

# The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks

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## I. Introduction

Many fish stocks are not confined to the maritime zones of one state, but either are present in the maritime zones of more than one coastal state or both in coastal state zones and the high seas. In such a situation, effective management may in many cases require that measures in respect of the stock take into account the stock as a whole. International law has recognized for a long time that this situation requires cooperation between the coastal state(s) and/or states fishing on the high seas. For instance, the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas indicated in broad terms the circumstances under which states fishing on the high seas were to cooperate

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with each other or with a coastal state.<sup>1</sup> Similar obligations to cooperate were included in the United Nations Convention on the Law of the Sea.<sup>2</sup> However, this basic legal framework does not indicate how the rights and interests of the states involved have to be reconciled in adopting measures in one maritime zone, in case these also have impacts in other maritime zones.

A number of conflicts between coastal states and states fishing on the high seas at the end of the 1980s and the beginning of the 1990s highlighted the inadequacy of the global legal regime in this respect.<sup>3</sup> Negotiations to address these shortcomings resulted in the adoption of the Fish Stocks Agreement in 1995.<sup>4</sup> To further the compatibility of conservation and management measures for coastal state zones and the high seas, article 7 of the Fish Stocks Agreement sets out criteria, which have to be taken into account by coastal states and states fishing on the high seas in the determination of such measures.

The present analysis seeks to establish to what extent the Fish Stocks Agreement in general and its article 7 in particular provide an effective tool for resolving conflicts that may arise between coastal states and states fishing on the high seas in establishing conservation and management measures for straddling fish stocks and highly migratory fish stocks.<sup>5</sup> Although the analysis is primarily legal in nature, the

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- <sup>1</sup> Adopted on 29 April 1958; entered into force on 20 March 1966, UNTS Vol. 559 No. 8164.
  - <sup>2</sup> Hereinafter LOS Convention, adopted on 10 December 1982; entered into force on 16 November 1994, *ILM* 21 (1982), 1261 et seq.; UNTS Vol. 1833 No. 31363. See especially the articles 63 to 67 and 116 to 120 of the Convention.
  - <sup>3</sup> The focus in this respect has been on stocks occurring both in the high seas and areas under national jurisdiction, with little attention for the development of the framework for cooperation in respect of stocks occurring in more than one area under national jurisdiction.
  - <sup>4</sup> 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 of 4 August 1995 (not yet entered into force), *Law of the Sea Bulletin* No. 29, 25 et seq.
  - <sup>5</sup> For an overview of the development of international fisheries law in the 1990s see e.g. E. Hey (ed.), *Developments in International Fisheries Law*, 1999; F. Orrego Vicuña, *The Changing International Law of High Seas Fisheries*, 1999; D. Vignes/ G. Cataldi/ R. Casado Raigón, *Le Droit International de la Pêche Maritime*, 2000.

impact of the framework for the application and interpretation of article 7 also has to be considered. This will be done by discussing the practice of fisheries management organizations and arrangements and by analyzing the provisions on provisional arrangements and dispute settlement of the Fish Stocks Agreement.

Article 7 para. 2 of the 1995 Fish Stocks Agreement can be considered to be the linchpin of the scheme contained in this article. This paragraph provides that conservation and management measures for straddling fish stocks and highly migratory fish stocks for the high seas and areas under national jurisdiction shall be compatible. In six subparagraphs, article 7 para. 2 lists the factors to be taken into account in the determination of such measures.<sup>6</sup>

Article 7 para. 2 can be expected to raise complex issues of interpretation. The article states the factors that have to be taken into account in determining compatible conservation and management measures without explicitly specifying how these factors have to be balanced.

This article analyzes these factors contained in article 7 para. 2 and will suggest considerations which can be taken into account in balancing them. One possibility in this connection is the use of equity and the need to arrive at an equitable result. The characteristics of each of the factors listed in article 7 para. 2 lit.(a) to (f) also can provide guidance in this respect.

An analysis of article 7 para. 2 has to take into account its linkage to other provisions of the Fish Stocks Agreement and the LOS Convention. Apart from the other paragraphs of article 7, *inter alia* arts 5 and 6 of the Fish Stocks Agreement and arts 61, 63, 64, 116 to 119 and 297 of the LOS Convention are relevant in this context.

Compatible conservation and management measures will be established in the framework of mechanisms for international cooperation established by the states concerned. The form such a mechanism takes, e.g. its membership, area of application or mandate, may influence the contents of compatible conservation and management measures. Part III of the Fish Stocks Agreement establishes mechanisms for interna-

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<sup>6</sup> The issue of compatible conservation and management measures is also addressed in the FAO Code of Conduct for Responsible Fisheries of 31 October 1995 (Code of Conduct), *International Fisheries, Instruments with an Index*, 1998, 56 et seq., Sections 6.12, 7.3.1 and 7.3.2. These provisions not only apply to straddling fish stocks and highly migratory fish stocks, but also to transboundary stocks (stocks that straddle the exclusive economic zones of two or more states) and high seas stocks.

tional cooperation concerning straddling fish stocks and highly migratory fish stocks. The mandate and activities of some regional fisheries management organizations and arrangements in respect of the compatibility of conservation and management measures is analyzed to assess what similarities and differences can be ascertained in practice.

Although states have a duty to cooperate for the purpose of achieving compatible measures, agreement may not always be forthcoming. To mitigate the negative effects of the absence of an agreement on compatible measures, article 7 para. 5 of the Fish Stocks Agreement provides for the possibility of provisional arrangements or measures. Article 7 para. 6 lists a number of considerations in connection with the adoption of such arrangements or measures, including their relationship to compatible conservation and management measures. The analysis of provisional arrangements and measures will focus on whether their availability may either contribute to or hinder agreement on compatible conservation and management measures. In addition, the impact that third party dispute settlement can have on the determination of compatible measures will be assessed. In this connection it is relevant that the possibility to assess all the aspects of disputes over compatible measures and provisional arrangements is restricted by article 32 of the Fish Stocks Agreement. This article stipulates that article 297 para. 3 of the LOS Convention also applies to the Agreement. Article 297 para. 3 lit.(a) provides that the coastal state shall not be obliged to accept the submission to binding dispute settlement procedures of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone (EEZ) or the exercise of those rights. As the exercise of such sovereign rights by the coastal state is one of the key aspects of the scheme of article 7, article 297 para. 3 lit.(a) of the LOS Convention seems to restrict significantly the possibility for compulsory settlement of disputes concerning compatible measures or the indication of provisional measures.

Section II. of this article discusses different aspects of article 7 para. 2, including its linkage to article 7 para. 1, the definition of the term "compatible", the factors mentioned in lit.(a) to (f) of article 7 para. 2 and possible considerations for balancing these factors. Section III. will shortly discuss the relevance of Part III of the Agreement for the determination of compatible conservation and management measures and looks at the activities of regional fisheries management organizations and arrangements in this respect. Section IV. will assess the aspects of provisional arrangements and measures indicated above, and Section V. the issues raised by the Agreement's dispute settlement procedures in

the context of article 7. A final Section evaluates the main findings of the article.

## II. Article 7 para. 2 of the Fish Stocks Agreement

### 1. Article 7 para. 1 of the Fish Stocks Agreement

The provision on the compatibility of conservation and management measures in article 7 para. 2 is preceded by a paragraph which reaffirms the respective rights of coastal states and states fishing on the high seas contained in the LOS Convention. Article 7 para. 1 of the Fish Stocks Agreement can be seen as a specific application of the general provision contained in article 4 of the Agreement to the effect that nothing contained in it shall prejudice the rights, jurisdiction and duties of the states under the LOS Convention and that the Agreement has to be applied in a manner consistent with the Convention. The introductory part of article 7 para. 1 recognizes that it is without prejudice to the sovereign rights of coastal states for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in the Convention, and the right of all states for their nationals to engage in fishing on the high seas in accordance with the Convention. This formulation recognizes the rights of states as formulated in in arts 56 para. 1 lit.(a) and 116 of the LOS Convention respectively. Lit.(a) and (b) of article 7 para. 1 recapitulate the provisions of arts 63 para. 2 and 64 para. 1 of the LOS Convention regarding cooperation concerning straddling fish stocks and highly migratory fish stocks. Thus, article 7 para. 1 reaffirms the distinction in this respect between both types of stocks contained in the LOS Convention. However, equally important, in the light of the present discussion concerning the determination of compatible conservation and management measures, is the place of article 7 para. 1 in the Agreement, directly preceding the key provision on the compatibility of conservation and management measures. This makes article 7 para. 1 an important part of the context for the interpretation of article 7 para. 2 of the Agreement.<sup>7</sup> If the terms of article 7 para. 2 would leave uncertainty as

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<sup>7</sup> Article 31 para. 1 of the Vienna Convention on the Law of the Treaties of 23 May 1969 (entered into force on 27 January 1980), UNTS Vol. 1155 No. 18232 provides that:

to whether in determining compatible conservation and management measures preference has to be given to coastal state rights or high seas fishing states rights, the inclusion of para. 1 in article 7 indicates that, in making this assessment, the balance contained in the LOS Convention in this regard has to be respected. This suggests that any interpretation of article 7 para. 2 should be extremely careful to avoid tilting the balance in favour of either of the interests involved.<sup>8</sup>

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A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This provision and the other articles of the Convention on the interpretation of treaties can be considered to reflect customary international law on the matter, see e.g. *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment of 3 February 1994, ICJ Reports 1994, 6 et seq., (21-22, para. 41); *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*; Jurisdiction and Admissibility, Judgment of 15 February 1995, ICJ Reports 1995, 6 et seq., (18, para. 33).

