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CONFIDENTIALITY OF FISHERIES INFORMATION:
Are there legal limits to transparency?

Key messages:

1. Efforts to increase public access to government information can clash with laws that allow – or oblige – governments to keep information secret. Some information may be classified as commercially sensitive, some may be considered a state secret for security purposes, whereas other information may threaten people's right to privacy. Governments can prevent the public from accessing certain information for legitimate reasons, such as ensuring the safety of people. At the same time, access may be restricted for illegitimate reasons, such as to hide corruption. Hence, there is a longstanding tension between Freedom of Information laws and those laws that allow government information to be treated as confidential.
2. The tension between public access to information and confidentiality is important in fisheries. It was a key consideration when developing the FiTI Standard, particularly regarding the contracts of foreign fishing access agreements, data on the catches, ownership of vessels and information on law enforcement. In each case, there are strong arguments for transparency based on the principle of public interest. Nevertheless, many governments and fishing industry representatives view these types of information as confidential.
3. As momentum builds for transparency in fisheries, more debate must be given to this subject. This should consider the compelling benefits for fisheries management where public access to government information has been achieved. At the same time, transparency advocates must also recognise persuasive reasons why some information should be treated sensitively. This is illustrated by the ongoing debate on how governments share information on the beneficial owners of fishing companies.

Edition #10

Fisheries Transparency Initiative

This tBrief is authored by Dr Andre Standing for the Fisheries Transparency Initiative (FiTI). Financial support for this publication by the Gordon and Betty Moore Foundation is kindly acknowledged.

Introduction

The argument that people have the right to information on how natural resource sectors are managed, such as fisheries, was established in Principle 10 of the Rio Declaration in 1992.[1] It has been used as a rallying cry for freedom of information advocates. The importance of public access to government information was reiterated in the UN Sustainable Development Goals (SDGs). Target 16.10 calls on all states to adopt legislation or policies guaranteeing the right to information, which is expressed as an enabler to achieving all other SDGs. The problem, however, is that the public right to information comes up against competing and sometimes valid claims for the confidentiality of data. It can be hard to know where to draw the line.

Competing claims for the public right to know vs. the right to confidentiality are sensitive issues in the fisheries sector. The FiTI requires governments to publish several types of information where this is apparent. Some stakeholders have raised the question of whether international laws and norms mean governments can withhold specific information and might be legally bound to do so.

This tBrief will discuss some of the most contentious claims for confidentiality of fisheries information, looking specifically at transparency requirements in the FiTI Standard. The key question being asked is whether there are legitimate reasons why some types of information on fisheries management should be hidden from public view, and if so, what is this information, and what are the reasons?

Although it is unlikely to settle these debates once and for all, the analysis suggests that concerns over the confidentiality of information requested by the FiTI may be exaggerated. There might, however, be aspects beyond the FiTI where public requests for information from governments go further, and the arguments between public access to information and confidentiality are not nearly as clear-cut. Debates on public access to information on the beneficial owners of fishing vessels illustrate this well, as do the requirements of governments to collate and publish real-time satellite images of fishing vessels. What is clear, however, is that there is a need for more organisations involved in fisheries' governance to have an opinion and think more seriously about this issue.

1 Principle 10 sets out three fundamental rights – access to information, access to public participation and access to justice – as key pillars of sound environmental governance, and has become a critical point for campaigns about justice and accountability in environmental matters, including fisheries. U.N. Conference on Environment and Development (1992) 'Rio Declaration on Environment and Development'.

1. The public's right to know vs the government's right not to tell them

There is a longstanding tension between those advocating for transparency of government information and those advocating for limits to this. The points of tension can be understood in relation to Freedom of Information laws (FOI), which have proliferated globally since the 1990s. Today, *UNESCO reports that 137 countries have FOI laws.* However, these laws coexist – often uneasily – with many other laws that prohibit or protect governments from sharing types of information. To simplify, these can be arranged into three broad categories. It is helpful to have some historical knowledge of how these laws evolved.

Reasons for confidentiality of information

A The individual right to privacy

B Trade secrets & commercially sensitive information

C Information that is prejudicial to the functioning of governments

The individual right to privacy

The earliest laws that established the concept of confidentiality originated from specific trades, most notably the provision of medicine and later other professions, including lawyers. From the 17th century onwards, rules that provided doctors and barristers formal protection for client confidentiality were formalised in Europe. Common law extended the notion of confidentiality to various other relationships, including between husband and wife, employers and employees, bankers and their clients, etc. The more general idea of individuals' right to privacy emerged later and was pioneered in the United States. One of the motivations was widespread concerns about the growth of sensationalist journalism and the invention of cheap portable cameras that allowed the rich and famous to be snapped for newspapers. Influenced by an article published by the founders of the Harvard Law Review in 1890 on the 'right to privacy', US law courts allowed individuals to sue newspapers and others for divulging information on their personal lives.[2]

The concept of people's right to be 'let alone' influenced attitudes towards government behaviours. This was affected by the expansion of government censuses. From the Mid-19th century, the US government collected an increasing amount of personalised information for their national census, and citizens began refusing to cooperate. In 1889, to overcome this lack of participation, a federal law in the US made it illegal for government officials to disclose census information to a third party, with a punitive fine of $500 for anyone who did.[3]

The US perspective of the right to privacy influenced the UN's Declaration on Human Rights in 1948, with Article 12 declaring that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation." However, modern data protection laws were born in 1974 when the US passed the Privacy Act, which established detailed regulations on how federal authorities handled personalised data. This became the inspiration for a European convention on privacy laws in 1981. Since then, and driven by concerns about advances in technology and the capacity of surveillance by state agencies, European regulations on data protection have been strengthened, including in 2016 when the EU adopted the General Data Protection Regulation.

2 Warren, S. D. and Brandeis, L. D. (1890) 'The Right to Privacy', Harvard Law Review 4, no. 5: 193–220.

3 Solove, D. J. and Richards, N. M., (2007) 'Privacy's Other Path: Recovering the Law of Confidentiality', 96 Geo. L.J. 123.

Trade secrets & commercially sensitive information

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While the legal justifications for the right to privacy were developed, a related legal doctrine, again pioneered in the US, was created on the rights of businesses to protect information that would undermine their profitability. In the US, this became known as the protection of trade secrets, although that terminology is used interchangeably with the concept of *commercially sensitive* information. There is an overlap between this and patent law, but *trade secrets* are broader than patents, and there are many reasons (including costs) why businesses prefer to protect information via trade secrecy law rather than applying for specific patents.

