

A NEW GLOBAL RECORD FOR AN OLD THREAT

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1. A New Global Record

Records and registries are used domestically and internationally as important tools of management and enforcement. Over the past fifteen years there have been numerous calls for an international record of all fishing vessels in the global fishing fleet. These calls have been raised in the past as a response to re-flagging of vessels; managing migratory and straddling fish stocks; and fishing fleet overcapacity. However, since the 2005 Ministerially-led Task Force on illegal, unreported and unregulated (IUU) fishing on the high seas, there has been a new, louder call for a global record of all fishing vessels, refrigerated vessels and fishing support vessels. Such a record is seen to be a vital tool in the international fight against IUU fishing. This article will consider both the problem of IUU fishing and the Global Record proposed by the United Nations Food and Agriculture Organisations (FAO) as a remedial tool to address IUU fishing.

1.1 Records on a Global Scale

That records and databases are beneficial in enforcing and policing laws is a matter of common sense; imagine an attempt to police traffic laws without a system of vehicle identification. In an international policing context, records and databases have proven an important part of Interpol's core functions with much of the organisation revolving around maintaining global databases.¹ The concept of a record database has also been applied to international shipping. The International Maritime Organisation (IMO) through the *Convention for the Safety of Life at Sea (SOLAS)*² maintains the Global Information Shipping System with the information contained being used to assist authorities manage marine security, vessel safety and vessel caused marine pollution.³ Lloyds also maintains a private corporate arm (Fairplay) which houses an international shipping database record and provides a comprehensive range of data on larger shipping vessels. The Lloyds Register is made available to both the government and private sector alike.⁴ With the effective use of global records in international shipping it is no surprise there have been long standing calls for the creation or extension of a record to cover all fishing vessels, not just shipping vessels.⁵

The first instrument to formalise a call for a record of fishing vessels was the 1993 *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (the Compliance Agreement). This agreement was created to address the problem of vessel re-flagging which was thereby impacting on the effectiveness of the 1982 *Law of the Sea Convention*.⁶ Article IV creates a requirement that each party maintain a record of fishing vessels,⁷ Article V (3) speaks of global co-operation,⁸ and Article VI sets out that the data in individual states records should be reported to FAO and there form the basis of a fishing vessel record called the *High Seas Fishing Vessel Authorization Record (HSVAR)*.⁹ Unfortunately HSVAR has failed to become the comprehensive

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¹ Interpol <<http://www.interpol.int/Public/icpo/about.asp>>, at 10 May 2008.

² Opened for signature 1 November 1975, IMO, (entered into force 25 May 1980).

³ Global Information Shipping System <<http://gis.imo.org/Public/>> at 10 May 2008.

⁴ Lloyds Register <<http://www.lr.org/Industries/Marine/Services/Shipping+information/>> at 10 May 2008.

⁵ G. Lugten, 'The FAO Global Record of Fishing Vessels, Refrigerated Vessels and Fishing Support Vessels' (2008) *International Journal of Marine and Coastal Law* (In press).

⁶ Opened for signature 10 December 1982, (entered into force 16 November 1994); *Agreement To Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993* relevant section of the preamble reads: 'Recalling that Agenda 21, adopted by the United Nations Conference on Environment and Development, calls upon States to take effective action, consistent with international law, to deter reflagging of vessels by their nationals as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas...'

⁷ Article IV states that 'Each Party shall, for the purposes of this Agreement, maintain a record of fishing vessels entitled to fly its flag and authorized to be used for fishing on the high seas, and shall take such measures as may be necessary to ensure that all such fishing vessels are entered in that record'.

⁸ Article V (3) states that 'The Parties shall, when and as appropriate, enter into cooperative agreements or arrangements of mutual assistance on a global, regional, subregional or bilateral basis so as to promote the achievement of the objectives of this Agreement'.

⁹ G. Lugten, *Development of a Comprehensive Global Record of Fishing Vessels, Refrigerated Carriers and Support Vessels*, Legal Consultation for the Food and Agriculture Organization of the United Nations, (2008); *Compliance Agreement* (see particularly Annex II), available at <<http://www.fao.org/legal/treaties/012T-e.htm>> at 8 May 2009.

record envisaged by the Compliance Agreement. States have failed to follow through on legal obligations, some in providing data and others in providing accurate or complete data.¹⁰

Only two years after the Compliance Agreement was signed *The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (The Fish Stocks Agreement) again called for the establishment of vessel records.¹¹ This agreement aimed to improve the management provisions of the 1982 *Law of the Sea Convention* in relation to migratory and straddling fish stocks. Article 18 (3) (c) makes it a requirement states maintain a record of vessels flying their flag.¹² Arguably the cooperative provisions of the agreement also invite states to cooperate in a global record in order to improve enforcement capabilities of regional organisations.¹³ However, it must be recalled that this instrument is limited to highly migratory or straddling fish stocks and therefore, the 'record' it envisaged, would be, limited in scope and nature.

A global record was next called for as an answer to addressing fishing fleet overcapacity in the International Plan of Action for the Management of Fishing Capacity (IPOA-capacity).¹⁴ Over-investment in the fishing industry was unsustainable in the face of declining fish stocks that were already overexploited.¹⁵ Under part III –Urgent Actions, Articles 16, 17 and 18 provide clear directives for states to maintain their own national records in a globally compatible way and provide that information in a cooperative manner.¹⁶

The above mentioned calls for a global record have arisen out of problems with the re-flagging of vessels, with managing migratory and straddling fish stocks and with addressing over-capacity. Recently calls have arisen for a global record to address the latest challenge in international fisheries management: illegal, unreported and unregulated fishing.

1.2 Illegal, unreported and unregulated fishing

IUU fishing is a significant problem for nations worldwide, and it is the major obstacle to achieving sustainable fisheries and effective fisheries management in both areas of national jurisdiction and on the high seas.¹⁷ Prevention of IUU fishing (and the setting of targets for legal fishing in light of the uncertain impact of IUU fishing), provides an enormous challenge to national, regional and international bodies attempting to manage fisheries.¹⁸ IUU fishing on the high seas (whilst not as large a problem as IUU fishing within exclusive economic zones) constitutes an old problem in a new form. It is a contemporary manifestation of the long recognised tragedy of the commons.¹⁹ The high seas have been free to all to use since the time of Hugo Grotius.²⁰ Unfortunately as all can use it, but none own it, the classic tragedy situation of people exploiting without care for the future of the resource has arisen. The international law has

¹⁰ Lugten, above n 9.

¹¹ *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* 1995.

¹² Article 18 (3) (c) requires the 'establishment of a national record of fishing vessels authorized to fish on the high seas and provision of access to the information contained in that record on request by directly interested States, taking into account any national laws of the flag State regarding the release of such information'.

