

Sustainable Development and High Seas Fisheries

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Abstract

This article examines the role of the concept of sustainable development in the legal regime governing the exploitation of the natural resources of the oceans, particularly fisheries on the high seas. General documents on sustainable development and legal instruments on high seas fisheries are analyzed in order to see in which way they refer to each other and whether they provide a sufficiently comprehensive framework to ensure the sustainable management of fisheries in the high seas.

Keywords

sustainable development; oceans; law of the sea; United Nations; General Assembly; fisheries

1. Introduction

What makes life on Earth possible? In the view of Cherdsak Virapat, the Executive Director of the International Oceans Institute, we continue to live as long as we have the ocean, this ‘gigantic body of salt water, which wraps around the planet like an insulating blanket.’¹ This blanket is truly unique. The oceans and rivers make the functioning of the world’s economies possible, give us our food, store valuable minerals, and offer a place to rest. The oceans are the engines that drive the world’s climate, produce more than half of the oxygen in the atmosphere, define the weather and store huge quantities of solar energy in the process. Yet, while billions of people around the world depend on the oceans and their resources,² these very same oceans are currently some of the most threatened ecosystems. Above all, the extensive exploitation of the marine resources by humans, such as overfishing and destructive fishing practices, have led to a dramatic decline in fish stocks, leaving little, if anything, for future generations. As shown by the 2012 World Review of Fisheries and Aquaculture, published by the Food and Agriculture Organization (FAO), the proportion of non-fully exploited fish stocks continues to

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¹ *Relationship between the Oceans and the Three Pillars of Sustainable Development*, presentation by Cherdsak Virapat on 20 June 2011, at the 12th Meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea. See *Report on the Work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at Its Twelfth Meeting*, p. 5.

² Globally, fish provides about 3 billion people with almost 20% of their intake of animal protein, and 4.3 billion people with about 15% of such protein. Especially in developing countries fish is often the cheapest and sometimes the only available or affordable protein source and is therefore of particular importance for the vulnerable or lowest income groups. See FAO, *World Review of Fisheries and Aquaculture*, 2012, p. 84.

decrease, whereas the percentage of fully exploited stocks has increased to approximately 57%. The amount of overexploited stocks is 30%. The latter require immediate and strict management to ensure their sustainable productivity.³ The situation is equally critical for some highly migratory, straddling and other fisheries that are exploited solely or partially in the high seas. In contrast with the territorial waters and the exclusive economic zone (EEZ), the natural resources of the high seas may be exploited by all and any state.⁴ These high seas' waters cover collectively 218.7 million km², equalling about 61% of the world's oceans, or 43% of the globe's surface, thus comprising by far the largest, and one of the most important ecosystems on Earth.

The briefly sketched facts and numbers inevitably bring up the question as to the root causes of the continuously deteriorating situation of existing fish stocks. Are the states not aware of the urgency of the problem? Does the notion of the sustainable management of resources appear to be a dead letter particularly when it comes to states' activities in the marine areas beyond national jurisdiction? Or is there, perhaps, a lack of substantive regulations ensuring the long-term sustainability of fisheries? Greenpeace recently called for the adoption of a new implementing agreement under the United Nations Convention on the Law of the Sea, to secure the sustainable management of human activities on the high seas.⁵

In search for an answer to these questions, this article adopts a two-pronged approach. References to the ocean in general declarations on sustainable development are examined chronologically as a first step. We will then analyse references to sustainable development in the relevant legal instruments dealing with the ocean. The aim is to look at the cross-fertilization between the general ideas on sustainable development and the fisheries regime. Finally, some recent developments during the 2012 UN Conference on Sustainable Development are analyzed. Special attention is paid to the sustainable use of the living resources of the high seas.⁶

2. References to the ocean in declarations on sustainable development

As a first step, the declarations and outcome documents of the most important sustainable development conferences are examined chronologically. We will look at references to fisheries in those declarations with the aim of discovering how the value of sustainable development was applied to the legal regime of the world's oceans, high seas fisheries in particular.

The first international conference to bring the industrialized and developing nations together to discuss global environmental issues and challenges was held in Stockholm in 1972. Although the value of the conference, as a first worldwide step in defining the rights of the people to a healthy and productive environment, cannot be

³ FAO, *World Review of Fisheries and Aquaculture*, 2012, p. 11.

⁴ FAO, *World Review of Fisheries and Aquaculture*, 2012, pp. 12-13.

⁵ See Compilation Document – Rio+20 – United Nations Conference on Sustainable Development (Major Groups), available on the website of the conference:

<<http://www.uncsd2012.org/rio20/content/documents/compilationdocument/MajorGroups.pdf>>, p. 584 (last visited 15 December 2012).

⁶ In the following, the term 'high seas' is understood in the sense of Art. 86 of the UNCLOS. It thus refers to 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.'

underestimated, for present purposes the outcome of this conference, the Stockholm Declaration on the Human Environment,⁷ is of limited value, since it did not specifically address the issue of the high seas. In its Principle 7, the declaration only generally delineated the states' obligation to take all possible steps to prevent 'pollution of the seas' by substances that could harm marine life or 'interfere with other legitimate uses of the sea'.

The term 'sustainable development' as such was not yet coined, let alone being applied to the governance of the oceans.⁸ Although the Stockholm Conference symbolized the awakening of an environmental awareness in international law at the beginning of the 1970s, a further fifteen years had to pass before the report of the World Commission on Environment and Development, 'Our Common Future', or the Brundtland Report,⁹ embraced the concept of sustainable development and popularized the latter in international discourse. The report addressed environmental and development issues facing the world as one common challenge to be solved by collective multilateral action. Recognizing that high seas outside of national jurisdiction are truly 'commons', the report emphasized the necessity of international action to secure the high seas' and fisheries' sound management.¹⁰

Despite the concerns already expressed in the Brundtland Report, not many speeches were devoted to the seas and oceans during the 1992 Conference in Rio de Janeiro.¹¹ There were some exceptions. For example, Prince Rainier of Monaco devoted his entire speech to call for the sustainable use of the oceans.¹² Some other delegates also referred to the sustainable use of the oceans, such as the President of the Federated States of Micronesia, the Prime Minister of Canada, the President of the Republic of Kiribati,¹³ and the Swedish King.¹⁴ These states all had different reasons to be concerned with the oceans and their unsustainable use by humankind. Small Island Developing States had

⁷ Declaration of the United Nations Conference on the Human Environment, in *Report of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14, at 2 and Corr.1 (1972).

