4. The FAO Global Record of Fishing Vessels: Issues for Pacific Island States and the Forum Fisheries Agency
Gail Lugten*

Introduction

In 1993, the United Nations Food and Agriculture Organisation (FAO) concluded 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).1 The primary aim of the Compliance Agreement was to address the increasing global problem of reflagged fishing vessels or vessels which were attempting to escape the jurisdiction (and control) of their flag State.2 The Compliance Agreement proposed numerous significant measures, but for the purposes of this chapter, the provisions relating to the need for, and establishment of, a global record of fishing vessels, are of particular significance.3

History suggests that the Compliance Agreement may have been drafted too soon. Although it was a prompt response to the reflagging problem in 1993, the problem was to significantly magnify over the following years until 1997 when the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) became the first forum to expressly identify and label illegal, unreported and unregulated fishing (IUU fishing).4 It was soon apparent that

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* The author wishes to acknowledge the intellectual contribution of Dr. Denzil Miller, Executive Secretary of the Commission for the Conservation of Antarctic Marine Living Resources, (CCAMLR, Hobart).
1 FAO, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, FAO, Rome, 1993, 41 ISBN 92-5-103834-1. In accordance with Article XI (1) of the Compliance Agreement, the Agreement entered into force on 24 April 2003 when the Republic of Korea became the twenty-fifth State to accept the Agreement. There are currently 38 instruments of acceptance: Albania, Angola, Argentina, Australia, Barbados, Belize, Benin, Brazil, Canada, Cape Verde, Chile, Cook Islands, Cyprus, Egypt, European Community, Georgia, Ghana, Japan, Madagascar, Mauritius, Mexico, Morocco, Mozambique, Myanmar, Namibia, New Zealand, Norway, Oman, Peru, Republic of Korea, St Kitts and Nevis, St Lucia, Seychelles, Sweden, Syrian Arab Republic, Tanzania, United States of America and Uruguay. (Note most recent acceptance by Brazil on 2 March 2009.)
2 The existing legal regime on fishing for living resources of the high seas is covered in Articles 116-119 of the 1982 United Nations Law of the Sea Convention (LOSC) but as a mechanism to deal with reflagging of fishing vessels, the existing regime was inadequate. The Compliance Agreement aimed to interpret, in practical terms, the LOSC provisions.
3 Compliance Agreement Article IV, Records of Fishing Vessels; Article V, International Cooperation; and Article VI Exchange of Information.
4 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). Refer CCAMLR-XVI (1997) paragraphs 8.7-8.13. The preferred definition/explanation of IUU fishing is that offered in the FAO IPOA –IUU fishing (see Chapter 3 for detail). The FAO IPOA-IUU was adopted by consensus at FAO Committee on Fisheries (COFI) on 2 March 2001. Available online through Legal Materials at http://www.fao.org

combating IUU fishing would require broader domestic, regional and international action than simply becoming a party to the Compliance Agreement. Many States appear to have weighed up the effectiveness of the Compliance Agreement, and their cost/benefit analysis led them to reject the instrument as a remedy for IUU fishing. Consequently, the number of instruments of acceptance for the Compliance Agreement is sparse, its entry into force was slow, and its global record of fishing vessels has never been effectively realised.

Six years after the Compliance Agreement, the call for a Global Record of fishing vessels was restated with some urgency in the International Plan of Action (IPOA) for the Management of Fishing Capacity. Here, 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.”

The wheels of progress have turned slowly and the next call for the Global Record occurred on 9 March 2005 when 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 of information relating to the global high seas fishing fleet.”

Also in 2005, the Rome Declaration on Illegal, Unreported and Unregulated Fishing identified and called for “new actions” to address IUU fishing including the development of:

A comprehensive global record of fishing vessels within FAO, including refrigerated transport vessels and supply vessels, that incorporates available information on beneficial ownership, subject to confidentiality requirements in accordance with national law.

Finally in 2008, real movement occurred to support the calls for a FAO Global Record. From 25-28 February, FAO conducted an Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, Refrigerated Vessels and Fishing Support Vessels (hereafter referred to as the Expert Consultation). The purpose of the consultation was to determine

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6 The High Seas Fishing Vessel Authorisation Record (HSVAR) is not specifically mentioned in the Compliance Agreement. Instead, the HSVAR is a construct based on provisions for compiling and exchanging vessel-related data under Articles IV, V and VI of the Agreement. The HSVAR title for the database was invented by FAO.
whether a Global Record could be developed and implemented successfully, and, if so, how could this success be maximised and maintained?\(^9\)

The aim of this chapter is to examine the progress of the FAO Global Record and its likely impact on both individual Pacific Island States and on the Pacific Islands Forum Fisheries Agency (FFA).