Predominantly, companies used the argument for trade secrecy in the US against employees sharing information with other companies. However, from the late 19th century, legal arguments for trade secrecy were affected by federal legislation that required companies (mainly those producing food and medicines) to publish the ingredients of their products to protect consumers. This created a highly contested terrain of case law influenced by shifting attitudes of law courts in different states on the rights of consumers against the rights of companies. According to legal historians, the justification and definition of trade secrets have varied considerably over time and within US states. Arguments that trade secrecy undermines public interest have been countered with arguments that trade secrecy is essential for the efficient functioning of competitive markets and technological innovation.

After decades of contested law cases and inconsistencies between courts, a federal statute on trade secrets was eventually created in 1979, known as the Uniform Trade Secrecy Act (UFTA). It defined trade secrets broadly as any valuable business information companies can show they have tried to keep secret. Yet this did not clarify how law courts should interpret this definition and the purposes behind any limitations. Controversially, in the 1980s, US companies successfully used the UFTA to prevent public access to information ranging from cigarette ingredients to industrial fertiliser chemicals. Additionally, in an era of rapidly expanding transnational enterprises, US companies pressurised other countries to enact similar legislation, which became the precursor to the international Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), established through the World Trade Organisation in 1995.

The US is generally considered to have emboldened trade secrecy laws more than is the case in other jurisdictions, such as the EU.[4] Examples illustrating this include companies such as Google and Facebook declaring algorithms used to condition online advertising being trade secrets, fracking companies withholding information on the chemicals used for drilling, pharmaceutical companies keeping the cost of drug production secret, and car manufacturers classifying data on the efficiency of their airbags as commercially sensitive information. As Amy Kapcynski, Professor of Law at Yale University, writes:

4 Sandeen, S. K. and Mylly, U.-M. (2019) 'Trade Secrets and the Right to Information: A Comparative Analysis of EU and US Approaches to Freedom of Expression and Whistleblowing', North Carolina Journal of Law and Technology.

5 Kapczynski, A. (2022) 'The public history of trade secrets', University of California Davis School of Law, Volume 55.

> *"Companies have seized upon the extraordinarily broad definition of trade secrets to argue that anything they do not wish to disclose would in fact be illegal – even unconstitutional – to share with researchers or the public... Disproving a trade secret claim in court requires not only resources and lawyers, but also access to facts – for example, about what is truly secret or valuable in a business – that the public and lawmakers rarely have ready access to. Even when legislatures, regulators, and litigants push back against these expansive claims, they often succumb over time... Trade secret law has emerged as a critical source of private power, with significant potential to disrupt our democracy."*[5]

Information that is prejudicial to the functioning of governments

A third area of law that provides confidentiality of government information stems from the argument that specific information held by public authorities is *politically sensitive*, with public disclosure undermining the legitimate functions of national authorities. Again, policies and statutes on this have developed over the past century, with one of the earliest examples being the Official Secrecy Act (OSA) passed by the British government in 1889. This was designed to prevent spies and corrupted civil servants from divulging government information to other countries, predominantly linked to military information and international relations. There is, however, an overlap between the OSA and the much older concepts of 'treason' or 'treachery' (i.e. aiding the enemy of the state).

The OSA has been credited as the inspiration for similar laws in many other countries. Yet, as with trade secrets, definitions and interpretations of politically sensitive information have been contested and have varied over time and between countries. There has been a collision between the spread of national secrecy laws and those laws promoting freedom of expression, particularly laws that protect *whistleblowing*: the act of people exposing the wrongdoing of authorities. Today, the balance of power between statutes that severely punish people for breaching official secrecy and those that enable citizens to expose the wrongdoing and incompetence of authorities is perhaps one of the most contentious areas of civil liberties and anti-corruption, as evident in the case of Wikileaks or the pursuit of Edward Snowden by the US government.

Laws on official secrets or espionage overlap with laws determining public access to government records. A widely used system is based on a hierarchy of classified documents, ranging from 'top-secret' and 'secret' to 'confidential'. Government records classified as secret or top-secret are usually legally protected from public disclosure, including from freedom of information laws, whereas those only classified as confidential may be more accessible to the public. However, policies for deciding what classification level to use can be ambiguous and vulnerable to abuse to protect authorities from public scrutiny. A problem stemming from this is referred to as 'overclassifying' documents. Research in the US, for example, has shown that many government documents classified as confidential or secret ought to be reclassified as public documents.[6] The US government classifies over 50 million documents a year as confidential or secret, with one legal expert arguing: *"A lot of the information is classified for the wrong reasons because its disclosure would embarrass somebody or it would be inconvenient or would subject government officials to scrutiny that they would rather not have".*[7]

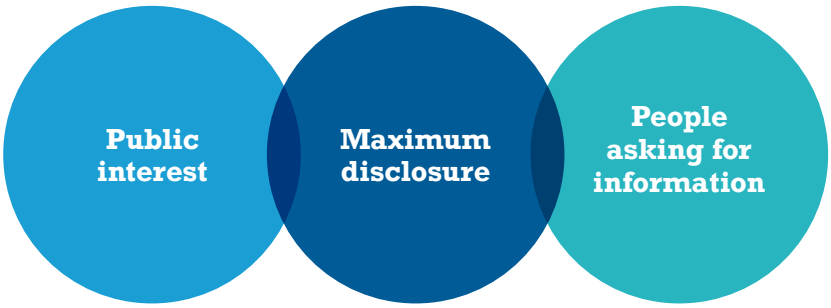
6 Kulugu, M. (2023) 'Over-classifying government documents leads to mishandling and abuse-analysis', Eurasia Review.

7 Smith, D. (2023) 'Biden and Pence documents reveal US crisis of 'overclassification', experts say', The Guardian newspaper.

2. International Principles for Freedom of Information laws

While laws have progressed on the confidentiality of information held by public authorities, so has the legal right for public access to government-held information under Freedom of Information (FOI) laws. It is also common for governments to have specific laws that regulate access to government records. In Europe, for example, this is detailed in the Access to Documents Regulation, passed in 2001.

For several decades, organisations working on the right to information, including Special Rapporteurs from the UN and regional inter-governmental organisations, have agreed on best practice principles.[8] This includes how governments should approach publishing information that may otherwise be considered confidential. Two of the most widely celebrated laws demonstrating best practices are the so-called *Aarhus Convention* (applicable mostly to European countries and the EU) and the so-called *Escazú Agreement* (developed for countries in South America and the Caribbean), which deal specifically with public access to information on environmental matters.



One of the most important principles of FOI laws relates to **public interest**. Thus, although governments can restrict public access to information to protect an individual's right to privacy or a company's right to keep commercially sensitive information secret, if there is a clear public interest in this data being published, governments should release the information. The Aarhus Convention, for example, lists several reasons why governments could refuse access to information, including where information is commercially sensitive. However, it goes on to say that this list should "be interpreted in a restrictive way, taking into account the public interest served by disclosure". In other words, under this convention, governments must provide access to information if the public interest is considered more critical than firms' commercial interests.

