International Transparency Obligations in Fisheries Conservation and Management: Inter-State and Intra-State Dimensions

Abstract
Transparency is considered as a touchstone of good governance and this article sets out to explore how transparency has been implemented in the context of fisheries conservation and management. The focus of the article is on access to information relating to fisheries conservation and management by states, including related activities such as enforcement and trade regulation. The article recognises that there are multiple rationales underpinning the drive for transparency, which results in transparency being implemented in different ways depending on the role that a state is fulfilling. The article also recognises that transparency not only serves to promote trust and confidence between states, but it can also have important implications for fisheries governance at the national level. At the same time, transparency is rarely absolute and it has to be balanced against other considerations, such as the need to protect proprietary information or to ensure effective enforcement. The precise balance that is struck will often depend upon the rules that have been negotiated. The article analyses the relevant legal framework and identifies the emergence of a more detailed understanding of transparency in the context of fisheries conservation and management, and a widening of its scope of application. Taken together, these developments suggest that important inroads have been made in promoting transparency, to the extent that it could be described as a general principle, which exerts an influence over the interpretation and progressive development of international fisheries law.

Keywords: transparency; international fisheries law

1. Introduction
Transparency has become a growing concern in the development of international law in the past decades. The literature on global governance has highlighted transparency as an important consideration in the design and operation of international regimes in order to strengthen the legitimacy of their increasing impact upon the autonomy of states, companies and individuals[1]-[2]. Yet, there is no single definition of transparency, which is widely recognized as a contested concept involving choices about the degree of transparency that must be achieved[3]-[4]. In a similar vein, some authors have argued that the meaning of transparency may differ ‘within and across different structures of global governance’[5].

The focus of this contribution is on the emergence of transparency in the field of international fisheries law and its reflection in an increasing number of treaties and related instruments. The article concentrates on those transparency rules that are directly applicable to states involved in the regulation of fishing. In doing so, the article fills a gap in the existing literature which has tended to focus on the transparency of relevant international institutions[6]. Yet, addressing the transparency obligations that apply to states is important because states remain the principal regulators of fishing, particularly in areas within national jurisdiction where the majority of fish are caught.

This article considers transparency from the perspective of providing access to and sharing information about fisheries conservation and management, as well as related fisheries issues, such as enforcement and trade regulation. The article therefore does not address wider conceptions of transparency, such as access to and participation in decision-making forums[7], even though it is recognised that there are important links between access to information and effective participation.

The article starts by considering the various rationales for transparency in fisheries conservation and management, which may influence the breadth and scope of transparency rules in practice. It then turns to the relevant legal framework, starting
with an analysis of the manner in which transparency is embedded in the fisheries provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and proceeds to consider how the international rules on transparency in fisheries conservation and management have evolved, both through the development of more detailed requirements and through a widening of the scope of application of transparency in relation to fisheries. The paper concludes by asking whether we can consider transparency as a general principle that exercises a broad influence over the interpretation and progressive development of international fisheries law.

2. Rationales for transparency in fisheries governance

Global and regional fisheries regimes rely on states in several different capacities to uphold internationally agreed obligations and to undertake a range of conservation, management and enforcement tasks. Given that many fish stocks are shared between states, fisheries rules are generally integral in character, which means that all parties must perform their obligations independently if the objectives of the rules are to be achieved[8]. If a single state decides to overfish a particular shared stock in disregard of the agreed rules, it has consequences for all other states fishing for that stock. In this context, it is important for each state to know that other participants in the regime are also performing their obligations[9]. The introduction of transparency obligations provides a key means of building trust and confidence in order to facilitate compliance with international law by providing information on how other parties to an obligation behave[10]-[12]. The international relations literature on regime-building refers to this as a ‘strategy of assurance’ and it is used ‘when each party believes that the others, like itself, wish to maintain cooperation under the agreement, but seek to avoid being taken advantage of, by accident or design’[13].