¹³ G. Lugten, *The FAO Global Record of Fishing Vessels: Issues for Pacific Island States and the Forum Fisheries Agency*, (2008), paper prepared for FFA Legal Conference 7-9 April Fiji 2008; *The Fish Stocks Agreement* 1995, Article 20 (1) which calls for international co-operation in enforcing regional fisheries management.

¹⁴ FAO International Plan of Action for the Management of Fishing Capacity, <http://www.fao.org/docrep/006/X3170E/x3170e04.htm> at 10 May 2009.

¹⁵ R. Metzner, 'Fishing Aspiration & Fishing Capacity: Two Key Issues' (2005), *Conference on the Governance of High Seas Fisheries and the UN Fish Agreement* St. John's, Newfoundland and Labrador 1-5 May, 2005.

¹⁶ Article 16 provides that: 'States should support FAO in the development of appropriate and compatible standards for records of fishing vessels', Article 17 provides that: 'States should develop and maintain appropriate and compatible national records of fishing vessels, further specifying conditions for access to information'; and Article 18 provides that:

While awaiting the entry into force of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (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.

¹⁷ 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 instrument* (UN publications: A/59/298).

¹⁸ United Nations Food and Agriculture Organisation, Committee on Fisheries Making Monitoring, Control and Surveillance of Fishing Vessels more Effective Rome, Italy, 24-28 February 2003, <<http://www.fao.org/docrep/meeting/005/Y8216E.htm>> at 10 May 2008.

¹⁹ G. Hardin, 'The Tragedy of the Commons' (1968) *Science* 162 3859 pp. 1243 – 1248; G Lugten, 'The FAO Global Record of Fishing Vessels: Issues for Pacific Island States and the Forum Fisheries Agency' (2008) paper prepared for FFA Legal Conference 7-9 April Fiji 2008.

²⁰ H. Grotius 'Mare Liberum or The Freedom of the Seas' (1608) as translated by Magoffin, (1916). <http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=552> at 10 May 2008.

been aware of IUU fishing for a relatively short time; it was recognised and named at a 1997 *Convention for the Conservation of Antarctic Marine Living Resources* (CCAMLR) meeting.²¹ The term encompasses fishing done in violation of national, regional and international laws and regulations, fishing that is conducted but not reported or not reported accurately to the managing authority, and fishing that is conducted by unregulated vessels or in unregulated fisheries.²²

IUU fishing is a problem global in scope. It has been estimated that in the Indian and Pacific Oceans up to 400,000 tonnes of tuna have been caught by IUU fishermen on an annual basis and that the global IUU fishing catch is worth between 1.9 and 9.5 billion dollars annually.²³ The ecological impacts of IUU fishing are also wide ranging:

- it compromises the scientific basis of management of fish stocks by impacting on stock assessment and historical catch data;
- it undermines the management of those stocks, by fishing outside of prescribed limits and thereby threatens the fisheries that many depend on for food and income;²⁴
- it has a disproportionate effect on non-target species, habitat and ecology compared with legal fishing, because IUU vessels bypass the fishing technique and gear requirements placed on legal vessels.²⁵

The demand for fish is growing faster than the world's population as developing nations increase the protein in their diet their demand for fish increases.²⁶ As many exclusive economic zone fisheries, closer to coastal populations, are currently being overexploited or have long since been depleted, vessels are turning to the high seas to satisfy the world's demand for fish and fish products.²⁷ This means that both legal fishers and IUU fishers are competing for the dwindling high seas fish catch.²⁸ It is in this context that the calls for a global record to assist in the fight against IUU fishing have been growing in strength.

The first call came in the form of the FAO International Plan of Action on Illegal, Unreported and Unregulated Fishing created under the Code of Conduct.²⁹ In that plan Articles 42 and 43 provide great detail on the maintenance of a record of fisheries vessels to be held by the flag state. Though not calling for a global record this instrument was calling for all states to hold national records. In 2005 the Ministerially-led Task Force on IUU Fishing on the High Seas agreed a global information system for fishing vessels was needed.³⁰ Also in 2005, the *Rome Declaration on*

²¹ The first appearance of the term 'IUU' fishing was at the 1997 annual meeting of the *Convention for the Conservation of Antarctic Marine Living Resources* (CCAMLR).

²² IUU fishing is given its scope in the International Plan of Action –Illegal, Unreported and Unregulated Fishing where the plan provides:

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, to the relevant national authority, 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.

²³ Marine Resources Assessment Group, *IUU Fishing on the High Seas: Impacts on Ecosystems and Future Science Needs Final Report*, August, 2005 *Department of International Development*, London United Kingdom; M. Lack, 'Catching On? Trade Related Measures as a Fisheries Management Tool' (2007) *Traffic International*, Cambridge, United Kingdom.

²⁴ Lack, above n 23; Lugten, above n 9.

²⁵ Lack, above n 23.

²⁶ Metzner, above n 15.

²⁷ Metzner, above n 15.

²⁸ Lack, above n 23

²⁹ *International Plan of Action on Illegal, Unreported and Unregulated Fishing* <<http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM>>, at 10 May 2008; *FAO Code of Conduct for Responsible Fisheries* <<http://www.fao.org/DOCREP/005/v9878e/v9878e00.htm>> at 14 May 08

³⁰ High Seas Task Force, *High Seas Governance*, (2005) *Meeting of the High Seas Task Force* Paris, 9 March 2005.

Illegal, Unreported and Unregulated Fishing called for the creation of a global record of fishing vessels, supply vessels and refrigerated transport vessels.³¹

Finally in 2008, FAO convened an expert consultation on the development of a new comprehensive global record of fishing vessels, refrigerated vessels and support vessels (the Global Record).³² The proceedings of the expert consultation, and the (as yet unresolved) legal controversies that surround the FAO Global Record, are the subject of the remainder of this article.

1.3 The FAO Global Record and Expert Consultation

In February 2008 experts convened in Rome for a FAO consultation on the Global Record which received submissions from academics and interested parties. The consultation considered the benefits of the Global Record. According to one expert a FAO Global Record would support initiatives against IUU fishing by:³³

- Providing comprehensive data on the size, structure and nature of the global fishing fleet;
- Provide a resource for those enforcing port state measures to be able to identify vessels;
- Allow managers and authorities to access data on licences; and
- Support catch documentation and vessel monitoring and surveillance schemes.

