.

By contrast, Private Law deals with the relations between private persons (which include corporations). The categories of Private Law include subjects such as contract law, corporate law, family law, torts, and property law.

The classification of Public and Private law is important to the process of vessel registration.

At the public law level, the process of registering a vessel means that the vessel is vested with certain rights and obligations vis a vis the flag state. Foremost, the vessel acquires the jurisdiction of the State, including the responsibility of complying with any international instruments to which the State is a party (note the reference to SOLAS and MARPOL in the *Saiga* Case at 2.3.1). In return, the vessel has certain public rights: to fly the flag of the flag State, to diplomatic and naval protection, and to engage in activities such as fishing within the State maritime zones.

Private law protects the legal personality behind the vessel. Specifically, the ship owner's title to the vessel is protected, along with the title of persons who hold security interests in a vessel (mortgages, liens and other encumbrances). Note the failed attempt by Australia to identify the beneficiaries, managers, directors, insurers and financiers of the *Volga* in 2.3.2.

### **3.2 Vessel registration and flag State jurisdiction**

#### **3.2.1 Vessel registration systems**

It has been noted that Article 94(2)(a) of the 1982 Convention provides that every State shall maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size.

However, despite this legal obligation in an international treaty which enjoys widespread support, the reality is that a significant number of States do not do this. Furthermore, for those States which do operate a register of ships, there is no internationally agreed system with respect to the content, purposes or goals of vessel registries. The different systems, languages, contents, and purposes of the numerous vessel registers that exist in different States, do emphasize a need for an agreed system of unique vessel identifiers. It is submitted that the most appropriate method of unique vessel identification should be included in the international legal regime.

#### **3.2.2 Dual registration and demise charters**

Demise charter or Bareboat charters refer to arrangements for hiring a bare vessel, or a vessel without crew or provisions. The concept is of legal interest as without a master and crew, the

vessel owner effectively gives the legal property in the vessel to the charterer. Of importance to this paper, a vessel will often be given the flag of the State that the charterer resides in, whilst it simultaneously remains registered, and still has the flag of the original (chartering out) State. This is dual registration. The increasing trend towards Demise Charters would suggest that it is more administratively convenient for a Global Record to simultaneously recognize and record both flags and both registrations, rather than require the vessel to constantly “Register anew” upon each Charter.

### 3.3 Legal and Beneficial Owners

The legal owner of a vessel will have his / her / their name on a title as the registered owner of the vessel. The legal owner may also be the equitable or beneficial owner of the vessel, however there is an increasing trend in international law for these identities to be separate. That is, the legal owner holds the vessel in name only, and the beneficial owner who controls the real activities and profits of the vessel, hides behind the registered legal activity. The term “hidden beneficial owners” refers to the fact that many vessels, particularly those engaging in illegal fishing activity, are traditionally owned by “front companies” which are themselves registered in international tax havens. These “front companies” constitute the public face of a highly complex, transnational corporate structure that deliberately disguises the identity of the corporation’s beneficial owners and controllers.

A typical illegal fishing operation will consist of the secret beneficial owners purchasing an outdated, barely sea-worthy vessel, refitting the vessel with State-of-the-art technology, and then registering the vessel in a Flag of Convenience (FOC) State. The web-site [www.flagsofconvenience.com](http://www.flagsofconvenience.com) provides simple instructions and bargain prices for flag registration in a jurisdiction that will ask no questions and impose no laws. The beneficial owners will then usually incorporate a “front” company in the vessel’s new flag State, often with bearer shares. Bearer shares are documents provided by a company indicating that the bearer is entitled to a specified interest in the company. The FOC website allows for both registration of a ship and registration of a company. Other shell companies will then hold shares in the “front” company. The ultimate effect, (across numerous State borders,) is that the beneficial owners of the fishing operation will remain tightly hidden. Even State domestic shipping registers cannot guarantee that they have the true identity of a beneficial owner, particularly where that beneficial owner wants to remain hidden.

Despite international recognition of the problem of hidden beneficial owners, both domestic and international law have traditionally maintained a rigid adherence to entity law that protects the identity of beneficial owners.<sup>38</sup> There are managerial, financial and taxation benefits to this method of doing business, but there is also the risk that the corporate structure will be used to disguise the identity of the beneficial owners who will shirk responsibility for the illegal activities of their companies. Furthermore, identification of the beneficial owners behind a vessel is only one part of the problem, attachment of liability once identity is known, and illegality is proven, is just as critical.

