

Current Legal Developments

Food and Agriculture Organization of the UN

The Code of Conduct for Responsible Fisheries: An Introduction¹

Background

The Code of Conduct for Responsible Fisheries was adopted by the Conference of FAO at its twenty-eighth session in 1995. It was the culmination of two years negotiation and the result of five formal meetings, principally in the form of technical consultations. Much of the pressure for the formulation of a Code came from the concerns that had been building up concerning high seas fishing, a problem that had been highlighted in the media by the widespread use of drift-nets on the high seas, and which had led itself to the preparation of a resolution dealing with large-scale drift-nets on the high seas.

However, it was the Declaration of Cancun which more than any other instrument pushed forward the idea of a Code of Conduct on Responsible Fisheries. This Declaration emanated from a meeting hosted by the Mexican Government which was held in Cancun from 6 to 8 May 1992, and which called on FAO to prepare an International Code of Conduct.

The Declaration of Cancun was followed by the Rio Conference meeting on Environment and Development, which in Agenda 21 of Chapter 17, made a call for the formulation of an intergovernmental conference with a view to promoting the effective implementation of the provisions of the United Nations Convention on the Law of the Sea on straddling fish stocks and highly migratory fish stocks.

Against this background, the international community moved into what can be described as a twin-track approach on the subject of high seas fishing: the negotiation of an international agreement to deal specifically with straddling fish stocks and highly migratory fish stocks, while on the other track there was developed a Code of Conduct which was intended to be voluntary in nature, and which was also intended to cover much more than high seas fishing. The voluntary character of the Code has enabled it to cover much more than could possibly be covered in a document intended to be a binding international

¹ The views expressed here are personal. Nothing in this note implies the expression of any opinion whatsoever on the part of the FAO concerning the legal status of any country, territory, city, or area or of its authorities, or concerning its frontiers or boundaries.

agreement such as the New York "Straddling Stocks" Agreement. In fact, this aspect of the Code is one of its hidden strengths, for it has enabled the international community to focus on the one hand those matters urgently needing attention in an international agreement which principally concerned high seas fishing, while in the voluntary Code, it has been possible to pursue and to set out in a more broadly based manner a future path for achieving responsible fisheries. Such an approach would have been difficult or impossible to achieve in a binding agreement.

One other development must also be mentioned here. While these issues were being resolved, the FAO had been working on the FAO Compliance Agreement (its full name being The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas). This agreement which was intended to reduce fishing on the high seas contrary to internationally agreed conservation and management measures, was adopted by the FAO Conference in November 1993, and is open for acceptance. This agreement constitutes an integral part of the Code of Conduct. It is important in the present context for that reason alone, but it is important to appreciate that the Compliance Agreement, along with the Code, and the New York "Straddling Stocks" Agreement, all of which are underpinned by the UN Convention on the Law of the Sea, 1982, will constitute the basis for future directions in the area of fisheries.

The scope of the Code

To turn to the Code itself, it is important to note that it has a very wide scope indeed. In Article 1 (The Nature and Scope of the Code), it is stated that it is "global in scope, and is directed toward members and non-members of FAO, fishing entities, subregional, regional and global organizations, whether governmental or nongovernmental, and all persons concerned with the conservation of the fishery resources and management and development of fisheries, such as fishers, those engaged in processing and marketing of fish and fishery products and other users of the aquatic environment in relation to fisheries". The same Article makes it clear that it applies to "all fisheries", indeed it continues to add: "It also covers the capture, processing and trade of fish and fishery products, fishing operations, aquaculture, fisheries research and the integration of fisheries into coastal area management". These terms indicate the breadth of the Code, and this is borne out by subsequent chapters, one of which deals exclusively with aquaculture, while others embrace, as appropriate, inland fisheries. Also, while recreational fisheries is not specifically mentioned in this particular clause, it is clearly intended to be embraced as the introduction refers to the role of fisheries in "recreation". Significantly, by applying to all fisheries, the Code embraces fisheries within the EEZ and the territorial sea as much as those on the high seas, as well as, of course, inland fisheries even when they are in shared waters.

