

Current Legal Developments

Food and Agriculture Organization

The FAO Global Record of Fishing Vessels, Refrigerated Vessels and Fishing Support Vessels

Over the past fifteen years there have been numerous calls for a global record of all fishing vessels. In 1993, the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas¹ (the Compliance Agreement) required all States to maintain a record of their fishing vessels² and to make that record of information readily available to FAO.³ Six years later (and in the age of IUU fishing),⁴ the call for a global record of fishing vessels was restated with some urgency in the International Plan of Action for the Management of Fishing Capacity.⁵

In 2005, the Ministerially-led Task Force on IUU Fishing on the High Seas agreed on the need to establish a global information system on high seas fishing vessels in the form of a publicly available international database.⁶ Also in

¹ FAO Res. 15/93 (Reproduced in (1995) 10 *IJMCL* 417–425, as an appendix to a commentary by FAO Legal Counsel Gerald Moore, pp. 412–416; see also 33 *ILM* 968 (1994)). Drafted in 1993, the Compliance Agreement was a prompt response to the international problem of reflagging of fishing vessels. However, the Agreement actually pre-dated the problem of IUU fishing by approximately 4 years from when IUU fishing was first labelled. The Agreement was not intended to remedy IUU fishing, and consequently, it failed to do so. The number of instruments of acceptance is sparse, the Agreement's entry into force was slow, and (more importantly for the purposes of this paper), its global record of fishing vessels has never been effectively realised.

² Article IV.

³ Article VI.

⁴ Illegal, Unreported and Unregulated fishing—more fully defined in Article 3 of the FAO International Plan of Action on Illegal, Unreported and Unregulated Fishing. (The IPOA-IUU is available on line through Legal Materials at <http://www.fao.org>.)

⁵ Paragraph 18 provides, “while awaiting the entry into force of the [Compliance Agreement], States should support the establishment by FAO by the end of 2000 of an international record of fishing vessels operating in the high seas, following the model indicated in the Compliance Agreement.”

⁶ High Seas Task Force, “How to Get Better Information About High Seas Fishing Vessels”

2005, the Rome Declaration on Illegal, Unreported and Unregulated Fishing identified and called for “new actions” to address IUU fishing. These “new actions” included the development of “a comprehensive global record of fishing vessels within FAO, including refrigerated transport vessels and supply vessels.” Furthermore, it was noted that the FAO record should incorporate “available information on beneficial ownership, subject to confidentiality requirements in accordance with national law.”⁷

Finally in 2008, significant movement has occurred in the journey towards a FAO Global Record of Vessels. From 25–28 February 2008, FAO conducted an expert consultation (hereinafter referred to as “the consultation”) on the development of a comprehensive global record of fishing vessels, refrigerated vessels and fishing support vessels. The primary aim of the consultation was to determine the feasibility of a FAO Global Record (GR) and how the GR could best be progressed.⁸

The consultation began by noting the differences between a vessel registry and a vessel record.⁹ It was stressed that the GR would not provide legal personality. It is intended to be a mere record, more akin to a database than a shipping registry. The FAO GR would also not follow the current trend which is apparent in many regional fishery management organizations (RFMOs) of distinguishing between “black” and “white” listed vessels. That is, black-listed vessels have been accused of some form of IUU fishing and most will have reflagged more than once. White-listed vessels have RFMO or State authorization to fish. These labels require a judgement or assessment and FAO is unwilling to engage in such classifications.¹⁰ FAO is not a management body, it is a neutral body in the service of its members and in accordance with its mandate, it is argued by the FAO legal office that “black” or “white” vessel classifications may be *ultra vires* the FAO Constitution.

Another preliminary matter for the consultation to address was the value of the existing legal regime for a record of fishing vessels (that is the High Seas Fishing Vessel Authorisation Record [HSVAR], which exists under the FAO Compliance Agreement). Extensive consideration was given to the content, operation and value of the HSVAR, and its value as a remedial tool in the

(Paris 9 March 2005), available at www.high-seas.org/docs/HSTF_05_February_2005_Final.pdf.

⁷ Available at [ftp://ftp.fao.org/fi/DOCUMENT/ministerial/2005/iuu/declaration.pdf](http://ftp.fao.org/fi/DOCUMENT/ministerial/2005/iuu/declaration.pdf).

⁸ The *Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels held in Rome from 25–28 February 2008* is published by FAO as FAO Fisheries Report No. 865, Rome (2008). Hereinafter, all references to “fishing vessels” should be interpreted as including refrigerated transport vessels and supply vessels.

⁹ *Ibid.*, pp. 2 and 39.