⁸ On the gradual crystallisation of the concept of sustainable development in the course of major international conferences see generally N. van der Burgt, *The Contribution of International Fisheries Law to Human Development*, 1997, pp. 33 et seq. This can be explained by the fact that, despite a number of environmental crises that called for legal attention before the Stockholm Conference such as the 1967 Torrey Canyon oil spill, such occurrences were usually dealt with on an ad hoc basis as no elaborate body of international law to address them existed. The *Torrey Canyon*, a supertanker which was shipwrecked off the western coast of Cornwall, England, gave rise to the contamination of large areas of coastline by oil and exemplified the risk posed by the daily transport of large quantities of toxins and hazardous substances at sea. As a consequence, the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties was adopted in 1969. See also P. Birnie & A. Boyle (eds.), *International Law and the Environment*, 2009, p. 380. See also Y. Tanaka, *The International Law of the Sea*, 2012.

⁹ The Report was given this title after the chairperson of the commission, the then Prime Minister of Norway, Mrs Gro Harlem Brundtland. The Brundtland Commission defined sustainable development as 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs', see World Commission on Environment and Development, *Our Common Future*, 1987, p. 43.

¹⁰ UN Doc. A/42/427, p. 259, Para. 7

¹¹ See also Paras. 11-19, *Oceans and the law of the sea: Report of the Secretary-General (Addendum)*, UN Doc. A/66/70/Add.1, distributed 11 April 2011.

¹² *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992, Vol. III: Statements Made by Heads of State or Government at the Summit Segment of the Conference, UN Doc. A/CONF.151/26/Rev.1 (Vol. III), pp. 50-53, p. 56, pp. 72-73, and p. 216.

¹³ *Ibid.*, p. 56, pp. 72-73, p. 216.

¹⁴ *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, 3-14 June 1992, Vol. II, A/CONF.151/26/Rev.1 (Vol. II), p. 53.

serious concerns about the depletion of marine living resources such as tuna, and in the short term, this was perhaps their most pressing problem.¹⁵

Despite the urgency of ocean-related sustainable development issues, the Rio Declaration of 1992 did not say much about how the general principles of sustainable development should be applied to the oceans. Of course, this did not mean that they were inapplicable to the latter; it simply meant that little attention was paid to the way in which they could be applied. The sustainable exploitation of the natural resources of the high seas was not seen as a priority.

Yet, Agenda 21, the extensive implementation plan also adopted at the same conference, did have something to say about the sustainable development of the oceans. This is crucial, because Agenda 21 continues to serve as a key document on sustainable development.¹⁶ The Secretary-General referred to it recently as ‘the most comprehensive and effective programme of action ever launched by the international community to preserve the rights of future generations.’¹⁷ Chapter 17 of Agenda 21 introduced several new elements not yet embraced by the 1982 United Nations Convention on the Law of the Sea (UNCLOS),¹⁸ including an emphasis on integrated and precautionary approaches to the protection of the marine and coastal environment. It shifted the focus from the control of causes of marine pollution to the prevention of environmental degradation of marine ecosystems in general.¹⁹ Though Agenda 21 cannot amend UNCLOS, and is not binding on states, it can be taken into account when interpreting or implementing the Convention. Moreover, it has had the effect of legitimizing and encouraging legal developments based on the new perspectives of the sustainable usage of aquatic resources. The impact of Agenda 21 illustrates how a more conceptually sophisticated focus on the protection of the marine environment has evolved out of Part XII of UNCLOS in general, and consequently also out of Part VII of UNCLOS concerned *inter alia* with the environment and fisheries on the high seas.²⁰

Part of Agenda 21’s Chapter 17 was devoted to the topic of the sustainable use and conservation of the marine living resources of the high seas.²¹ According to this plan, ‘management of high seas fisheries, including the adoption, monitoring and enforcement of effective conservation measures, [was] inadequate in many areas and some resources [were] overutilized.’²² Various solutions were then proposed. Above all, states were encouraged to take effective action, including bilateral and multilateral cooperation, where appropriate at the sub-regional, regional and global levels, to ensure that high seas fisheries were managed in accordance with the provisions of UNCLOS. The need to ensure the effective monitoring of fishing activities by vessels flying the states’ national

¹⁵ At the same time, they were worried about being literally swallowed up by the sea. The President of the Maldives explained that ‘we are told that as a result of global warming and sea level rise, my country, the Maldives, may, some time during the next century, disappear from the face of the earth.’ Many Small Island Developing States shared this fear. See *Report of the United Nations Conference on Environment and Development*, Vol. III, p. 9.

¹⁶ See in general with regard to Agenda 21 Chapter 17: S. Bateman, ‘Technical Cooperation for Sustainable Development: Capacity Building’, in M. Kusuma-Atmadja et al. (eds.), *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21*, 1997, pp. 783 et seq.; S. Kaye, *International Fisheries Management*, 2001, pp. 201 et seq.; See also Birnie & Boyle, *supra* note 10, p. 745; van der Burgt, *supra* note 9, pp. 35-38

¹⁷ *Oceans and the law of the sea: Report of the Secretary-General (Addendum)*, UN Doc. A/66/70/Add.1, para. 12.

¹⁸ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 *United Nations Treaty Series* 396; <www.un.org/Depts/los> (last visited 15 December 2012). See Section 3 *infra*.

¹⁹ Birnie & Boyle, *supra* note 8, p. 384.

²⁰ *Ibid.*

²¹ *Report of the United Nations Conference on Environment and Development*, Vol. I, pp. 252 et seq.

²² Agenda 21, Para. 17.45.

flags on the high seas so that they take place in a manner minimizing incidental catch, reducing wastage, post-harvest losses and discards, was emphasized. The necessity to improve techniques for the processing, distribution and transportation of marine living resources as well as the need to promote enhanced collection and exchange of data required for the conservation and sustainable use of the marine living resources of the high seas was duly underscored as well.

The next major declaration on (sustainable) development, the Millennium Declaration, does not refer to the management of the oceans.²³ The paragraph that comes closest contains a pledge to ‘adopt in all our environmental actions a new ethic of conservation and stewardship and, as first steps, [to] resolve to stop the unsustainable exploitation of water resources by developing water management strategies at the regional, national and local levels, which promote both equitable access and adequate supplies.’²⁴ However, this phrase refers to freshwater, not to ocean governance, and thus does not seem to be directly relevant to the present discussion. Nevertheless, the link between the Millennium Development Goal 7 on ensuring environmental sustainability and the oceans was established later on by the High-level Plenary Meeting of the General Assembly. By calling on the world community to take measures ensuring the sustainable management of fish stocks, inter alia through ecosystem approaches to ocean management, the General Assembly decided in favour of a larger and more sophisticated reading of the Millennium Declaration’s goals.²⁵