The consultation then made several findings on the feasibility of the Global Record. These included technical aspects such as the need for an individual identification number (the unique vessel identifier), the cost of the database and the data to be included.³⁴ They also made findings on several key legal matters. For example, the Global Record would be a record, not a register, the difference being a register provides some legal standing such as the right to fish, whereas the FAO Global Record will merely house the data.³⁵ In a similar vein the consultation also decided that the Record will not create 'black' or 'white' lists as some Regional Fishery Management Organisations, such as CCAMLR do, but rather be a more neutral information source.³⁶

The expert consultation also raised questions of its own, and it is these critical questions, (in particular those relating to the legal base of the Global Record), that this article aims to examine. Accordingly, Part II of this article will consider the options generated for providing a legal base to the Global Record by the Expert Consultation. It will examine in particular detail the possibility of attaching the Global Record to two treaties which are currently in progress:

- The *draft Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*;³⁷ and
- The *1993 Torremolinos Protocol*.³⁸

Finally, the article will also examine the ability of market-driven measures to be used as an implementation tool for the Global Record.

2. The Legal Basis of the Global Record and Related Issues

2.1 The Need for a Legal Base

Whether or not there should be legal base for the Global Record and what form that base should take was an important consideration of the Expert Consultation and was discussed repeatedly throughout the process.³⁹ This part of the article will consider the reasons why the Global Record will need legal support and then the various options for that, particularly those considered by the Expert Consultation.

³¹ The 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing adopted by the *FAO Ministerial Meeting on Fisheries*, Rome 12 March 2005 < <ftp://ftp.fao.org/fi/DOCUMENT/ministerial/2005/iuu/declaration.pdf> > at 10 May 2008.

³² Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, Rome, Italy, 25-28 February 2008.

³³ A. Mouzourouopoulos, Paper submitted to the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, Rome, Italy, 25-28 February 2008.

³⁴ Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 32.

³⁵ Lugten, above n 9.

³⁶ Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, Rome, Italy, 25-28 February 2008; B. Le Gallic, *Using Trade Measures in the Fight Against IUU Fishing: Opportunities and Challenges*, (2004), IIFET Japan Proceedings 2004

³⁷ *draft Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* <<ftp://ftp.fao.org/FI/DOCUMENT/tc-psm/2008/2e.pdf>> at 3 May 2008.

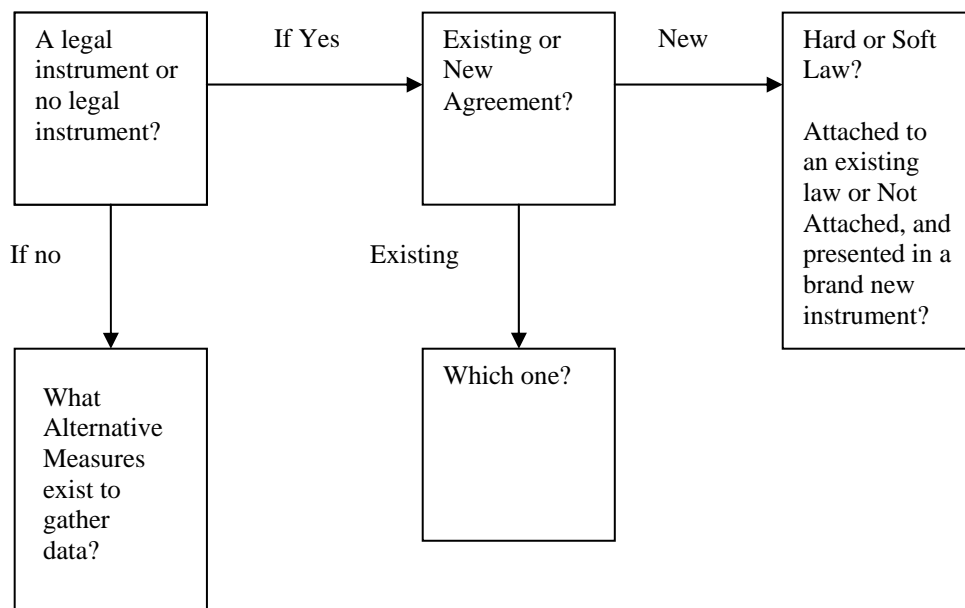
³⁸ *Torremolinos Protocol of 1993 relating to the Torremolinos International Convention for the Safety of Fishing Vessels, 1977* opened for signature 2 April 1993, IMO, not yet in force.

³⁹ Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36, 5.

The Expert Consultation came to several important conclusions on the nature of the Global Record. Firstly it was decided that it would not create black lists (or presumably white lists) but would be neutral and only a source of information.⁴⁰ Secondly the Consultation determined that the Global Record would be a record and not a registry.⁴¹ This is important because a record is defined as: recorded pertinent details of fishing vessels compared to a registry which grants some legal status to the vessel such as the right to fly a nation's flag or the right to access a regionally managed fisheries area.⁴² As the Global Record is not granting legal standing or publishing lists on legal standing it will not need a legal basis to give its records a particular status. One other particular need that should be focused on is the importance of sourcing data, as the Global Record will need comprehensive and accurate data to be effective.⁴³ This data does not currently exist and whilst some could be obtained from records such as HSVAR or other existing databases, much would have to be obtained directly from states or Regional Fishery Management Organisations (RFMOs).⁴⁴ This in turn will require the active participation of states and RFMOs, and therefore some instrument will be advantageous in supporting and guiding that participation.⁴⁵

Essentially there were several options available. The first decision is whether there would or wouldn't be a legal instrument? Next, if there is to be a legal instrument it has to be decided whether an existing instrument should be used or whether a new instrument should be negotiated? If it was to be an existing agreement, which agreement would it be? Finally, if it were to be a new agreement, (either hard or soft law) should it be attached to an old instrument, or should it stand alone? Table One presents the options in a flow-chart model.

Table One
The Consultation delivered four options on this matter:⁴⁶



- *Option One:* Retain the status quo. The Compliance Agreement will be the legal instrument underpinning a Global Record in conjunction with its database, HSVAR.
- *Option Two:* Develop the HSVAR database by adding data from EQUASIS, Lloyds Fairplay, readily compliant States and RFMOs. This option will not have a legal instrument at its base.

⁴⁰Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36, 4.

⁴¹Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36, 6.

⁴² Lugten, above n 9. In that work, Article 1(d) of the Agreement to Promote Compliance with International Conservation and Management measures by Fishing Vessels on the High Seas was cited as defining a 'record'. That section reads: 'record of fishing vessels' means a record of fishing vessels in what 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.'

⁴³ Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36, 5.

⁴⁴ Lugten, above n 9.

⁴⁵ United Nations Food and Agricultural Organisation, Flag State Implementation *Report of the Second Joint FAO/IMO ad hoc Working Group on IUU Fishing and Related Matters*, at 31 July 2007.