<sup>8</sup> Part of the problem in this respect is that coastal states and states fishing on the high seas did not agree on the interpretation of the relevant provisions of the LOS Convention in the first place, especially in respect of straddling fish stocks. Some authors have maintained that under the LOS Convention the coastal state has special rights over straddling stocks; see e.g., W. T. Burke, *The New International Law of Fisheries; UNCLOS 1982 and Beyond*, 1994, 133-135; B. Kwiatkowska, "Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice", *Ocean Development and International Law* 22 (1991), 153 et seq., (167-173). In a later publication, Burke has observed that an interpretation of these provisions to give significant control to coastal states has been mostly disregarded, W.T. Burke, "Compatibility and Precaution in the 1995 Straddling Stocks Agreement", in: N. Scheiber (ed.), *Law of the Sea; The Common Heritage and Emerging Challenges*, 2000, 105 et seq., (108). Another view is that the coastal state is not granted any special rights over straddling stocks, other than the duty to cooperate of the states fishing on the high seas; see e.g., R. Lagoni, "Principles Applicable to Living Resources Occurring both within and without the Exclusive Economic Zone or in Zones of Overlapping Claims (Report of the International Committee on the EEZ of the International Law Association)", *Report of the Sixty-Fifth Conference*, London, The International Law Association, 1993, 254 et seq., (272-274 and 276-277); S. Oda, *International Control of Sea Resources*, 1989, xxi-xxii; Vignes et al., see note 5, 209-210; see also J. Ziemer, *Das Gemeinsame Interesse an einer Regelung der Hochseefischerei; Dargestellt am Beispiel des Fish Stocks Agreement*, 2000, 118.

## 2. Meaning of the Term “Compatible”

The Fish Stocks Agreement does not define the term “compatible”. Generally, this term is used to qualify rights or obligations attributed under a provision by requiring their exercise or observance to be compatible with another provision.<sup>9</sup> This implies that the provision, which has to be compatible, shall be applied in such a way that it does not result in a derogation of rights or obligations existing under the provision with which it has to be compatible.

Article 7 para. 2 of the Fish Stocks Agreement uses the term “compatible” differently. Instead of restricting the scope of application of one provision by reference to another provision, it provides that conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible *inter se*. This requires the balancing of these two sets of measures, with the possibility that either one can be adjusted.<sup>10</sup>

Article 7 para. 2 provides guidance on how to determine the content of compatible measures in two ways. The article defines the objective to be met by the establishment of compatible measures and it indicates factors to be taken into account in determining such measures.

Article 7 para. 2 defines the objective of the compatibility requirement by providing that:

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<sup>9</sup> See e.g. the use of the term “compatible” in arts 18 para. 4 and 44 para. 1 of the Fish Stocks Agreement and arts 56, 58, 240 and 266 of the LOS Convention.

<sup>10</sup> The Code of Conduct uses the same approach in respect of compatibility, providing that states should: ensure effective conservation and protection of living aquatic resources throughout their range of distribution, taking into account the need for compatible measures in areas within and beyond national jurisdiction (Section 6.12).

Another view is that the fact that article 7 para. 2 lit.(a) of the Fish Stocks Agreement requires that states ensure that high seas measures do not undermine the effectiveness of coastal states measures “resolves the issue of orientation of compatibility – high seas measures are compatible when they do not undermine the effectiveness of coastal State measures”, Burke, “Compatibility”, see note 8, 114. However, subsequently an important qualification is made to this conclusion, *ibid.*, 115. A similar view on compatibility seems to be implicit in writings which attach particular significance to the wording of article 7 para. 2 lit.(a), see further note 27 and the text at that note.

"[c]onservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety."<sup>11</sup>

The use of the word "shall" indicates that guaranteeing this objective is a binding obligation.

The term "conservation and management", employed in the objective to be achieved by compatible measures, has to be interpreted in the light of arts 2, 5 and 6 of the Fish Stocks Agreement. Article 2 defines the objective of the Agreement as "to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the [LOS] Convention". Article 5 sets out in detail the obligations of States parties in order to conserve and manage straddling fish stocks and highly migratory fish stocks. Article 6 obliges states to apply the precautionary approach to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks.<sup>12</sup> These detailed provisions can contribute significantly to assessing whether compatible measures ensure the objective of conservation and management of stocks as required by article 7 para. 2.

However, the definition of the maximum sustainable yield in article 5 lit.(b) of the Fish Stocks Agreement, which refers to this yield "as

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<sup>11</sup> This objective was generally accepted by the participants at an early stage of the Fish Stocks Conference see e.g. "Statement Made by the Chairman of the Conference at the Conclusion of the General Debate on 15 July 1993", Doc. A/CONF.164/2 of 21 July 1993, reproduced in: J. Lévy/ G.G. Schram, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks; Selected Documents*, 1996, 69 et seq., (69–70); D. Balton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", *ODILA* 27 (1996), 125 et seq., (137). However, the mechanisms to be established for achieving the implementation of this objective were controversial.

<sup>12</sup> Article 3 of the Agreement establishes that, unless otherwise provided, the Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction. An exception is made in respect of arts 6 and 7, which also apply to areas under national jurisdiction, subject to the different legal regimes applicable to these areas. The general principles enumerated in article 5 of the Agreement shall be applied *mutatis mutandis* by the coastal state within areas under national jurisdiction.



qualified by relevant environmental and economic factors, including the special requirements of developing States”,<sup>13</sup> indicates that states may have different views on the considerations to be taken into account in assessing whether this objective is met.<sup>14</sup> For instance, in multi-species fisheries, larger harvests of one species may require lesser harvests of other species. This may become a contentious issue if the states involved are not interested to the same extent in the same species. A problem may also arise if some states are interested in higher levels of exploitation, with lower value per unit, and others are interested in restricting catches to attain higher value per unit. Some guidance to resolve such questions can be found in the reference to the special requirements of developing states and the factors mentioned in article 7 para. 2 lit.(d) and (e).<sup>15</sup> In any case, this is an issue which requires careful consideration of all relevant circumstances of the particular case.

The inclusion of the term “in their entirety” in the objective of article 7 para. 2 seems intended to reconfirm that conservation and management concerns the stocks as a whole, without distinguishing between parts of the stock on the basis of their occurrence in areas under national jurisdiction or the high seas.<sup>16</sup> This interpretation is supported

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<sup>13</sup> See also article 61 para. 3 and 119 para.1 lit.(a) of the LOS Convention.

<sup>14</sup> See also L. Juda, “The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique”, *ODILA* 28 (1997), 147 et seq., (152–154); O. Thébaud, “Transboundary Marine Fisheries Management. Recent Developments and Elements of Analysis”, *Marine Policy* 21 (1997), 237 et seq.

<sup>15</sup> See further *infra*.

<sup>16</sup> The term “in their entirety” replaced the term “overall” contained in earlier drafts of the Agreement, see Draft 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 (Prepared by the Chairman of the Conference), Doc. A/CONF.164/22 of 23 August 1994, reproduced in: Lévy, see note 11, 621, article 7 para. 2; Draft 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 (Prepared by the Chairman of the Conference), Doc. A/CONF.164/22/Rev.1 of 11 April 1995, reproduced in: *ibid.*, 671, article 7 para. 2. Reportedly, it was considered that the term “stocks overall” was unclear and that a better term was “stocks as a whole or in their entirety”, see *Earth Negotiations Bulletin* (ENB) <http://www.iisd.ca/linkages/vol07/700000e.html> (22 March 1999), Vol. 7, issue 47; see also A. Tahindro, “Con-

by the Code of Conduct, which requires that in order to conserve and manage stocks throughout their range measures should be compatible.<sup>17</sup>

### 3. The Factors to be Taken into Account in the Determination of Compatible Measures

Lit.(a) to (f) of article 7 para. 2 list a number of factors to be taken into account in the determination of compatible conservation and management measures. This concerns a closed list, excluding the possibility of including further factors without the agreement of all the states concerned.

In assessing the significance of these factors for the determination of compatible conservation and management measures, a distinction has to be made between the second element of lit.(a) and lit.(f) and the other factors listed in the subparagraphs. In determining compatible conservation and management measures states shall "take into account" the latter factors. In respect of the second element of lit.(a) and (f) the word "ensure" is used instead of "take into account". The requirement to "take into account" a factor implies that depending on the specific case it can be given only limited weight or no weight at all in establishing compatible measures. On the other hand, the use of the term "ensure" indicates that an objective is concerned, which always has to be attained in determining compatible measures.