The Johannesburg Declaration of 2002 identifies, as one of the global problems, the depletion of fish stocks, as well as water and marine pollution.²⁶ The Johannesburg Plan of Implementation is much more detailed. The Plan states that ‘oceans, seas, islands and coastal areas form an integrated and essential component of the Earth’s ecosystem and are critical for global food security and for sustaining economic prosperity and the well-being of many national economies, particularly in developing countries.’²⁷ Their protection is thus essential, and this calls for a ‘sustainable development of the oceans.’²⁸ Reference is made to Chapter 17 of Agenda 21, which is described as ‘the programme of action for achieving the sustainable development of oceans.’²⁹ According to the Johannesburg Plan, which could be considered as a sequel to Chapter 17 of Agenda 21, ‘sustainable fisheries’ requires the international community to ‘maintain or restore stocks to levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015.’³⁰

The World Summit Outcome Document of 2005 says very little about the oceans, but it does link the oceans to the UN’s work on sustainable development. In the Outcome Document, it is stated that ‘in pursuance of our commitment to achieve sustainable development,’ the states resolve to ‘improve cooperation and coordination at all levels in order to address issues related to oceans and seas in an integrated manner and promote integrated management and sustainable development of the oceans and seas.’³¹

²³ See also *Oceans and the Law of the Sea: Report of the Secretary-General (Addendum)*, UN Doc. A/66/70/Add.1, Para. 28.

²⁴ *Millennium Declaration*, Para. 23; UN Doc. A/RES/55/2 (2000).

²⁵ *Keeping the Promise: United to Achieve the Millennium Development Goals*, UN Doc. A/RES/65/1 (2010).

²⁶ *Johannesburg Declaration*, Para. 13.

²⁷ *Johannesburg Plan of Implementation*, Para. 30.

²⁸ *Ibid.*, Para. 30.

²⁹ *Ibid.*

³⁰ *Ibid.*, Para. 31.

³¹ *World Summit Outcome 2005*, Para. 56.

The declarations referred to above are generally considered to be the most important declarations on sustainable development adopted in the UN context. Although the oceans were mentioned here and there in these official statements, none of them focused exclusively on the application of sustainable development to the high seas. The general principles and lessons learned were simply viewed as equally applicable to the existing legal framework for ocean governance.

3. References to sustainable development in legal instruments relating to the oceans

Traditionally, the common legal framework for the management of fish in the oceans was based on the principle of free access to the ocean's living resources. The idea that the oceans belonged to everybody was already formulated in the seventeenth century by the Dutch jurist Hugo Grotius.³² Grotius' approach appears to be quite useful, given that property rights on the high seas are fairly difficult to define, regulate and enforce.

In the old days, fisheries and the management of fisheries were not considered to be priorities, as interest in the oceans was more for navigation and trade. Perhaps, mainly for these reasons, it was only after World War II that rules concerning the oceans and marine biodiversity started to change and conventions regulating fishing rights came into force. A number of soft and hard law instruments have emerged since then to protect the oceans and the natural resources within them.³³

The first species to enjoy protection were whales and tuna. Thus, the International Convention on the Regulation of Whaling was signed in 1946 and the International Whaling Commission (IWC) was established in the same year. Subsequently, the Inter-American Tropical Tuna Commission was founded in 1950 and the International Commission for the Conservation of Atlantic Tuna in 1968. Yet, while these institutions focused on the sustainable exploitation of specific animals, further steps were needed to ensure better protection for the marine environment in general and the international high seas fisheries in particular. While even the inland transboundary waterways (e.g., the Caspian Sea) present significant difficulties, the regulation and monitoring of the high seas fisheries is in a way more complex: the physical distance from land and direct oversight make the latter difficult and costly to control, assess and regulate. The worldwide abundance of fishing vessels that are capable of exploiting the living resources of the high seas further exacerbates this situation.³⁴

Yet, it was not until 30 years after World War II that the more comprehensive legal framework was elaborated. The work on codifying existing coastal laws – commenced by the United Nations International Law Commission in 1949 – paved the way towards the UN Law of the Sea Conferences in 1958,³⁵ 1960 and 1973 and eventually resulted in the signing of the UNCLOS in 1982.³⁶

³² According to Grotius one cannot have a property right in the sea because it is limitless and inexhaustible, see H. Grotius, *Mare Liberum 1609-2009* (R. Feenstra (ed.)), 2009.

³³ B. Sovacool, 'A Game of Cat and Fish: How to Restore the Balance in Sustainable Fisheries Management', 2009 *Ocean Development and International Law* 40, pp. 97-125, pp. 100 et seq.; M. Williams, 'Are High Seas and International Marine Fisheries the Ultimate Sustainable Management Challenge?', 2005 *Journal of International Affairs* 59, pp. 221-234, pp. 222 et seq.

³⁴ Williams, *ibid.*, p. 222.

³⁵ The United Nations Conference on the Law of the Sea held in Geneva from 24 February to 27 April 1958 opened for signature four conventions and an optional protocol, inter alia, also the Convention on the High Seas (450 *United Nations Treaty Series* 11) and the Convention on Fishing and Conservation of the Living Resources of the High Seas (559 *United Nations Treaty Series* 11).

The 1982 Convention attempted for the first time to provide a global framework for the exploitation and conservation of the sea's resources and the protection of the environment. In many respects it served as a model for the evolution of international environmental law.³⁷ To date, while the UN Charter can be regarded as the world's constitution, the UNCLOS is seen as the major international instrument of ocean governance. It essentially establishes the basic law of the oceans. Yet, as UNCLOS entered into force only in 1994, it is considerably younger than the world's charter, and its constitutional status is, unlike that of the UN Charter, not undisputed.

Some of the purposes of UNCLOS are listed in the Preamble. The States Parties therein recognize the need for a constitution of the oceans which will promote the 'equitable and efficient utilization of [the ocean's] resources, the conservation of [its] living resources, and the study, protection and preservation of the marine environment.' It further reminds states that the Convention aims to 'contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole.' Presumably, this also includes future generations.

In essence, the regime protecting fish stocks of the high seas consists of four Articles in UNCLOS. These are Articles 116-120, i.e. Section 2 of Part VII of UNCLOS, dealing with the conservation and management of the living resources of the high seas. Other relevant articles include those relating to straddling stocks and highly migratory species, as well as those in Part XII, dealing with the protection and preservation of the marine environment. Especially Article 194 is relevant, since it calls for arrangements to prevent, reduce and control pollution of the marine environment, including 'those [measures] necessary to protect and preserve (...) the habitat of depleted, threatened or endangered species and other forms of marine life.'