**Record versus Register**

As an important preliminary point it is necessary to distinguish between the words “Record” and “Register.” The term “Record of fishing vessels” was defined in Article 1(d) of the Compliance Agreement as “a record of fishing vessels in which are recorded pertinent details of the fishing vessel.” This must be distinguished from a “Registry of fishing vessels.” “Registry” has different meanings at the national and regional levels.

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. Article 94(2)(a) of the 1982 Law of the Sea Convention (LOSC) 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.\(^{10}\) However, despite this legal obligation in an international treaty which enjoys widespread support,\(^{11}\) 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, goals or even language, of vessel registries.

A Registry of fishing vessels can also exist at the regional level. Many regional fisheries management organisations (RFMOs) maintain a list (or record) of the vessels which are authorised to fish in their area, and they call this record “a vessel register.”\(^{12}\) The FFA has a system which is unlike other RFMOs. The FFA, (which was established for the purpose of helping member States manage their exclusive economic zone (EEZ) fishery resources), has an obligation on

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\(^{10}\) UN Doc.A/CONF. 62/122.

\(^{11}\) Currently the LOS Convention has 157 ratifications. The most recent State (at the time of writing) to ratify the Convention was Liberia on 25 September 2008.

\(^{12}\) For example: Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR since 1997); Commission for the Conservation of Southern Bluefin Tuna (CCSBT since 2003); Western and Central Pacific Fisheries Commission (WCPFC since 2005); Northwest Atlantic Fisheries Organization (NAFO since 2004); South East Atlantic Fisheries Organisation (SEAFO, using national records established from March 2004); International Commission for the Conservation of Atlantic Tunas (ICCAT since 2003); North East Atlantic Fisheries Commission (NEAFC with a system of notification for authorisation to fish since 2007); Indian Ocean Tuna Commission (IOTC since 2003); and Inter-American Tropical Tuna Commission (IATTC since 2000).
foreign fishing vessels to be listed on the FFA Vessel Register in order to apply for a national fishing license from an FFA member State.\textsuperscript{13} Any application which is incomplete, inaccurate or misleading is rejected. Registration is required on an annual basis upon payment of a substantial fee.\textsuperscript{14}

In lay terms, the FAO Global Record is likely to be more akin to a database, than a State vessel registry which accords legal personality to a vessel, or an RFMO vessel record which authorises fishing.

The FAO Global Record will not follow the trend apparent in many RFMOs of distinguishing between “black listed vessels” and “white listed vessels.” In simple terms, a black listed vessel is a vessel which has been accused of some form of IUU fishing, and most black listed vessels will have reflagged more than once. A white listed vessel has a “clean” fishing record and can be granted RFMO or State authorisation to fish. These labels require a judgment or assessment, and FAO is unwilling to engage in such classifications. FAO is not a management body, it is a neutral body in the service of its members, and in accordance with its mandate, it would be illegal for FAO to make value judgements on the status of any fishing vessel. Therefore the FAO database is a simple record, and States, RFMOs, and non-government organisations (NGOs) can interpret the data on the record as they see fit.\textsuperscript{15}

The Existing Regime under the Compliance Agreement (HSVAR)

The Compliance Agreement entered into force on 24 April 2003, and at the time of writing there are 38 instruments of acceptance.\textsuperscript{16} Australia, New Zealand and the Cook Islands are the only FFA member States which are also States Parties to the Compliance Agreement. The low level of instruments of acceptance given to the Compliance Agreement is not surprising. As mentioned above, the Compliance Agreement was barely drafted before it was out-of-date. The result is that comparatively few States have had the inclination or political will to accept the Compliance Agreement. Even less support is given to the vessel record system established by the Compliance Agreement: the High Seas Fishing Vessel Authorization Record (HSVAR).

The establishment and operation of HSVAR can be briefly outlined. Article IV of the Compliance Agreement requires each State Party to maintain a record of fishing vessels and ensure that all fishing vessels are entered on that record.


\textsuperscript{14} Ibid.


\textsuperscript{16} FAO, Compliance Agreement, Note 1.
Article V deals with international cooperation, and parties are required to exchange information, including evidentiary material. Article VI elaborates the exchange of information whereby each party shall make available to FAO certain mandatory and discretionary data on each fishing vessel domestically recorded under Article IV of the Agreement. This mandatory data (paragraph 1) and discretionary data (paragraph 2) which are made available to FAO is stored on a FAO database referred to as the HSVAR. The data to be exchanged with FAO is listed in Article VI(1) and (2) of the Compliance Agreement:

1. Each Party shall make readily available to FAO the following information with respect to each fishing vessel entered in the record required to be maintained under Article IV:
   a) name of fishing vessel, registration number, previous names (if known), and port of registry;
   b) previous flag (if any);
   c) International Radio Call Sign (if any);
   d) name and address of owner or owners;
   e) where and when built;
   f) type of vessel;
   g) length.