The author of this study has written elsewhere on the difficulties of lifting the corporate veil to reveal beneficial owner identities, and radical solutions to domestic corporate law and taxation law regimes have been proposed.<sup>39</sup> Put simply, public international law regulates States, not corporations. Domestic laws regulate the private actors within State borders, not transnational

<sup>38</sup> The seminal authority on this is the famous corporate veil case of *Salomon v Salomon & Co Ltd* [1897] AC 22.

<sup>39</sup> Griggs L. and Lugten G. “Veil Over the Nets: Unravelling Corporate Liability for IUU Fishing Offences” in (2007) 31 *Marine Policy* 159-168; and Bender P. and Lugten G. “Taxing Illegal Fishing: A Proposal for Using Taxation Law to Reduce Profiteering from IUU Fishing Offences” (2007) 22:4 *International Journal of Marine and Coastal Law* 513.



crime. Accordingly, exposure of the true identities of vessel beneficial owners will require extensive legal harmonization across all domestic jurisdictions.<sup>40</sup>

A final point on this subject can be noted. The FAO IPOAs operate by recommending that States address problems of conservation and management by adopting National Plans of Action (NPOAs) that will instigate reform at the domestic legislative level. It may be possible for an amended current instrument, or a potential new global instrument to urge States to adopt a form of NPOA that will reform existing legal regimes for domestic corporate law and / or taxation law in order to expose the beneficial owners of fishing vessels, or at best, to financially penalize these owners through a taxation accruals regime.

#### **4. THE PROPOSED UNFAO GLOBAL RECORD OF FISHING VESSELS, REFRIGERATED CARRIERS AND SUPPORT VESSELS**

##### **4.1 Legal Considerations for FAO**

###### *4.1.1 Does FAO have a Constitutional mandate to construct the global record?*

The Constitution of the Food and Agriculture Organization created FAO in order to improve efficiency in the production and distribution of food and agriculture products.<sup>41</sup> “Food” includes fisheries and marine products.<sup>42</sup> FAO powers include the ability to promote research, improve education and public knowledge, provide assistance to governments, encourage the adoption of international policies and make recommendations on the conservation of natural resources.<sup>43</sup>

The FAO comprehensive record of fishing vessels, refrigerated transport vessels, supply vessels and beneficial ownership will essentially be a data base. As a data base the record will promote research, improve education and public knowledge, and (of particular relevance) it will be a tool to provide assistance to governments. The data base will not make judgments regarding vessels which are entered on the record. It is simply a resource to be used by the public, including governments, as they may see fit. Furthermore, the record can be argued to be a tool that will improve the global distribution of food and agriculture products (fisheries). It is therefore submitted that although there is no constitutional express mandate for FAO to proceed with the Global Record, there is an implied endorsement that the Record would be within the terms of the FAO Constitution.

###### *4.1.2 The quality of data to be entered on the record:*

###### *4.1.2.1 From States*

Although not universal, a large number of States have vessel registries that contain extensive data on fishing vessels. Each State’s domestic law will vary with regard to the quality of domestic data, and their administrative preparedness or legal ability to release some, or all of this data.<sup>44</sup>

The existing international instruments described above in Part 2 of this paper vary with their provisions regarding an obligation by States to exchange data with each other, with RFMOs and with FAO. The 1982 Convention only makes reference to data being “contributed and exchanged on a regular basis”.<sup>45</sup> Similarly, the UN Fish Stocks Agreement imposes an obligation on flag States to provide relevant data. However, again, this Convention is limited by its regional focus and its

<sup>40</sup> Griggs and Lugten, *id*, recommend a suggested legal framework that includes: 1) disclosure of the corporate entity which must become transparent; 2) For an entity to gain the benefits of limited liability a minimum level of operating capital must be started with, and maintained throughout the life of the corporation; 3) Harmonization across national boundaries; and 4) A swift regulatory response to any attempt to transfer assets or liabilities between jurisdictions.

<sup>41</sup> Preamble to FAO Constitution. Refer UNFAO Legal Office Basic Texts, [www.fao.org](http://www.fao.org)

<sup>42</sup> *Id*, Article 1.1.

<sup>43</sup> *Id*, Article 1.2 and 1.3.

<sup>44</sup> A state-by-state analysis of the ability under domestic legal regimes to release to FAO some, or all, of a State’s vessel registry data would be an important future project for FAO to investigate. This research paper only examines the general duty to exchange data under international treaty and customary law.

<sup>45</sup> Article 119.

restricted subject matter of Straddling Fish Stocks and Highly Migratory Fish Stocks. The IPOA-IUU recognizes the primary responsibility for regulation and control of vessels lies with the flag State. Accordingly, it recommends each State to have an extensive data base that will ensure the flag State can exercise control over the legal and beneficial ownership, management and crew of its registered vessels. However, this instrument is a non-binding soft law.