#### a. Existing Measures

Lits.(a), (b) and (c) of article 7 para. 2 require that in determining compatible conservation and management measures, states shall "take into account" existing conservation and management measures. Lit.(a) requires states to take into account the conservation and management

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conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks" *ODILA* 28 (1997), 1 et seq., (15), who suggests that "in their entirety" refers to the stocks concerned "throughout their geographical range".

<sup>17</sup> Code of Conduct, Section 7.3.2. Furthermore, Section 7.3.1 of the Code, addressing effective management, refers to the "whole stock unit over its entire area of distribution" and the "area through which it migrates during its life cycle".

measures adopted and applied in respect of the same stocks by coastal states within areas under national jurisdiction and to ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures; lit.(b) to take into account previously agreed measures established and applied for the high seas in respect of the same stocks by relevant coastal states and states fishing on the high seas; and lit.(c) to take into account previously agreed measures established and applied in respect of the same stocks by a subregional or regional fisheries management organization or arrangement.<sup>18</sup> An important qualification of these existing measures is that they have to be adopted and applied "in accordance with article 61 of the [LOS] Convention" (lit.(a)) or established and applied "in accordance with the [LOS] Convention" (lit.(b) and (c)). In case of lit.(b) and (c) the relevant provisions of the LOS Convention are arts 63 para. 2, 64 and 116 to 119.<sup>19</sup>

Article 7 para. 2 lit.(a) differs from the two other paragraphs on existing measures in one important respect. It not only enjoins states to take the measures of the coastal state into account, but also to ensure that measures adopted for stocks on the high seas do not undermine the effectiveness of the measures adopted and applied by the coastal state. The existence of these two requirements under lit.(a) raises the question how they relate to each other. An interpretation of lit.(a) of article 7 para. 2 in accordance with the ordinary meaning of its terms seems to result in a contradiction between the two requirements. The obligation to take into account coastal state measures entails that such measures are one of the elements to be balanced to determine compatible measures and as such can be adjusted. On the other hand, the obligation to ensure that measures established for the high seas do not undermine the effectiveness of such measures, seems to imply that these same coastal state measures have to be accepted as they stand.<sup>20</sup> If this were the case,

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<sup>18</sup> Existing measures in general are an important element in determining conservation and management measures in all fisheries as these are expressive of the state of the stock and the interests involved in a fishery.

<sup>19</sup> For an analysis of these articles see e.g. S. Nandan/ S. Rosenne, *United Nations Convention on the Law of the Sea 1982; A Commentary*, Vol. II, 1993, 639 et seq.; *ibid.*, Vol. III, 1995, 279 et seq.; *The Law of the Sea; The Regime for High-Sea Fisheries; Status and Prospects*, 1992, 6–12.

<sup>20</sup> The words "such measures" in article 7 para. 2 lit.(a) refer to the conservation and management measures adopted and applied by the coastal state.

only high seas measures can be adapted in determining compatible measures.

If article 7 para. 2 lit.(a) is read in its context and in the light of the object and purpose of the Fish Stocks Agreement it seems that the contradiction between its two elements should not be resolved by adopting the latter interpretation.<sup>21</sup> Article 7 para. 2 requires the mutual compatibility of measures adopted for areas under national jurisdiction and for the high seas and not that measures adopted for the high seas have to be compatible with measures adopted for areas under national jurisdiction.<sup>22</sup>

States, in determining compatible measures, taking into account the factors set out in lit.(a) to (f) of article 7 para. 2, may reach agreement that the objective of article 7 para. 2 requires some adjustment of the measures adopted by the coastal state for areas under national jurisdiction. Such agreement can only be reached with the consent of the coastal state, as the Fish Stocks Agreement is without prejudice to the

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<sup>21</sup> The drafting history of article 7 para. 2 lit.(a) may be considered to provide support for the interpretation that the internal cross-reference to coastal states measures in article 7 para. 2 lit.(a) does not necessarily imply that this concerns exactly the same set of measures. An earlier draft of this subparagraph read:

take into account the conservation and management measures established in accordance with article 61 of the Convention in respect of the same stock(s) by coastal States within areas under national jurisdiction and ensure that measures established in respect of the high seas do not undermine the effectiveness of those measures established in respect of the same stock(s) by coastal States in areas under national jurisdiction (Draft 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 (Prepared by the Chairman of the Conference)), Doc. A/CONF.164/22/Rev.1 of 11 April 1995, reproduced in: Levy, see note 11, 671. According to the Chairman of the Conference, the changes made by the Secretariat to this version of article 7 para. 2, which resulted in the text included in the Agreement, were editorial, see ENB, Vol. 7, issue 47. This earlier draft does not suggest the same measure of identity between the two references to national measures in article 7 para. 2 lit.(a) as article 7 para. 2 lit.(a) of the Agreement.

<sup>22</sup> See supra; see also P. Davies/ C. Redgwell, "The International Legal Regulation of Straddling Fish Stocks", *BYIL* 67 (1997), 199 et seq., (262-263 and 269); Tahindro, see note 16, 17.

sovereign rights of the coastal state in its area under national jurisdiction.<sup>23</sup>

If it is accepted that article 7 para. 2 lit.(a) does not exclude the adjustment of measures established by the coastal state, without prejudice to the coastal state's sovereign rights,<sup>24</sup> the question remains what implications the second part of this subparagraph has. The term "undermine the effectiveness" indicates that there is some room for divergence between measures applicable to areas under national jurisdiction and the high seas. This terminology requires the absence of negative impacts of a certain magnitude on the conservation and management measures of the coastal state.<sup>25</sup> Measures for the high seas may have some negative impact on coastal state measures, but nevertheless, do not undermine their effectiveness. For instance, measures for the high seas allowing for an annual catch which is equal to part of the increase of total catches of a stock over the preceding year in principle can hardly be

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- <sup>23</sup> As is noted by Orrego Vicuña, citing Ambassador Nandan: It is clear from the wording of [article 7(2)] that the question is not that of high seas measures being applied under national jurisdiction, nor of national measures being applied in the high seas, but quite simply that both, adopted under their respective jurisdictional authority, will ensure compatibility by relying on similar standards of management that will not unbalance the system as a whole, Orrego Vicuña, see note 5, 188; see also P. Öreback, / K. Sigurjonsson / T.L. McDorman, "The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement", *International Journal for Marine and Coastal Law* 13 (1998), 119 et seq., (127-128).
- <sup>24</sup> This is supported by article 3 of the Agreement, which provides that article 7 also applies to the conservation of highly migratory stocks and straddling fish stocks in areas under national jurisdiction.
- <sup>25</sup> The term "undermine the effectiveness" has also been used in connection with the activities of fishing vessels, see e.g. article 18 para. 1 of the Fish Stocks Agreement; article III para. 1 of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993 (not yet entered into force; *ILM* 33 (1994), 968 et seq.). The context in which the term is used in both cases is different. In one case, the impact of measures applicable in one area on measures applicable in another area has to be established. In the other case, this concerns the effect of the activities of individual fishing vessels on the measures applicable to the area. In the latter context, a more restrictive interpretation of the term would seem to be desirable than in the present context.

considered to undermine the effectiveness of the management measures of the coastal state.

The requirement not to undermine the effectiveness of measures is missing in lit.(b) and (c) of article 7 para. 2. The absence of this requirement can be explained by the fact that article 7 para. 2 addresses coastal states and states fishing on the high seas, whereas only the coastal state is competent in regard of the adoption of measures for its area under national jurisdiction. Inclusion of a provision in article 7 that the states addressed by it shall ensure that coastal state measures are not to undermine the measures adopted for the high seas or by a (sub)regional organization or arrangement would contradict this exclusive coastal state competence.<sup>26</sup>

Too much weight should not be attached to the above-mentioned difference in formulation in lit.(a) and (b) of article 7 para. 2.<sup>27</sup> In the

<sup>26</sup> Orrego Vicuña notes in this respect that:

[i]t is precisely because the coastal state is the sole authority in the exclusive economic zone that the [Fish Stocks] Agreement is only concerned with ensuring that measures adopted for the high seas do not undermine the effectiveness of those adopted by the coastal state and not the other way round, Orrego Vicuña, see note 5, 194.

Looking at this issue from a different angle Stokke observes that:

[c]ompatibility highlights the spatial scope of agreed regulations and the extent to which they embrace all significant user states. Sovereignty concerns, in the form of coastal state reluctance to accept international premises for EEZ management, presents one impediment to *spatial compatibility*; but there are sometimes ways to overcome this barrier. While the agreement regulating pollock fisheries in the [Bering Sea] applies only to international waters, a non-binding but politically compelling Record of Discussions ensures an adequate level of compatibility with measures taken inside the EEZs of the coastal states (O.S. Stokke, "Managing Straddling Stocks: The Interplay of Global and Regional Regimes", *Ocean and Coastal Management* 43 (2000), 205 et seq., (212).