2. Each Party shall, to the extent practicable, make available to FAO the following additional information with respect to each fishing vessel entered in the record required to be maintained under Article IV:
   a) name and address of operator (manager) or operators (managers) (if any);
   b) type of fishing method or methods;
   c) moulded depth;
   d) beam;
   e) gross register tonnage;
   f) power of main engine or engines.

The 2008 Global Record Expert Consultation spent some time considering whether the HSVAR could be developed (and the Compliance Agreement amended) so that HSVAR could become the new FAO Global Record. However, it was made very clear that the HSVAR in its current form is a second-rate database, and inadequate to address the real purpose of a FAO Global Record which is to be a remedial tool in the fight against IUU fishing. Some specific weaknesses can be mentioned.

*HSVAR has Poor Data*

The HSVAR is limited by both the quantity and quality of data that it contains. Some States do not provide any data, and those that do, will often provide incomplete data. Neither the Article VI(1) compulsory data nor the Article VI(2) discretionary data are well provided to the HSVAR. New Zealand was singled out for its exceptional provision of comprehensive, clear data in excel.
spreadsheet format, but clearly the New Zealand practice is the exception and not the norm.\textsuperscript{17}

\textit{Restrictions Regarding the Size of Fishing Vessels and their Maritime Zones of Operation}

Fishing vessels which are less than 24 metres in length are exempted from the Compliance Agreement. Furthermore, the Compliance Agreement is specifically restricted to the high seas. This means that the HSVAR does not apply to vessels engaged in IUU fishing within coastal zones or inland waters where a large amount of IUU fishing occurs. It also does not apply to the increasing number of fishing vessels operating in all maritime zones, which are “invisible” (not recorded) as they are less than 24 metres.

\textit{No Attempt to Deal with Beneficial Ownership}

The HSVAR provides for data on “the owner.” Although it is a compulsory data requirement, the information is frequently not provided to FAO. Furthermore, where the owner’s name is provided to FAO, this will only be the name of the “legal owner” of the vessel. There is an increasing trend for vessels to have their real ownership vested in a beneficial owner. This is the party who controls the real activities and profits of the vessel whilst hiding behind the registered legal activity. The Expert Consultation had a mandate to consider the problem of “beneficial ownership” of vessels. Ultimately, it was decided to be too difficult. The Expert Consultation decided that data describing the identity of the vessel operator and manager would be more valuable as a remedial tool (since these people control the “operation” of the vessel, including any engagement in IUU operations), than the identity of the beneficial owner.\textsuperscript{18}

This author disagrees with the findings of the Expert Consultation on the matter of beneficial ownership. It is submitted that although identification of operator managers is also important, these people are merely working on the instructions of the beneficial owner. Put simply and literally, “the buck stops with the beneficial owner.” This point was recognised by the 2005 Ministerially-led Task Force on IUU fishing on the High Seas which noted that the identification of beneficial owners was a vital part of combating IUU fishing and that it was surprising that such information was not contained in a “single and complete database or register of high seas fishing vessels.”\textsuperscript{19} It was also noted at the Second Joint FAO/IMO \textit{ad hoc} Working Group where it was argued that whilst difficult to determine beneficial ownership, it was an important matter that

\begin{footnotes}
\item[18] FAO, \textit{Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels,} Note 9, paragraph 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.”
\end{footnotes}
It is submitted that the immediate role for international law should be to flag the matter as important, and call on all States to address the subject of beneficial ownership. An example can be given from the FAO International Plans of Action. These instruments call for “National Plans of Action” whereby States are encouraged to develop and implement national laws that would give effect to international instruments. If the subject of “beneficial ownership” is ignored by international law because it is difficult, it will never be resolved. However, if the subject is raised now and flagged as important, then there is a reason for the United Nations (UN) or FAO to return to the subject in five or ten years and ask States why better progress is not being made with national laws to address beneficial ownership. The subject is of vital importance to many areas of international crime, not just IUU fishing.

Inadequate Recognition of the Needs of Developing States

The Compliance Agreement contains only a brief statement in Article VII on providing assistance to developing countries:

The Parties shall cooperate, at a global, regional, subregional or bilateral level, and, as appropriate, with the support of FAO and other international or regional organizations, to provide assistance, including technical assistance, to Parties that are developing countries in order to assist them in fulfilling their obligations under this Agreement.

This may have been a significant provision at the time of writing in 1993, but in 2008 it reads more like “lip-service” recognition on the plight of developing States. The reality is that if developing States are to effectively contribute to, and benefit from, the FAO Global Record, they will need extensive assistance. It has already been noted that IUU fishing is not a mere high seas problem. It is highly damaging in coastal zones under national jurisdiction and in inland

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21 Griggs, L. and Lugten, G. “Veil Over the Nets: Unravelling Corporate Liability for IUU Fishing Offences” in Marine Policy (2007) 31 pp. 159-168; and Bender, P. and Lugten, G. “Taxing Illegal Fishing: A Proposal for Using Taxation Law to Reduce Profiteering from IUU Fishing Offences” in International Journal of Marine and Coastal Law Vol. 22, No. 4, 2007, p. 513. For example, Griggs and Lugten 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.