⁴⁶ Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n, 36, [14].

- *Option Three:* Amend the Compliance Agreement and extend HSVAR to address its short comings.
- *Option Four:* Attach the Global Record to a new legally binding instrument.

2.1.1 Option One

This option requires the Global Record to rely on the Compliance Agreement and the associated record the HSVAR but this agreement, as set out above, was created to address a problem different to the IUU fishing which demands attention today. That is, the Compliance Agreement looks only at vessels re-flagging on the high seas.

Article VI sets out the data reported to FAO that is the basis of a fishing vessel record HSVAR.⁴⁷ HSVAR has failed in being the comprehensive record envisaged and through various failings HSVAR has been rendered non-effective for global fisheries enforcement. These failings stem not just from states failing to implement the agreement but also the limitations of the Compliance Agreement itself. Pertinently it is limited to high seas vessels and vessels over 24 metres in length, both limitations remove a significant contingent of the IUU fleet from the scope of the Compliance Agreement and any Global Record based on it.⁴⁸

2.1.2 Option Two

As discussed above, for the Global Record to source data the active participation of States and RFMOs will be required. The exchange of data with FAO is more likely to be activated and sustainable if there is some sort of legal instrument to obligate states to provide the data that FAO will need. This would prima facie suggest that Option 2 is unrealistic for the effective operation of the Global Record, but in the final part of this paper the suggestion will be made that market measures may be able to ensure the provision of data, even without a legal instrument underpinning the Global Record.

2.1.3 Option Three

This is a viable option, and the Lugten report to the Expert Consultation considers the myriad of amendments required to address the Compliance Agreement's short comings. The weaknesses thus identified were:⁴⁹

- 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.
- 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.

Unfortunately the Compliance Agreement does not currently include any provision for a review mechanism. This means that it would be necessary to call the States Parties together and reach agreement amongst all of them on amending the original Compliance Agreement.⁵⁰

2.1.4 Option Four

Creation of a new legal instrument would have an opportunity to overcome many of the problems associated with past legal instruments creating global records. Currently across fisheries management there is a piecemeal system of authority, with authority and management stretching across national and international and regional organisations and across a myriad of hard and soft law agreements. This has led to a system of requirements and aspirational goals that are complex and confusing and in many cases causing 'instrument fatigue' and therefore low compliance.⁵¹ These considerations provide a partial explanation for the HSVAR failings, which although created by hard law, has had limited compliance.⁵² The limitations on compliance have also been seen in relation to soft law instruments, which although applied in some cases, overall compliance is often less than satisfactory.⁵³ Any treaty or instrument forming the basis of a new global record will be able to address these issues, by providing a comprehensive instrument

⁴⁷ Lugten, above n 9; Compliance Agreement < <http://www.fao.org/fishery/collection/compliance-agreement/3> > at 8 May 2008.

⁴⁸ Lugten, above n 9.

⁴⁹ Lugten, above n 5.

⁵⁰ Lugten, above n 9.

⁵¹ Cochrane and Douman, 'The rising tide of fisheries instruments and the struggle to keep afloat' (2005) *Fisheries: a Future* (Theme Issue of Philosophical Transactions of the Royal Society: Biological Sciences), 80.

⁵² Lugten, above n 9.

⁵³ Pitcher, Kalikoski, and Pramod 'Evaluations of Compliance with the FAO (UN) Code of Conduct for Responsible Fisheries' *Fisheries Centre Research Reports* 2006 Volume 14 Number 2.

containing all that is necessary for the Global Record, and addressing the needs of developing nations in combating instrument fatigue.⁵⁴ As well as being able to address these concerns a new agreement, whether hard or soft law, would provide new momentum and impetus to the task of creating the Global Record. To remain effective and not to suffer the waning compliance that HSVAR has experienced, any new instrument must include novel ideas to ensure relevance, and therefore compliance, in the long term. One interesting solution proposed to the expert consultation would require that all states that wish to register ships to their flag, must comply with certain international laws (in this case being recorded on the Global Record) before other states would recognise the right of these vessels to fish.⁵⁵ This would be an excellent solution, giving great strength to both port state and flag state countries who do comply with international law to enforce this upon more recalcitrant states. But the option may be in confrontation with the fundamental doctrine of freedom of the seas, (at least in relation to freedom of fishing).⁵⁶ Whilst the scientific community may agree that there are not enough fish in the sea for freedom of fishing to continue to exist, it seems that any interpretation that removes or undermines the customary law would be legally and politically controversial.⁵⁷

Whilst a new treaty may offer many benefits, it also has drawbacks. The primary disadvantage is the time it would take to negotiate and bring a new treaty into effect. There is widespread agreement that the global record is a matter requiring some urgency.⁵⁸ The next two parts of this article examine possible solutions to this dilemma, by considering the possibility of adding the requirements of a global record to two treaties which are already either open or fast-tracked and currently in progress. These are: the draft Agreement on Port State Measures and the 1993 *Torremolinos Protocol*.

2.2 An Agreement on Port State Measures and the Global Record

When the Expert Consultation specifically considered the possible legal basis for the Global Record, one option cited was the attaching of an agreement for the Global Record to the *draft Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Port States Agreement).⁵⁹ The proposed Agreement on Port State Measures is the culmination of a long push to broaden the jurisdiction to deal with IUU fishing that began when the *International Plan of Action to Combat Illegal, Unreported and Unregulated Fishing* (IPOA-IUU) was adopted and the instrument contained responsibilities of port states.⁶⁰ Port State responsibilities have been seen as an important additional weapon in the fight against IUU fishing as they presents the opportunity to deny IUU fishing catch entry into the market place through inspections at port and denial of access to those ports.⁶¹ Importantly port state jurisdiction is also an effective counter to the flags of convenience problem, which has been a major obstacle for other fishery management initiatives.⁶² The Expert Consultation on the Global Record indicated that as the Port States Agreement was currently in draft and ‘fast-tracked’, it could provide a legal basis for the Global Record. That is, by attaching the Global Record to a nearly completed, relevant treaty, the Global Record could come into operation in a much timelier manner than normally occurs with negotiations for a new binding instrument that would be negotiated ab initio.⁶³ However this practical consideration is not the only reason an Agreement for the Global Record could be added to the Port States Agreement. It is submitted that there is a synergy between the Global Record and Port States Agreement in their aims, provisions and in their practical application.

2.2.1 Aims

⁵⁴ Lugten, above n 13.

⁵⁵ Mouzourouopoulos, above n 33.

⁵⁶ Grotius, above n 20.

⁵⁷ Metzner, above n 15.