<sup>27</sup> See also *infra* text at note 103. For the argument that this difference is significant and gives a superior right to the coastal state see Burke, "Compatibility", see note 8, 114; G. Hewison, "Balancing the Freedom of Fishing and Coastal State Jurisdiction", in: Hey, see note 5, 161 et seq., (186); G. Vigneron, "Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement", *Geo. Int'l Envtl. L. Rev.* 10 (1998), 581 et seq., (598-599); Vignes et al., see note 5, 211-212; see also Stokke, see note 26, 212. Some of these authors indicate that this superior right of the coastal state is qualified by other provisions of the Agreement, see e.g. Hewison, see above, 186-187.

case of lit.(b) the relevant coastal states and the states fishing on the high seas have agreed upon measures. This involvement of the relevant coastal states suggests that such measures already reflect their interests and that they have an obligation to respect such measures for the time they have been agreed upon.<sup>28</sup>

A final question in respect of existing measures as listed in article 7 para. 2 lit.(a) to (c) is to what extent they actually differ from compatible measures. Article 7 provides for a procedure in two stages to establish conservation and management measures for straddling fish stocks and highly migratory fish stocks. Under article 7 para. 1 the relevant coastal states and the states fishing on the high seas shall seek to agree upon the measures necessary for the conservation of straddling fish stocks in the area of high seas adjacent to areas under national jurisdiction. In respect of highly migratory fish stocks the relevant coastal states and states fishing in the region shall cooperate with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond areas under national jurisdiction. Under article 7 para. 2 coastal states and high seas fishing states shall cooperate for the purpose of achieving compatibility of measures for both types of stocks for the high seas and areas under national jurisdiction.

Although article 7 makes a distinction between these two stages in the decision making process, in many cases, it may not be possible to distinguish them in practice, because among other reasons, both concern the same actors. In fact, it would seem that under article 7 para. 1, which in its two subparagraphs copies the obligations of arts 63 para. 2 and 64 para. 1 of the LOS Convention for coastal states and states fishing on the high seas to cooperate with respect to straddling fish stocks and highly migratory fish stocks, measures adopted by the coastal state for the same stocks are already taken into consideration, requiring a consideration of their relationship to the measures to be agreed upon under article 7 para. 1. In respect of highly migratory fish stocks, refer-

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Other publications, do not seem to consider this difference of wording that relevant as they conclude that article 7 provides a balance between the interests of coastal states and distant water fishing states, see e.g. Örebach, see note 23, 128; R. Rayfuse, "The Interrelationship between the Global Instruments of International Fisheries Law", in: Hey, see note 5, 107 et seq., (133); Ziemer, see note 8, 118-119.

<sup>28</sup> Cf. Fish Stocks Agreement, article 34.

ence is made to conservation and optimum utilization within and beyond areas of national jurisdiction.

Measures agreed upon under article 7 para. 1 already have to meet the general principles applicable to the conservation and management of straddling fish stocks and highly migratory fish stocks contained in arts 5 and 6 of the Agreement. This implies that such measures at the time they are adopted in principle also meet the objectives of article 7 para. 2.

The inclusion of a separate paragraph on compatible conservation and management measures in article 7 seems, at least in part, to be explained by the need to leave the legal framework for the conservation and management of straddling and highly migratory fish stocks established by the LOS Convention unaffected. Article 7 para. 1 reaffirms the respective rights of coastal states and states fishing on the high seas and the continued significance of arts 63 para. 2 and 64 para. 1 of the LOS Convention. The need for compatibility between measures for areas under national jurisdiction and for the high seas is given content in the separate article 7 para. 2. This has avoided the risk that, in the elaboration of a mechanism to coordinate coastal state and high seas fishing state conservation and management measures, the above-mentioned provisions of the LOS Convention would have been amended.<sup>29</sup>

#### **b. The Factual Circumstances Listed in arts 7 para. 2 lit.(d) and (e)**

Article 7 para. 2 lit.(d) and (e) list a number of factual circumstances which states shall take into account in determining compatible conservation and management measures. Lit.(d) first of all refers to the biological unity and other biological characteristics of the stocks concerned. The reference to the biological unity of the stocks concerned implies that states, in determining compatible conservation and management measures, have to take into account the impact of conservation and management measures on a stock throughout its geographical range, instead of looking only at the impact of the measures in their area of application.<sup>30</sup> Other biological characteristics of the stocks concerned include a stock's diffusion, and ontogenetic and seasonal migration.<sup>31</sup> To the extent that these other biological characteristics indicate a

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<sup>29</sup> Cf. ENB Vol. 7, issue 41, part II.

<sup>30</sup> See also Vigneron, see note 27, 587; see also *supra* text at note 16.

<sup>31</sup> See "Some High Seas Aspects relating to Straddling Fish Stocks and Highly Migratory Fish Stocks", Doc. A/CONE.164/INF/4 of 15 June 1993, reproduced in: Lévy, see note 11, 377, Annex V.



geographical or seasonal differentiation of relevance for the conservation and management of a stock, this would have to be translated into geographically or seasonally differentiated conservation and management measures.

The other factors listed in lit.(d) — distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction — have to be viewed jointly, as reference is made to the relationships between them. These factors indicate the relevance of the zonal attachment of the stocks concerned, looking both at the distribution of the stocks between the high seas and areas under national jurisdiction and the fishing effort in both areas.<sup>32</sup> Although such a comparative perspective is not explicitly included, it is implicit in the structure of this part of lit.(d), which first refers to distribution of stocks and fisheries of the region concerned and next specifies that this includes the extent to which the stocks occur and are fished in areas under national jurisdiction.<sup>33</sup>

Lit.(d) does not indicate how the factors of occurrence and fishing of stocks are to be balanced. The fact that reference is made to their relationship suggests that they should be correlated to a reasonable extent. However, as these are only two of the factors to be taken into account in determining compatible measures, such a reasonable degree of correlation does not necessarily have to result from the compatible measures eventually determined.

Article 7 para. (2) lit.(e) requires states to take into account the respective dependence of the coastal states and the states fishing on the high seas on the stocks concerned. Some indication for the interpretation of the term "dependence" can be found in arts 11 and 24 of the Fish Stocks Agreement. Arts 11 para. 1 lit.(d) and (e) provide that in determining the nature and extent of participatory rights for new members of a subregional or regional fisheries management organization, or

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<sup>32</sup> Both the "other biological characteristics" of the stocks concerned and these other factors listed under lit.(d) concern the distribution of stocks throughout their range, but they have different implications for conservation and management measures. The former factor can indicate the need for geographically differentiated measures, the latter would seem to be primarily intended to provide guidance in dividing shares in a stock between the interested states.

<sup>33</sup> See also *infra* text at note 86 and following for a qualification of the usefulness of this approach in certain instances.

for new participants in a subregional or regional fisheries management arrangement, states shall take into account:

(d) the needs of coastal fishing communities which are dependent mainly on fishing for the stocks;

(e) the needs of coastal States whose economies are overwhelmingly dependent on the exploitation of living marine resources; ...

Article 24 on the recognition of the special requirements of developing states reads in relevant part:

2. In giving effect to the duty to cooperate in the establishment of conservation and management measures for straddling fish stocks and highly migratory fish stocks, States shall take into account the special requirements of developing States, in particular:

(a) the vulnerability of developing States which are dependent on the exploitation of living marine resources, including for meeting the nutritional requirements of their populations or parts thereof;

(b) the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing States, particularly small island developing States; ...

These provisions suggest that dependence on stocks mentioned in article 7 para. 2 lit.(e) can be made operational by reference to the importance of the stocks to the state concerned in relation to its national economy and the dependence of specific groups on the stocks concerned. For developing states an additional relevant consideration is meeting the nutritional requirements of their populations or parts thereof.

That dependence may be expressed by reference to both the state as such and specific interests within the state is also indicated by the judgment of the ICJ in the *Fisheries Jurisdiction Cases* between the United Kingdom and Iceland and the Federal Republic of Germany and Iceland.<sup>34</sup> In these cases, the Court recognized the relevance of the special dependence of Iceland's people upon the fisheries in the seas around its coasts for its livelihood and economic development.<sup>35</sup> On the

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<sup>34</sup> *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974; ICJ Reports 1974, 3 et seq.; *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, *ibid.*, 175 et seq.

<sup>35</sup> *Ibid.*, 34, para. 79 and 206, para. 77.

other hand, the Court found that dependence of sections of the British fishing industry on the fisheries concerned also was of relevance.<sup>36</sup>

Although both types of dependence can be taken into consideration, it would seem to be equitable to give greater consideration to the relative dependence of the states concerned, if the absolute dependence is of comparable magnitude. This seems justified by the consideration that a state which to a larger extent depends on the fisheries in relative terms will be harder hit by the negative impacts of diminished fishing activities.