22 For example, Articles 25-27 of the FAO IPOA- IUU.
waters. In developing States, IUU fishing occurs not only at the industrial fishing level, but also with small-scale commercial or artisanal fishers. If a vessel record is to work effectively at the national level, as well as the regional and global level, then all artisanal fishing vessels would need to be domestically registered. For many developing States, (Indonesia springs immediately to mind), this will be an onerous task. It will require extensive cooperation between developed and developing States. Developed States can provide assistance through the UN Development Programme, FAO and other specialized agencies, the Global Environment Facility (GEF), the Commission on Sustainable Development and other appropriate international and regional organisations and bodies. Forms of cooperation include financial assistance, human resource development, technical assistance, and transfer of technology.23

Review Mechanisms

A final problem with the Compliance Agreement and the HSVAR is that there is no provision relating to review. Therefore, the Compliance Agreement has not remained current, relevant or practical. To amend the Compliance Agreement, it would be necessary to call the thirty-eight States parties (including the EU which represents 22 States) together and obtain support for the amendment of the Compliance Agreement and/or the HSVAR.

The Expert Consultation gave considerable discussion to whether the HSVAR could be developed into the new FAO Global Record. Ultimately, it was unanimously agreed that the weaknesses and limitations associated with the HSVAR suggested that “HSVAR could not be used for the global record without considerable investment, which would be better directed towards a new and more comprehensive system.”24

How a FAO Global Record is Likely to be Different from HSVAR

The Expert Consultation agreed that the main goal of the FAO Global Record should be simple: 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.25

However, the Expert Consultation added that additional goals for future uses of the Global Record could be identified:

• 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.26

The Expert Consultation envisaged that the Global Record would become a “publicly available one-stop shop with many linkages to data sources such as international, regional, national and other databases.”27 The Global Record should also be an essential tool in ensuring the practical effectiveness of port State measures and of binding and non-binding instruments that aim to address IUU fishing.28

The Expert Consultation on the Global Record was not required to delve into technical details of the structure and content of the Global Record, but several basic or preliminary subjects were considered. The fundamental legal starting point was whether the FAO Global Record should be incorporated into a soft law instrument, or a hard law treaty, or whether, (like most databases,) the Global Record should exist without any foundation legal instrument.

The Expert Consultation considered 4 options:29
1. HSVAR is renamed the FAO Global Record, and the Compliance Agreement in its current form becomes the legal instrument which underpins the Global Record. [However, to the extent that the Global Record is intended to improve oceans governance, and address IUU fishing, and the HSVAR does not address either of these subjects, this option was not considered appropriate to pursue.]
2. Developing or extending HSVAR in order to produce a new, extensive vessel database. This could be done by combining existing HSVAR data with data from Lloyds Register Fairplay, RFMOs registries and State registries, to quickly produce a comprehensive Global Record of vessels without a foundation legal instrument. That is, the database would no longer reflect the structure created by the Compliance Agreement. [This option may work, but the question remaining is whether States and RFMOs will continue to actively contribute data if there is no legal instrument compelling or encouraging them to do so.]
3. Amend both the Compliance Agreement and HSVAR in order to produce a Global Record, based on a binding legal instrument (the Compliance Agreement). The new regime should also correct any shortcomings in the existing regime. [Only the States parties of the

26 Ibid, paragraph 30.
27 Ibid, paragraph 31.
28 Ibid, paragraph 32.
29 Ibid, paragraphs 14 and 15.
Compliance Agreement can change the Compliance Agreement. This option would require the 38 States Parties (including the 22 member States of the European Union) to agree to numerous amendments. It is likely to be a time consuming process and the Global Record is an urgent issue.

4. Attach the Global Record to a new legally binding instrument, such as the Legally-Binding Instrument on Port States Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (the PSM).30 The Agreement on Port State Measures addresses most of the weaknesses that have been identified and listed in the Compliance Agreement: it applies to small fishing vessels; it applies to vessels operating in EEZs; it provides for an exchange of data between States, RFMOs and FAO; it makes extensive provision for the special needs of developing States; and it has review mechanisms.31

The FAO Legal Office offered a fifth alternative:

5. Linking the Global Record to an existing soft law instrument such as the FAO IPOA-IUU or the FAO IPOA-Capacity. The Record would clearly fit within both IPOAs where provisions recommend that States and RFMOs report to FAO, and that FAO collects all data for the purpose of establishing a global database. In support of this option, it was noted by the FAO legal office that follow-up on levels of compliance with voluntary versus binding instruments, suggested that voluntary instruments were more successful. It is submitted that more citable data and empirical analysis needs to be produced on this important submission. To suggest that voluntary soft laws are more effective than hard treaty laws impacts far beyond the international law of marine capture fisheries and would be a significant development in the making and implementing of all public international law.