Another key rationale for transparency in fisheries governance arises when states are involved in overseeing compliance with fisheries rules by another state’s vessels, for example when carrying out boarding and inspection of vessels fishing on the high seas, in their coastal waters, or visiting their ports. The conferral of such powers on non-flag states has been a key mechanism for improving compliance with international fisheries law, but these powers are often conditional, which means that it is also necessary to ensure that states do not exceed the powers that are conferred upon them. In this regard, transparency requirements can help to mitigate against the abuse of power by obliging relevant states to provide clear and accurate information about their activities, thereby facilitating scrutiny of their actions. This rationale can also be extended to states when exercising other functions related to fisheries, such as regulating trade in fish products. The use of market-based mechanisms has become a major strategy to promote sustainable fisheries in recent years [14]-[15], in part encouraged by the FAO Code of Conduct for Responsible Fisheries (CCRF)[16] and its accompanying International Plan of Action on Illegal, Unreported and Unregulated (IUU) Fishing[17], but this approach opens up room for protectionism of domestic producers, which transparency obligations can help to combat by demanding clarity in the reasons behind trade restrictions.

Both of the above-mentioned roles of transparency relate to the inter-state dimension of fisheries management. Yet, it has been recognised that transparency can be applied beyond state-to-state transactions and it has important implications for relations between states and private actors[3]. Thus, transparency may also be integrated into fisheries regimes for the purpose of promoting trust and mutual
confidence in the regulatory framework within a state. For example, the willingness of fishing vessel owners or masters to comply with regulations may be improved if they are assured that their competitors are operating on a level playing field. Transparency may also play a wider role in this context, given the status of fisheries in many countries as a public resource that should be managed on behalf of society as a whole\(^1\). On the one hand, reporting on regulatory and enforcement activity provides a means of demonstrating effective stewardship to national political actors and the public at large. On the other hand, the provision of information concerning how and when regulatory and enforcement powers are used, particularly where national authorities enjoy broad discretion, can be an important step in holding decision-makers to account. In addition, this function of transparency serves as a safeguard against corruption in the management of fisheries resources\(^{[18]}\). This intra-state dimension of transparency goes beyond the traditional scope of international regulation, with its focus on shared resources, by promoting the achievement of good governance of the fisheries sector in general, whether or not a fishery involves more than one state.

In both the inter-state and intra-state dimensions, transparency may apply across a range of different stages of fisheries conservation and management, including the collection of data, the adoption of conservation and management measures (CMMs), and their enforcement. Furthermore, transparency may take a number of different forms. Transparency mechanisms may include obligations to report and share information on fisheries conservation and management, as well as means to verify such information, thus allowing states to be held accountable for breaches. Designing transparency mechanisms requires choices to be made, including what should be made transparent, what is the trigger for transparency, who are the recipients or users of information, and what enforcement mechanisms may be available to ensure that transparency obligations are implemented\(^{[2]}\). Indeed, transparency obligations are rarely absolute and transparency may need to be balanced against other considerations, such as the need to protect confidential information relating to defence, diplomacy, commerce or personal data, or the need to ensure the integrity of enforcement processes. Building transparency mechanisms into international agreements allows the parties to a treaty to agree upon the precise form and scope of information required in order to engender sufficient confidence in the regime\(^{[13]}\). How transparency rules in the context of fisheries conservation and management reflect such a balance will be considered in the following sections.

2. Transparency in the fisheries provisions of UNCLOS

As the ‘constitution for the oceans’\(^{[19]}\), whose general rules on the conservation and management of fish stocks within and beyond national jurisdiction are widely considered to reflect customary international law\(^{[20]}\), UNCLOS is a logical starting point for our analysis. Yet, UNCLOS does not explicitly refer to the term ‘transparency’ in its fisheries provisions in either Part V on the exclusive economic zone (EEZ) or Part VII on the high seas. Nevertheless, UNCLOS does contain provisions which demand the sharing of some basic information about fisheries conservation and management.

\(^1\) See e.g. Norwegian Marine Resources Act 2008, s. 2: ‘the wild living marine resources belong to Norwegian Society as a whole.’
In relation to the role of flag states in regulating fisheries on the high seas, Article 119(2) requires that ‘available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.’ The emphasis on information exchange through international organisations in this provision reflects the long-standing role that regional fisheries management organisations (RFMOs) have played in facilitating transparency between states. For example, the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission, one of the RFMOs set up after the Second World War, was premised upon a desire to ‘co-operate in the gathering and interpretation of factual information to facilitate maintaining the populations of these fishes at a level which will permit maximum sustained catches year after year’[21]. Indeed, this function of data exchange is performed by a wide range of fisheries bodies, even if they do not have powers to adopt legally binding CMMs. For example, the Fisheries Committee for the Eastern Central Atlantic was established as an advisory body with the express function of, inter alia, ‘assist[ing] in the collection, interchange, dissemination and analysis or study of statistical, biological and environmental data and other marine fishery information.’[22]