8 In 1999 the UK NGO Article 19 produced international principles of FOI laws, which were updated in 2016. These have been endorsed by numerous organisations, including the UN's Special Rapporteur on Freedom of Opinion and Expression. These can be accessed here.

Another core principle of FOI laws is **maximum disclosure**. This concept gained prominence in the late 1990s through declarations on freedom of information jointly produced by the UN, the Organisation of American States, the Organisation for Security and Co-operation in Europe and the African Commission on Human and People's Rights. For example, in 2004, Special Rapporteurs from these organisations produced a joint declaration that read:

> *"The right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions... Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information. The burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions."*[9]

Another core principle of FOI laws – highlighted in the last sentence of the previous statement – is the requirement that **people asking for information do not need to specify the reasons for this**. International principles on FOI laws describe that it is the responsibility of public authorities to explain why certain information is considered confidential and what reasoning lies behind a decision that disclosing such information would cause more harm than keeping it secret. In the case of the Escazu Agreement, the rights of people to access information include "requesting and receiving information from competent authorities without mentioning any special interest or explaining the reasons for the request." Furthermore, the Agreement clarifies that "the burden of proof will lie with the competent authority".

9 The joint declaration can be found here in a catalogue of joint declarations to protect free media and expression, compiled by the Organisation for Security and Co-operation in Europe.

Best practice in reality

In most FOI laws, disputed decisions on refusing public access to information should be settled through law courts, an independent tribunal or a designated information commissioner, using the public interest doctrine and the principle of maximum disclosure as their guide to making decisions on disputed cases. However, it is well documented that in many countries, authorities with the power to decide disputed cases can favour confidentiality, irrespective of the wording of relevant national legislation and at odds with the public interest principle.

Furthermore, analysis of national FOI laws provided by the Centre for Law and Democracy and the NGO "Access Info" shows that the text of many countries' FOI laws do not follow international best practices. Of 137 countries surveyed, the FOI laws in 50 countries do not adequately establish the public interest doctrine. Worse, only 26 out of 137 countries explicitly recognise that FOI laws supersede other laws restricting public information.[10]

In some jurisdictions, the balance of power might be viewed as shifting towards government openness, whereas in others, the opposite is true. China is an important case. Over the past few decades, the Chinese state has gradually enacted laws that provide increased transparency and public access to state information. In 2007, China adopted an 'Ordinance on the Openness of Government Information". Recently, national policies have emphasised open government, including developing e-portals for better-arranging government information.[11]

Simultaneously, China has one of the strictest laws on State Secrets, initially developed in a law on State Secrets in 1988. This defines a state secret very broadly, covering not only matters relating to the military but any information relating to international relations and government policies affecting social and economic development. An amendment to this law was announced in late 2023, which includes prohibiting international travel (unless authorised) for any state employees who have access to confidential government reports, as well as increased punishments for those divulging secret government documents, including life sentences and the death penalty for those divulging state secrets to foreign people.[12]

China is illustrative of similar shifting and often inconsistent attitudes held by authorities to secrecy and openness in many other countries. This highlights an obvious point: whether there are legitimate legal limits to transparency has no objective answer. The boundaries between confidentiality and freedom of information are constantly moving, are politically contentious, and have differed between countries.

10 This analysis is presented through the project "Right To Information Rating", available here.

11 Mukhtar H., Rahman Saleem H. A., Hongdao Q., Mumtaz A. (2021) 'China's March from Open Government towards Open Judicial System', Global Journal of Politics and Law Research, Vol.9, No.7.

12 Cai, V. (2023) 'Explainer: How is China changing its state secret law and who will be affected?', South China Morning Post.

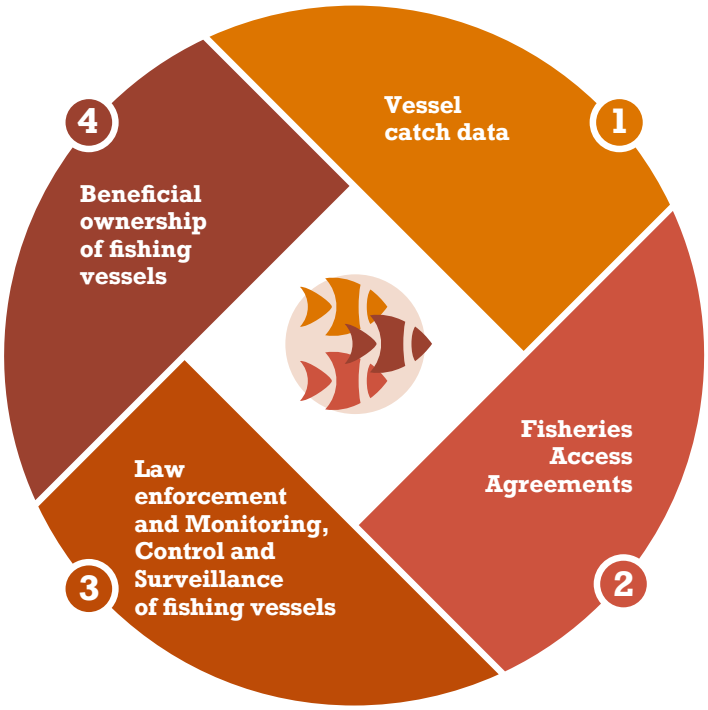
3. Confidentiality of fisheries information

The tensions between the confidentiality of information and the need for transparency based on the principles of public interest and maximum disclosure are evident in many aspects of fisheries management. Unfortunately, the most important international agreements on fisheries governance fail to offer specific guidance. The 1995 Code of Conduct for Responsible Fisheries illustrates this well. Although the Code establishes the principle of transparency in fisheries management, the part that deals with public information sharing merely refers to the need for States to compile and disseminate data *"in a manner consistent with any applicable confidentiality requirements"*.[13] This leaves much room for interpretation.

The same situation can be found in other regional and international agreements on fisheries management. While transparency is regularly mentioned as an essential aspect of fisheries management, this is not presented in terms of a human right or linked to international guidelines on FOI. For example, this is true for the FAO's *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication*. Again, while this elevates transparency to a fundamental principle for small-scale fisheries, it fails to consider how states should respect international principles on FOI laws. While these guidelines are often considered excellent for advancing the rights of those engaged in small-scale fisheries, they are not very helpful for transparency advocates.

While the FiTI Standard has clarified what is expected from governments regarding transparency of fisheries management, assumptions that certain types of information should be treated as confidential are still widespread, although for reasons that are often not well articulated. The following four examples are among the most contentious.