The Expert Consultation supported the Global Record using some of the broad definitions employed in the Draft Legally Binding Instrument on Port State Measures:

“fishing” means:

(i) the actual or attempted searching for, catching, taking or harvesting of fish; and

(ii) engaging in any activity which 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, transhipment, or


transport of fish that have not been previously landed and offloaded at a port, as well as the provision of personnel, fuel 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.32

The Expert Consultation proposed a phased-in approach to develop a global record commencing with vessels of 100GT and above, followed by vessels of 55GT and above but less than 100GT, and then finally by vessels of 10GT and above but less than 55GT. It was further agreed that the Global Record would need to use a system of unique vessel identifiers which would not change, even if a vessel changed flag, owner or name. This might be accomplished through a combination of Lloyds Register Fairplay vessel numbers (for vessels more than 100GT) and a FAO numbering system for vessels smaller than 100GT. It was agreed that more work needed to be done on unique vessel identification.33

Perhaps the most startling advancement of the proposed FAO Global Record over the HSVAR is the perception (and plan) that data on the Global Record will be used, and driven, by market forces. The Expert Consultation was addressed by an Industry Expert who noted that 65% of all fish consumed in the European Union (EU) is imported from third countries, and IUU fishing is becoming an increasingly important issue in the commercial fish processing and marketing industries, the media, powerful NGOs such as Greenpeace, and consumers. Fish buyers and processors need public access to up-to-date data (such as the Global Record) so that they can adequately risk assess and manage their supply basis. Ideally, the Global Record will create a situation whereby if a vessel is not on the Global Record, it could be presumed to be an IUU vessel, and consumers (such as the EU) would not buy the fish.34

Ultimately, the Expert Consultation believed that the Global Record would succeed where HSVAR has failed because it would be driven by both flag States and the harvesting industry in order to demonstrate transparency in the fishing operations of their fleets. Furthermore, and importantly, the Global Record will be driven by the retail market in order to meet the demands of consumers for non-IUU products.35

32 Draft Legally Binding Instrument on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, Note 30, Article 1 (Use of Terms) and Note 9, Paragraph 33.
The Role of the Pacific Islands Forum Fisheries Agency and Pacific Island States in the FAO Global Record

The urgency surrounding the need for the Global Record, and the operational strategies of how to get the database established quickly and extensively, tends to veil the fact that the Global Record will need to have long-term sustainability. From this perspective, the issue of ongoing data input is particularly important, and organisations such as the FFA, plus individual Pacific Island member States, will need to play a key role.

The following discussion looks at the obligation of RFMOs and States to exchange data (such as vessel registry/record details) with FAO for the purposes of creating and maintaining the Global Record.

From the LOSC, there is no systematic obligation on either States or RFMOs to exchange vessel data. Only Article 119(2) dealing with the conservation of the living resources of the high seas, comes close to addressing this issue when it provides:

> 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.36

This would not compel either the FFA or Pacific Island States to participate in Global Record data exchange with FAO.

Similarly, the UN Fish Stocks Agreement is limited to straddling fish stocks and highly migratory fish stocks. It prefers a State and regional, (as opposed to global) approach to the resolution of fishery management problems. Only Article 2 of Annex 1 comes close to supporting an exchange of data between States, RFMOs and FAO:

> 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.37

The FAO IPOA-IUU urges States and RFMOs to report to FAO on their plans to prevent, deter and eliminate IUU fishing,38 and the FAO is charged with collecting all relevant information and data39 and establishing and maintaining

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37 Emphasis by this author.
38 FAO IPOA-IUU, Note 4, Article 87.
39 Ibid, Article 88.
a regional and global database.\textsuperscript{40} However, the IPOA-IUU is a soft law instrument, and despite some argument that it has force as a customary international law,\textsuperscript{41} it carries no legally binding obligation for either the FFA or the Pacific Island States to exchange or contribute data to FAO.

The FAO Compliance Agreement is the only international instrument which requires parties to enter into cooperative agreements on a global, regional, subregional or bilateral basis.\textsuperscript{42} Article VI specifically deals with the exchange of mandatory and discretionary data on every fishing vessel to FAO for the purposes of the HSVAR database. Despite the clear application and relevance of the Compliance Agreement, two important points must be recalled. First, only three States from the FFA are member States of the Compliance Agreement: Australia, Cook Islands and New Zealand. Secondly, the Global Record Expert Consultation concluded that both the Compliance Agreement and the HSVAR were failed initiatives for the purposes of creating a FAO Global Record and the expense of resurrecting them would be better directed at launching a new project that would address the many weaknesses in the Compliance Agreement.