The information covered by Article 119(2) of UNCLOS falls into two distinct categories. Firstly, it covers total aggregated catch and effort statistics. This type of information will be important in the first instance to help establish appropriate CMMs, particularly total allowable catches (TAC).[2] It will also allow an assessment of whether a state has complied with such CMMs. The provision also includes ‘other data relevant to the conservation of fish stocks.’ This is a much broader term, which is capable of being interpreted to include a range of different data. It has been suggested that it covers, inter alia, ‘data on vessel numbers and capacity, identity of vessels engaged in IUU fishing, and other socio-economic factors relevant to the determination of the qualified [maximum sustainable yield]’[23]. It can also include data relating to enforcement, such as the number of inspections carried out or the number of violations detected. Indeed, the term ‘other data’ could arguably be interpreted in an evolutionary manner[24], meaning that it could incorporate some of the developments in international fisheries law discussed in the following sections.

In relation to the power of coastal states to regulate fisheries within the EEZ, Article 61(5) contains a similar obligation to exchange catch and fishing effort statistics and other relevant data, but UNCLOS also contains a number of additional provisions, which require specific forms of transparency at certain stages of fisheries conservation and management in the EEZ, particularly aimed at ensuring transparency concerning the exercise of regulatory powers over foreign fishing vessels. Firstly, Article 62(5) says that ‘coastal states shall give due notice of conservation and management laws and regulations.’ This obligation is imposed in connection with the duty of coastal states to grant access to foreign-flagged fishing vessels to catch any surplus of its TAC when the coastal state does not have the capacity to utilize the entire TAC itself. The rationale for this provision is that foreign flagged fishing vessels will be bound by such CMMs[25] and they therefore need to know their content. The manner in which notice must be given is not specified,

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2 On the requirement to set a total allowable catch, see UNCLOS, Article 119(1).
although the obligation may presumably be satisfied by general publication of laws and regulations and there is no necessity to give direct notification to individual fishing vessels each and every time that a law or regulation is updated. The requirement that notice must be ‘due’ implies that it must be given within a reasonable timeframe. Indeed, it is arguable that failure to give due notice will present an obstacle to enforcement, as an individual may not be prosecuted for an offence which had not been publicised in accordance with the general principle of *nulla poena sine lege*.

UNCLOS also contains express rules relating to the transparency of enforcement action by coastal states in the EEZ; Article 73(4) of UNCLOS requires that ‘in the case of arrest or detention of foreign flagged vessels the coastal State shall promptly notify the flag State, through appropriate channels, of the action taken and of any penalties subsequently imposed.’ In other words, notification must be made at the beginning and at the end of any enforcement proceedings brought by a coastal state against a foreign flagged vessel and its crew. The requirement for ‘prompt’ notification cannot be read to impose a single deadline for all circumstances, but rather it will require a case-by-case assessment. In the *M/V Virginia G Case*, the International Tribunal for the Law of the Sea (ITLOS) held that Guinea-Bissau had violated Article 73(4) by failing to notify Panama of the arrest of the vessel and ITLOS underlined that this omission ‘deprived Panama of its right as a flag state to intervene in the initial stages of action against the M/V Virginia G and during the subsequent proceedings’[26]. This decision both demonstrates the enforceability of the transparency obligations under UNCLOS3 but also how transparency serves as a prerequisite for the exercise of other rights.

In addition to these specific rules relating to the exchange of information, courts and tribunals have also interpreted more general obligations to include elements of transparency. For example, ITLOS has read in a requirement to uphold ‘international standards of due process of law’ when coastal states implement their obligation to promptly release vessels on payment of a reasonable bond under Article 73(2)[27] and these standards are likely to include minimum requirements of transparency. Thus, in the case of criminal proceedings, it is generally accepted that it is ‘the right of all persons charged with a criminal offence to be informed promptly and in detail in a language that they understand of the nature and cause of criminal charges brought against them’[28] and they are also entitled to access to all materials that the prosecution holds concerning the charges[28]. Whereas the protections may not be as strict for administrative proceedings, minimum due process requirements will still apply. Furthermore, any judgment rendered in a criminal case or a suit at law shall be made public with only minor exceptions permitted[29]. The reading of such requirements into UNCLOS demonstrates the possibilities for a systemic interpretation of the Convention, which may support a strengthening of transparency through the incorporation of more detailed standards, where the terms of UNCLOS support such an approach. It is therefore important to consider how transparency requirements have evolved in other relevant instruments.