In establishing the dependence of the coastal state and the states fishing on the high seas under article 7 para. 2 lit.(e) another consideration can be whether alternative fishing grounds are available for the vessels involved in the fisheries.<sup>37</sup> Whether this is the case may depend on

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<sup>36</sup> Ibid., 28–29, paras 64–66 and 34, para. 79; for the same conclusion with respect to the Federal Republic see *ibid.*, 206, para. 77. Dependence on fisheries also figured in two cases concerning maritime delimitation before the ICJ and in one arbitration. In the *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada v. United States of America) (*Gulf of Maine Case*), Judgment of 12 October 1984, ICJ Reports 1984, 246 et seq., the Chamber recognized the potential significance of the livelihood and economic well-being of the population of the countries concerned for the case, *ibid.*, 342, para. 237. In this case dependence of fisheries was only argued in respect of coastal communities and not of the states involved as such. In the *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen* (Denmark v. Norway), Judgment of 14 June 1993, ICJ Reports 1993, 38 et seq., the Court took into account the geographical distribution of certain fisheries resources to delimit part of the fishery zone boundary between Greenland and Jan Mayen *ibid.*, 72, para. 76. In this connection the Court referred to the fact that Denmark had argued the importance of fisheries for the whole of Greenland and had also stressed the dependence of the Inuit population of Greenland on the fisheries, and that Norway had argued that fishing activities in the Jan Mayen area accounted for more than 8 per cent of the total quantity of Norwegian catches, and that they contributed to the fragile economy of Norwegian coastal communities, *ibid.*, 71, para. 74. In the *Case Concerning the Delimitation of Maritime Areas between Canada and the French Republic* the Court of Arbitration defined dependence by reference to coastal communities, *ILM* 31 (1992), 1149 et seq., (1173, paras 83 et seq.).

<sup>37</sup> See also *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, ICJ Reports 1974, 3 et seq., (28, para. 64).

the possibility of access to other fisheries and whether the characteristics of the vessels involved make participation in such fisheries viable.

The factor of dependence may in certain instances exclude the participation of re-flagged vessels in a fishery. If a vessel is re-flagged to a state with which it has no links (e.g. the fish is not processed or marketed in this state and the crew and beneficial owner of the vessel do not have its nationality), this state would be hard pressed to argue its dependence on the fishery.<sup>38</sup>

### c. The Impact on Living Marine Resources

Lit.(f) of article 7 para. 2 of the Fish Stocks Agreement requires states to ensure that compatible management and conservation measures "do not result in harmful impact on the living marine resources as a whole".<sup>39</sup> Lit.(f) provides a benchmark against which to evaluate any system of management and conservation measures. Any such system which does not meet the requirement set out in lit.(f) would require amendment to guarantee that no harmful impact on the living marine resources as a whole results.

Article 7 para. 2 lit.(f) reconfirms that in conserving and managing fisheries resources states have an obligation to protect living marine resources.<sup>40</sup> The reference to living marine resources *as a whole* indicates that not only no harmful impact should result on individual species but

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<sup>38</sup> However, it is likely that such vessels would be operating outside the management regime in the first place.

<sup>39</sup> A concern for the marine environment is expressed in the 7th pre-ambular paragraph of the Fish Stocks Agreement, which reads:  
Conscious of the need to avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity of marine ecosystems and minimize the risk of long-term or irreversible effects of fishing operations.

Article 5 lit.(g) of the Agreement enjoins states to protect biodiversity in the marine environment and article 6 para. 1 provides for the application of the precautionary approach to the conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment. These obligations are elaborated in more detail in other instruments, such as the Convention on Biological Diversity (adopted on 5 June 1992; entered into force on 29 December 1993); *ILM* 31 (1992), 818 et seq.

<sup>40</sup> See also article 5 lit.(e) of the Fish Stocks Agreement.

also that no such impact should result on the ecosystems of which they form a part.<sup>41</sup>

Assessing whether specific conservation and management measures have a harmful impact on the living marine resources as a whole may be complicated because of the limited information on these resources, to the extent they are not target species of fishing efforts. Under the Fish Stocks Agreement two responses to this lack of information are envisaged. States are obliged to assess the impact of fishing on associated, dependent and non-target stocks.<sup>42</sup> Where the status of such stocks is of concern states shall subject them to enhanced monitoring.<sup>43</sup> Secondly, article 6 para. 1 of the Fish Stocks Agreement provides that:

States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.

Article 6 para. 2 enjoins states to be more cautious when information is uncertain, unreliable or inadequate. These provisions indicate that uncertainties concerning the harmful impact on the living marine resources under article 7 para. 2 lit.(f) have considerable consequences for the formulation of compatible conservation and management measures.

The need to prevent harmful impact on living marine resources under article 7 para. 2 lit.(f) may influence the content of conservation and management measures in two ways. A harmful impact may result from the way in which a fishery is being conducted. For instance, fishing gear may result in bycatches of a level having a harmful impact, or fishing areas or the fishing season may have to be adjusted to prevent such harmful impact. Guidance in this respect is provided by article 5 lit.(f) of the Agreement, which lays down a number of specific measures to minimize pollution and protect living marine resources. The Code of Conduct contains more detailed provisions in this respect.<sup>44</sup> Secondly, catch and/or effort level for the target species may have to be adjusted if

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<sup>41</sup> See also note 39.

<sup>42</sup> Fish Stocks Agreement, article 5 lit.(d); see also article 6 para. 3 lit.(d).

<sup>43</sup> *Ibid.*, article 6 para. 5.

<sup>44</sup> Code of Conduct, Sections 6.5 to 6.8, 7.2.2, 7.2.3, 7.6.9 and 8.5. For an evaluation of different management options to address the issue of bycatches see S. Pascoe, *Bycatch Management and the Economics of Discarding*, FAO Fisheries Technical Paper No. 370; FAO Fisheries Department, 1997.

it is found that these levels as such have a harmful impact on the living marine resources as a whole.

#### 4. Considerations for Balancing the Factors Mentioned in article 7 para. 2

Article 7 para. 2 does not indicate explicitly how the factors to be taken into account in determining compatible conservation and management measures have to be balanced. Some guidance in this respect is provided by the fact that article 7 para. 2 states the object of establishing such compatible measures. Moreover, in determining compatible measures states shall ensure that measures established for the high seas do not undermine the effectiveness of measures of the coastal state for areas under national jurisdiction (article 7 para. 2 lit.(a)) and that no harmful impact on the living marine resources as a whole results (article 7 para. 2 lit.(f)). However, these provisions only set limits to the range of compatible measures possible. Within these limits, compatible measures can be achieved by balancing the factors listed in the subparagraphs of article 7 para. 2 in different ways.<sup>45</sup>

Two considerations seem to provide a benchmark to balance the factors to be taken into account in determining compatible conservation and management measures. The balancing process can be viewed as a process requiring the application of equity in the light of the need to arrive at an equitable solution.<sup>46</sup> Secondly, the nature of the factors mentioned in the subparagraphs of article 7 para. 2 also gives some indication how they have to be balanced.

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<sup>45</sup> See also Juda, see note 14, 154–155; Tahindro, see note 16, 17 and *supra* notes 14 and 15.

<sup>46</sup> Effective management of high seas resources also depends on equity in a broader sense:

[t]he basic question of equity is this: do individuals get a reasonable and fair return on their contribution to a collective undertaking to regulate a commons? [...] Indeed, the presence of inequities may lead to the collapse of collective efforts, resulting in inefficiency. Equity problems are exacerbated by asymmetries among users, which create opportunities for some to benefit at others' expense. This, in turn, can lead to costly conflict where all parties lose, R.J. Oakerson, cited in Örebach, see note 23, 121, n. 5.

### a. Equity

The relevance of equity for international law is generally recognized. The relationship between international law and equity has been defined as:

[c]onsiderations of equity form part of the underlying moral basis for rules of law. In this sense equity may be regarded as a material source of law, but not as a formal source, nor in itself constituting a legal rule. It is perhaps in this sense that equity has its widest significance for international law.

In a more strictly legal sense, however, equity may be regarded as forming part of certain specific rules of law or even as part of international law generally. Thus it may be regarded as incorporated in and forming a necessary part of certain general principles of law, such as, for example, the principle of good faith. [...] Similarly, a rule of law, if not actually embodying equitable principles, may require their application. In that case equity acquires a legal character, and is applied not just as equity but as part of a legal rule.<sup>47</sup>

Taking into account this definition, there are a number of arguments indicating that equity and the need to arrive at an equitable solution can be considered as relevant in the application of article 7 para. 2.<sup>48</sup> First of all, the structure of article 7 para. 2 indicates the possibility to take into

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<sup>47</sup> R.Y. Jennings/ A. Watts (eds), *Oppenheim's International Law*, 9th edition, 1992, 43–44; for further reading on equity and international law see *ibid.*, 43 at note 1.