However, apart from the provisions of treaty law, there is a recognizable trend in the law of marine capture fisheries for States to cooperate with one another and with competent sub-regional, regional and global organisations. Kwiatkowska has described a “duty to cooperate.”\textsuperscript{43} It can be argued that the duty to cooperate exists in international customary law, particularly in matters of marine resource conservation and management, such as the remedying of IUU fishing.

In fact, the customary law duty to cooperate is supported by numerous treaty references obliging States to cooperate on a variety of subjects including the conservation and management of EEZ\textsuperscript{44} and high seas\textsuperscript{45} fisheries, and, (in the case of the Compliance Agreement), on exchange of vessel data with FAO.\textsuperscript{46}

The international customary law duty to cooperate can be linked to the common law doctrine of obstruction. That is, it is an offence to obstruct or hinder without reasonable excuse, a person or body acting under statutory authority. Applied to international law, it may be an offence to obstruct or hinder a party acting under treaty law as there is an express obligation that

\textsuperscript{40} Ibid, Article 92.
\textsuperscript{42} FAO Compliance Agreement, Note 1.
\textsuperscript{44} Note for example the 1982 Convention, Articles 61(2), 64(1), 65, and 66(3)(b).
\textsuperscript{45} Ibid, Articles 117 and 118.
\textsuperscript{46} The duty to cooperate in international law is also clear in the UN Charter, and the ILO, FAO and GATT Constitutions.
States parties to a treaty will cooperate with one another, and (in the case of the Compliance Agreement) with the FAO. The duty to cooperate can be effectuated in several ways, and the exchange (with FAO) of vessel data, (where release of that data does not breach confidentiality laws) can be seen as a basic first step.

Of some importance as a FFA contribution to the FAO Global Record is the fact that vessel and gear data has been compiled on the FFA Register since its inception in 1979. Each year, a physical description of vessels which are entered on the FFA Vessel Register, is presented to the Director General of the FFA. Vessel Register Forms include the physical characteristics of the vessel, its home port, the identity of the fishing master, the identity of the vessel master and owner, as well as a photograph of the vessel which includes its identifying characteristics. At the present time, the FFA Vessel Register only covers foreign fishing vessels, and for a comprehensive picture of vessels operating in the region, it would be necessary for either the FFA to expand its database, or, more ideally, to jointly contribute data to FAO with other regional bodies such as the Secretariat of the Pacific Community – Oceanic Fisheries Programme (SPC-OFP) and the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (WCPFC). The WCPFC data is more limited because it does not actually indicate where its vessels are operating. The FFA are currently working with the SPC to get all combined vessel data on to the Tuna Fishery Data Management System (TUFMAN).

In a leading display of regional cooperation, the FFA and the SPC have concluded a 1997 Memorandum of Understanding between the Pacific Islands Forum Fisheries Agency and the Secretariat of the Pacific Community Concerning Collaboration in the Development, Conservation and Management of the Tuna and Related Resources of the Western and Central Pacific. The Memorandum has been revised three times with the most recent revision being 2007. The Memorandum of Understanding provides for free exchange of information and documentation between the parties. Ideally such data exchange could also be extended to FAO for the purposes of establishing and maintaining the Global Record.

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48 Baird, note 13 lists the “vessel data” held by the FFA as: name of vessel, register number, international radio call sign and name / address of owner / operator, pp. 12-13.


A 2002 report which reviewed the quality of FFA Vessel Register data noted problems of duplicated vessels, missing data and possible errors in data entry.\textsuperscript{51} Since that time, the FFA has endeavoured to update both their data bases and the quality of their data as part of the Regional Monitoring, Control and Surveillance (MCS) Strategy.

Specifically, in 2002 there was both a Vessel Monitoring System (VMS) Register and a Register of Foreign Fishing Vessels. Not all vessels on the VMS Register were on the latter register and so the Lawson report discovered inaccuracies or inconsistencies. Today, the two vessel registers have been integrated and the current FFA data is adequate for FFA purposes.

Nevertheless, as the FAO Global Record would rely on the provision of continuous, top-quality data, the FFA (and other RFMOs with predominant developing State membership) is likely to require special assistance.

**Should the Pacific Islands Forum Fisheries Agency and the Pacific Island States “Cooperate” with FAO over the Global Record?**

Ultimately, both the individual Pacific Island States and the FFA will need to decide whether the FAO Global Record is an initiative that is worth supporting. An appraisal will be offered by this author.