13 See Art.7.4.4 in FAO's Code of Conduct for Responsible Fisheries.



1 Vessel catch data

There is a longstanding tradition in global fisheries management that information on the catches made by individual fishing vessels is confidential. The argument for doing so is that catch data represents **commercially sensitive information** or a **trade secret**.

During the initial negotiation of the FiTI Standard, several arguments were discussed against per vessel catch data being made public. This included concerns that publishing per vessel catch data would provide competitors with vital information that could assist with (hostile) takeovers, or it may allow competing firms to learn from the success and failures of fishing vessels to adapt fishing strategies. Another concern was that publishing per vessel catch data poses a risk to fishing companies as this data is complex and easy to misunderstand. Without considerable contextual information, it may be misused to shame individual vessels or stimulate anti-industry campaigns.[14]

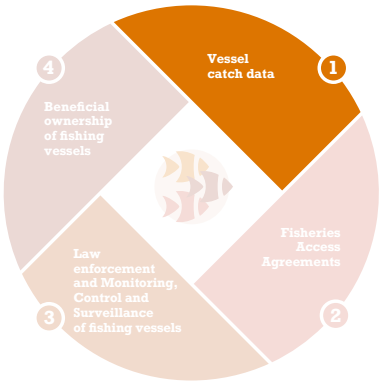
The current tradition of confidentiality in fisheries asserts that catch data should only be presented for groups of vessels or an entire fishery but not for a specific vessel. This approach was articulated in the 1995 UN Agreement on Stradling and Highly Migratory Fish Stocks. The agreement urged public authorities to collate fisheries data, but at the same time, it stated that "confidentiality of non-aggregated data shall be maintained."

14 More information can be found here.

A *report on the confidentiality of catch data* written in 2006 by a representative of the European Commission described that in Europe, North America, and Australia, fishing authorities guaranteed vessel owners that information they share with them on their fishing activities would be treated as confidential. In the US, federal law describes that the publication of catch data must follow the 'rule of 3'. Any published catch data must be combined from a minimum of three vessels. If a fishery only has two vessels, then the catch data for that fishery would be considered confidential.

This attitude towards the confidentiality of catch data remains pervasive throughout fisheries management, including at the regional or international level. This applies to all Regional Fisheries Management Authorities (RFMOs), where confidentiality clauses keep secretariats and technical working groups from sharing per-vessel catch data. Some RFMOs, such as the Indian Ocean Tuna Commission, have rules that allow disaggregated catch data to be shared with independent scientists, but not with the general public. Similar confidentiality agreements are also imposed on technical groups analysing fisheries data through the FAO, meaning countries submitting catch data to the FAO must only submit aggregated data.[15] Likewise, in the fishing agreements signed between the European Union and third countries, a clause prohibits coastal states from sharing disaggregated information on the activities of EU-flagged vessels. They can report total figures for catches by EU-flagged vessels but not data on the catches declared by individual vessels.

Furthermore, regulations on the confidentiality of catch data, have also strengthened over time. In the UK, for example, up until 2009, independent scientists were allowed to receive highly detailed disaggregated catch data for their studies, including per-vessel catch data and spatial and time-bound data. This allowed them to analyse the dynamics of individual fishing vessels over a fishing season. The one caveat to sharing this data was that the names of fishing vessels were removed. In 2009, the European Commission passed a new regulation that ended this practice, restricting detailed catch and spatial data to fishing authorities and law enforcement agencies.[16] Henceforth, the UK fishing authorities denied this data to fisheries scientists.[17]



15 https://www.fao.org/3/y2339e/y2339e0e.htm#bm14.4

16 This was described in Commission Regulation (EC) No. 1224/2009 of 20 November 2009 establishing a community control system for ensuring compliance with the rules of the Common Fisheries Policy.

17 Hinz, H., Murray, L. G., Lambert, G. I., Hiddink, J. G. & Kaiser, M. J. (2013) *'Confidentiality over fishing effort data threatens science and management progress'*, Fish and Fisheries, 14(1), 110-117.

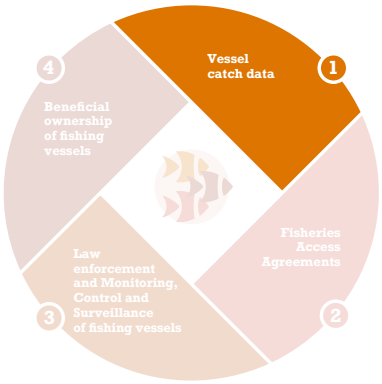
Refuting claims vessel catch data is confidential

In general, countering claims of treating fisheries information confidential can be based either on the 'public interest' principle (manifested in FOI laws) or challenging the reasons why certain information is categorised as being a state secret or being commercially sensitive.

Although the confidentiality claim of catch data linked to individual vessels is now normalised, some oppose it because this data ought to be considered in the public interest. Arguments about public interest in per-vessel catch data are multifaceted. One theme relates to the widespread problems of fishing vessels misreporting or underreporting their catches or vessels catching species not targeted by their fishing licenses. Poor levels of fisheries management in many places – combined with corruption – mean there is distrust by non-government stakeholders in the ability of governments to scrutinise catch data to reveal inconsistencies. This will also include instances where vessels fail to report catch data in time, which means published data on annual totals of fish caught are misleading. These anomalies in fisheries statistics are obscured where catch data is aggregated.

Detailed catch data can also be essential for independent scientific and economic studies of the fishing industry. A group of marine scientists in the UK, writing in protest of the EC's stance on the confidentiality of fisheries data in 2009, argued that withholding detailed fishing effort data represented "a big step backwards from achieving sustainable fisheries management".[18] They further argued that the rules were incoherent in the context of the EC seeking the support of independent scientists to strengthen fisheries management. Their inability to undertake a detailed analysis of the fishing sector prevented them from contributing to debates on the environmental impacts of fishing. It also undermined research that could help improve fishers' safety at sea. Making per-vessel catch data accessible to the general public would also prevent the selective sharing of information – to certain scientists or consultants only. Privileged access encourages bias in research findings and an inability for outsiders to scrutinise their results.

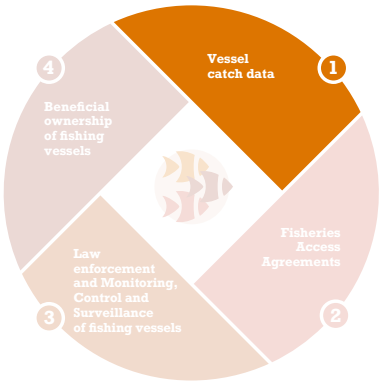
In addition to a public interest in vessel-by-vessel catch data, the claim that such data is a trade secret or represents commercially sensitive information is also contentious. It is difficult to find similar examples from other industries which could validate the confidentiality claim for fisheries. In other natural resource sectors, production statistics are not considered trade secrets. Oil and gas companies, for example, do not insist that information on the volume of oil or gas they produce is confidential. Likewise, it would be unusual for a timber company to request confidentiality on its figures for wood production from public forests. So why do fishing companies expect information on how much fish they catch to be treated as commercially sensitive information?