Only the Compliance Agreement provides for both mandatory and discretionary fishing vessel data to be made available to FAO, and it is this data that is the foundation for the HSVAR.

However, apart from specific treaty provisions, there is a recognizable trend in the law of marine capture fisheries for States to cooperate with one another. Kwiatkowska has gone so far as to describe a “duty to cooperate”.<sup>46</sup> It can be argued that this duty to cooperate exists in international customary law, particularly in matters of marine resources conservation and management. Furthermore, the duty would be supported by numerous treaty law references obliging States to cooperate on a variety of subjects including the conservation and management of EEZ<sup>47</sup> and high seas<sup>48</sup> fisheries. All the abovementioned conventions constantly reiterate the principle that international cooperation is to be achieved through competent sub-regional, regional or global organizations, such as FAO. A duty to cooperate can be effectuated in several ways, and the sharing of basic vessel data, (where release of that data does not breach domestic confidentiality laws) must be seen as a basic first step.

#### 4.1.2.2 *From RFMOs*

Fisheries governance at the regional level is the role of regional fisheries management organizations, and many of these RFMOs maintain records or registries, that are publicly available descriptions of a large number of global fishing vessels. It should be noted that a list of RFMOs such as CCAMLR, FFA, ICCAT, IATTC, IOTC, WCP, NAFO AND NEAFC would come close to representing the major global high seas fishing grounds, and for this reason they are an ideal place to start compiling data for a phased in approach to the FAO Global Record.

RFMOs must apply the principle that authorization to fish will only be granted if the fishing vessel is entered on the relevant RFMO record or registry. The record or registry must have strict vessel licensing requirements, insist on continuous monitoring of vessels whilst in the Convention/Regulatory area (VMS); and insist on full or complete data for the RFMO Registry/Record.

A final point must be mentioned regarding the maintenance of vessel register/records by RFMOs. This is the increasing tendency of RFMOs to compile “black lists”. A “black list” is a list of vessels which are accused of some form of IUU fishing, and most of the black listed vessels have reflagged more than once. The various websites with “black lists” contain case histories and recent photographs of the accused vessels. Although this may seem to be a defamatory practice, where public accusations are made without due process of law, RFMOs will usually only black list a vessel after a lengthy and transparent process of internal investigation.

The FAO Global Record will essentially be a data base. It should not make judgments or accusations about vessels, it will simply provide information, and leave others to interpret the data. For this reason, it would be inappropriate for the FAO Record to become embroiled in the process of “black listing” any vessel.

<sup>46</sup> Kwiatkowska B., “The Role of Regional Organizations in Development Cooperation in Marine Affairs” in Soons, A.H (ed.) *Implementation of the Law of the Sea Convention Through International Institutions* 1990

<sup>47</sup> Note for example the 1982 Convention, Articles 61(2), 64(1), 65, and 66(3)(b).

<sup>48</sup> *Ibid*, Articles 117 and 118.

### 4.1.3 *Incomplete or Incorrect Data and the Liability of FAO*

If incorrect or incomplete information were provided by FAO through its Global Record, it would be unlikely to result in legal action. It must be remembered that the FAO Global Record will essentially be a data base, and FAO can take no responsibility for how that data is used or interpreted. Similarly, confidentiality cannot be an issue in a publicly available data base.

To act on the side of caution, FAO would be advised to attach a Disclaimer of Liability to any release of information pertaining to the Global Record. For example:

“The Food and Agriculture Organization of the United Nations hereby disclaims any liability or responsibility arising from the use of information or data contained in this Record. The Organization, members of its staff and its contractors shall not be liable for any financial or other consequences whatsoever arising from the use of information or data contained in this Record.”

### 4.1.4 *Should the Global Record have a legal instrument at its base?*

#### 4.1.4.1 *Problems with the existing legal instruments*

Of the four existing instruments discussed above under 2.2, the following summary can be provided.

The 1982 Convention neither prioritises, nor provides a systematic process for, the exchange of data between States and any international organization. It is a framework convention dealing with broad legal principles. Article 119 on the living resources of the high seas, comes closest to dealing with the proposed FAO record when it provides that “data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations.” As the proposed FAO Global Record is a remedial tool to address IUU fishing, it can be interpreted as being a data base which is “relevant to the conservation of fish stocks.” However, it must be remembered that IUU fishing is more than a high seas problem. It also exists in zones of national jurisdiction, and in inland waters.

The UN Fish Stocks Agreement is also legally restricted by applying only to the subject of straddling fish stocks and highly migratory fish stocks. However, the UN Fish Stocks Agreement does contribute to the subject of a FAO Global record by elaborating the type of vessel data which could be collected and shared: vessel identification, flag and port of registry, vessel type, vessel specifications<sup>49</sup>, and fishing gear descriptions.