⁵⁸ United Nations Food and Agricultural Organisation (2007) *Flag State Implementation Report of the Second Joint FAO/IMO ad hoc Working Group on IUU Fishing and Related Matters* at 31 July 2007.

⁵⁹ Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36, [14]; This draft agreement is available at <http://ftp.fao.org/FI/DOCUMENT/tc-psm/2008/2e.pdf>, at 3 May 2008.

⁶⁰ I. Nomura ‘Strengthening Port Measures in the Indian Ocean; The Key to Improving Fisheries Management and Combating IUU Fishing’ (2007), Opening Address *IOC-FAO-IOTC International Symposium* 18 -20 June 2007.

⁶¹ *Ibid*; A Fabra, V. Gascon and F. Werner, ‘Use of Port State Measures to Improve Fisheries Compliance: Issues and Instruments’ (2006) *National Environmental Trust* < <http://www.illegal-fishing.info/uploads/Fabra-use-of-port-state-measures.pdf> > at 10 May 2008.

⁶² Port State Jurisdiction has been used for a long time in the regulation of shipping, in that situation it has also been a response to problems with flags of convenience see Standing Committee on Communications, Transport and Microeconomic Reform Inquiry into the Australian Maritime Safety Authority *Annual Report 1996-97* ch. 4; Report of Technical Consultation to Review Port State Measures to Combat Illegal, Unreported and Unregulated Fishing Rome 31 August – 2 September 2004 *FAO Fisheries Report* 759.

⁶³ Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36.

The Global Record's express aim is to combat IUU fishing. This aim was expressed in the Prospectus for the Expert Consultation and in that Consultation's Report.⁶⁴ This aim is expressly the same as the aim of the Port States Agreement: 'The objective of this Agreement is to ensure the long-term conservation and sustainable use of living marine resources through strengthened and harmonized port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing.'⁶⁵

2.2.2 Provisions

The text of the Port States Agreement also supports the view that the Global Record could be connected to it. The agreement's proposed text contains provisions that encourage a legally based Global Record. It specifically calls for the integration of anti-IUU measures and for the sharing of information amongst states. This is done through Article 5 (b) which calls on parties to 'integrate Port State measures with other measures to prevent, deter and eliminate illegal, unreported and unregulated fishing' and Article 6 which calls on parties to cooperate and exchange information with relevant States, regional fisheries management organizations, international organizations and other entities as appropriate. The Global Record will essentially be a tool for the sharing of information on vessels and their fishing permissions. It is a tool which would allow the relevant parties (national and international) to quickly access the information provided by others to more effectively enforce other anti-IUU initiatives. Article 6 requires parties to share this information with FAO (as an international organisation) which satisfies the main legal need of the Global Record to get data. Once information about vessels is within FAO it can be used to create the Global Record.⁶⁶ The Global Record and Port States Agreement are similar in their aims and in their need for information sharing, so it would be no large step to integrate the two as suggested in the Port State Agreement itself at Article 5.

2.2.3 Practice

Implementation of the Port States Agreement will require parties to deny access for the purpose of unloading fish in their ports, if the state has reasonable grounds for believing the vessel has engaged in some form of IUU fishing.⁶⁷ The making of such an assessment requires knowledge of where a particular vessel has been fishing and what licenses that vessel has been granted for fishing, both of which rely on accurate identification of the vessel. This task would clearly be more easily achievable with access to a global record allowing for accurate identification of the vessel, viewing the vessel's permission to fish, and receiving any intelligence relating to where the vessel did fish. In many respects enforcement of anti-IUU measures through port states has a need for the effective information sharing that a global record would accord.⁶⁸ This is impliedly acknowledged in the text of the draft agreement where in Annex A Box 11 shows that it is expected that vessels will supply their 'Global Record ID' before entry into port. The effectiveness that the Global Record would add to the Port State Agreement has already been seen in the implementation of port state measures to improve shipping regulations. There, the Global Information Shipping System has shown itself to be an integral component of those measures.⁶⁹ In this way the Global Record would have a synergy with port state measures, making them more effective and easier to implement.

A particularly important aspect of this is that the Global Record would lower the investigative cost associated with enforcing the treaty, thereby benefiting developing states. Developing states, though having large fishing fleets often struggle to implement international instruments. This has many causes but most often it is because developing countries do not have the technical or financial resources to implement the multitude of instruments applicable to them.⁷⁰ The Port States Agreement specifically addresses this problem in Article 22 where the agreement calls on parties to give full recognition to the special requirements of developing states, adopting the Global Record would help the parties also address this issue in practice.⁷¹

⁶⁴ Prospectus of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, Rome, Italy, 25-28 February 2008; Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36.

⁶⁵ Article 2 draft Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

⁶⁶ Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36, [12].

⁶⁷ See specifically article 9 parts (1) to (5).

⁶⁸ T. Lobach 'Measures to be Adopted by the Port State in Combating IUU Fishing Expert Consultation on Illegal, Unreported and Unregulated Fishing' (2000) Conference Organized by the Government of Australia in Co-operation with FAO Sydney Australia 15-19 May 2000.

⁶⁹ United Nations Food and Agricultural Organisation, above n 58.

⁷⁰ G. Lugten and N. Andrew, 'Maximum Sustainable Yield of Marine Capture Fisheries in Developing Archipelagic States –Balancing Law, Science, Politics and Practice' (2008) *International Journal of Marine and Coastal Law* 23:1 1-37.

⁷¹ The relevant parts of Article 22 of the proposed Agreement on Port State Measures reads:

1. Each Part shall give full recognition to the special requirements of developing States in relation to the implementation of port State measures. To this end, Parties shall, either directly or through FAO and other specialized agencies of the United Nations and other appropriate international and regional organizations, provide assistance to developing States in order to:

Whilst attaching the Global Record to the Agreement on Port States Measures would allow for the record to be moved through the negotiation process much more quickly than would otherwise occur, it would also make the process for the Ports States Agreement slower than it might have otherwise been. Yet there is still an argument for the merger to occur because of the synergies between the two initiatives. Both initiatives share the aim of combating IUU fishing and both require the sharing of information between parties.⁷² More importantly the Global Record has the potential to be an integral tool in implementing the Port State Agreement as the Global Information Shipping System has been to the port state control of international shipping.⁷³ The Global Record will be particularly important in assisting developing states to effectively implement the requirements of the Port State Agreement which in turn is required for that agreement to be effective. As the Global Record would be a useful and integral part of implementing the Agreement on Port States Measures, the possibility of combining both initiatives should be considered.