18 Ibid.

Interesting insights were gained during a workshop hosted by the Western and Central Pacific Fisheries Commission in November 2022.[19] The event did not consider the legal validity of commercially sensitive catch data or how these claims would stand up to FOI laws. Instead, it set out to understand why the industry holds this view. This helped clarify that some industry representatives thought publishing per vessel catch data in isolation did not threaten their business interests. This was also not applicable to fisheries where individual firms are subject to catch quotas. Their concern was with the publication of catch data combined with spatial data in *real-time*, as this could allow other fishing firms to copy their fishing strategies and give away a company's 'location advantage' (which is different from mining or logging companies).

Another counterargument for the confidentiality claim comes from the same marine scientists complaining about the EC's regulations that prohibited sharing data with them. They described the *commercial benefits* of publishing data for the fishing industry. The withholding of this information, they argued, not only diminishes public understanding of the ecosystem impacts of fishing but:



19 https://meetings.wcpfc.int/node/18093

> *"...will ultimately damage fishers' commercial interests through poorer quality and greater uncertainty in management advice. Furthermore, the inability of the public, represented by Non-Governmental Organizations and stakeholders, to access detailed fishing effort data may lead to unnecessary conflicts between commercial and conservation interests. If fishing effort data are only available on large spatial scales, conservation and stakeholder groups aiming to conserve specific habitat features are more likely to demand the precautionary principle, leading to the exclusion of fishers from a potentially disproportionately large area of the marine environment."*

While considering the commercial benefits of transparency, a further argument is that any information that could improve efficiency in fisheries could lead to public benefits in reducing fishing efforts and, therefore, lowering costs. Indeed, fisheries is one sector where it is dubious to believe the state's goal is to encourage and facilitate competition between firms. Competitive behaviours between firms have been a consistent feature of fisheries failures, whereas success in fisheries management is often associated with trust and a collective approach.[20]

Ultimately, arguments over the legal rights of fishing firms to treat their catch data as trade secrets confront the reality that the right to fish is a conditional and short-term authorisation by national authorities to exploit a public resource.

Transparency of vessel catch data in practice (Example)

Few countries publish information on the catches made by individual fishing vessels. However, Iceland is an exception. For several years, the Directorate of Fisheries in Iceland and the National Industrial Fishing Association have developed policies on transparency that include substantial publication of the non-financial information of fishing companies. This includes a *government statistical dashboard* open to the public that records the catch of commercial species by all large-scale vessels in Iceland's waters. There have been no reports that this information threatens the business interests of fishing companies or is commercially sensitive information.

2 Fisheries Access Agreements

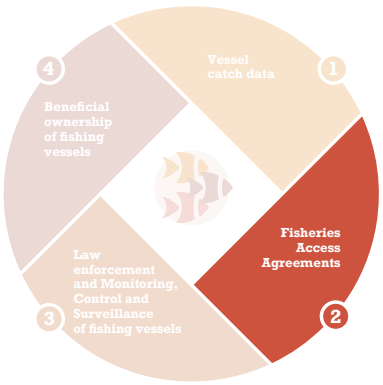
Fisheries access agreements are contracts that regulate international companies' fishing in other countries' waters. They can be signed between governments (bilateral agreements) or governments and private fishing entities (private agreements). These agreements usually set out the conditions of fisheries access, such as the number of vessels allowed, quantities of fish that can be caught, and rules on local landings. They also detail fee structures and other payments.

While the text of the EU's Sustainable Fisheries Partnership Agreements with African and Pacific countries are public documents, many other agreements are confidential. There has been a longstanding recommendation by civil society organisations that this practice should end. This is also a core requirement set out in the FiTI Standard. However, several governments claim that publishing contracts classified as confidential could expose them to litigation. Maintaining confidentiality over an access agreement is also justified as it increases the bargaining position of coastal states when negotiating with other potential companies or countries.[21] This is similar to arguments advanced in some countries that prohibit the publication of public procurement contracts.[22] Based on the experiences of the FiTI International Secretariat, a refusal to publish access agreements classified as confidential is frequently used by governments to claim they cannot implement the FiTI Standard.

20 Pomeroy, R. et al. (2016) 'Drivers and impacts of fisheries scarcity, competition, and conflict on maritime security', Marine Policy, Volume 67.

21 Walton, G., Keen, M. & Hanich, Q. (2020) 'Can Greater Transparency improve the Sustainability of Pacific Fisheries?', Marine Policy, Volume 136.

22 Open Contracting Partnership (2018) 'Mythbusting Confidentiality In Public Contracting'.



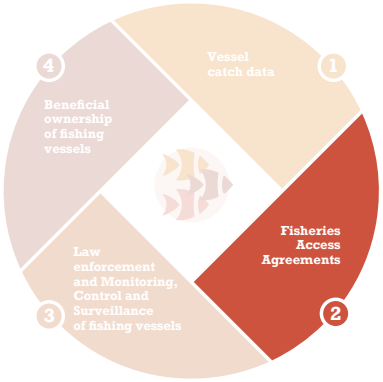
Confidentiality and the case of the Pacific Island's Vessel Day Scheme

In 2007, Parties to the Nauru Agreement established a regionalised system for managing access to shared tuna resources. This created what is known as the Vessel Day Scheme for purse-seine fishing vessels. It is a highly complex system whereby a regional secretariat establishes an annual Total Allowable Catch, and individual member states are allocated a proportion of this calculated as a number of days fishing vessels can operate. These vessel days can be traded between member states, which is influenced by tuna movements in the Pacific region. Although there is a standardised price for selling vessel days to fishing firms, each member state can negotiate separate prices, providing some companies with discounts. The discounts are used strategically to advance the economic interests of member states and can be linked to other agreements between governments and fishing companies, as well as the home nations of fishing firms. The Vessel Day scheme is widely credited for increasing government revenues from tuna fisheries. In 2007, the total revenues from tuna fisheries for PNA was approximately US$60 million, which has increased to nearly US$500 million in recent years.

Several types of information relating to the Vessel Day scheme are treated as confidential. This includes the formula used to allocate the number of days to individual member states, the outcomes of trades between states, and information on the prices at which vessel days are sold to individual companies. Little has been written about why this confidentiality persists. However, experts say secrecy in trading decisions gives PNA states a competitive advantage over the commercial interests of distant water fishing nations and their firms. The VDS is considered a success for the Pacific Islands, but it is politically fragile. As a result, there is no political pressure among civil society and fisheries experts for transparency reforms, in case these exacerbate political tensions. What is more controversial, however, is that many PNA governments do not publish information on the total revenues received from the scheme either, which prevents public understanding of how this revenue is used.