From a legal perspective, the data required by the International Plan of Action on Illegal, Unreported and Unregulated Fishing (IPOA-IUU) would establish a comprehensive profile on vessels and vessel ownership that would suit a hard law instrument. Article 42 of the IPOA-IUU specifically states that records should include the information set out in the Compliance Agreement, and then adds to this by listing names, addresses, and nationalities of the legal owners, the managers, and the beneficial owners, plus a photograph of the vessel. It cannot be suggested that the compilation of such data would be anything but difficult. Particularly with regard to the inclusion of beneficial ownership, it may be impossible to ascertain and include such data. However, if the FAO Global Record could be constructed to ultimately include as much detail as possible, including full ownership data, the value of the record as a resource would be immeasurable. In 2008, the inclusion of accurate beneficial ownership details on a Global Record of Vessels is nearly impossible, but this does not mean it should not be attempted. If nothing else, it will flag to the international community of States that this is a subject that will eventually need to be dealt with.

<sup>49</sup> For example, material of construction, date built, registered length, gross registered tonnage, power of main engines, hold capacity and catch storage methods.

Finally, the Compliance Agreement is clearly the most relevant of the existing hard law instruments. It has numerous strengths and weaknesses as a foundation instrument for the FAO Global Record and these are elaborated below.

Article I definitions describe a “fishing vessel” as one used for, or intended for use for, the commercial exploitation of living marine resources, including mother ships and any other vessels directly engaged in such fishing operations.<sup>50</sup> This definition could extend to refrigerated vessels and fishing “support vessels”. However, it would not extend to vessels engaged in inland water fishing. It has been noted that the problem of IUU fishing is much more than a high seas problem. If the FAO Global Record is to comprehensively address all forms of IUU fishing, it will be necessary to also consider coastal fishing vessels and inland water fishing vessels.

Article II also specifically refers to fishing vessels on the high seas. It further provides that fishing vessels which are less than 24 metres in length are exempted from the Compliance Agreement. This reflects the equally problematic provision in Article 94 of the 1982 Convention which states that vessels of a “small size” are excluded from generally accepted international regulations, such as the registry process. The size of vessels that must be registered or are ideally registered is a matter for technical experts but several sources are suggesting that there is an increasing number of small vessels (between 12 and 24 metres) fishing world wide. Furthermore the number of such vessels is increasing due to their “transparent legal status”. Again, an amended or alternative legal regime would be needed to cover the (increasingly) smaller vessels.

Article IV provides for each State party to maintain a comprehensive record of fishing vessels entitled to fly its flag.

Article V provides for international cooperation, exchange of information (including evidentiary material) in order to assist other states. Only paragraph 3 can be specifically linked to international organizations (such as FAO) by providing for States to enter into cooperative agreements or arrangements on a global basis.

Article VI provides for mandatory and discretionary fishing vessel data to be made available to FAO, and it has been noted that this is the foundation for the HSVAR. Later paragraphs in Article VI detail the maintenance of information on domestic records and the FAO record. However, it has already been noted that these provisions are not well complied with, and the HSVAR is lacking in both the quantity and quality of its data.

Finally, Article VII of the Compliance Agreement deals with cooperation with Developing Countries. This is an extremely important subject which should be given more than a brief three line mention. In 2006 the United Nations held a Review Conference to consider the status of implementation of just one of the abovementioned laws: the 1995 UN Fish Stocks Agreement. The Review Conference noted with concern that, particularly in the case of developing States, there was a slow acceptance and adoption of the 1995 Agreement. It is clear that the full and effective implementation of the above listed instruments poses a major challenge for any country. Developing countries (which often lack technical, financial and institutional capacity) are particularly vulnerable to excessive global programmes of development and change.<sup>51</sup>

Developing States face particular problems (all of which are based on financial constraints) when they try to implement the principles of the international law of marine capture fisheries. Many of these States also face significant enforcement problems with the management of their inland fish stocks.

<sup>50</sup> Emphasis by this author.

<sup>51</sup> Lugten G. and Andrew N. “Maximum Sustainable Yield of Marine Capture Fisheries in Developing Archipelagic States – Balancing Law, Science, Politics and Practice” (2008) 23:1 *International Journal of Marine and Coastal Law* (in press).

Article 24 of the UN Fish Stocks Agreement notes the requirement of all states to provide assistance to developing states, and Article 25 examines the forms that such assistance might take. In particular, States are obliged to provide assistance through the United Nations Development Programme, FAO and other specialized agencies, the Global Environment Facility (GEF), the Commission on Sustainable Development and other appropriate international and regional organizations and bodies. Forms of cooperation include financial assistance, human resource development, technical assistance, and transfer of technology.<sup>52</sup> If developing States are to be effective contributors to, and real beneficiaries of, a FAO Global Record, it will be necessary for the UN specialized agencies to formulate precise assistance programmes. Such programmes could be elaborated in an amended or new legal regime.