For present purposes, however, it is not so much the rules that are interesting, but rather the ultimate goal thereof. In what way is this goal related to sustainable development?³⁸

From Article 117 of UNCLOS, it can be concluded that 'the conservation of the living resources of the high seas' is the aim of the action or the purpose of the legal regime presented in Articles 116 to 120 of UNCLOS. According to the accompanying principle, or the rule of action, stated further in Article 119 UNCLOS, all states are required to 'maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield'.³⁹

Moreover, Article 116 UNCLOS proclaims that the freedom of fishing on the high seas is subjected to states' other treaty obligations. It can therefore be argued that

Nations Treaty Series 285). Whereas the Convention on the High Seas regulates rather generally states' right for their nationals to engage in fishing on the high seas (Art. 2) without addressing or regulating the issue of sustainable fisheries, the Convention on Fishing and Conservation of the Living Resources of the High Seas incorporates the idea of 'optimum sustainable yield' (Art. 2). This concept later found its qualified formulation in Arts 61 and 119 UNCLOS as 'maximum sustainable yield' and serves as a guideline in achieving the sustainable development of fisheries.

³⁶ See also D. Rothwell & T. Stephens, *The International Law of the Sea*, 2012, pp. 294-297 and J. de Yturriaga, *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea*, 1997, pp. 11 et seq.

³⁷ Birnie & Boyle, supra note 8, p. 383.

³⁸ The documents referred to below are only a selection. There are other examples of legal documents, adopted both within and outside the UN framework, applying the global value of social progress and development to the legal regime governing the exploitation of the ocean's natural resources, with or without explicit reference to the UN's documents and declarations on sustainable development.

³⁹ See also D. Freestone, 'International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle', in A. Boyle & D. Freestone (eds.), *International Law and Sustainable Development*, 1999, pp. 145-164, p. 147.

this provision of the UNCLOS potentially links states' rights and duties established under the UNCLOS to obligations of cautious and sustainable fishing, if such obligations are established elsewhere. In other words, if a state is a member of one or more regional fisheries treaties explicitly referring to the concept of sustainable development, then states' high seas fishing must be exercised in accordance with such other obligations.⁴⁰

The 1982 Convention was not the final word on the legal regime regarding high seas fisheries. In fact, global rules on high seas fishing grew considerably stronger during the 1990s. The 1992 Rio Conference, and especially its Agenda 21, inspired the drafters of the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement). This Agreement reminded states that, through the adoption of Agenda 21, they already committed themselves to 'the conservation and sustainable use of marine living resources on the high seas.'⁴¹ The Compliance Agreement defines the responsibilities of a state for ships flying its flag on the high seas (Article III). It requires Flag State authorization for such fishing activities (Article III (2)), and obliges a state to ensure that fishing activities conducted by vessels under its flag do not undermine the effectiveness of international conservation and management measures on the high seas (Article III (1) (a)). The Compliance Agreement attempts not only to strengthen the Flag State control but above all to counter one of the major current problems on the high seas: to deter the evasive reflagging of vessels under the flag of a state that is either unwilling or unable to enforce fisheries regulations on the high seas.⁴²

Recognizing that regardless of the general aspiration for comprehensiveness, the UNLCOS was primarily concerned with fisheries issues within the exclusive economic zone and that it failed to provide for sufficient protection for border straddling fish populations, the Rio Conference of 1992 also led to the adoption of 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 (Fish Stocks Agreement). The Agreement was made, inter alia, to address the problems outlined in Rio's Agenda 21, such as the fact that 'the management of high seas fisheries is inadequate in many areas and that some resources are overutilized'.⁴³ It provided for much broader conservation and sustainability measures applicable to high seas fisheries, through its provisions relating to national and regional management bodies, its enhanced enforcement of existing restrictions, and its more precautionary approach to conservation and exploitation.⁴⁴ For example, as evidenced by Articles 10, 17 and 21 of the Fish Stocks Agreement, this instrument strengthens the duty to co-operate with other states in the field of high seas fisheries providing that only states that are members of regional fisheries management organizations,⁴⁵ or that agree to apply the conservation and management policies adhered

⁴⁰ H. Schiffman, 'International Law and the Protection of the Marine Environment' Encyclopedia of Life Support Systems (EOLSS), <<http://www.eolss.net/Sample-Chapters/C14/E1-36-02-03.pdf>> (last visited 15 December 2012).

⁴¹ *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, entered into force in 1995, (signed and approved in 1993) within the framework of the FAO.

⁴² Birnie & Boyle, supra note 8, p. 743.

⁴³ Preamble, *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*.

⁴⁴ Williams, supra note 33, p. 223.

⁴⁵ Regional fisheries management organizations constitute international governmental organizations responsible for managing fish stocks on the high seas and fish stocks which migrate through the waters of more than just a single State. They are

to under such regional regimes, shall have access to fishery resources on the high seas.⁴⁶ Further, the principal objective of the Agreement, *i.e.* ‘to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks’, also contains a clear reference to sustainable development.⁴⁷ At the same time, the Fish Stocks Agreement aims to effectively implement the relevant provisions of UNCLOS, and its frequent references to this Convention ensure that the Agreement is firmly rooted in the ‘constitutional law’ of the sea.⁴⁸

Similarly, the 1995 Code of Conduct for Responsible Fisheries, which was negotiated in parallel with the Fish Stocks Agreement, has to be interpreted and applied ‘in the light of’ the Rio Declaration and Agenda 21.⁴⁹ Although voluntary in nature, the overall objective of the Code is to provide principles and international standards of behaviour for responsible practices relating to conservation, management and development of all fisheries under all jurisdictions (Principle 1). These principles and standards take into account all relevant biological, technological, economic, social, environmental and commercial aspects. These principles thus aim to secure a rational and sustainable exploitation of world’s fisheries and sustainable fishing in the high seas.⁵⁰ The Code explicitly refers to the ‘sustainable development of fisheries’ in several places,⁵¹ and represents the first and only international instrument of its type advanced so far with respect to fisheries.⁵²

The 1999 International Plan of Action for the Management of Fishing Capacity and the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing – both voluntary instruments elaborated within the framework of the 1995 Code of Conduct for Responsible Fisheries – deal with similar issues.⁵³ Although the Plans do not contain an explicit reference to the sustainable development declarations mentioned above, they incorporate the 1992 Rio Declaration as well as Agenda 21 into their framework by stating that the 1995 Code of Conduct applies

generally mandated to adopt resolutions or conservation and management measures which are binding on their members and are thus regarded as key actors in effectively addressing existing fisheries problems. See also M. Palma et al., *Promoting Sustainable Fisheries*, 2010, pp. 201 et seq.

⁴⁶ O. Stokke, ‘Trade Measures and the Combat of IUU Fishing: Institutional Interplay and Effective Governance in the Northeast Atlantic’, 2009 *Marine Policy* 33, pp. 339-349, p. 340; See also Williams, *supra* note 33, p. 223.