<sup>48</sup> Whether equity and need to arrive at an equitable solution will have a significant impact in practice may be open to some doubt. Generally, their elaboration has been carried out primarily by the judiciary. In international law this has been done mostly in the context of cases concerning the delimitation of maritime boundaries. The provisions on the compulsory settlement of disputes of the Fish Stocks Agreement (as those of the LOS Convention) may exclude the possibility of such a development in respect of the establishment of compatible conservation and management measures, see further *infra* Section V. Even if there will be an important role for the judiciary, it should be realized that equity and the need to arrive at an equitable solution can only give general guidelines and leave room for different interpretations in their application to the specific case, see e.g. *Gulf of Maine Case*, ICJ Reports 1984, 246 et seq., (290, paras 80–81 and 299, para. 111); *Affaire de la Délimitation de la Frontière Maritime entre la Guinée et la Guinée-Bissau*; Sentence du 14 Février 1985, RIAA Vol. XIX, 181–182, para. 88.

account these considerations. Article 7 para. 2 requires the balancing of a number of distinct factors, without providing any further guidance. In a similar situation involving the delimitation of the continental shelf between states, the judiciary has employed equity and the requirement that the outcome of the delimitation process has to be equitable.<sup>49</sup>

The need for an equitable solution in resolving disputes over fisheries between coastal states and states fishing on the high seas has been explicitly mentioned by the ICJ in one instance. In the *Fisheries Jurisdiction Cases* the Court observed that:

It follows from the reasoning of the Court in this case that in order to reach an equitable solution of the present dispute it is necessary that the preferential fishing rights of Iceland, as a State specially dependent on coastal fisheries, be reconciled with the traditional fishing rights of the Applicant.<sup>50</sup>

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<sup>49</sup> The 1958 Geneva Conventions on the Law of the Sea addressed the delimitation of the territorial sea and the continental shelf by reference to equidistance/the median line and the possibility of a boundary delimited by another method if this were indicated by the presence of special circumstances, Convention on the Territorial Sea and the Contiguous Zone of 29 April 1958 (entered into force on 10 September 1964), UNTS Vol. 516 No. 7477, article 12; Convention on the Continental Shelf of 29 April 1958 (entered into force on 10 June 1964), UNTS Vol. 499 No. 7302, article 6. For an overview of the relevant case law see e.g. L. Lucchini/ M. Vœlckel, *Droit de la Mer*, Tome 2, Vol. I, 1996, 207 et seq.; P. Weil, *The Law of Maritime Delimitation – Reflections*, 1989, 191 et seq.; Jennings and Watts, see note 47, 776–782 and 804–807; Research Centre for International Law (ed.), *International Boundary Cases: The Continental Shelf*, 1992, 10–55.

<sup>50</sup> *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, ICJ Reports 1974, 3 et seq., (30, para. 69); *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, *ibid.*, 175 et seq., (198, para. 61). The Court summarized its reasoning referred to at the beginning of the citation as follows in the case between the United Kingdom and Iceland:

that Iceland's extension of its exclusive fishery jurisdiction beyond 12 miles is not opposable to the United Kingdom; that Iceland may on the other hand claim preferential rights in the distribution of fishery resources in the adjacent waters; that the United Kingdom has also established rights with respect to the fishery resources in question; and that the principle of reasonable regard for the interests of other States enshrined in Article 2 of the Geneva Convention on the High Seas of 1958 requires Iceland and the



Although the legal framework existing in 1974 differs significantly from the legal regime contained in the LOS Convention and the Fish Stocks Agreement, similarities are also apparent. These concern the existence of interests of coastal states and states fishing on the high seas in the same stocks, the need for conservation and management measures applicable to the whole stock, which straddles a jurisdictional limit, and arguments concerning the dependence of the states involved on the fisheries.

A final consideration indicating the relevance of equity and the need to arrive at an equitable solution in determining compatible conservation and management measures is the importance these considerations have been attributed generally in the law of the sea and the LOS Convention.<sup>51</sup> In itself this is not an argument for employing these considerations to a particular case if this is not required by the applicable law. It does, however, make it likely that these considerations will be of relevance for a case that lends itself for such application, such as article 7 para. 2 of the Fish Stocks Agreement.

The following discussion on the implications of equity and the need to arrive at an equitable solution in the context of article 7 para. 2 draws upon the 1974 *Fisheries Jurisdiction Cases* and the case law on the delimitation of maritime boundaries. Although the application of general principles to the specific case in both instances differs, these general principles themselves to a large extent are equally applicable to both cases.<sup>52</sup> A recent discussion on allocation criteria in the framework of the International Commission for the Conservation of Atlantic Tunas

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United Kingdom to have due regard to each other's interests, and to the interests of other States, in those resources, *ibid.*, 29, para. 68.

<sup>51</sup> See e.g. LOS Convention, 4th pre-ambular consideration, arts 59, 69, 70, 74, 76, 82, 83, 140, 155, 266 and 269.

<sup>52</sup> See also *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands) (*North Sea Continental Shelf Cases*), Judgment of 20 February 1969, ICJ Reports 1969, 3 et seq., (48, para. 88); *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, *ibid.*, 1974, 3 et seq., (33, para. 78); *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, *ibid.*, 175 et seq., (202, para. 69).

(ICCAT) provides an example of the use of a reference to the need for an equitable solution in the context of fisheries management.<sup>53</sup>

In the *Fisheries Jurisdiction Cases*, the ICJ made an important qualification to the need to arrive at an equitable solution, noting that this is "not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law".<sup>54</sup> In the *Libya/Malta Continental Shelf Case* the ICJ addressed the implications of this proposition, observing that in establishing considerations to be taken into account in the delimitation process:

... it is evident that only those [considerations] that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature.<sup>55</sup>

In the context of article 7 para. 2 of the Fish Stocks Agreement, this finding confirms the importance of respecting the legal framework as established by the LOS Convention and reconfirmed by the Fish Stocks Agreement in determining compatible conservation and management measures.

Another pronouncement on equity of relevance for the process of determining compatible conservation and management measures is that it does not necessarily imply equality. In the *North Sea Continental Shelf Cases* the ICJ observed that this implies that:

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<sup>53</sup> See *Report of the 1st Meeting of the ICCAT Working Group on Allocation Criteria (ICCAT Report, 1998-99 (II), Annex 6)*, para 6.8 and the Opening Statement by Japan, *ibid.*, Appendix 3 to Annex 6.

<sup>54</sup> *Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Merits, Judgment of 25 July 1974, ICJ Reports 1974, 3 et seq., (33, para. 78); *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, Merits, Judgment of 25 July 1974, *ibid.*, 175 et seq., (202, para. 69).

<sup>55</sup> *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)* (Libya v. Malta Continental Shelf Case), Judgment of 3 June 1985, ICJ Reports 1985, 13 et seq., (40, para. 48); see also *Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment of 24 February 1982, ICJ Reports. 1982, 18 et seq., (43, para. 36); *Arbitration between the United Kingdom and France on the Delimitation of the Continental Shelf*, Decision of 30 June 1977, *ILR* 54 (1979), 11 et seq., (115, para. 246).

... There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy.<sup>56</sup>

The question how to balance different considerations was addressed by the ICJ in the *North Sea Continental Shelf Cases*. The Court observed that:

...more often than not it is the balancing-up of all such considerations that will produce [an equitable] result rather than reliance on one to the exclusion of all others. The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case.<sup>57</sup>

The importance of the circumstances of the case was also noted by the ICJ in the *Fisheries Jurisdiction Case* between Iceland and the United Kingdom when it pointed out that:

... both in regard to merits and jurisdiction the Court only pronounces on the case which is before it and not on any hypothetical situation which might arise in the future.<sup>58</sup>

These pronouncements indicate the importance of considering the factual circumstances of each particular case in applying the general legal framework provided by article 7 para. 2. All the factors mentioned in lit.(a) to (f) of article 7 para. 2 have a specific value in each particular case.

#### **b. The Characteristics of the Factors Listed in article 7 para. 2**

A second possibility to assess how to balance the factors to be taken into account in determining compatible conservation and management

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<sup>56</sup> ICJ Reports 1969, 49–50, para. 91.

<sup>57</sup> *Ibid.*, 50, para. 93; see also *Gulf of Maine Case*, ICJ Reports 1984, 246 et seq., (313, para. 158).

<sup>58</sup> *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, ICJ Reports 1974, 3 et seq., (32, para. 73); see also *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, *ibid.*, 175 et seq., (201, para. 65).

measures is to look more closely at the characteristics of each of them. A distinction can be made between lit.(a) to (c), which concern existing management measures, and lit.(d) and (e), which concern factual circumstances related to the stocks concerned and the coastal states and the states fishing on the high seas.

The logical starting point for determining compatible conservation and management measures is to establish to what extent existing conservation and management measures already ensure the objectives of article 7 para. 2 and appropriately take into account the factors mentioned in lit.(d) and (e). If this is the case, there is in principle no need for adjusting such existing measures. In order to establish whether this is actually the case, these measures will have to be evaluated in conformity with the requirements and procedures set out in article 7 para. 2 and other relevant provisions of the Fish Stocks Agreement.