To summarize, the FAO Compliance Agreement is the best of the existing hard law instruments dealing with marine capture fisheries. However, this paper suggests that the Compliance Agreement in its current form is not good enough. Specific shortcomings are:

- Failure to apply to waters other than the high seas;
- Failure to apply to vessels smaller than 24 metres in length;
- Exchange of all relevant data is not obligatory;
- Failure to include detailed database provisions on legal owners, vessel managers, and beneficial owners;
- Failure to provide detailed assistance programmes that address the specific needs of developing States; and of particular importance to the FAO Global Record
- Failure to provide for Review Mechanisms that would allow for the constant monitoring and review of the implementation of the Agreement.

There are also shortcomings in the operation of the Compliance Agreement:

- The low number of States Parties;
- That HSVAR is only accessible by the low number of States Parties;
- States Parties are not demonstrating a commitment to maintaining the HSVAR.

#### 4.1.4.2 *Four options on the FAO Global Record's legal base*

The question of whether the FAO Global Record should have a legal instrument (other than the FAO Constitution) at its base, leads to four possible conclusions:

- Status Quo Remains (ie the Compliance Agreement and HSVAR)
- Developing HSVAR so that it is part of an extensive new data base (the Global Record) and although the HSVAR component of the Global Record will continue to be linked to the Compliance Agreement, the new Global Record will not have a legal instrument at its base.
- Amending the Compliance Agreement and HSVAR so that they are the legal instrument base of the Global Record.
- Basing the Global Record in a new FAO or UN international instrument.

These options are elaborated below:

**Option One** is to retain the status quo. FAO (and the Compliance Agreement States Parties) could actively promote the existing Compliance Agreement and the High Seas Fishing Vessel Authorization Record (HSVAR). However, this would be a slow, probably unsuccessful, and weak option. Furthermore, this report has strongly argued that the Compliance Agreement is unsatisfactory in its current state. Finally, of critical importance to this report, the status quo will

<sup>52</sup> For an examination of the role of the World Bank and GEF in the implementation of the LOSC regime, refer Freestone D., "The Role of the World Bank and the Global Environment Facility in the Implementation of the Regime of the Convention on the Law of the Sea" in Freestone D., Barnes R. and Ong D., (eds) *The Law of the Sea: Progress and Prospects*, Oxford University Press, (2006) at 320.

not produce a FAO Global Record, unless the HSVAR in its current state is classed as the FAO Global Record.

**Option Two** is to develop HSVAR so that it is part of an extensive new data base (the Global Record) and although the HSVAR component of the new Global Record will continue to be linked to the Compliance Agreement, the new Global Record will not have a legal instrument at its base.

The FAO Global Record could be developed by extending the current data in HSVAR from a number of sources, of which the European Quality Shipping Information System or EQUASIS would appear to be the most promising. EQUASIS contains data on ships, but not fishing vessels<sup>53</sup>, of 100GT and over. It has the benefit of being an established and comparatively successful data base. It contains records of refrigerated vessels, and it is a public authority data base. An extended EQUASIS data base could be created so as to include fishing vessel (and other data) from Lloyds (Fairplay). Lloyds (Fairplay) asserts itself as the world's leading supplier of maritime information. It is able to provide comprehensive data on the world's whole merchant fleet that is 100 gross tonnes or above. Their database includes ships, maritime companies, information on ports and terminals, vessel detentions, photographs and electronic news archive. The Lloyds Register of Ships is produced on a CD Rom which is held by FAO in its library. A combination of the existing records in HSVAR, the EQUASIS database, and the Lloyds (Fairplay) data would produce an extensive data base that could form the basis of the FAO Global Record. If a "phasing in" option were adopted, FAO could adopt data from HSVAR, EQUASIS and Lloyds, and gradually add this to data provided from readily compliant States and RFMOs. This would produce an extensive, detailed data base and it could be done in a comparatively short time. However, this option is not based in a legal instrument (either soft or hard law) and this author believes that without a legal base, States (who will ultimately be the primary data contributors to the FAO Global Record), may not feel an obligation to provide ongoing support for the database.