Refuting claims fisheries access agreements are confidential

The public interest in transparency surrounding access agreements is well established. These agreements often allow for fishing activities that risk overfishing and may harm the domestic fishing sector, including small-scale fisheries. It is objectionable that governments agree to such deals without informing the public. Citizens have the right to know how their government sells their resources to foreign companies and countries. As argued by the *Revenue Watch Institute*, an NGO specialising in access to information on natural resources:



> *"Contracts are essentially the law of a public resource project, and a basic tenet of the rule of law is that laws shall be publicly available... Where contracts create their own law – because they modify existing laws, freeze the application of those laws, or elaborate on outdated or incomplete laws – it is all the more important to disclose their contents for democratic accountability."*

In addition to a public interest in these agreements, it is also dubious to accept that contract secrecy enhances the bargaining position of coastal states. This argument has been refuted by the International Monetary Fund (IMF) when examining the transparency of revenue-sharing contracts in other resource sectors.[23] As explained by the IMF, a flaw in this logic is that contract terms are often widely known in the industry, which means there is unlikely to be any strategic advantage for governments in keeping contracts classified as confidential. A similar situation exists in fisheries, where it is not unusual to find that confidential fisheries access agreements are shared within the industry and among consultants.

Revenue Watch also argues that contract openness could be advantageous for developing countries, as governments can negotiate better contracts if they have access to the contracts of other countries. Arguments for contract secrecy in fisheries become weaker when compared to the experiences of other resource sectors, where progress on public access to contracts has become more widespread, with no obvious ill effects for governments.[24]

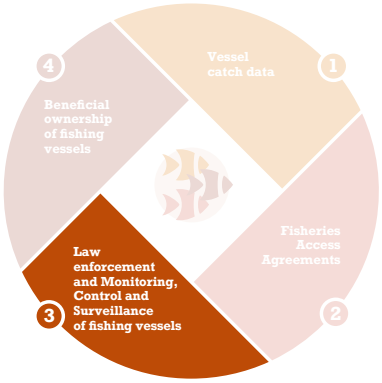
Transparency of access agreements in practice (Example)

In 2022, Seychelles and Taiwanese fishing companies removed a non-disclosure clause to make it compliant with the FiTI Standard. The agreements are now publicly accessible on the Seychelles authorities' website. When this non-disclosure clause was removed, both parties renegotiated the contract terms, which improved fee structures for Seychelles and reduced the number of Taiwanese vessels that could access Seychelles waters.

23 International Monetary Fund (2007) 'Guide on resource revenue transparency'

24 Pitman,R. (2017) 'How Many Governments Are Disclosing Oil, Gas and Mining Licenses and Contracts?', Open Government Partnership.

3 Law enforcement and Monitoring, Control and Surveillance of fishing vessels



With growing international attention on the problems of unsustainable and illegal fishing, there has been a corresponding campaign for transparency on how national authorities implement fishing laws and regulations. Included is the requirement that national authorities publicise the outcomes of court proceedings against fishing companies for breaking the rules. This is not controversial in terms of confidentiality of information. Most countries provide public access to information on the outcomes of criminal proceedings against companies, although locating this information can be hard in practice.

Where confidentiality becomes more contentious is with out-of-court settlements. These are used in many countries in the fisheries sector and may be justified for reducing state costs in protracted legal disputes. There is no information on how frequent these agreements are, but research by the OECD describes that among parties to the OECD Anti-Bribery Convention, 78% of all criminal trials brought against companies between 1999 and 2017 have been resolved through 'non-trial resolutions'.[25] Such settlements can include confidentiality clauses so there is no public record. This benefits companies who wish to protect their reputations, which may be increasingly important in fisheries, given the role of international lists of vessels engaged in illegal fishing practices. Being on this list can result in a fishing vessel being refused licenses.

Another aspect of fisheries management that has been the focus of transparency efforts lies with information on law enforcement activities (often called monitoring, control and surveillance (MCS)). Again, such information is included in the FiTI Standard, which requires national authorities to provide information on government expenditures and resources and the frequency of inspections. Yet this is a further area where some governments claim information is politically sensitive and represents state secrets. An example is found at the level of the European Union. EU member states are subject to the EU Fisheries Control Regulation, first enacted in 2009. The regulation requires member states of the EU to report to the European Commission (EC) on their efforts to ensure fishing vessels comply with European fishing rules. It also includes a system of accountability based on independent audits and inspections of member states by EU officials. However, the 2009 Fisheries Control Regulation contained a confidentiality clause (Article 113) that prevented the EC from sharing data and reports submitted by member states and its audit reports. The EC has published *summary reports* on the results of its audits, but this does not link data to specific member states.

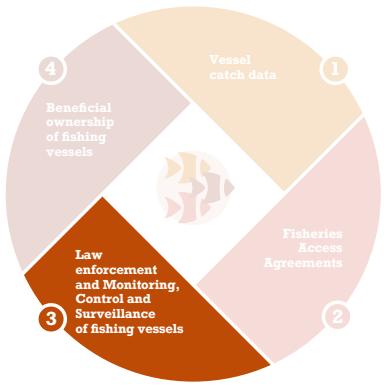
25 OECD (2019) 'Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention'.

Refuting claims law enforcement and MCS information is confidential

In FOI laws, it is usually accepted that information relating to ongoing criminal investigations is treated as confidential, as this can prejudice legal proceedings. However, there are counterarguments for greater public access to information on law enforcement activities, particularly as many reports claim illegalities in the fisheries sector are widespread, and law enforcement can be ineffective and potentially undermined by corruption. In this context, there is a legitimate public interest in accessing data on public authorities' responses to lawbreaking, which includes cases prosecuted in law courts and those subject to administrative fines.

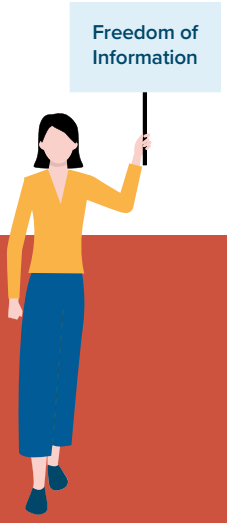
Arguments for transparency on out-of-court settlements have been raised for many years. There are serious concerns that such arrangements have undermined the rule of law and allowed persistent rule-breaking by companies to be treated leniently. Furthermore, out-of-court settlements are advantageous to companies as settlements paid can be tax deductible, which is not true for regulatory fines. A number of anti-corruption NGOs have therefore campaigned for greater public access to information on these arrangements.[26] The Working Group on the OECD Anti-Bribery Convention has similarly urged Parties to adopt maximum disclosure, including publishing information on the nature of the alleged crimes, why criminal court proceedings were not followed and the value of settlement agreements. Because of this, an increasing number of countries are publishing this type of information, which demonstrates that transparency in out-of-court settlements is not contingent on confidentiality agreements or non-disclosure contracts.