2.3 Shipping and Fishing Vessels: Possible Cooperation between the International Maritime Organisation and the United Nations Food and Agriculture Organisation

The FAO is a specialised agency of the United Nations tasked with working to eradicate hunger and secure food supplies around the world; this mission includes responsibility for fisheries and agriculture.⁷⁴ The IMO is also a United Nations specialised agency which was formed in 1958 to ‘provide machinery for cooperation’ in shipping between states.⁷⁵ This has meant that in relation to fishing vessels there is significant overlap in the jurisdiction and expertise of FAO and the IMO.⁷⁶ That is, the IMO have a mandate for safety at sea and protection of the marine environment, while FAO has a mandate for fisheries in general.⁷⁷ This natural overlap has been recognised by the cooperation between the two organisations, forming *ad hoc* joint meetings to address issues of concern to both.⁷⁸ This has included general cooperation on addressing IUU fishing and as discussed above, cooperation on port state measures.⁷⁹ This cooperation has extended to the Global Record as in the Second Joint FAO/IMO *ad hoc* Working Group on IUU fishing, the Global Record was discussed.⁸⁰ This section of the paper will examine the options for cooperation between the two organisations on the Global Record. Firstly the possibility of the IMO providing technical assistance, and then the possibility of the IMO providing an integrated register of shipping and fishing vessels and the benefits that this would bring.

2.3.1 Technical Assistance and Experience

The *International Convention for the Safety of Life at Sea (SOLAS)*,⁸¹ is the flagship safety treaty of the IMO, and was first introduced with enthusiastic support following the Titanic disaster. Unfortunately SOLAS does not cover fishing vessels but it does contain the provisions for the Global Shipping Information System that can provide an example for the Global Record.⁸² SOLAS adopts a system of both registered flag state and port state information gathering.⁸³

(a) enhance the ability of developing States, in particular the least-developed among them and small island developing States, to develop a legal basis and human capacity for the implementation of effective port State measures;

(b) facilitate the participation of developing States in any subregional, regional and international organizations that promote the effective development and implementation of port State measures; and

(c) facilitate technical assistance to strengthen the implementation of port State measure by developing States, coordination with relevant regional and international measures and mechanisms.

⁷² Article 6 of the Agreement on Port State Measures; Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36, [14].

⁷³ United Nations Food and Agricultural Organisation, above n 58.

⁷⁴ The Preamble and Article 1 of the FAO Constitution < <http://www.fao.org/docrep/009/j8038e/j8038e01.htm#1> > at 11 May 2008.

⁷⁵ Article 1(a) Convention on the International Maritime Organization 1946 < http://www.imo.org/conventions/mainframe.asp?topic_id=771 > at 11 May 2008.

⁷⁶ Report of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters Rome, Italy, 9-11 October 2000 *FAO Fisheries Report*. No.637. Rome, FAO. 2001. 24p.

⁷⁷ E. Mitropoulos, ‘Address to the Committee on Fisheries (COFI) of the Food and Agriculture Organization of the United Nations (FAO)’ 27th session, Rome, 5-9 March 2007.

⁷⁸ For example Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters Rome, Italy, 9-11 October 2000.

⁷⁹ Report of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters Rome above n 74; United Nations Food and Agricultural Organisation, above n 58.

⁸⁰ United Nations Food and Agricultural Organisation, above n 58.

⁸¹ Opened for signature 1 November 1975, IMO, (entered into force 25 May 1980).

⁸² International Maritime Organisation, Information required from SOLAS Contracting Governments under the provisions of SOLAS regulation XI-2/13 *Circular letter No. 2514* 8 December 2003; International Maritime Organisation, *Guidance To Masters, Companies And Duly Authorized*

Regulation XI-2/13 requires flag states to submit information to IMO for entry into their Global Information Shipping System and SOLAS Regulation XI-2/9.2.1 requires ships to submit data to port states on entry, with that data again forwarded to IMO, all provided for in an online submission system.⁸⁴ The twin requirements of information reporting from flag and port states allows a comprehensive coverage of vessels, even considering that many states have not signed up to the treaty.⁸⁵

Importantly the treaty shows that the IMO has much to offer in terms of technical support to the Global Record, including the experience of setting up a global information system and experience in gathering the data required. The experience of creating a merchant shipping record that successfully integrates various sources of data including from flag and port states would be invaluable to FAO in setting up a technically similar record for fishing vessels. That the two records would be so technically similar has led to suggestions that an integrated record covering all shipping would be the most effective way to create the Global Record.

2.3.2 An Integrated Global Record

A joint database could be used to supply the needs of both shipping, security and fisheries managers, this may offer technical benefits such as a saving in operating costs but it may also offer benefits in convincing states to join the Global Record. This may simply be a case of practicality, with states more likely to sign up to a system where there is only one place to submit data to and only one place they have to go to get the data they need. It would also be easier, particularly for developing states if there is only one agreement to implement.⁸⁶ There is also an argument that the subject matter within a joint database may speed up the process of states joining, as the IMO record covers the security of international shipping.⁸⁷ Global security is an issue that has garnered much support in recent times and states have been quick to support and implement security measures, and have been much more receptive to highly enforceable agreements on this topic.⁸⁸ Therefore if the global fishing vessel record could be part of a wider move to create a much broader global record, through a co-operative of IMO and FAO, then the potential for strong international support may increase.

The potential for an integrated record exists in the (as yet not in force) *1993 Torremolinos Protocol* (1993 Protocol) as amending *The Torremolinos International Convention for the Safety of Fishing Vessels 1977* which was never accepted into force. The 1993 Protocol is an IMO instrument that if accepted into force could form a building block for the Global Record and an integrated record. Through the 1993 Protocol it would become mandatory for fishing vessels to have a unique IMO number, an important requirement for the Global Record.⁸⁹ The 1993 Protocol would also create legal requirements, similar to those in place for shipping vessels and apply these to fishing vessels. For example, it would make it mandatory for flag states to provide information to allow the vessels to be tracked and for port states to forward information to the IMO when the vessel is docked.⁹⁰ Although the information collection and tracking requirements under the 1993 Protocol are targeted at addressing safety at sea, the procedures for collecting the data are already present so only amendment as to what data is collected would be required. The main obstacle to achieving cooperation in this matter is the difference in definition of a fishing vessel between FAO and IMO. IMO and the 1993 Protocol cover fishing vessels and support vessels over 24 metres in length, but if the Global Record is to be comprehensive, it must include smaller vessels.⁹¹ The 1993 Protocol has other issues that would have to be addressed before it could support the Global Record, such as ensuring coverage within exclusive economic zones, and providing support for developing states, fortunately Article 11 provides for a comprehensive system of amendments.