Against supporting the FAO Global Record, this author sees 3 arguments:

- that the concept has been tried (in the form of HSVAR) and has failed;
- that the personnel, technical and financial costs of assimilating and sustaining the Global Record data at a State and regional level, will be prohibitive for the developing economies of Pacific Island States and the FFA; and finally
- that many States are suffering from “instrument implementation fatigue”\textsuperscript{52} and the extensive and ongoing requirements of the Global Record will only exacerbate this problem.

First, regarding the argument that the concept has been tried and has failed, it must be remembered that although various forms of IUU fishing have existed for many years, the HSVAR was established before IUU fishing in its contemporary sense, was identified, labelled and addressed. That is, the HSVAR database was never intended to deal with the current problem of IUU fishing. The HSVAR deals with large vessels reflagging on the high seas. It does not deal with, and does not address, for example, dynamite or cyanide artisanal fishing within coastal waters, or unreported tuna longliners operating


in EEZs. The modern problems of IUU fishing are vastly different to the issues that were a priority for the drafters of the Compliance Agreement. To effectively address IUU fishing, the Global Record would need to be a significantly different database to that of the HSVAR. The Expert Consultation recognised this fact, and noted the need for the Global Record to address the jurisdictional and technical shortcomings of the HSVAR.53

A second reason why Pacific Island States and the FFA might elect to reject or not participate in the FAO Global Record, is a financial inability to do so. In a collaborative research project conducted with the World Fish Center in Penang, this author has examined aspects of fisheries law compliance by five developing archipelagic States. In brief, it was found that:

The full and effective implementation of [international fishery laws] 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.54

It has already been noted that the 1993 Compliance Agreement gives only the briefest recognition to developing States. In contrast, the 1995 UN Fish Stocks Agreement (UNFSA) set a new standard in legal provisions dealing with developing States. Here, Articles 24-26 elaborate an extensive regime for cooperation between States, and by using the expertise of specialised agencies within the United Nations.55 The provisions acknowledge the vulnerability of developing States, the need to avoid adverse impacts on subsistence and artisanal fishers and how to improve monitoring, control, surveillance, compliance and enforcement. The provisions culminate in a proposal to establish a trust fund that would assist developing States to meet the costs of implementing the UNFSA.

This sophisticated legal regime to assist developing States has been reconstructed in the Agreement on Port State Measures where Article 22 recognises the special requirements of developing States.56

The Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels noted:

Consideration should be given to establishing mechanisms which can provide financial assistance and expertise to developing countries for

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55 United Nations Development Programme, the Global Environment Facility, the Commission on Sustainable Development and other appropriate international and regional organisations.
56 Draft Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Note 30.
capacity building. These could be similar to the 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 Environmental Program (UNEP) should be considered.

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.57

If the FAO Global Record progresses, and some form of foundation instrument accompanies it, the instrument is likely to include firm statements that will enable assistance to be given to both individual Pacific Island States and the FFA.

In the six months following the Global Record Expert Consultation, this author has consulted with numerous delegates from Pacific Island States and the FFA, and the third reason why such entities might reject, or not actively participate in the FAO Global Record has been found to be the strongest of reasons. This is the issue of instrument implementation fatigue.

The subject of instrument implementation fatigue has been persuasively argued by Cochrane and Doulman who have examined the multitude of international fishery instruments since the LOSC, and the challenges for States and RFMOs to comply with every recommendation in this multitude of instruments.58 The challenges of instrument implementation are compounded in developing State economies.

This discussion overlaps a subject raised above which is a fundamental starting point in the progression of the FAO Global Record – should the record have a soft or hard law at its base? It is submitted that any analysis on State and RFMO levels of instrument implementation fatigue must distinguish between the obligation to implement hard law treaties, and the recommendation to implement soft law instruments. Put simply, it is absurd for States to get too “fatigued” implementing instruments that do not have to be implemented.

57 Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, Note 9, paragraphs 43 and 44.
58 Note for example the following environmental / sea / marine resource instruments: 1992 Convention on Biological Diversity; 1992 Agenda 21; 1993 FAO Compliance Agreement; 1995 UN Fish Stocks Agreement; 1995 Code of Conduct for Responsible Fisheries, 2001 FAO Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem, 2002 World Summit on Sustainable Development’s Plan of Implementation. To this list, could be added the 4 FAO IPOAs: seabirds, sharks, IUU fishing and fishing capacity, the FAO Technical Guidelines on Sea Turtles and the 2005 Rome Declaration on IUU fishing.
In February 2003, the twenty-fifth FAO Committee on Fisheries (COFI) meeting convened in Rome and considered, *inter alia*, a Report on Progress of the Implementation of the soft law Code of Conduct for Responsible Fisheries and its related International Plans of Action. The Report revealed an appalling level of State interest in, and compliance with, the soft law FAO IPOAs. Only 57% of FAO members even bothered to respond to the FAO questionnaire. Bearing this in mind, it is interesting to note that the FAO Legal Office now suggests that the previous five years (2003-2008) may have seen a complete turn-around by the international community of States so that voluntary soft law instruments are now more widely adhered to than hard law instruments.