**Option Three** is to amend the Compliance Agreement and HSVAR so that they are the legal instrument base of the FAO Global Record. However, Option three may be the most difficult of the options as the list of desirable amendments is extensive:

- A. Recognition that IUU fishing is more than the Unregulated fishing that was conceived by the original 1993 Compliance Agreement;
- B. Recognition that IUU fishing is more than a high seas problem, an amended instrument should consider maritime zones within national jurisdiction;
- C. The FAO Global Record may commence with vessels of 24 metres in length, but by a "phased in" approach, it must go progressively smaller. Dynamite fishing from an unpowered canoe is a form of IUU fishing.
- D. The amended Agreement should incorporate a system of unique vessel identifiers.
- E. The exchange of data between States and RFMOs with FAO should be obligatory.
- F. The amended HSVAR should include provision for legal owners, vessel managers, beneficial owners and their addresses.
- G. The amended Agreement should include elaborate assistance programmes between all United Nations Agencies that will address the specific needs of developing States.
- H. The amended HSVAR data base should be increased by input from both EQUASIS and Lloyds (Fairplay).

Finally, and most important as both a first and concluding step:

- I. The amended Agreement must include provision for Review Mechanisms.

<sup>53</sup> As noted in Annex III Other Existing Global Registers / Records, at pg. 2, the EQUASIS data base does not extend to vessels solely engaged in fishing; ships without mechanical means of propulsion; pleasure yachts; ships engaged on special service; hopper barges; floating docks; ships of war and troop ships; and wooden ships in general.

This option has numerous benefits. It does not duplicate the Compliance Agreement and HSVAR – it uses them; it would address the current problems of IUU fishing; it would allow for phasing in and gradual extension of the database; it would offer real assistance to developing States; and it would provide for review.

The option also has weaknesses. Primarily, only the parties to the Compliance Agreement can change the Compliance Agreement, and this could be a time consuming process. Furthermore, it must be borne in mind that the mandate and the momentum for the FAO Global Record exist now.

**Option Four** is to base the FAO Global Record in a new FAO or UN international instrument. This is an interesting alternative as after 13 years with no significant fishery treaty being developed in international law, FAO is currently preparing a draft text for a legally binding instrument on Port State Measures that will be based on the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing and the 2005 FAO Model Scheme on Port State Measures to Combat Illegal, Unreported and Unregulated Fishing.

The Draft Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (hereinafter referred to as the Agreement on Port State Measures) is NOT an existing hard law treaty, but it is a draft international agreement that is contemporary and it therefore addresses many of the weaknesses or omissions that have been identified in the existing legal instruments. These may be listed below:

- Article 1 on the Use of Terms has a comprehensive definition for “illegal, unreported and unregulated fishing” being the same meaning as set out in the IPOA-IUU.
- Article 1 defines “fish” as all species of living marine resources which extends IUU fishing into marine coastal zones of national jurisdiction, and not just the high seas.
- Article 1 offers a very broad definition of “vessel” which would extend to small fishing vessels and vessels engaging in “fishing related activities”. These terms would address fishing vessels much less than 24 metres. In fact, the definition would apply to the single dynamite fisher in a dug-out canoe. The inclusion of “fishing related activities” would extend to refrigerated “fish” carriers and fishing support vessels.
- Article 6 specifically provides for Parties to cooperate by an exchange of information with relevant States, RFMOs and international organizations such as FAO. In fact, Article 6(1)(a) would specifically apply to the FAO Global Record when it states that cooperation and exchange of information can be done by “requesting information from, and providing information to, relevant databases.”
- Article 22 has extensive provisions for the special needs of developing States.
- Article 25 provides a mechanism for Monitoring and Review that will ensure regular and systematic monitoring to achieve the objectives of the Agreement.

Finally, Annex A to the Draft Agreement on Port State Measures describes “Information to be provided in advance by vessels”. This material is so comprehensive in both legal and technical data, that it is repeated below with an added comment that this should be the template for the FAO Global Record.