IMO and FAO now have a history of cooperation on fishery vessel issues and the Global Record could be the next development in that collaborative history.⁹² This cooperation has a practical benefit in terms of economic and administrative efficiency that would be beneficial to the global record, but it also has a more important benefit in terms

Officers On the Requirements Relating to the Submission of Security-Related Information Prior to the Entry of a Ship Into Port *MSC/Circ.1130* 14 December 2004.

⁸³ Ibid.

⁸⁴ International Maritime Organisation (2003) above n 82.

⁸⁵ 158 States have ratified SOLAS 1974 by only 89 have ratified the SOLAS 1988 protocols the latest amendments which contains the Global Shipping Information System.

⁸⁶ Lugten and Andrew, above n 70.

⁸⁷ International Maritime Organisation (2003), above n 82.

⁸⁸ H. Hesse and N. Charalambous, (2004) 'New Security Measures for the International Shipping Community World Maritime University' *Journal of Maritime Affairs* 3, 2.

⁸⁹ Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 35; Stølsvik, Gunnar. Senior Adviser, Resource Management Section, Ministry of Fisheries and Coastal Affairs, Norway Personal Communication dated 24/4/2008.

⁹⁰ IMO http://www.imo.org/Conventions/contents.asp?doc_id=675&topic_id=257#3 at 10 May 2008: Stølsvik, above n 89.

⁹¹ Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36; United Nations Food and Agricultural Organisation, above n 58.

⁹² United Nations Food and Agricultural Organisation, above n 58.

of obtaining data from states and implementation. Particularly the possibility of an integrated record with all its benefits should be considered as such a record is an important part of management of all sea vessels.⁹³ FAO and IMO should consider working together to amend and promote the 1993 Protocol as a way of securing agreement on points vital to the Global Record, such as mandatory IMO numbers and then use that agreement to work towards an integrated global record of shipping.⁹⁴

2.4 Market Measures and The Global Record

In February 2008 the Expert Consultation on the Global Record specifically considered the option of creating the Global Record without any legal base.⁹⁵ This section of the article will examine the use of market measures as a possible means of ensuring ongoing compliance without any legal foundation. However market measures are not just effective in the absence of legal agreements, they are an emerging part of the trend away from sole reliance on flag states for enforcement of conservation measures towards an integrated approach therefore this section will also argue that those same market measures have value in assisting any legal basis of the Global Record.⁹⁶

The aim of a market driven instrument to address IUU fishing would be to remove IUU fishing products from the market, or allow consumers accessing a publicly available data base to distinguish for themselves between IUU and legal fishing products.⁹⁷ Two trade-based schemes that currently operate are catch documentation schemes and vessel list schemes. Both of these schemes could encourage vessels to ensure that they are recorded on the Global Record by identifying the products from those vessels that are on the Record, and limiting access to markets for those vessels that are not. However the scheme that is most likely to prove useful in the Global Record is a combination of both the Catch Documentation Scheme and Eco-Labeling.

2.4.1 A Market Scheme for the Global Record

Market measures have an important role in the future of international environmental regulation; they allow international organisations to create enforcement pressures outside of the sometimes slow treaty system. They use the will of consumers in the market as a tool which can pressure other private citizens and States to directly change.⁹⁸ This will become more and more relevant to international environmental managers as consumers become increasingly aware of where their food comes from and their impact on the world. This sentiment can be used to drive higher environmental standards from producers, simply by providing information to consumers. Regional Fisheries Management Organisations (RFMO's) have already tested these measures and have found them useful for combating IUU fishing. The organisations have utilised catch documentation schemes to inform suppliers that the product was caught within the RFMO's management scheme and therefore that any product without documentation is likely to be illegal.⁹⁹ It has been shown that market measures like this can curb the aspiration to engage in IUU fishing by significantly cutting profits.¹⁰⁰

An example of the success of market measures is the Agreement on the International Dolphin Conservation Program. This program operated by certifying that products (usually tuna) were dolphin safe, and then allowing that product to be packaged and labelled in a manner that would convey its "dolphin safe" status to the consumer. The result was that consumer driven practices produced better environmental practices.¹⁰¹ Another more pertinent example is the Marine Stewardship Council (MSC). This is an international organisation which has created an eco-labelling standard for sustainable fisheries products.¹⁰² This means that products declared sustainable by the MSC can be labelled with the MSC badge and therefore can be differentially chosen by consumers.¹⁰³ This has been recognised as a tremendous shift in the drive behind sustainable fisheries. His Royal Highness the Prince of Wales stated:

⁹³ Stølsvik, above n 89; United Nations Food and Agricultural Organisation, above n 58.

⁹⁴ Stølsvik, above n 89.

⁹⁵ This was option two in the Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, Rome, Italy, 25-28 February 2008.

⁹⁶ Lack above n 23.

⁹⁷ Ibid.

⁹⁸ M. Cohen 'Monitoring and Enforcement of Environmental Policy' (1998), *International Yearbook of Environmental and Resource Economics* Volume III 1999.

⁹⁹ R. Baird 'An Analysis of the Practice of Regional Fisheries Bodies' (2008), Paper submitted to the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, Rome, Italy, 25-28 February 2008.

¹⁰⁰ Metzner, above n 15.

¹⁰¹ M. Palma 'Combating IUU Fishing: International Legal Developments' (2008) Unpublished Paper prepared for the *FFA Legal Conference 7-9 April Fiji 2008*.

¹⁰² Ibid.

¹⁰³ Ibid.

It is consumer power that drives the MSC. The organisation enables individuals, literally around the world, to make individual choices about sustainability. Retailers and restaurants will increasingly have the opportunity to offer their customers fish which is independently certified, as coming from well managed, sustainable fisheries and I hope they do.¹⁰⁴

This shift has been supported by the Australian Commonwealth Government which supports the economic driving of conservation goals.¹⁰⁵ At the moment the MSC labelling of seafood is entirely voluntary but already ninety-four fisheries around the world are accredited or being assessed for the MSC badge. This would suggest that there are significant financial benefits to be obtained by operating in a fishery that is certified.¹⁰⁶ The importance and effectiveness of eco-labelling can be expected to increase as consumers (particularly in Europe) are becoming more conscientious of where food has come from, and are now willing to pay more for sustainable produce.¹⁰⁷ Already some large companies are supporting eco-labelling with Unilever (a leading processed fish provider,) undertaken that it will purchase all fish supplies from sustainable fisheries. The MSC could play an important role in getting both fisheries and fishers to sign-up, and to provide data to the global record. That is, if it were made a requirement of certification that a vessel must be entered completely and accurately on the Global Record, then there would be a financial incentive for fisheries and vessels to ensure they were entered on that record.¹⁰⁸

Market measures may have the added benefit of supporting developing nations to comply with international instruments. Often it is financial and technical pressures which cause instrument fatigue, but eco-labelling can place economic pressure on compliance and provide financial benefits (in terms of higher prices) for those that do comply.