But what about more general data on the MCS activities of law enforcement agencies? Again, the existence of the public interest argument can be viewed in response to the secrecy of information of EU member states. In 2018, when the EU's Control Regulation was revised, a coalition of NGOs campaigned for amendments to Article 113 based on the argument that preventing public access to reports submitted by member states and the audit reports contravened the EU's law on access to documents and the Aarhus Convention. In one statement produced by the *EU Fisheries Control Coalition*, it was described that,

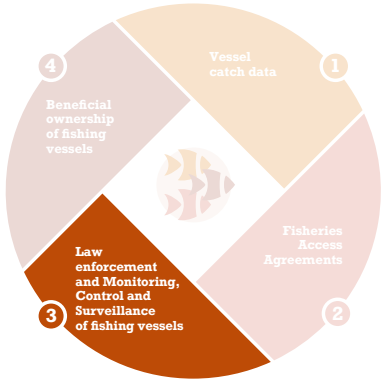


26 For example: Transparency International (2015), 'Can Justice Be Achieved Through Settlements?', Policy Brief; UNCAC Coalition (2018) 'CSO letter to OECD on Principles for the use of non-trial resolutions in foreign bribery cases'.

> *"The past two decades have seen a sea change in access to public information in Europe, moving from a presumption of confidentiality to a presumption of transparency. But this "freedom of information" has not reached the troubled waters of EU fisheries."*



After debates involving the European Parliament, a *final text* was agreed to in October 2023. Slight wording changes have meant the regulation makes information on law enforcement more accessible for NGOs, although the regulation falls short of promoting maximum disclosure. The regulation states that information may be shared with organisations whose 'function requires them to have access to such data', but only with the consent of the EC or member states. It further establishes that reasons for this refusal must accompany the decision to prevent access to information. The regulation, therefore, recognises that data may be subject to requests under the public interest doctrine. The problem with this – from the perspective of FOI – is that data sharing requires NGOs to spend substantial resources to make specific requests, meaning those without these resources are unlikely to gain access to the information.



Transparency of law enforcement and MCS activities information in practice (Example)

In several countries, national authorities proactively publish information on fisheries law enforcement, including the outcome of sanctions and fines against fishing vessels. The USA is one of the best examples. The Office for Law Enforcement (OLE) under the National Oceanographic and Atmospheric Administration's (NOAA) Fisheries department has its own dedicated webpage where information on resources deployed to monitor fishing vessels is published. The OLE publishes weekly reports on what it calls 'enforcement actions', which include investigations against illegal fishing and the outcomes of state and federal prosecutions. It also provides details of all major law enforcement events against illegal fishing.[27] The US Coast Guard also publishes a five-year plan for addressing IUU fishing, including measurable performance indicators.

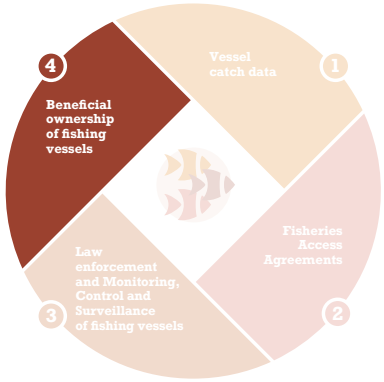
27 For more analysis, see here.

4 Beneficial ownership of fishing vessels

A final issue that exposes shifting attitudes over confidentiality and FOI is information on the beneficial owners of fishing vessels – that is, in short, the natural person(s) who ultimately owns or controls a customer and/or the natural person on whose behalf a transaction is being conducted.

As discussed in our *previous tBrief on this topic*, there has been a longstanding argument in fisheries that secrecy over the BO of fishing vessels has exacerbated problems of accountability in fisheries management. The argument has been made predominantly by those interested in fighting illegal fishing or tax evasion, as a lack of transparency prevents the ultimate owners of vessels from being culpable for crimes and fraud. Yet this is not the only reason there is a public interest. Another reason is that confidentiality obscures understanding of economic concentration in the sector. There are situations where a few powerful individuals – sometimes including those who are politically influential – receive a large proportion of fishing rights. However, this is obscured because these people own several distinct companies, giving the impression access to fishing opportunities is distributed more widely. This is not an illegal problem but an ethical one in the context of the state's duties to share the benefits of a public resource more widely.

At the same time, BO can be seen as a case where the claims for and against more transparency clash. Those who argue against public access to BO information do so on the grounds of the right to privacy. It is also argued that public access to beneficial ownership information has important safety implications. Granting public access to information contained in beneficial ownership records might increase people's risk of being a victim of crime, such as identity theft, kidnapping, and blackmail.[28]



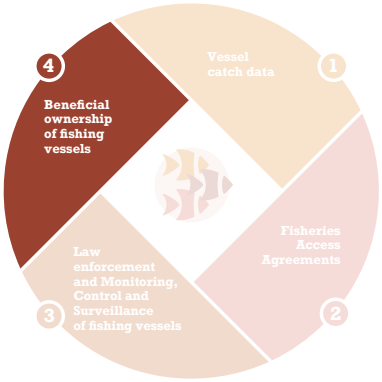
28 Open Ownership et al. (2019) 'Data protection and privacy in beneficial ownership disclosure'.

Refuting claims information on beneficial ownership of vessels is confidential

Until recently, arguments over the public's right to access information on beneficial ownership of companies were gaining ascendency over the personal rights to secrecy. In 2016, the UK became the first country in the world to create an online and freely accessible registry of the beneficial owners of UK-registered companies. In developing this, the UK's government considered debates for limiting access to this information for specific company records when requested by certain groups with a legitimate interest in this information, as opposed to making the registry freely available to anyone. Allowing the government to define who has a legitimate interest was strongly criticised by open government advocates. One of the *influential arguments* that tipped the debate towards public access was that a public registry was more cost-effective to manage. Furthermore, experience has shown that the accuracy of information held by the government has improved as people have spotted inconsistencies, which is less likely to happen if access to the registry is limited. Campaigners for public access have further shown that certain types of research on corporate fraud, such as abuse in the use of offshore tax havens, are only possible if researchers have access to all the records to run searches across large numbers of companies. Access to case-by-case records only would prevent this sort of research from occurring. The UK authorities, however, recognised the arguments over personal safety and established procedures where the personal information of beneficial owners, including children, can be redacted from public records, but only when individuals formally request this.