At this stage it is unclear whether the FAO Global Record will be linked to a hard law treaty (with an obligation for States to exchange vessel data), or a soft law instrument (with a recommendation that States exchange vessel data) or whether it will be a mere database with no legal instrument underpinning its existence, and reliant only on the good-will of States and RFMOs to support the FAO materials. This author strongly supports a hard law instrument at the base of the Global Record. Admittedly, some instrument implementation fatigue may be experienced by States which are struggling to keep up with the many international instruments of fisheries governance, but there have been no new hard global fishery laws since the 1995 UNFSA – thirteen years ago, and as such, the Global Record should take State and RFMO compliance priority over the many soft law instruments.

A number of points will now be made for Pacific Island States and the FFA to support the FAO Global Record.

First, and most obviously, the FAO Global Record will be an important tool in improving oceans governance. The global fight against IUU fishing is hampered by one overwhelming problem – lack of information. The problem applies to where IUU fishing is happening, who is engaging in it, what is its true financial damage and its true environmental damage. The FAO Global Record has the potential to become the biggest source of fishing vessel information in the world and it would be a publicly available database. However, the Global Record can only work if it is supported by States and RFMOs contributing their registry data in an ongoing exchange of information.

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59 Food and Agriculture Organisation of the United Nations, Committee on Fisheries COFI/2003/3.
60 The survey was conducted in 2000 and 2002. The total responses in 2000 were 56% and in 2002 they were 57%. Some States responded in 2002 when they did not respond in 2000, but conversely there were other states responding in 2000 and not responding at all in 2002.
61 Refer above discussion on Option Five presented by the FAO Legal Office.
Secondly, as an international lawyer participating in the negotiations at the FAO Global Record, it was surprising to observe the role of private enterprise (such as Lloyds Register Fairplay) and seafood industry representatives in the negotiation and progression of public international law. It has been noted above that the Global Record is expected to be driven by market forces: if your boat is not on the list, it could be presumed to be an IUU vessel, and you will be unable to sell your fish.\(^{63}\) If powerful trading blocks such as the EU take a commercial stand in favour of the Global Record, the global fishing fleet will need to pay attention. It was further pointed out by an industry expert present at the Expert Consultation that if a NGO such as Greenpeace, directs its members to only purchase fish from Global Record vessels, the European seafood industry will be forced to pay attention. Green groups have enormous market clout within the EU. The Pacific Island States and the FFA should aim to be at the forefront of accessing this preferred market choice by supporting the global record.

Thirdly, it has been mentioned that the Global Record has both urgent and aspirational goals. As part of its aspirational goals, data on the record will be used to: improve the traceability of vessels and their fish products; strengthen risk assessment for both governments and industry; and to support decision-making on topics such as fleet capacity, safety at sea, pollution, and vessel security. It will be a vital tool in the armoury of flag and port State jurisdiction, and in the fighting of transnational fishing crimes.\(^{64}\) Put simply, the Global Record aims to expose illegal and improper fishing activity.

Finally, it has been mentioned that it is thirteen years since the international community’s last global hard law fisheries management treaty. In the intervening period, the leadership of much fisheries governance has moved away from global organisations and into the hands of proactive RFMOs. However, the Global Record is a clear example of a “big picture” project that can only be done at the global level. Ecosystems are inter-connected, fish markets are trans-national, and the philosophical discipline is public international law. These factors necessitate a global approach to dealing with the subject. The scope of the Global Record will be world-wide. It will aim to include all UN specialised agencies, all coastal States, all RFMOs and private enterprise corporations. Ultimately, it is not unfeasible that the Global Record could totally change the way we manage, catch and purchase our fish and fish products.

**Conclusion**

This chapter has examined a potential new international instrument to improve oceans governance – the FAO Global Record of Fishing Vessels. It has considered the historical origins of, and formal calls for, a global vessel

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\(^{63}\) *Ibid*, paragraphs 49 and 50.

\(^{64}\) *Ibid*, paragraph 30.
database, the FAO Compliance Agreement and HSVAR as a prototype of the Global Record; how the Global Record would differ from the prototype; the potential role of the FFA and individual Pacific Island States in establishing and maintaining the Global Record; and finally an evaluation of whether the Global Record is good for the region.

This text is to commemorate and celebrate the thirtieth anniversary of the Pacific Islands Forum Fisheries Agency. In 1979 the FFA led the way with regional fisheries management based on a vessel register system that was unlike any other. It would be encouraging to see (thirty years later) the FFA take another leading stand by using its regional and State registry data to promote the FAO Global Record.
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2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing.


Secondary Materials


Baird R. “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” in Appendix G of Report of the