3. Conclusions

When in February 2008 an Expert Consultation on the Global Record convened in Rome they heard that the record would have considerable benefits. It would provide an insight into the size and structure of the global fishing fleet, be a resource for enforcing port state measures, enable national and international authorities to access license data and support catch documentation and vessel monitoring.¹⁰⁹ In short, the Global Record does have the potential to be an important remedial tool in the global fight against IUU fishing.

The concept of a global record for fishing vessels is not new; it has been discussed before in the context of other international fisheries issues. It has risen in response to re-flagging of vessels, managing migratory and straddling fish stocks and fishing fleet overcapacity.¹¹⁰ Though none of the early calls were wholly successful, international records have shown themselves to be invaluable in other subject areas requiring international management. An example which has been elaborated in this article is that of international shipping, where the IMO (through SOLAS) maintains a Global Information Shipping System. This system has proven to be vital in the international enforcement of shipping standards.

When considering the question of whether the Global Record should have a legal instrument at its base, several avenues were available to the Expert Consultation. These have been summarised in Table One (above). In brief, should there be a legal instrument at all, whether to have a hard or soft law instrument, and whether to have a new instrument or use an old one. The consultation considered all of these alternatives and put forward four options. These options were to:¹¹¹

- retain the status quo having the Compliance Agreement as the legal instrument underpinning the existing regime which is HSVAR;
- have no legal instrument but instead run the Global Record as a pure database with linkages to other databases,

¹⁰⁴ Marine Stewardship Council Website < http://www.msc.org/html/content_519.htm> at 8 May 2008.

¹⁰⁵ Senator Ian McDonald as quoted on Marine Stewardship Council Website http://www.msc.org/html/content_519.htm at 8 May 2008:

"The MSC and the Commonwealth have a common aim when it comes to fisheries management, that is, a desire for fisheries to be managed on a sustainable footing and to achieve the conservation and economic goals that Australians expect and deserve from our fisheries. I am happy to support the MSC in the attainment of those common goals."; This approach is still supported as shown in Australia's National Plan of Action to Prevent, Deter and Eliminate, Illegal, Unreported and Unregulated Fishing available at <http://www.daff.gov.au/fisheries/iuu/action-plan/plans> at 19 May 2008.

¹⁰⁶ Palma, above n 101.

¹⁰⁷ Marine Stewardship Council Annual Report 2006-2007 < http://eng.msc.org/assets/docs/MSC_Annual_report_2006-07_EN.pdf> at 8 May 2008.

¹⁰⁸ European Commission Fisheries website http://ec.europa.eu/fisheries/cfp/external_relations/illegal_fishing_en.htm at 12 May 2008.

¹⁰⁹ Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36.

¹¹⁰ *Agreement To Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* 1993; *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* 1995; FAO International Plan of Action for the Management of Fishing Capacity.

¹¹¹ Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36, [14].

- amend the Compliance Agreement and therefore address its numerous weaknesses; or
- attach the Global Record to a new legally binding instrument.

On the final option, this article has considered the possibility of attaching the Global Record to one of two legally binding instruments. One of these is still under negotiation, but fast-tracked and due for possible completion in 2008: the *draft Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*. The second instrument is completed, but not yet in force: *the Torremolinos Protocol 1993*.

Attaching the Global Record to the Port States Measures Treaty would allow the Global Record to be moved through the international negotiation process much more quickly than may otherwise occur. More importantly than this it was argued that there were important synergies between port state measures and the Global Record which meant that the combination of the two could be effective. Both initiatives share the aim of combating IUU fishing and both require the sharing of information between parties.¹¹² The Global Record has the potential to be a vital tool for enforcing the Port State Agreement. It will particularly assist developing states by providing access to information which would otherwise be expensive to obtain, allowing them to fulfil their own international obligations. Ultimately, the global record could be seen as a adjunct to the Port States Agreement and as such, they could both be implemented together, in one instrument.

Attaching the Global Record to the *1993 Torremolinos Protocol* offers the potential of an integrated record covering not just fishing vessels but all shipping. The 1993 protocol is an agreement managed by the IMO a United Nations specialised agency with responsibility over shipping and the marine environment. The IMO has experience and technical expertise from managing shipping records, including the Global Shipping Information System which would be beneficial to the Global Record. Although the Global Record is being created by FAO (another specialised agency of the United Nations) the responsibilities of the FAO and the IMO often overlap and they have cooperated on the issue of IUU fishing in the past.¹¹³ The benefits of an integrated record are clear: there would be fewer instruments to administer and therefore less data submission from states. Accordingly, there should be an, increase in State compliance with the international regulator. Further the 1993 Protocol already has much of the machinery required for the Global Record including the ability to compel ships to have a unique IMO number and a requirement for flag and port states to submit data on vessels in their jurisdiction to a central authority. Whilst some amendments would be needed, these could occur through the protocol's amendment provisions.¹¹⁴

The Expert Consultation considered the option of the Global Record being a pure database without any legal support. This paper has suggested that market measures could be used to encourage compliance in that situation, but they would be more effective in encouraging compliance with a legal agreement. A useful scheme in this context would be one that includes both Catch Documentation and Eco-Labeling. This would allow consumers to preferentially choose fish caught by vessels complying with fisheries management measures, (such as being included on the Global Record).¹¹⁵

The problem of IUU fishing is widespread and it continues to proliferate due to our ignorance of remote activities on the high seas. Tools such as the FAO Global Record are urgently needed to fill the void of lack of information and knowledge. During these early months of negotiation and development, it is imperative that the international community carefully considers all options for the future of the Global Record. In particular, care must be taken to find a path for the Global Record's progressive development that will not lead the Global Record to suffer the same fate as previous international instruments, such as the HSVAR. The new Global Record must be sustainable. This article has argued that it must be based on an international agreement that encourages compliance now and into the future. It must additionally support developing states which traditionally struggle to fulfil their international treaty obligations. Finally, whatever avenue is taken to progress the Global Record, it must be taken soon.

¹¹² Report of the Expert Consultation on the Development of a Comprehensive Global Record of Fishing Vessels, above n 36; Article 2 *draft Legally-Binding Instrument on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*.

¹¹³ Report of the Joint FAO/IMO Ad Hoc Working Group on Illegal, Unreported and Unregulated Fishing and Related Matters Rome, Italy, 9-11 October 2000 *FAO Fisheries Report*. No. 637. Rome, FAO. 2001. 24p; United Nations Food and Agricultural Organisation above n 58.

¹¹⁴ Stølsvik, above n 89.

¹¹⁵ Metzner, above n 15.