If existing measures do not ensure that the objectives of article 7 are attained or do not appropriately take into account the factors mentioned in lit.(d) and (e), their adjustment is required in determining compatible measures. As was argued above, existing measures in principle should be able to guarantee the objectives of article 7 para. 2. This indicates that the need for adjustment of existing measures to achieve compatibility in this case would in principle arise from new circumstances, which cause that such existing measures no longer ensure these objectives of article 7 para. 2. This need for more stringent measures indicates that in determining compatible conservation and management measures in this case the less stringent measures should be made compatible with the more stringent measures. If such a step still would not realize the objectives of article 7 para. 2 modification of all measures would be required.

If existing measures do not take the factors mentioned in lit.(d) and (e) of article 7 para. 2 into account appropriately, existing measures for areas under national jurisdiction and the high seas can be adjusted to a different extent to reflect these factors to a larger extent. Such adjustment in principle does not require the establishment of more stringent measures. As some of the factors mentioned in lit.(d) and (e) in a specific case may result in giving more weight to coastal state interests and others to the interests of high seas fishing states, their balancing may give limited weight to each of these factors.

The biological unity and other biological characteristics of the stocks concerned are of relevance for regulating catches. As was noted above, these biological factors may also result in different measures being applied to different zones or seasons. The other considerations in

lit.(d) concern the distribution of the stocks concerned and fishing effort of the states concerned. In taking into account these factors, it would seem that there has to be achieved a correspondence between the zonal and seasonal distribution of stocks (if relevant for the stocks concerned) and the share of the states involved in the fisheries.

The requirement of lit.(e) to take into account the respective dependence of the coastal states and the states fishing on the high seas on the stocks concerned is primarily of relevance for the distribution of stocks by setting a total allowable catch (TAC) or other measures. This respective dependence can, for instance, be a consideration to adjust the division of the TAC between the states involved in the fisheries established on other considerations. Such an adjustment can be achieved between the coastal states and the states fishing on the high seas or between the states fishing on the high seas. As the Fish Stocks Agreement recognizes the special requirements of developing states, for these states a larger role may be assigned to the factor of dependence than for developed states in a comparable situation. Apart from para. 2 of article 24 referred to above, article 24 para. 1 is relevant in this respect. This provision requires states to give full recognition to the development of fisheries by developing states. This obligation may require the adjustment of conservation and management measures to allow for such development.<sup>59</sup>

If conservation and management measures as defined in lit.(a) to (c) of article 7 para. 2 are not in place, the reasons for this absence have to be taken into consideration in establishing compatible conservation and management measures. If a coastal state has not adopted conservation and management measures for areas under its national jurisdiction, it also seems unlikely that such measures have been adopted under the other subparagraphs of article 7 para. 2. In this case, measures adopted by the states fishing on the high seas without involvement of the coastal state would probably become relevant for the determination of compatible conservation and management measures. In the absence of measures under lit.(b) and (c) coastal state measures would gain impor-

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<sup>59</sup> Implementation of this obligation may give rise to major controversy, especially if other states have a vested interest in the fishery and the stocks concerned are fully exploited, see e.g. the discussion in this respect in *Report of the 1st Meeting of the ICCAT Working Group on Allocation Criteria*, Annex 6 to ICCAT Report, 1998-99 (II), 84-113 (<http://www.iccat.es/Manage.html>) (12 February 2001), 85 et seq.

tance in establishing compatible measures.<sup>60</sup> However, in this case it also would seem relevant to inquire into the reasons for the absence of measures under lit.(b) and (c). If a coastal state has previously refused to participate in the establishment of such measures, the significance of coastal state measures for establishing compatible measures would be diminished.

### III. The Framework for Implementation of article 7 para. 2

#### 1. Mechanism for Cooperation under the Fish Stocks Agreement

Under article 7 of the Fish Stocks Agreement, states have a duty to cooperate in respect of highly migratory fish stocks and straddling fish stocks.<sup>61</sup> This duty to cooperate is elaborated in considerable detail in Part III of the Fish Stocks Agreement. Although states can also cooperate directly, the main thrust of Part III is towards the establishment of effective subregional or regional fisheries management organizations or arrangements. In principle, the conservation and management of any straddling fish stock or highly migratory fish stock has to be addressed through such an organization or arrangement.<sup>62</sup> Part III sets out the circumstances in which states have to cooperate towards the establishment of such organizations and arrangements and lays down their functions.<sup>63</sup> Only states which are members of such organizations or par-

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<sup>60</sup> On the interaction between the measures adopted under lit. (a), (b) and (c) see also Orrego Vicuña, see note 5, 193.

<sup>61</sup> For a discussion of the implications of the duty to cooperate under article 7 of the Fish Stocks Agreement see the paper cited in note \*, Section 3; E.J. Molenaar, "The Concept of "Real Interest" and Other Aspects of Cooperation through Regional Fisheries Management Mechanisms" *International Journal of Marine and Coastal Law* 15 (2000), 475 et seq., (477-484).

<sup>62</sup> See Fish Stocks Agreement, article 8.

<sup>63</sup> Fish Stocks Agreement, arts 8 and 10. In fulfilling their obligation to cooperate through subregional or regional fisheries management organizations or arrangements, states shall *inter alia* agree on and comply with conservation and management measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks; agree, as appropriate, on participatory rights such as allocations of allowable catch or levels

ticipate in such arrangements, or which agree to apply the measures established by such organizations or arrangements, shall have access to the fishery resources to which those measures apply.<sup>64</sup>

In view of the functions of subregional or regional fisheries management organizations or arrangements, they will have a fundamental role in applying and interpreting the rules on compatibility contained in article 7 of the Fish Stocks Agreement.<sup>65</sup> This consideration is not only important from a practical point of view, but also has important legal implications. Subsequent practice of states can be of relevance for the interpretation of the Fish Stocks Agreement.<sup>66</sup> One requirement for such practice to be relevant is that it is sufficiently uniform. If practice on a specific point is not uniform between organizations and arrangements, it cannot contribute to the interpretation of provisions on compatibility.

One important aspect of the provisions on cooperation contained in Part III of the Agreement is that they allow regional idiosyncrasies to be taken into account.<sup>67</sup> For instance, article 8 para. 1 provides for cooperation, "taking into account the specific characteristics of the subregion or region". Article 9 para. 1 elaborates in more detail what considerations can be taken into account in establishing subregional and regional fisheries management organizations and arrangements. Reference is made to *inter alia* the biological characteristics of the stocks concerned and the characteristics of the subregion or region, including so-

of fishing effort; and adopt and apply any generally recommended international minimum standards for the responsible conduct of fishing operations, Fish Stocks Agreement, article 10 lit.(a) to (c).

<sup>64</sup> Fish Stocks Agreement, article 8 para. 4.

<sup>65</sup> See also Burke, "Compatibility", see note 8, 115; Vigneron, see note 27, 587.

<sup>66</sup> Article 31 para. 3 of the Vienna Convention on the Law of Treaties provides, that:

There shall be taken into account, together with the context [of the terms of a treaty]:

[...]

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

[...].

<sup>67</sup> See also A.C. de Fontaubert, "The Politics of Negotiation at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks", *Ocean & Coastal Management* 29 (1995), 79 et seq., (88); Thébaud, see note 14, 249-250.

cio-economic, geographical and environmental factors. Part III also contains provisions on two particular types of regions. Article 15 addresses the situation of enclosed and semi-enclosed seas, and article 16 that of areas of high seas surrounded entirely by an area under the national jurisdiction of a single state.<sup>68</sup> Moreover, the differences in the regime applicable to straddling fish stocks and highly migratory fish stocks are also of relevance in this respect.<sup>69</sup>

These considerations imply that there may only be uniformity of practice between organizations and arrangements at a high level of abstraction in the application of article 7 of the Agreement or that it may be difficult to draw generalizations from their activities altogether.

## 2. Recent Practice of Fisheries Management Organizations and Arrangements<sup>70</sup>

Before the adoption of the Fish Stocks Agreement in 1995, the question how to achieve consistency between measures applicable to areas under national jurisdiction and the high seas was also being considered in the framework of fisheries management organizations and arrangements. Since 1995, states have started to make specific reference to article 7 of the Fish Stocks Agreement in this connection.

In looking at the practice of fisheries management organizations and arrangements, two aspects can be distinguished. The constitutive in-

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<sup>68</sup> However, these articles hardly develop on the legal framework the Agreement otherwise establishes, see also M. Hayashi, "The 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention", *Ocean and Coastal Development* 26 (1996), 51 et seq., (64–65); E. Hey, "Global Fisheries Regulations in the First Half of the 1990s", *International Journal of Marine and Coastal Law* 11 (1996), 459 et seq., (474–475); A. Oude Elferink, "The Sea of Okhotsk Peanut Hole: *De Facto* Extension of Coastal State Control", in: O.S. Stokke (ed.), *Governing High Seas Fisheries: Regime Interplay and Straddling Stocks Management*, forthcoming, 2001, Chapter VI. Nonetheless, in practice the regime in one of the areas, which falls under the definition of article 16, has developed in a way that differs from most other regions, see further *infra*.

<sup>69</sup> See Balton, see note 11, 128–129.