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3 Although there is an optional exception in Article 298 of UNCLOS allowing states to exclude disputes concerning law enforcement activities in regard to the exercise of sovereign rights in the EEZ.
3. The development of transparency requirements in other fisheries treaties and instruments

Since the negotiation of UNCLOS, transparency has emerged as a more explicit consideration in international fisheries law and policy. A foundational instrument in this regard is the CCRF, which expressly states that ‘States should, to the extent permitted by national laws and regulations, ensure that decision making processes are transparent and achieve timely solutions to urgent matters’ (para. 6.13). This ‘general principle’ is directed at all forms of decision-making relating to fisheries. It also appears to apply to both the inter-state and the intra-state dimensions of fisheries regulation. However, the principle acknowledges that some discretion should be afforded to states in determining the extent to which transparency is integrated into their regulatory frameworks and it allows other considerations to be taken into account when designing transparency rules.

This general principle in section 6 of the CCRF is supplemented by additional provisions containing specific transparency requirements. For example, paragraph 7.3.4 provides that ‘States … should foster and promote international cooperation and coordination in all matters related to fisheries, including information gathering and exchange....’ This provision would appear to apply to states acting in any capacity, and not just in those situations covered by UNCLOS.

Whilst the CCRF is important for its explicit reference to transparency of fisheries governance, the CCRF is not legally binding, even if it has become an important point of reference for international fisheries policy[30]-[33]. Indeed, many of the principles found in the CCRF have been reflected in other treaties.

The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement (UNFSA) is a key treaty which emerged at the same time as the CCRF and which also applies transparency to the conservation and management of straddling and highly migratory fish stocks. Whilst the general provision on transparency in Article 12 only applies to the activities of RFMOs, Article 14 requires individual states to compile and exchange ‘fishery-related and other supporting scientific data’ either directly or through the RFMO where one exists. What the UNFSA adds to UNCLOS is an express recognition that the information collected must be ‘in sufficient detail’ and ‘provided in a timely manner’ (Article 14(1)). Indeed, Article 10(f) of the UNFSA underlines that a key function of RFMOs is to provide a forum for states to ‘compile and disseminate accurate and complete statistical data … to ensure that the best scientific evidence is available, while maintaining confidentiality where appropriate.’ This express mention of confidentiality serves as a reminder that transparency may need to be balanced against other considerations, with a specific reference to the need to protect non-aggregated data (Annex I, Article 1(1)), presumably with a view to ensuring that the fishing patterns of individual vessels are not revealed to potential competitors.

Annex I contains standard requirements for the collection and sharing of data, including a list of the categories of data that should be exchanged (Annex I, Article 3). Another important way in which the UNFSA advances the legal framework beyond UNCLOS is it’s insistence that ‘states or, as appropriate, subregional or regional fisheries management organisations or arrangements, should establish
mechanisms for verifying fisheries data’ (Annex I, Article 6), as well as its emphasis on agreed formats for data to be shared so that it can be compared (Annex I, Article 2(d)). Agreement on reporting formats is often achieved through RFMOs. For example, the North-East Atlantic Fisheries Commission has adopted requirements for the reporting of monthly landing and transhipment statistics for specific stocks[34].

The UNFSA also calls for additional transparency in those situations where a party is exercising enforcement powers against the vessels of another party. Article 20 extends the right of a contracting party to an RFMO to inspect the vessels of another UNFSA contracting party fishing on the high seas, but subjects this right to a requirement in Article 21 to promptly notify the flag state of any alleged violations. In return, the flag state is charged with ‘promptly’ informing the inspecting state of any further investigation and enforcement action taken by it. Like UNCLOS, the UNFSA includes compulsory dispute settlement procedures, which permit the enforcement of these provisions (Articles 27-32).