⁴⁷ Art. 2 Fish Stocks Agreement; It should also be noted that some of the provisions of the Compliance Agreement and the Fish Stocks Agreement overlap. Yet, there are some important differences. First, whereas the Fish Stocks Agreement only addresses straddling fish stocks and highly migratory fish stocks, the Compliance Agreement applies to all high seas fishing. And while the UN Fish Stocks Agreement contains an obligation to establish a national record of fishing vessels, and to make the respective information available on request (Art. 18), only the Compliance Agreement provides for a systematic exchange of information regarding high seas fishing vessels to which the Agreement applies (Arts. 4 and 6).

⁴⁸ Art. 4 Fish Stocks Agreement. See also E. Molenaar, ‘Non-Participation in the Fish Stocks Agreement: Status and Reasons’, 2011 *The International Journal of Marine and Coastal Law* 26, pp. 195-234, pp. 200-201. See also J. Hyvarinrn et al., ‘The United Nations and Fisheries in 1998’, 1998 *Ocean Development and International Law* 29, pp. 323-338.

⁴⁹ *Code of Conduct for Responsible Fisheries*, adopted on 31 October 1995 within the framework of the FAO.

⁵⁰ FAO, *Ethical Issues in Fisheries*, 2005, p.13.

⁵¹ E.g., Principle 6.2 (General Principles), Principle 10.1.3 (Integration of Fisheries into Coastal Area Management), Principle 11.1.5 (Post-Harvest Practices and Trade).

⁵² G. Hosch et al., ‘The 1995 FAO Code of Conduct for Responsible Fisheries: Adopting, Implementing or Scoring Results?’, 2011 *Marine Policy* 35, pp. 189-200, p. 189; See also W. Edeson, ‘Towards Long-Term Sustainable Use: Some Recent Developments in the Legal Regime of Fisheries’, in A. Boyle & D. Freestone (eds.), *International Law and Sustainable Development*, 1999, pp. 165-203, pp. 168.

⁵³ *International Plan of Action for the Management of Fishing Capacity; International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, adopted respectively in 1999 and 2001, both within the framework of the FAO; See also K. Riddle, ‘Illegal, Unreported, and Unregulated Fishing: Is International Cooperation Contagious?’, 2006 *Ocean Development & International Law* 37, pp. 265-297.

to the interpretation and application of the former.⁵⁴ Thus, both Plans of Action make the goals of long-term sustainability and responsible fisheries management their objectives.

The same can be said of the 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem.⁵⁵ Though not exclusively concerned with the issues relating to the high seas regions, this instrument intended to underscore the necessity of incorporating ecosystem considerations into existing fisheries management.⁵⁶ In the Preamble to the Reykjavik Declaration, Chapter 17 of Agenda 21 was referred to as an example of a document containing ‘additional legal and political commitments that supplement the provisions of the Convention.’

Among the latest instruments deserving attention is the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, elaborated under the auspices of the FAO in 2009.⁵⁷ Against the background of the general failure of Flag States to effectively control fishing operations carried out by vessels flying their flag, this instrument was elaborated to prevent illegally caught fish from entering international markets through ports. Its objective was to ‘prevent, deter and eliminate [illegal, unreported and unregulated] fishing (...) and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems.’⁵⁸ Though not explicitly referring to Agenda 21 or the 1992 Rio Declaration, the 2009 Port State Agreement defined ‘illegal, unreported and unregulated fishing’ in line with Paragraph 3 of the Plan of Action against Illegal, Unreported and Unregulated Fishing of 2001. This Plan of Action made the 1992 Rio Declaration, as well as Agenda 21, part of its framework. Thus, these sustainable development mechanisms again found their way into the legally binding commitments of states.

Last but not least, the International Guidelines for the Management of Deep-sea Fisheries in the High Seas adopted by the FAO in 2008 should be mentioned.⁵⁹ In view of the fact that many deep water fish species have low resilience to intensive fishing, and their recovery from overfishing can take generations,⁶⁰ the guidelines prescribe steps which are essential for the sustainable use of marine living resources in deep-sea areas beyond national jurisdiction. In principle, the Guidelines are to be interpreted and applied in conformity with the relevant rules of international law, as reflected in the UNCLOS.⁶¹ At the same time reference to the Fish Stocks Agreement as well as the FAO Code of Conduct for Responsible Fisheries is frequently made in the document, reflecting the gradual penetration of the sustainability approach into the deep sea areas of the high seas.

⁵⁴ See respectively § 4 1999 IPOA-MFC and § 5 2001 IPOA-IUU.

⁵⁵ *Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem*, adopted at the Reykjavik Conference on Responsible Fisheries in the Marine Ecosystem, held between 1 and 4 October 2001, a conference convened at the initiative of Iceland and the FAO.

⁵⁶ See also M. Sinclair et al., ‘Conference Report: Responsible Fisheries in the Marine Ecosystem’, 2002 *Fisheries Research* 58, pp. 255-265.

⁵⁷ *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, adopted in 2009, within the framework of the FAO.

⁵⁸ *Ibid.*, Art. 2; See also in general M. Palma et al., *Promoting Sustainable Fisheries*, 2010, pp. 157 et seq.

⁵⁹ FAO, *International Guidelines for the Management of Deep-sea Fisheries in the High Seas*, 2009.

⁶⁰ See *ibid.*, Para. 8 of the *International Guidelines for the Management of Deep-sea Fisheries in the High Seas*: ‘These Guidelines have been developed for fisheries that occur in areas beyond national jurisdiction and have the following characteristics:

i. the total catch (everything brought up by the gear) includes species that can only sustain low exploitation rates; and
ii. the fishing gear is likely to contact the seafloor during the normal course of fishing operations.

⁶¹ *Ibid.*, Para. 7.

The legal instruments discussed in this section all see sustainable development as an important consideration, and sometimes as the primary goal, when it comes to the legal regime of high seas fisheries. Many of them explicitly refer to the general instruments on sustainable development, especially Agenda 21 and the 1992 Rio Declaration. In this way, it is made clear that the more specific regulations on high seas fisheries ought to be interpreted in accordance with the general principles of sustainable development developed in these general declarations.

4. References to the ocean at the UN Conference on Sustainable Development of 2012

The latest United Nations Conference on Sustainable Development took place in Rio de Janeiro in 2012.⁶² In preparing for the conference, the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (the Consultative Process) was asked by the General Assembly to devote its twelfth meeting ‘to the assessment, in the context of the United Nations Conference on Sustainable Development, of progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development and addressing new and emerging challenges.’⁶³ Essentially all previous meetings of this group discussed in some way or another the linkage between sustainable development and the law of the sea. For example, in 2005 a panel of experts debated the issue of fisheries and their contribution to sustainable development.⁶⁴ But in 2011, the twelfth meeting was for the first time entirely devoted to a discussion of the implementation of the outcomes of the major summits on sustainable development in the legal regime regulating the oceans.