In 2018, the EU's 5th Anti-Money Laundering Directive required all EU member states to produce their own public registries. Again, extensive debates were held on whether registries should be reserved for those with a legitimate interest and whether access should be specific to requested records or not. Eventually, arguments for public access won out.

However, the case for beneficial ownership transparency was thrown in disarray by late 2022. A legal case was brought to the European Court of Justice by a company registered in Luxembourg, complaining that Luxembourg's decision to release a *public* registry contradicted the right to privacy. The EU Court of Justice ruled in favour of the company, deciding that the public registry of beneficial ownership data contradicted the EU's Charter of Fundamental Human Rights. Shortly afterwards, many EU member states declared that their public registries would be moved to private ones and that access to this information would only be subject to legitimate requests. The doctrine of maximum disclosure has been replaced with restricted access. This is crucial, given that decisions by the EU have ramifications on how governments in other parts of the world will act.[29] Critics of these developments argue that vested interests have 'weaponised privacy against transparency'.[30]



29 Krause S. (2023) 'Who should have access to beneficial ownership registries? ECJ revokes public access in the EU but confirms access for journalists and civil society', Stolen Asset Recovery Initiative (STAR).

30 Knobel, A. (2024) 'Privacy-Washing & Beneficial Ownership Transparency: Dismantling the weaponisation of privacy against beneficial ownership transparency', Tax Justice Network.

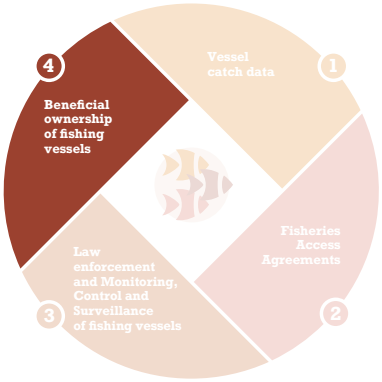
Therefore, the EU's 6th Anti-Money Laundering Directive was revised, resuscitating the idea of restricting access to those only with a legitimate interest. The directive's wording does recognise the importance of *generalised access* to beneficial ownership registers for those who are granted access.[31] However, this topic remains highly divisive; some campaigners on BO transparency consider restricted but generalised access a reasonable compromise, whereas others see it as a step back from public accountability and a loss for those who may be interested in BO information for reasons other than fighting crime.

These international debates on public vs restricted access to beneficial ownership data have clear ramifications for debates on transparency in fisheries. However, even if the right to privacy becomes normalised among governments in their approach to BO registries, a sector such as fisheries could be approached to a higher standard of freedom of information. This already happens in other areas. For example, many countries require political parties and candidates to publicly disclose their campaign finances, including the names and gifts of prominent donors. Campaign finance is sufficiently risky for abuse, meaning governments accept a high degree of transparency. Could such an argument apply to the fisheries sector?

Transparency of beneficial ownership of vessels in practice (Example)

Few countries have public vessel registries that directly include beneficial ownership information. Instead, information about the registered owner may be part of a vessel registry, whereas information regarding corporate vehicles is stored in a BO registry. In case both databases are publicly accessible, such as in Denmark, one could, therefore, identify the registered owner of a vessel and then retrieve information on both the legal and beneficial owner(s).[32] However, given that many BO registries are not publicly accessible in general or limit access to those with a legitimate interest, such analysis remains a difficult or at least cumbersome task.

Several non-governmental organisations are monitoring the advance (and retreat) of public BO registries in general, and specifically as these apply to the fisheries sector. For example, the *Triton database*, provided by the NGO C4ADS, captures published information on industrial fishing vessels and information by governments on the people that ultimately control them. It can, therefore, be assumed that the quest for public access to information on a vessel's registered owner and those who ultimately benefit from the vessel's activities will advance in the coming years.



31 Transparency International (2024) 'EU reaches deal on anti-money laundering rules, ending uncertainty about how watchdogs will access information on companies' real owners'.

32 Open Ownership (2024) 'Using beneficial ownership information in fisheries governance'.

Conclusion

Public availability of credible information is a prerequisite for achieving sustainable fisheries. Without reliable information, the capacity of national authorities to make decisions based on the best available data is diminished. So is the ability of non-governmental stakeholders to exercise effective oversight, demand accountability and engage in public dialogue.

A question raised among those working on transparency in fisheries is whether there are legal reasons why some information should be withheld from the public. However, there is no legal certainty on where to draw the boundary between confidentiality and the freedom of information. If we take the 'best practice' principles of FOI laws, the scope of transparency in fisheries is very wide. None of the existing requirements for government transparency in the FiTI Standard could be questioned from this perspective. The FiTI stops short of demanding the level of transparency that might be compatible with the strongest FOI laws in the world, such as the Aarhus Convention or the Escazu Agreement. The case of catch data is perhaps the clearest example. Due to arguments over the commercially sensitive nature of this data, it was agreed that per-vessel catch reporting would not be a mandatory requirement of the FiTI Standard. Instead, governments must publish catch data aggregated for specific fisheries and groups of vessels sharing the same flag. Nevertheless, arguments for fishing vessels to publicly disclose how much they catch are unlikely to go away. There are other grey areas, such as the confidentiality clauses of out-of-court settlements or public access to beneficial ownership information.

Irrespective of best practice, experience shows that pushing the boundaries of FOI remains politically sensitive. There seems to be no reason to support confidentiality in the contracts of fishing access agreements. Yet, there are arguments that applying high levels of FOI principles might destabilise regional cooperation for managing tuna fisheries in the Pacific, possibly to the advantage of more powerful actors from industrialised fishing nations. Some stakeholders committed to sustainable and equitable tuna fisheries management may support confidentiality, even if they recognise valid arguments for freedom of information.

This tBrief has also illustrated that debates on transparency vs confidentiality in fisheries are probably not where they should be. International agreements on fisheries management have been partly to blame, as they have not clarified where to draw the line. Voluntary transparency initiatives, such as the FiTI, the Extractive Industries Transparency Initiative, or the Open Contracting Partnership (to name just a few), can play a role in clarifying legal uncertainties and debunking confidentiality claims that are still used to avoid public access to government information. Yet, there is a clear need for more discussions on this, particularly as the demands for transparency continue to gain momentum, levels of information on the activities of fishers increase through technological advances (such as satellite monitoring), and competition over scarce resources multiplies. In this context, the control of information to the public on fisheries management will come under increasing spotlight.

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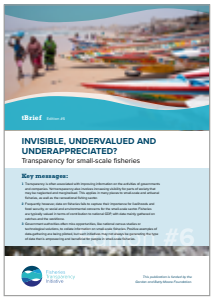

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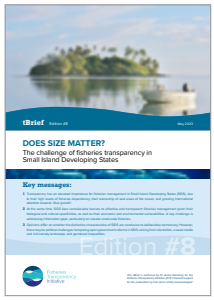

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