Several other international fisheries instruments also go into more detail about the nature of the information that must be exchanged, particularly by flag states. The 1993 FAO Compliance Agreement establishes an elaborate framework requiring states to maintain a record of fishing vessels and to share relevant information about their vessels in order to prevent unauthorised high seas fishing[35]. This element of transparency has been reiterated by the 2014 Voluntary Guidelines on Flag State Performance which call for flag states to make sure that ‘registration procedures are accessible and transparent’ and flag states must cooperate ‘with other States by exchanging information on registration, deregistration, and suspension of all vessels…’[36] Nor is it only basic information about vessel identity that must be shared, as the Voluntary Guidelines also call for flag states to promote transparency in the context of enforcement by encouraging flag states to share ‘information on the progress and outcome of the investigations [with] all States having an interest in, or affected by, the alleged violation’ (para. 36). These provisions focus on the inter-state level and they would seem to be aimed at promoting mutual confidence in fisheries enforcement between state actors. Yet, the Voluntary Guidelines also go beyond inter-state transparency to include an element of intra-state transparency by suggesting that ‘registry data [is made] publicly available and easily accessible subject to any applicable confidentiality requirements’ (para. 22). The acknowledgement of the need to balance transparency against confidentiality requirements gives some leeway for states to determine precisely what information should be made publicly available. Moreover, the Voluntary Guidelines are not binding and so these developments lie in the realm of de lege ferenda.

Post-UNCLOS fisheries instruments also extend transparency requirements to states when acting as port states, thereby going beyond UNCLOS, which does not address the role of port states in fisheries enforcement. Thus, Article 23 of the UNFSA recognises that ‘a port state has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures.’ The role of port states is also addressed in the CCRF (para. 8.3.1) and the International Plan of Action on IUU Fishing (para. 52). Whilst these instruments recognise the importance of port state responsibilities, both emphasise the key role of transparency in the exercise of such powers. The
International Plan of Action on IUU Fishing provides that ‘[s]uch measures should be implemented in a fair, transparent and non-discriminatory manner’ (para. 52) and the CCRF says that port states ‘should make known to other States details of regulations and measures they have established for this purpose’ (para. 8.3.1). Such an expansion of transparency in relation to port state measures is now crystallised in the 2009 FAO Port State Measures Agreement, which entered into force in June 2016 and imposes a general duty for parties to apply the Agreement ‘in a fair, transparent and non-discriminatory manner, consistent with international law’[37], and goes on to specify in some detail the nature of the information that must be provided by port states. Specific duties to exchange information arise when a port state decides to deny port entry (Article 9(3)), deny the use of a port (Article 11(3)), as well as when an inspection has been carried out (Article 15). Such information shall be transmitted not only to the flag state, but also to other relevant states, RFMOs, and the FAO, as appropriate (Article 15), preferably through some form of computerised communication system (Article 16 and Annex D). Article 19 of the Agreement also requires information about available domestic review procedures to be made publicly available and a port state must share information about the outcome of any review with the flag state, the owner, operator, master or representative thereof, and any other state or international organization that has previously been informed of the decision that has been the subject of review. The Agreement also highlights that any information exchange may be subject to ‘appropriate confidentiality requirements’ (Articles 6(1), 16(1), 16(2)) although the Agreement itself does not provide further details on such exceptions, but rather leaves it to individual parties. Indeed national legislation containing strict confidentiality requirements has been identified as a potential constraint on the effective implementation of the Agreement and states have been encouraged to review national laws to ensure that sufficient information can be released, thereby emphasising the balance that must be struck between these two values[38].

As this brief review has demonstrated, many international fisheries instruments adopted since UNCLOS prescribe more detailed requirements relating to transparency in fisheries regulation and they also apply transparency requirement to situations which are not addressed in UNCLOS. Whilst most of these instruments address the inter-state dimension, there are also some examples of transparency being extended to the intra-state dimension, particularly in non-binding instruments. These developments in international fisheries law are also supplemented by other international regimes, which may further strengthen the demands for transparency in these dimensions of fisheries conservation and management.

4. Transparency and Trade Law in the context of Market States
A key development in modern fisheries law is the emphasis that is placed upon market states in ensuring that fish sold to consumers has been sourced in accordance with international rules. The CCRF played a fundamental role in ushering in this new perspective on fisheries governance, providing that ‘[l]aws, regulations and administrative procedures applicable to international trade in fish and fishery products should be transparent, as simple as possible, comprehensible and, when appropriate, based on scientific evidence’ (para. 11.3.1).