To facilitate the discussion of the twelfth meeting, the General Assembly requested the UN Secretary-General to write a report on the relationship between sustainable development and the law of the sea, and to make the report available to the participants of the Consultative Process before their meeting. This report gave an overview of instruments that applied the general principles of sustainable development to the oceans.⁶⁵ It emphasized the importance of the oceans to the realization of the three pillars of sustainable development: economic (I) and social development (II), and environmental protection (III). Specifically regarding social and economic development, the report noted that the oceans were ‘critical for global food security and for sustaining economic prosperity and the well-being of many national economies, particularly in developing countries.’⁶⁶ The Secretary-General’s conclusion on the general linkage was that ‘the development of a “green economy” capable of fostering economic growth and poverty alleviation while promoting social development and ensuring environmental

⁶² About the preparation, see *Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21 and the outcomes of the World Summit on Sustainable Development*, UN Doc. A/RES/64/236 (2009).

⁶³ *Oceans and the law of the sea*, UN Doc. A/RES/65/37 (2010), Para. 231. This Process was established in 1999 by the UN General Assembly; its task was to look at the relationship between sustainable development and the law of the sea. See *Results of the review by the Commission on Sustainable Development of the sectoral theme of “Oceans and seas”: international coordination and cooperation*, UN Doc. A/RES/54/33 (1999).

⁶⁴ *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its sixth meeting*, annexed to a *Letter dated 7 July 2005 from the Co-Chairpersons of the Consultative Process addressed to the President of the General Assembly*, UN Doc. A/60/99, distributed 7 July 2005. See especially Paras. 48-84 of the report.

⁶⁵ *Oceans and the law of the sea: Report of the Secretary-General (Addendum)*, UN Doc. A/66/70/Add.1, especially Section II.

⁶⁶ *Ibid.*, Para. 6.

protection depends on the sustainable development and use of the oceans and their resources.⁶⁷

With the help of the Secretary-General's report, the Consultative Process organized a very interesting discussion. Both state representatives and academics participated in the debate, which was essentially about ways to link the 'blue economy' to the 'green economy.'⁶⁸ In a joint statement, the Small Island Developing States once again stressed their dependency on the oceans: 'we are not only Small Island Developing States, but also large ocean developing States.'⁶⁹ They thus proposed that 'oceans should feature prominently on the agenda for Rio plus 20.'⁷⁰ Annexed to the joint statement of the Small Island Developing States was a useful overview of international (legal) instruments applying the principles of sustainable development to the ocean.⁷¹

During the meeting, Cherdasak Virapat⁷² delivered a presentation on how the three pillars of sustainable development – the social, environmental and economic pillar – were applied to the law governing the oceans.⁷³ In Virapat's view, the ocean's natural resources provided jobs and food security, and thus possibilities for social development, for many communities and states.⁷⁴ States also used the ocean for various economic activities, such as the exploitation of natural resources, both living and non-living; the transportation of various goods from one place of the world to another; the laying of telephone and internet cables; recreation such as cruises and other forms of water tourism; the production of energy; and the disposal of industrial and other waste.⁷⁵ Finally, Virapat identified three different categories of environmental harm caused to the oceans: the pollution of the marine environment, disruption to the ecological balance because of overfishing and destructive fishing practices, and a change of habitat due to climate change and rising sea levels.⁷⁶ Cicin-Sain, the President of the Global Ocean Forum and a participant in the same discussion, also stressed the paramount importance of the oceans for life on Earth. He put it as follows: 'just as you cannot do without a healthy heart and lungs, the world cannot do without a healthy ocean.'

Many of the other participants in the discussion organized by the Open-ended Informal Consultative Process emphasized the importance of the national implementation of international commitments. There was no need to come up with more international agreements and commitments to solve particular challenges to the sustainable use of the

⁶⁷ Ibid., Para. 7.

⁶⁸ *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its twelfth meeting*, annexed to a Letter dated 22 July 2011 from the Co-Chairs of the Consultative Process addressed to the President of the General Assembly, UN Doc. A/66/186, distributed 25 July 2011, Para. 75.

⁶⁹ *Contribution to the twelfth meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, submitted by the Pacific small island developing States*, UN Doc. A/AC.259/21, distributed 9 May 2011, Para. 3.

⁷⁰ Ibid.

⁷¹ Besides the documents referred to above, these included the *Resumed Review Conference on the Fish Stocks Agreement* (2010), the *Barbados Programme of Action for the Sustainable Development of Small Island Developing States* (1994) and the two *Mauritius Strategies for the Further Implementation of the Barbados Programme of Action* (2010 and 2005).

⁷² See the Introduction to this article.

⁷³ *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its twelfth meeting*, Para. 14.

⁷⁴ *Relationship between the Oceans and the Three Pillars of Sustainable Development*, presentation by Cherdasak Virapat on 20 June 2011, at the 12th Meeting of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea. See *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its twelfth meeting*, Para. 15.

⁷⁵ Ibid., p. 4.

⁷⁶ Ibid.

oceans, because many such agreements already existed, and adding even more would only lead to further fragmentation.⁷⁷ It was suggested that this should also be the message for Rio+20: avoid any fragmentation of the law of the sea, and focus on the national implementation of existing agreements and commitments.⁷⁸ Babajide Alo, of the University of Lagos, for example, suggested that states act in accordance with the slogan of Agenda 21: ‘think globally, but act locally.’ In his view, the focus should be on improved implementation at the national level of the goals and targets set internationally. Similarly, Sebastian Mathew of the International Collective in Support of Fishworkers argued that the successful implementation of Agenda 21 was above all the responsibility of governments. He thus emphasized the importance of good governance on the national level. It was noted that overfishing was the most acute problem.⁷⁹ Yoshinobu Takei, of the Netherlands Institute for the Law of the Sea (NILOS) of Utrecht University, also believed that states should develop their own integrated national ocean policies. National practices and experiences could then be shared, so that states could learn from each other’s good examples – and from bad mistakes. A brief report of this meeting was sent to the Rio+20 Conference.

The United Nations General Assembly stated that the discussion organized by the Open-ended Informal Consultative Process had been very useful, and that ‘the perspective of the three pillars of sustainable development should be further enhanced [by the Process] in the examination of the selected topics.’⁸⁰ The Assembly further recommended to all states to see the Consultative Process as a think-tank to help them come up with effective measures in Rio in 2012, to ‘implement internationally agreed goals and commitments relating to the conservation and sustainable use of the marine environment and its resources.’⁸¹

The Consultative Process is not the only forum where states come together to discuss the application of the principles of sustainable development to the oceans regime. Another example is the Ad Hoc Open-ended Informal Working Group to Study Issues relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction. This group is presently co-chaired by Kohona, the Permanent UN Representative of Sri Lanka, and Liesbeth Lijnzaad, a Legal Adviser at the Dutch Ministry of Foreign Affairs. In a recent meeting of this group, it was noted that the conservation of marine biodiversity and its sustainable use were directly related, not just to environmental issues, but also to the social and economic pillars of sustainable development.⁸²

Their work uses as its point of departure the commitments made by the international community of states in one of the products of the 1992 Rio Conference, the Convention on Biological Diversity.⁸³ The main objective of the Biodiversity Convention

⁷⁷ See also *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its Twelfth Meeting*, Paras. 20 and 83.