The application of the Code to the European Community and its members is

put beyond doubt by Article 1.4 which states: "In this Code, the term, States includes the European Community in matters within its competence ..."

The nature of the Code

Article 1.1 states simply: "This Code is voluntary".

Despite the "voluntary" character of the Code, which did, as has been mentioned, enable the Code to be given a very wide scope indeed, some of the provisions were drafted with the precision of a treaty regime. These provisions were in the main those dealing with the relationship of the Code to other international agreements.

Article 1 continues:

"... However, certain parts of it are based on relevant rules of international law, including those reflected in the United Nations Convention on the Law of the Sea of 10 December 1982. The Code also contains provisions that may be or have already been given binding effect by means of other obligatory legal instruments amongst the Parties, such as the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 1993, which, according to FAO Conference resolution 15/93, paragraph 3, forms an integral part of the Code."

Article 1 achieves several objectives. It, along with Article 3 (see below), places beyond doubt that the Code, as a voluntary instrument, nonetheless is intended to be based on international law. The second part of the sentence is intended primarily to deal with the Compliance Agreement. It acknowledges both the facts that the Compliance Agreement is an integral part of the Code, and that there may be other agreements entered into that will give effect to part of the Code.

Relationship with other international instruments

It has already been noted that the Code is based on international law. Article 3 deals with the relationship with other instruments, and it is worded so as to reflect a hierarchy of provisions which govern the Code.

"The Code is to be interpreted and applied in conformity with the relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea, 1982. Nothing in this Code prejudices the rights, jurisdiction and duties of States under international law as reflected in the Convention."

The use of the term "conformity" is derived from the same use of the term in the New York "Straddling Stocks" Agreement. The language chosen to express the relationship between international law and the UN Convention is based on a formula which was designed to cover those states which did not intend to sign or ratify the UN Convention. Article 3.2 continues

"The Code is also to be interpreted and applied:

- (a) in a manner consistent with the relevant provisions of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks;
- (b) in accordance with other applicable rules of international law, including the respective obligations of States pursuant to international agreements to which they are party;"

Here, the use of "in a manner consistent with" and "in accordance with" were intended to be used to reflect a lower position in the hierarchy, compared to the previous paragraph.

Finally, Article 3.2c states that it is also to be interpreted and applied

"(c) in the light of the 1992 Declaration of Cancun, the 1992 Rio Declaration on Environment and Development, and Agenda 21 adopted by the United Nations Conference on Environment and Development (UNCED), in particular Chapter 17 of Agenda 21, and other relevant declarations and international instruments."

Here the term "in the light of" is intended to reflect the fact the instruments in question were not themselves binding instruments. In the course of the negotiations, this clause was in fact revised many times, for it was originally considered that there were many agreements which should have some influence on the code, including for example, an agreement as important as the Marrakesh Agreement establishing the World Trade Organization, and some very relevant IMO Agreements. The solution adopted above reflected the reality that the list would indeed be very long, and that more problems would be created in the attempt to be comprehensive. In the end, the clause set out above was adopted, in the case of the Declaration of Cancun to reflect its catalytic impact on the Code itself, in the case of the United Nations Conference on Environment and Development, to reflect its fundamental importance to responsible fisheries.

The substantive provisions of the Code are indeed very lengthy and merit separate treatment in their own right. Suffice it to note that there are substantive Articles dealing with the following: Nature and Scope of the Code, Objectives of the Code, Relationship with Other International Instruments, Implementation, Monitoring and Updating, Special Requirements of Developing Countries, General Principles, Fisheries Management, Fishing Operations, Aquaculture Development, Integration of Fisheries into Coastal Area Management, Post Harvest Practices and Trade, and Fisheries Research. Each of the substantive Articles merits full consideration by itself, containing as each does many important new principles and statements to guide all persons involved in fisheries. It is not proposed to discuss them here. One Article does merit quoting in full, however, which is Article 5 concerning Special Requirements of Developing Countries. It states:

"5.1 The capacity of developing countries to implement the recommendations of this Code should be duly taken into account.