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4 See in particular Articles 6(1), 13(2), 14, 15, 16, 18(1), 19(1), 20(3).
This express reference to transparency in the context of market-based measures can be in part explained by the importance attached to this concept in international trade law. With 164 parties, trade obligations contained in the WTO covered agreements are an important source of law constraining the exercise of market power by states, thereby supplementing the non-binding provisions of the CCRF.

Of particular importance for the present topic is Article X of the General Agreement on Tariffs and Trade (GATT), which is titled ‘Publication and Administration of Trade Regulations’ and it has been explained as having the objective of ‘ensuring that due process is accorded to traders when they import or export’[39]. Transparency is a key part of this provision. In the first place, Article X(1) of the GATT expressly lays down an obligation for parties to ensure that ‘[t]he laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to [the import and export of goods] shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.’ The WTO Appellate Body has expressly referred to this provision as embodying ‘the principle of transparency’, which it described as being ‘a principle of fundamental importance’[40]. Indeed, the GATT goes on to specify that such laws and regulations shall not be enforced ‘before such measure has been officially published’[41]. These obligations not only apply to the laws and regulations themselves, but also to other key information that is used in the application of the rules[42].

This interpretation of Article X has been endorsed by the WTO Appellate Body, which, in US – Shrimp, held that certain trade restrictions imposed on imports of shrimp not meeting minimum fishing standards were incompatible with the requirements of Article X because ‘[t]he non-transparent and ex parte nature of the internal governmental procedures applied by the competent officials in the [US government] throughout the certification processes …, as well as the fact that countries whose applications are denied do not receive formal notice of such denial, nor of the reasons for the denial, and the fact, too, that there is no formal legal procedure for review of, or appeal from, a denial of an application, are all contrary to the spirit, if not the letter, of Article [X(3)] of the GATT 1994’[43]. This implies that administrative procedures designed to implement trade restrictions, such as those foreseen by the exercise of powers to restrict market access to fisheries products, must comply with basic transparency and due process requirements if they are to satisfy WTO law.

The role of WTO law in this context not only reinforces developments in international fisheries policy, but it provides a mechanism for enforcement through the compulsory procedures contained in the Dispute Settlement Understanding [44]. There is little doubt that these rules have influenced practice in relation to market-based measures for fisheries. For example, the European Union’s IUU Regulation 1005/2008 makes an explicit reference to the need for ‘prior notification’ and the application of ‘transparent, clear and objective criteria’ before taking trade measures against states suspected of IUU fishing[45].

5. Transparency and International Environmental Law in the context of Fisheries Governance

Another relevant set of rules which may impact upon the conservation and management of fisheries can be found in international environmental law. In this field, transparency and access to information is an established principle set out in
Principle 10 of the 1992 Rio Declaration on Environment and Development. This non-binding instrument has been followed by the negotiation of the 1998 Aarhus Convention, which lays down binding legal obligations relating to access to information in environmental matters.\(^5\) This treaty defines environmental matters to include information relating to elements of the environment, as well as activities or measures affecting the environment\(^[46]\). This definition is clearly broad enough to cover some information related to both the status of fish stocks as an ‘element of the environment’ and fishing as an ‘activity likely to affect the elements of the environment.’ These obligations apply to states in whatever capacity they are acting and they reinforce transparency in the intra-state dimension as they apply regardless of whether a fish stock is shared or not. Thus, they provide another route to promoting transparency in fisheries conservation and management, particularly when linked to the duty to establish enforcement procedures to ensure the ‘expeditious’ review of decisions to deny access to information (Article 9(1)). It is also important to emphasise in this context that ‘it is not only the availability of information that counts; it is also essential that it is accessible and that citizens have the assurance that the information provided by governments and fishing companies is credible’\(^[47]\). In this context, Article 5 of the Aarhus Convention requires all public authorities to proactively collect and update environmental information relating to their functions and making sure that information about the type of data held is also publicly accessible. Some regional seas treaties contain similar requirements to provide public access to information on the marine environment, which may cover some fisheries information\(^[48]-[49]\).