⁷⁸ *Ibid.*, Para. 74.

⁷⁹ *Ibid.*, Para. 33.

⁸⁰ *Section XIV on Open-ended Informal Consultative Process on Oceans and the Law of the Sea, part of Oceans and the Law of the Sea*, UN Doc. A/RES/66/231 (2012), Para. 226.

⁸¹ *Ibid.*, Para. 227.

⁸² *Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction and Co-Chairs’ summary of discussions*, UN Doc. A/66/119, distributed 30 June 2011, Para. 8.

⁸³ The *Convention on Biological Diversity* was adopted at the United Nations Conference on Environment and Development of 1992, and entered into force on 29 December 1993.

is to promote ‘the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.’⁸⁴ The term biological diversity refers to the ‘variability among living organisms from all sources including (...) marine and other aquatic ecosystems and the ecological complexes of which they are part.’⁸⁵ The Convention does not establish particular obligations relating to the oceans, but it does make a link by obliging all States Parties to the Biodiversity Convention to ‘implement [it] with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.’⁸⁶ A Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) was established, tasked inter alia with the identification of new and emerging issues relating to the conservation and sustainable use of biological diversity. New and emerging issues relating to the sustainable exploitation of the oceans and their resources that have been proposed include deep sea fishing (in 2011), marine protected areas and undersea noise (in 2009), as well as ocean acidification (in 2008).

Before the start of the Rio+20 Conference, various stakeholders shared their views with the conference’s participants. Many NGOs and others did so, expressing their concerns about the continuous unsustainable use of the oceans. For example, the Blue Marine Foundation noted that ‘some of the most important threats to sustainable development to emerge in the decade since (...) Johannesburg have been in the oceans,’ and that there was thus a ‘strong public expectation that Rio+20 will address and improve man’s stewardship of the watery commons that cover 70 per cent of the Earth’s surface.’⁸⁷ Partly for this reason, one of the expectations of the Advisory Group on International Environmental Governance was that the conference would, ‘building on the Law of the Sea, establish a coherent global mechanism for the regulation of ocean fisheries mandated to reduce fishing pressure to the capacity of the resource, and ultimately to restoring the productivity of the seas.’⁸⁸ Greenpeace submitted that ‘a new implementing agreement under the UN Convention on the Law of the Sea (UNCLOS) [was] needed for the conservation of marine biodiversity and sustainable management of human activities in areas beyond national jurisdiction.’⁸⁹ Greenpeace further suggested combating the use of what it referred to as ‘unsustainable fishing techniques.’⁹⁰ Similarly, under the heading of ‘the blue economy,’ the Marine Conservation Institute called for ‘ecological sustainability in the marine environment.’⁹¹ And the International Coastal and Ocean Organization believed the oceans were the ‘quintessential sustainable development issue’ of present times, since they ‘perform[ed] vital life-sustaining functions for the planet.’⁹²

⁸⁴ *Convention on Biological Diversity*, Art. 1. These three objectives, i.e. conservation and sustainable use of genetic resources in order to leave something for the future generation, and equitable sharing of the benefits of their use among the present generations, have to be promoted according to what is generally referred to as the ecosystem approach, in an integrated way; see also L. Nordtvedt Reeve et al., ‘The Future of High Seas Marine Protected Areas’, 2012*Ocean Yearbook*, pp. 265-289, p. 277.

⁸⁵ *Ibid.*, Art. 2.

⁸⁶ *Ibid.*, Art. 22(2).

⁸⁷ Compilation Document – Rio+20 – United Nations Conference on Sustainable Development (Major Groups), available on the website of the conference: <<http://www.uncsd2012.org/rio20/content/documents/compilationdocument/MajorGroups.pdf>>, p. 236 (last visited 15 December 2012).

⁸⁸ *Ibid.*, p. 38.

⁸⁹ *Ibid.*, p. 584.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, p. 1047.

⁹² *Ibid.*, p. 900.

States could also send their contributions, and so could international organizations. One of the more important contributions to the debate was that submitted by the EU and its Member States. In their jointly submitted note, it was stated that ‘the sustainable management of oceans and seas, including sustainable fisheries, [was] essential to achieve the goals of a “blue” economy in terms of sustainable economic growth, poverty eradication and job creation with decent working conditions.’⁹³

Finally, in the conference’s outcome document, entitled *The Future We Want*, some of these ideas and concerns expressed by states, international organizations and other relevant stakeholders re-emerge.⁹⁴ In a section on Oceans and Seas, it is stated that ‘oceans, seas and coastal areas form an integrated and essential component of the Earth’s ecosystem and are critical to sustaining it.’⁹⁵ Specifically on the issue of unsustainable fisheries, the states ‘commit to urgently take the measures necessary to maintain or restore all [fish]stocks at least to levels that can produce the maximum sustainable yield, with the aim of achieving these goals in the shortest time feasible.’⁹⁶

Among the remaining concerns for the international community, the section identified ocean acidification as well as the impact of climate change on marine ecosystems and resources.⁹⁷ The need for transparency and accountability in fisheries management by regional fisheries management organizations was noted.⁹⁸ Marine pollution in general as well as the rising sea level were extensively deplored and a call on the international community to enhance its efforts to address these challenges was uttered.⁹⁹

The states also reiterated some of the commitments already made in the Johannesburg implementation plan, among others to eliminate subsidies that contribute to illegal, unreported and unregulated fishing.¹⁰⁰ Deplorably, governments around the world continue to spend billions, and by some accounts tens of billions, of dollars on subsidies to the fisheries sector, thereby significantly reducing fishing costs.¹⁰¹ This eventually contributes to the catching of fish at inefficient and unsustainable levels, and fairly often leads to over-capacities in the catching and production sector.¹⁰² Against this background the declaration’s restatement of states’ commitment to reduce overfishing is particularly laudable. Bearing in mind that a number of WTO members, particularly many developing countries, continue to ask for flexibility in granting subsidies to their fisheries sectors, this statement proves an awareness on the part of States Parties to the WTO Agreement that a fair balance needs to be struck between their respective rights under the WTO legal

⁹³ *Contribution by the EU and its Member States to the UN Department of Economic and Social Affairs*, published in the Compilation Document – Rio+20 – United Nations Conference on Sustainable Development (Political Groups), available on the website of the conference: <<http://www.unccd2012.org/rio20/content/documents/compilationdocument/PoliticalGroups.pdf>>, p. 15 (last visited 15 December 2012).