¹⁰ *Ibid.*, pp. 2 and 51.

global fight against IUU fishing.¹¹ The consultation concluded that specific weaknesses in both the Compliance Agreement and the HSVAR restricted their value:

- Only State Parties to the FAO Compliance Agreement are obliged to provide data to the HSVAR.
- The HSVAR has both poor quality of data and an inadequate quantity of data. Some State Parties do not provide any data, and those that do, will often provide incomplete data.
- The Compliance Agreement is specifically restricted to the high seas and most IUU fishing occurs within zones of national jurisdiction.
- Fishing vessels which are less than 24 metres in length are exempted from the Compliance Agreement, and an increasing number of vessels are being constructed which are “invisible” by being less than 24 metres.
- The HSVAR makes no provision to deal with the problem of beneficial ownership of vessels.
- The HSVAR gives inadequate recognition to the needs of developing States.
- The Compliance Agreement lacks any form of review mechanism.¹²

Ultimately, the consultation suggested that the “HSVAR could not be used for the global record without considerable investment, which would be better directed towards a new and more comprehensive system.”¹³ This “new system” would be the FAO Global Record.

Having determined that there should be a FAO GR, the consultation gave particular attention to whether the GR should have a legal instrument at its base. Several options were considered, including: no legal instrument (a pure database); an amended legal instrument (such as calling the Compliance Agreement parties together for consideration of a proposal to extend or reform both the Agreement and its HSVAR database); or attaching the FAO GR to a new soft or hard law instrument.¹⁴

Bearing in mind that the development of the Global Record has been a long and slow process, and that there is some urgency to act on the GR now, not wait another fifteen years, there is much that can be said in support of attaching the GR to the new draft Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and

¹¹ *Ibid.*, pp. 6 and 52–3.

¹² *Ibid.*, and p. 2.

¹³ *Ibid.*, p. 6.

¹⁴ *Ibid.*, pp. 2–3, 53–56.

Unregulated Fishing (the PSM).¹⁵ The GR consultation did not expressly support this proposal. However, as a potential home for the new FAO GR, the PSM can be seen as having numerous advantages:

1. It is fast-tracked and currently in draft;
2. It has direct subject-relevance to the global record as the GR will facilitate Port State management in reviewing requests for port access by vessels and the need for verification of vessel ID in in-port inspections;
3. It specifically addresses the many weaknesses raised above in the Compliance Agreement. That is, the PSM:
 - applies to all vessels,
 - has a broad definition of fishing and fishing-related activities,
 - makes provision for States and RFMOs to exchange data with FAO,
 - applies to EEZ waters,
 - establishes a trust fund for developing States, and
 - has a review mechanism procedure.

The consultation concluded that the FAO GR was feasible.¹⁶ It was noted that FAO had an implied mandate to proceed with the GR¹⁷ and that confidentiality issues would not arise if the record contained information that was already in the public domain.¹⁸ The goal of the GR would be as a tool to prevent, deter and eliminate IUU fishing and related activities by making it more difficult and expensive for vessels and companies acting illegally, to do business. It should improve the traceability of vessels and products, provide transparency of vessel information, strengthen risk assessment, and aid in decision-making processes regarding fleet capacity, management, safety, pollution, security, statistics, etc. Importantly, the GR would eventually be a publicly available “one-stop shop” with linkages to data sources and databases at the international, regional, and national levels.¹⁹

The consultation agreed that the scope of the GR should be broad so that the GR would be comprehensive and effective, and the consultation approved

¹⁵ *Draft Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*. Draft as of 3 May 2008 available on line at <ftp://ftp.fao.org/FI/DOCUMENT/tc-psm/2008/2e.pdf>.

¹⁶ *Supra*, note 9, pp. 9–10.

¹⁷ FAO Constitution, Articles 1.2 and 1.3 provide that FAO powers include (*inter alia*) 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.

¹⁸ *Supra*, note 9, p. 3.

¹⁹ *Ibid.*, pp. 4–5.

of the broad definitions given to “fishing”, “fishing related activities” and “vessel” that have been used in the PSM.²⁰

However, despite the broad scope given to “fishing” and “fishing vessels”, the consultation did not agree to pursue the broad subject of identifying the beneficial owners of IUU vessels. It was suggested that it is extremely difficult to obtain reliable information regarding beneficial ownership, and a more feasible exercise would be to identify the sources of operational control of a vessel.²¹