Yet these environmental treaties do not necessarily cover all fisheries information. For example, it has been stressed that the access to information obligation in the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) \(^[48]\) is ‘not a general freedom of information statute\(^[50]\) and that information concerning the economics of an activity does not fall within the scope of environmental information\(^[50]\). Moreover, the right to access of information in these environmental treaties is usually subject to a number of express exceptions, which provide considerable scope to restrict access to information. Such exceptions would cover the confidentiality of proprietary data, which, as noted above, is recognised in several of the fisheries instruments as a valid ground for restricting access to information. Yet, the Aarhus Convention also excludes information concerning, inter alia, ‘international relations’ or ‘the confidentiality of the proceedings of public authorities’, and ‘the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature’ (Article 4). Such a list provides an indication of a broader range of scenarios in which it may be ‘appropriate’ for a state to restrict transparency, particularly in an intra-state context, highlighting the balance that must be struck when applying transparency in practice.

6. Conclusion
This article has reviewed the international rules through which states are expected to promote transparency in fisheries conservation and management. It has traced different pathways through which transparency has been embedded in international law, covering not only international fisheries law, but also relevant provisions of

\(^5\) See also the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, adopted on 4 March 2018, but not yet in force.
international trade law and international environmental law. The developments in these different areas are mutually supportive[51], reinforcing a general trend towards greater transparency.

In the first place, the article has demonstrated how transparency rules have become more detailed in successive instruments, thereby removing some of the discretion available to states to decide on the degree of transparency to be achieved. The applicability of these rules will, however, vary from state to state, depending on whether they are a party to the relevant treaty. Nevertheless, there may be some scope for cross-fertilisation if the general provisions of earlier treaties can be interpreted in light of subsequent developments.

The article has also shown how the scope of transparency rules has been extended from flag states and coastal states, which was the original focus of UNCLOS, to encompass the transparency of action taken by port states and market states, both through the negotiation of new fisheries instruments, but also through other fields of international law, such as WTO law.

Another important trend is the shift from an exclusive focus on the inter-state dimension of transparency, which is concerned with facilitating compliance with international rules by individual states, to a greater emphasis on the intra-state dimension, where the objective is better fisheries governance in general. Yet, at present, this dimension of transparency is largely reflected in non-binding instruments, non-state initiatives[47], or other fields of international law, particularly international environmental law.

The overall findings of this article suggest that important inroads have been made in promoting transparency in international fisheries law, to the extent that the CCRF describes it as a ‘general principle’. The precise status of transparency as a ‘principle’, a ‘concept’ or an ‘interstitial norm’ can be debated[7], but even if transparency is accepted as a general principle – and increasing references to transparency in both fisheries treaties and non-binding instruments would appear to support such a conclusion⁶ - it does not follow that transparency must be fully implemented in all settings. After all, principles are ‘general norms which express justifying and explanatory values of [a legal] system’⁵² rather than precise prescriptions that can be strictly enforced. The value of principles is their ability to inform and shape the progressive development and interpretation of rules in order to ensure coherency between various instruments and fields of law⁵³. Principles may thus be gradually embedded in the legal framework over time, either as consensus emerges over their importance in a particular context or as they are applied to new situations. At the same time, the application of principles calls for the balancing of other considerations before determining the ultimate course of action⁵⁴. This is reflected in the current context by the fact that many rules which implement the principle of transparency in relation to fisheries conservation and management recognise that some information may be kept confidential and a balance must be struck in order to ensure that fisheries conservation and management operates in a fair and effective manner. This

⁶ Boyle and Chinkin point out that general principles of international law simply require ‘the endorsement of states’ to come into existence, rather than widespread and consistent state practice and opinio juris; AE Boyle and C Chinkin, The Making of International Law (Oxford University Press 2007) 224.
observation reinforces the complex and multi-faceted nature of transparency in international fisheries law. Moreover, it is clear that even if transparency is accepted as a principle of fisheries governance, it is only one element of promoting sustainable fisheries, which requires the implementation of a much broader range of principles.

References


[28] UN Human Rights Committee, General Comment No. 32: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, para. 31.


[34] NEAFC Recommendation 2:2011 (as amended). This provision gives effect to Article 10 of the NEAFC Scheme of Control and Enforcement.


[37] 2009 FAO Agreement on Port State Measures to prevent, deter and eliminate illegal, unreported and unregulated fishing, Article 3. 4.


[45] Council Regulation No 1005/2008 establishing a system to prevent, deter and eliminate illegal, unreported and unregulated fishing, OJ L 286/1, 29 October 2008, preambular para. 31. See also Articles 26, 27, 29, 32, 33, 35.


[50] *Dispute concerning access to information under Article 9 of the OSPAR Convention* (Arbitral Award), 2 July 2003, para 170.