⁹⁴ *The Future We Want*, UN Doc. A/RES/66/288 (2012) (Annex).

⁹⁵ *Ibid.*, para. 158.

⁹⁶ *Ibid.*, para. 168.

⁹⁷ *Ibid.*, para. 166.

⁹⁸ *Ibid.*, para. 172.

⁹⁹ *Ibid.*, paras. 163 and 165.

¹⁰⁰ *Ibid.*, para. 173.

¹⁰¹ WTO, <http://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm> (last visited 22 November 2012).

¹⁰² With regard to the similar problem within the EU, an interesting analysis of the compatibility of the public financial support to the fisheries sector with the EC Common Fisheries Policy is provided by T. Marcus, ‘Towards Sustainable Fisheries Subsidies: Entering a New Round of Reform under the Common Fisheries Policy’, 2010 *Marine Policy* 34, pp. 1117-1124.

framework and their commitments pertaining to the sustainable use of the oceans' resources. Accordingly, the Rio+20 Declaration not only encourages states to further enhance the transparency and reporting of existing fisheries subsidies programmes through the WTO, but equally to refrain from introducing new or extending and enhancing existing subsidies that might negatively affect fisheries.¹⁰³

Moreover, the Rio+20 Declaration, *The Future We Want*, lays down states' commitment 'to address, on an urgent basis, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction'.¹⁰⁴ Depending on the outcome of the ongoing work of the Ad Hoc Open-ended Informal Working Group to Study Issues relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, the declaration further anticipates that before the end of the sixty-ninth session of the General Assembly in 2014 a decision will be reached as to whether a new international instrument under the UNCLOS is necessary. The future will show whether a new multilateral agreement will be elaborated resulting inter alia in expanding the existing legal duties of states to enhance the protection of marine genetic resources and conduct sound management of the high seas fisheries.¹⁰⁵

Finally, the declaration establishes a link with the currently ongoing work conducted by the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects (the Global Process). The Global Process was established under the United Nations in 2004 and is overseen and guided by an Ad Hoc Working Group of the Whole of the General Assembly.¹⁰⁶ It embodies an intergovernmental process guided by international law, including the UNCLOS and other applicable international instruments. It equally represents all of the world's geographical areas.¹⁰⁷ In accordance with the past practice of the United Nations, relevant IGOs and NGOs with consultative status with the ECOSOC can be invited to participate in the meetings of the Working Group. Relevant scientific institutions and major groups identified in Agenda 21 can request an invitation to participate in the Working Group's sessions.

The Global Process embodies the recognition of the need for internationally concerted efforts in the protection and sustainable management of the world's global commons. As indicated in the first outline submitted in 2011, the content of the assessment would include, apart from the general survey of the oceans' and seas' role in the life of the planet, more specified data, e.g., on the capture of fisheries (Chapter 11), aquaculture (Chapter 12), fish stock propagation (Chapter 13) as well as social and economic aspects of fisheries and sea-based food (Chapter 15). The latter includes an assessment of the implementation of international fisheries agreements and benefits which states obtain from fisheries and aquacultures.

The completion of the first global integrated assessment of the state of the marine environment is expected by 2014 and is subjected to subsequent consideration by the General Assembly. The Rio+20 Conference attaches considerable significance to the outcome to be reached by the Global Process as the declaration explicitly encourages states to consider the assessment findings at appropriate levels.

¹⁰³ *The Future We Want*, Para. 173.

¹⁰⁴ Para. 162; see also Nordtvedt Reeve et al., *supra* note 84, p. 272.

¹⁰⁵ See also UN Doc. A/66/119.

¹⁰⁶ UN Doc. A/RES/57/141 (2002), Para. 45.

¹⁰⁷ UN Doc. A/RES/65/37 (2010).

5. Conclusion

In this article, we first examined references to the oceans in United Nations declarations and documents dealing with sustainable development in a general sense. Probably the most important such document is Agenda 21, adopted in Rio de Janeiro in 1992. Chapter 17 of this implementation plan is about the sustainable use and conservation of the marine living resources of the high seas.

We then did the exact opposite, and looked at references to sustainable development in treaties and other legal instruments relating to the oceans, in particular, high seas fisheries. In this regard, the UNCLOS, the Fish Stocks Agreement, and the Compliance Agreement provide the major framework for current and future actions. As all three agreements were negotiated over a broadly similar time frame, many of the negotiators were the same. This, in turn, contributed to the high level of consistency among the agreements.

Finally, we returned to the present year and looked at the latest United Nations conference on sustainable development organized, once again, in the *Cidade Maravilhosa*: Rio de Janeiro. Various working groups, both within and outside the UN family, have worked hard to make the sustainable use of the oceans a priority topic there. The importance of connecting sustainable development with the legal regime of all that is blue on our blue planet can hardly be underestimated. Inspired by the twelfth meeting of the Consultative Process, where this link was explored, the Rio+20 Conference took great steps in identifying sustainable development as the primary goal for the regime of the oceans and the conservation of its living resources.

What are the answers to the questions we asked at the very beginning? It would be erroneous to assume that the overly extensive exploitation of the ocean's natural resources results from a lack of awareness by states about the depletion of the existing high seas' fish stocks. Neither can we agree with Greenpeace that a new implementing agreement under the UNCLOS to secure the sustainable management of human activities in the marine areas beyond national jurisdictions is necessary. As the overview in this article has shown, plenty of relevant agreements already exist. Rather, the global challenge in combating unsustainable fishing techniques is the consequent implementation of the existing regulatory framework. As compliance with a sustainable and responsible fishing practice is at best only partial,¹⁰⁸ the blue planet's super highways still demand more attentive voyagers and more diligent road workers.

Little attention was devoted above to the states' reporting obligations (or the lack thereof) under the discussed instruments. The same could be said of conflict resolution mechanisms and procedures. Yet, a detailed discussion of the latter issues was not envisaged in this article. The aim was to examine the enduring cross-fertilization between the concept of sustainable development and the substantive norms and principles of the high seas fisheries regime to show that the time has come to shift the focus from regulation to compliance and enforcement.

Only then would Dory's reassurance to his fellow fish Marlin not to be afraid of the big blue sea, because 'this is the Ocean, silly, we're not the only two in here,' still ring true in the future.¹⁰⁹

¹⁰⁸ FAO, *World Review of Fisheries and Aquaculture*, 2012, p. 203.

¹⁰⁹ This is a quote from *Finding Nemo*, Walt Disney Pictures & Pixar Animation Studios, 2003.