## ANNEX A

## Information to be provided in advance by vessels

|                                       |  |                   |               |                       |               |         |    |    |
|---------------------------------------|--|-------------------|---------------|-----------------------|---------------|---------|----|----|
| 1. Intended port of call              |  |                   |               | 2. Country            |               |         |    |    |
| 3. Estimated date and time of arrival |  |                   |               | YYYY                  | MM            | DD      | HH | MM |
| 4. Purpose(s)                         |  | LAN               | TRX           | PRO                   | OTH (specify) |         |    |    |
| 5. Port and date of last port call    |  |                   |               | YYYY                  | MM            | DD      |    |    |
| 6. Port and date of next port call    |  |                   |               | YYYY                  | MM            | DD      |    |    |
| 7. Name of the vessel                 |  |                   |               |                       |               |         |    |    |
| 8. Flag State                         |  | 9. Type of vessel |               |                       | 10. ICRS      |         |    |    |
| 11. Global Record ID                  |  |                   |               | 12. IMO ship ID       |               |         |    |    |
| 13. External ID                       |  |                   |               | 14. Other ID          |               |         |    |    |
| 15. MMSI ID                           |  |                   |               | 16. Home port         |               |         |    |    |
| 17. LOA                               |  |                   |               | 18. Moulded depth     |               |         |    |    |
| 19. GT                                |  |                   |               | 20. Beam              |               |         |    |    |
| 21. Engine(s) power                   |  |                   |               | 22. Construction year |               | YYYY    |    |    |
| 23. Construction place                |  |                   |               |                       |               |         |    |    |
| 24. Vessel owner(s)                   |  |                   |               |                       |               |         |    |    |
| 25. IMO company ID(s)                 |  |                   |               |                       |               |         |    |    |
| 26. Vessel beneficial owner(s)        |  |                   |               |                       |               |         |    |    |
| 27. Vessel operator(s)                |  |                   |               |                       |               |         |    |    |
| 28. Master                            |  |                   |               |                       |               |         |    |    |
| 29. Fishing master                    |  |                   |               |                       |               |         |    |    |
| 30. Vessel agent                      |  |                   |               |                       |               |         |    |    |
| 31. VMS                               |  | No                | Yes: National |                       | Yes: RFMOs    |         |    |    |
| 32. AIS                               |  | No                | Yes           | 33. LRIT              |               | Yes     | No |    |
| 34. Previous name(s)                  |  |                   |               |                       |               | Date(s) |    |    |
|                                       |  |                   |               |                       |               | YYYY    | MM | DD |
|                                       |  |                   |               |                       |               | YYYY    | MM | DD |



|  |                |                           |                 |                       |               |                                 |
|--|----------------|---------------------------|-----------------|-----------------------|---------------|---------------------------------|
| <b>35. Previous flag(s)</b>              |                |                           |                 | <i>Date(s)</i>        |               |                                 |
|  |                |                           |                 | <i>YYYY</i>           | <i>MM</i>     | <i>DD</i>                       |
|  |                |                           |                 | <i>YYYY</i>           | <i>MM</i>     | <i>DD</i>                       |
| <b>36. Previous owner(s)</b>             |                |                           |                 | <i>Date(s)</i>        |               |                                 |
|  |                |                           |                 | <i>YYYY</i>           | <i>MM</i>     | <i>DD</i>                       |
|  |                |                           |                 | <i>YYYY</i>           | <i>MM</i>     | <i>DD</i>                       |
| <b>37. Fishing license reference</b>     |                |                           |                 | <i>Issue date(s)</i>  |               |                                 |
|  |                |                           |                 | <i>YYYY</i>           | <i>MM</i>     | <i>DD</i>                       |
|  |                |                           |                 | <i>YYYY</i>           | <i>MM</i>     | <i>DD</i>                       |
| <b>38. License scope</b>                 |                | <i>Period of validity</i> |                 |                       |               |                                 |
| <i>Quota</i>                             |                |                           | <i>Effort</i>   |                       |               |                                 |
| <i>Issuing authority</i>                 |                |                           |                 | <i>Country(ies)</i>   |               |                                 |
| <i>Target Species</i>                    |                |                           |                 | <i>Gear</i>           |               |                                 |
| <i>Fishing area(s)</i>                   |                |                           |                 |                       |               |                                 |
| <b>39. Transshipment documents</b>       |                |                           |                 |                       |               |                                 |
| <i>Species</i>                           | <i>Product</i> | <i>Area</i>               |                 | <i>TRX from</i>       | <i>TRX to</i> | <i>Date</i>                     |
|  |                |                           |                 |                       |               | <i>MM</i> <i>DD</i>             |
|  |                |                           |                 |                       |               | <i>MM</i> <i>DD</i>             |
| <b>40. Transshipping authorizations</b>  |                |                           |                 |                       |               |                                 |
| <i>Issued by</i>                         |                |                           | <i>Number</i>   |                       | <i>Date</i>   | <i>YYYY</i> <i>MM</i> <i>DD</i> |
| <b>41. Trip starting</b>                 | <i>Date</i>    | <i>YYYY</i>               | <i>MM</i>       | <i>DD</i>             | <i>Time</i>   | <i>HH</i> <i>MM</i>             |
| <b>42. Fish onboard at start of trip</b> |                |                           |                 |                       |               |                                 |
| <i>Species</i>                           |                | <i>Product</i>            |                 | <i>Quantity</i>       |               |                                 |
| <i>Species</i>                           |                | <i>Product</i>            |                 | <i>Quantity</i>       |               |                                 |
| <b>43. Areas visited</b>                 |                |                           |                 |                       |               |                                 |
| <b>44. Total fish onboard</b>            |                |                           |                 | <b>45. Landed/trx</b> |               | <b>46. Retained</b>             |
| <i>Species</i>                           | <i>Product</i> | <i>Catch area</i>         | <i>Quantity</i> | <i>Quantity</i>       |               | <i>Quantity</i>                 |
|  |                |                           |                 |                       |               |                                 |
|  |                |                           |                 |                       |               |                                 |
|  |                |                           |                 |                       |               |                                 |