This is a disappointing conclusion to the serious global problem of corporate laws that continue to protect the identities of hidden beneficial owners.²² There are numerous managerial, financial and taxation benefits in doing business as a hidden beneficial owner disguised behind a corporate structure; however, the process can also be used to disguise the identity of beneficial owners who want to shirk responsibility for the illegal activities (such as illegal fishing) of their companies.²³ There is no doubt that this is a complex problem. Domestic laws regulate private actors within States, not transnational crime. Public international law regulates States, not corporations. Accordingly, exposure of the true identities of vessel beneficial owners would require extensive legal harmonization across all domestic jurisdictions and between domestic and public international law.²⁴

The task is big, but not impossible, and there is some valuable precedent in the form of the FAO International Plans of Action (IPOAs). These soft law instruments each recommend that States should address international problems of conservation and management by adopting National Plans of Action (NPOAs) that will instigate reform at the domestic level. Accordingly, the FAO GR could be housed in an international instrument which called on

²⁰ *Supra*, note 16, Article 1. These definitions encompass fishing vessels and fishing support vessels of all types, without an application of criteria such as vessel tonnage, length or other factors.

²¹ *Supra*, note 9, p. 4.

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

²³ 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* 517–544.

²⁴ 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.

States to reform their existing legal regimes on corporate or taxation law in order to expose, or financially penalise, the beneficial owners of IUU fishing vessels. This is a long-term issue, but it can only start to be addressed at the domestic level if it is initially flagged as important at the international level. Ignoring the subject, because it is difficult, is no solution.

Data for the GR would initially come from a range of sources that would be capable of providing information on vessel legal activity and historical behaviour.²⁵ This could comprise data which are on the current HSVAR database, supplemented by data made available to FAO from readily compliant States and RFMOs. It was noted that it should be possible for data to eventually be contributed from commercial databases such as Lloyds Register Fairplay (LRF).²⁶

The consultation considered it appropriate for the GR to adopt a phased-in approach, commencing with larger vessels and progressively recording smaller vessels.²⁷ Each vessel should have a unique vessel identifier that would not change even if the vessel changed flag, owner or name. This could be accomplished through a numbering system which combined the current LRF system for vessels over 100 GT, and a numbering system issued by FAO for vessels less than 100 GT. Close cooperation between FAO, LRF and the International Maritime Organization was encouraged to pursue further operational details on the unique vessel identifier.²⁸

The consultation recognised and addressed the fact that developing States would have special needs if they were to contribute to, and benefit from, the GR. Financial assistance and expertise in capacity building should be provided in a format similar to the Trust Fund which exists in Article 22 of the PSM.²⁹ Further financial and technical assistance for developing States should be provided from other specialized UN agencies and bodies such as the World Bank and the United Nations Environment Programme.

An industry expert addressed the consultation regarding the increasing levels of consumer concern that fish products should not be derived from any form of IUU fishing. The European fish processing industry is considering taking its own action to avoid IUU products. It was noted that a publicly available database which could be linked to a global record would reduce the risk of purchasing any IUU fish products.³⁰ The consultation recognised that

²⁵ *Supra*, note 9, p. 6.

²⁶ *Ibid.*

²⁷ *Ibid.*, p. 4.

²⁸ *Ibid.*, pp. 6–7.

²⁹ *Supra*, note 16.

³⁰ *Supra*, note 9, pp. 7–8.

the GR could, and should, be market-driven. This would ensure both increased levels of compliance and a greater impact for the GR as a remedial tool to address IUU fishing.³¹

Further analysis of the viability of the FAO GR will occur during 2008. The initiative has recently received a significant financial boost in the form of a \$400,000 donation from the UK Department for International Development. In March 2009 all proposals on the FAO GR will be presented to the FAO Committee on Fisheries (COFI).

In summary, although the expert consultation chose not to link the GR to the fast-tracked PSM, nor to address the difficult issue of beneficial ownership, it did agree that there is a strong justification for the GR and that the project should proceed. This is an encouraging outcome. It has been thirteen years since the international community's last global fisheries management treaty. In the intervening period, the leadership of much fisheries governance has moved away from global organizations and into the hands of proactive RFMOs. However the FAO GR is a clear example of a "big picture" project that can only be effectively done at the global level. That is, the construction and maintenance of the GR will depend upon financial support, data-sharing, and/or technology-sharing from other UN specialized agencies and bodies, coastal States, RFMOs and participating private enterprise corporations.

If the GR vision is to ever be realised, it will totally change (for the better) the way we manage, catch and purchase our fish and fish products. For its innovation and potential, the FAO Global Record should be supported.

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³¹ *Ibid.*, Abstract on p. iv provides: "The experts expressed both a sense of urgency about the need for this tool (the GR) and their belief that market forces could spur compliance prior to any mandatory legal requirement imposed on countries to provide information."

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