5.2 In order to achieve the objectives of this Code and to support its effective implementation, countries, relevant international organizations, whether governmental or non-governmental, and financial institutions should give full recognition to the special circumstances and requirements of developing countries, including in particular the least-developed among them, and small island developing countries. States, relevant intergovernmental and non-governmental organizations and financial institutions should work for the adoption of measures to address the needs of developing countries, especially in the areas of financial and technical assistance, technology transfer, training and scientific cooperation and in enhancing their ability to develop their own fisheries as well as to participate in high seas fisheries, including access to such fisheries."

There was widespread support for this Article, which was viewed as being very important to the future effectiveness of the Code. This Article is likely to assume some importance in the future work of giving effect to the Code, as it will form the basis of requests for technical assistance.

The general principles and the substantive articles

Article 6 sets out the general principles, and anticipates the subsequent more detailed Articles. The reason for this is that it is hoped that each substantive Article (discussed further below) is capable of being freestanding.

Article 7 on Fisheries Management contains many important subheadings concerning management objectives, management framework and procedures, data gathering and management advice, the precautionary approach, management measures, and implementations, and financial institutions. Within these subheadings are found some very important provisions concerning the need for fisheries management to be based on effective data, detailed provisions on the implementation of the precautionary approach, and the need for levels of fishing and fishing capacity to be commensurate with the state of the fisheries resources.

Article 8 deals with fisheries operations, and it has provisions on the duties of flag states and port states, as well as provisions on harbours, protection of the environment, and the abandonment of structures and reefs. The overall objective of this Article is to promote a framework that would encourage sustainable development, foster protection of the aquatic environment and the maintenance of biodiversity while making a significant contribution to the safety of fishing operations and the wellbeing of fishers.

Article 9 contains provisions on Aquaculture Development which includes both aquaculture and culture based fisheries, as well as concerning its responsible development both in areas of national jurisdiction and within transboundary aquatic ecosystems.

The Integration of Fisheries into Coastal Management (Article 10) contains

provisions relating to the institutional framework, policy measures, regional co-operation, and implementation. Among the provisions of importance here are clauses stressing the need to take into account the fragility of coastal ecosystems, the need to consult those involved in the use of the resources, the need to value coastal resources, the need to promote public awareness, and the need for exchange of information in respect of activities that may have an adverse transboundary environmental effect on coastal areas, including co-operation at the subregional and regional level.

Article 11 deals with post-harvest practices and trade, and has provisions dealing with responsible fish utilization, responsible international trade, and laws and regulations relating to fish trade.

Article 12 deals with fisheries research. It stresses the importance to responsible fisheries of the availability of a sound scientific basis to decisions concerning fisheries management.

The future of the Code

Finally, there are some other important features of the Code which should be noted: first, the Code is not intended to be static, for it is anticipated (in Article 4.3) that the Code may be revised by FAO through its competent bodies. The substantive Articles will also be supplemented by technical guidelines prepared by the Secretariat which will also be updated from time to time. These will set out standards which might be applied, guidance on how the Code might be implemented in national systems, etc.

Secondly, it is intended that the substantive Articles to a large extent will be capable of standing alone. Thus, for example, it is possible that the Article on aquaculture might in certain contexts be presented by itself, accompanied by its own technical guidelines, if appropriate. It is partly for this reason that the Article on general principles overlaps to some extent with the substantive Articles on fisheries management, fishing operations, aquaculture development, integration of fisheries into coastal area management, post-harvest practices and trade, and fisheries research. This innovative approach is intended to ensure that the Code can be presented in a flexible manner.

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