| 47. Flag State status in RFMO(s)  | <i>Party</i> | <i>Coop. non-Party</i> | <i>Non-Party</i> |
|-----------------------------------|--------------|------------------------|------------------|
|                                   |              |                        |                  |
| 48. Fishing logbook               | <i>Yes</i>   | <i>No</i>              |                  |
| 49. Production/processing logbook | <i>Yes</i>   | <i>No</i>              |                  |
| 50. Catch receiver (landed)       |              |                        |                  |
| 51. Catch receiver (transhipped)  |              |                        |                  |
| 52. Catch destination             |              |                        |                  |
| 53. Catch documentation scheme    |              |                        |                  |
| 54. Trade information scheme      |              |                        |                  |

As the FAO Global Record and the Draft Agreement on Port State Measures are being negotiated simultaneously but with different time frames for COFI endorsement, it is unclear whether the two initiatives can be linked. There is no doubt that the Agreement on Port State Measures does address most of the criticisms raised against the current hard law regime, and (if the projects were linked) it would provide a sound legal base for the FAO Global Record.

## 5. RECOMMENDATIONS AND CONCLUSIONS

This report has raised some legal points that need to be borne in mind:

- Illegal and Unregulated fishing are economic AND environmental crimes and the FAO Global Record would be a valuable remedial tool in addressing the ongoing problem.
- Under international customary law, the high seas are free to all, but vessels on the high seas are exclusively subject to the authority of their Flag State.
- Too many Flag States are shirking their responsibilities with regard to their vessels. This shirking of responsibility can take many forms: failure to control reflagged fishing vessels; failure to cooperate with other States, with RFMOs and with global institutions such as FAO in the sharing of data on fishing vessels.
- International Case Law on the law of the sea suggests an inherent conservatism on the part of the judiciary which prefers a narrow, literal meaning of treaty words, and rejects the bigger picture which is sustainability of global fish stocks.
- Existing international treaties are too limited in subject to supply full data to the FAO Global Record. The 1982 Convention only deals with exchange of data when it discusses the high seas; the UNFSA only deals with straddling fish stocks and highly migratory fish stocks; the FAO IPOA-IUU provides a valuable contribution to the subject, but it is a non-binding, soft law instrument and the Compliance Agreement (for the many reasons elaborated above) is not adequate in its current form.
- The inadequacies of the current legal regime are leading to a proliferation of activity that falls beyond the law: dual registration and demise charters, vessels that are legally transparent as they are less than 24 metres in length, beneficial owners hidden behind front companies that are based in international tax havens, flags of convenience. Put simply, criminal or extra-legal activity is one or more steps in front of the current law. The international legal regime needs to address this gap.
- To address this illegal and extra-legal activity, the core starting point must be the provision of information regarding what is really happening with IUU fishing. The FAO Global Record

constitutes an important development in providing this basic information. It will also provide a better understanding of the legal fishing industry.

- Four options have been elaborated to provoke discussion regarding the legal base of the FAO Global Record.

In the global fight against IUU fishing there is one overwhelming problem: lack of information. This problem applies to the geography, actors, financial and environmental damage of IUU fishing. The simple fact is that neither global institutions, RFMOs, States nor legal fishers, know the full extent of the problem. The proposal for a FAO Global Record is the most significant initiative to look at addressing our IUU fishing ignorance in over a decade and there is no doubt that it would greatly improve oceans governance. For this reason, more than any other, the FAO Global record should proceed.



The goals of the Expert Consultation were to advise FAO on the development and implementation of a global record of fishing vessels and to respond to the request from FAO's Committee on Fisheries to further develop the concept as described in the feasibility study. A comprehensive global record, a potential additional tool to combat illegal, unreported and unregulated fishing, is envisioned as a global database gathering data from many sources in one location. A major obstacle facing fisheries enforcement bodies is the lack of access to information on vessel identification, ownership and control. Currently, there is no single source containing basic information about fishing vessels of all sizes. The experts expressed a sense of urgency about the need for this tool. They also believed that a global record should be extensive in scope. They recommended interim activities to raise awareness about the global record and further develop some technical issues in advance of the Committee on Fisheries to be held in 2009.

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