<sup>70</sup> This Section is not intended to give an overview of all practice, but serves to illustrate how the issue of compatibility has been discussed in the framework of fisheries management organizations and arrangements.



strument of such organizations and arrangements can address the question of compatibility in general terms. Once they become operative, organizations and arrangements apply these provisions in adopting conservation and management measures.

The Northwest Atlantic Fisheries Organization (NAFO), which was established in 1979, manages a number of straddling fish stocks.<sup>71</sup> The NAFO Convention defines a "Convention Area" and a "Regulatory Area". The Convention Area includes parts of the maritime zones of Canada, Denmark (Greenland), France (St. Pierre and Miquelon) and the United States and adjacent areas of high seas. The Regulatory Area is that part of the Convention Area which lies beyond the areas in which coastal states exercise fisheries jurisdiction.<sup>72</sup> The Fisheries Commission of NAFO is responsible for the conservation and management measures of the Regulatory Area.<sup>73</sup> The NAFO Convention provides that in the exercise of its functions the Fisheries Commission shall seek to ensure consistency between:

- a) Any proposal that applies to a stock or group of stocks occurring both within the Regulatory Area and within an area under the fisheries jurisdiction of a coastal State, or any proposal that would have an effect through species interrelationships on a stock or group of stocks occurring in whole or in part within an area under the fisheries jurisdiction of a coastal State; and
- b) Any measures or decisions taken by the coastal State for the management and conservation of that stock or group of stocks with respect to fishing activities conducted within the area under its fisheries jurisdiction.

The appropriate coastal State and the Commission shall accordingly promote the coordination of such proposals, measures and decisions. Each coastal State shall keep the Commission informed of its measures and decisions for the purpose of this Article.<sup>74</sup>

This provision on consistency already prefigures the structure of article 7 of the Fish Stocks Agreement. It does not indicate any hierarchy be-

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<sup>71</sup> NAFO was established under the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (NAFO Convention) of 24 October 1978, entered into force 1 January 1979, UNTS Vol. 1135 No. 17799.

<sup>72</sup> *Ibid.*, articles I(1) and I(2).

<sup>73</sup> *Ibid.*, article XI(1).

<sup>74</sup> *Ibid.*, article XI(3).

tween coastal state measures and measures adopted for the high seas, but recognizes that the appropriate coastal state and the Commission bear responsibility for areas under national jurisdiction and the Regulatory Area respectively. The provision does not indicate what considerations have to be taken into account to achieve consistency.<sup>75</sup>

A recent discussion involving the application of the consistency provision of the NAFO Convention, in which reference was also made to the concept of compatibility, took place at the 1999 Meeting of the Fisheries Commission.<sup>76</sup> During the Meeting contracting parties other than Canada expressed their serious concern that management measures for the cod stock in the Convention subareas 2J3KL might not be consistent throughout its range in the Convention Area in the year 2000. No directed fishery of cod in the part of the subareas 2J3KL in the Regulatory Area was admitted, but Canada had set a 9,000 tons TAC for the inshore cod fishery in the subareas 3KL for 1999. At the same time, Canada had maintained the moratorium for offshore cod. In the Meeting, Canada presented a number of considerations explaining its decision. The inshore fishery was very limited, and was subject to strict management measures and controls. The decision only took place after extensive scientific review and the cod fishery was being conducted so as to improve confidence in management and rebuilding of the stock. Canada believed that its approach was consistent with conservative management of the resource. The representative of the European Union expressed disagreement, noting that the 2J3KL cod stock was a single

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<sup>75</sup> A number of considerations are listed in connection with the allocation of catches in the Regulatory Area. These considerations are similar to those contained article 7 para. 2 of the Fish Stocks Agreement. The provision concerned reads:

Proposals adopted by the Commission for the allocation of catches in the Regulatory Area shall take into account the interests of Commission members whose vessels have traditionally fished within that Area, and, in the allocation of catches from the Grand Bank and Flemish Cap. Commission members shall give special consideration to the Contracting Party whose coastal communities are primarily dependent on fishing for stocks related to these fishing banks and which has undertaken extensive efforts to ensure the conservation of such stocks through international action, in particular, by providing surveillance and inspection of international fisheries on these banks under an international scheme of joint enforcement (NAFO Convention, see note 71, article XI(4)).

<sup>76</sup> The following account is based on *Northwest Atlantic Fisheries Organization (NAFO); Annual Report 1999* (<http://www.nafo.ca/annrep.htm>) (18 January 2001), 57, 77–81 and 101.

stock and was very depleted with very weak yearly yields since the beginning of the 1990s. There was no supporting data to the contrary. Inshore fishing primarily comprised juveniles and any fishing on one portion of the stock could seriously impact on the recovery of the stock in its entirety. By-catch of cod in other fisheries could also have an impact on the rebuilding of the cod. He concluded that there was no scientific basis for Canada to open the inshore fishery.

Following this discussion, the Fisheries Commission referred two questions to the Scientific Council of NAFO: to evaluate the impact of catch in the range of 5.000 to 10.000 tons yearly on the recovery of the cod in 2J3KL; and to evaluate the impact of by-catches of cod in other fisheries in the Canadian 200 nautical mile zone and the Regulatory Area. In its response the Scientific Council observed that the information it had access to did not place it in a position to indicate risks associated with fishing at different levels. However, the Council noted that the size of the stock as a whole remained at a very low level. Any removals including directed catch and by-catch in other fisheries would hamper recovery of the resource, although the extent of this delay could not be determined with available data.

In response, Canada acknowledged that there was a lack of good scientific data for inshore areas. The data being collected in the inshore fishery would contribute to filling that gap and allowing for more reasoned and scientifically based decisions. In respect of the issue of shared stock, it was suggested that the preponderance of interest resided with Canada as the coastal state, noting that the allocation for cod in 2J3KL was 95 per cent for Canada and 5 per cent for other NAFO parties. In setting the TAC for 2J3KL cod Canada had operated in a manner consistent with its rights and obligations and had not put the sustainability of the stock at risk. NAFO did not have the authority to approve or reject Canada's decision but rather to decide whether it choose to set a TAC for this stock in the NAFO Regulatory Area.

The EU repeated its concern over the fact that the stock had become subject to conflicting conservation and management measures, although there were no indications of different stock components for the inshore and offshore. This situation was contrary to the consistency requirement of the NAFO Convention, the precautionary approach and fell short of the compatibility requirement of the Fish Stocks Agreement. The EU suggested that Canada in its capacity as a coastal state could request the Scientific Council of NAFO for scientific advice. This would allow for a more transparent situation and provide good scien-

tific advice, on the basis of which both the Fisheries Commission and Canada could operate.

ICCAT provides an example of an organization involved in the management of highly migratory fish stock.<sup>77</sup> The ICCAT Convention applies to all waters of the Atlantic Ocean, including the adjacent seas<sup>78</sup> and the Commission is responsible for the conservation of tunas and tuna-like species. The ICCAT Convention does not explicitly address the relationship between management measures adopted for the high seas and those adopted for areas under national jurisdiction.<sup>79</sup> However, language in the Convention indicates the importance of looking at stocks in their entirety and the interdependence of stocks.<sup>80</sup> Some of the recommendations of ICCAT indicate further considerations, which have been taken into account in the management of stocks. For instance, Recommendation 98-3 makes reference to the rights of developing coastal states in developing their own fisheries.<sup>81</sup> Recommendation 98-5 recognizes the need to reconcile conservation of a stock with the needs of coastal fishing communities which are dependent mainly on fishing for this stock.<sup>82</sup> A final example is Recommendation 98-6, which as a consideration lists the highly migratory characteristics of

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<sup>77</sup> ICCAT was established under the International Convention for the Conservation of Atlantic Tunas (ICCAT Convention), adopted on 14 May 1966; entered into force on 21 March 1969; UNTS Vol. 673 No. 9587.

<sup>78</sup> The ICCAT Convention contains two safeguarding clauses in respect of maritime zones under national jurisdiction. Nothing in the Convention is considered to affect the rights, claims or views of any party in respect of the extent of jurisdiction over fisheries under international law (article II). The system of enforcement to be applied to the Convention area does not apply to the territorial sea and other waters in which a state is entitled to exercise fisheries jurisdiction under international law (article IX).

<sup>79</sup> At the time the Convention was adopted most of the states involved only had a territorial sea and continental shelf.

<sup>80</sup> See e.g. ICCAT Convention, article VI.

<sup>81</sup> Recommendation by ICCAT on the Bigeye Tuna Conservation Measures for Fishing Vessels Larger than 24 m Length Overall (LOA), entered into force on 21 June 1999, Section 7.

<sup>82</sup> Recommendation by ICCAT on the Limitation of Catches of Bluefin Tuna in the Eastern Atlantic and the Mediterranean, entered into force on 20 August 1999.

bluefin tunas, including juveniles, as well as the appearance of these juveniles at different times in different areas of the Mediterranean Sea.<sup>83</sup>

A further example of ICCAT practice is provided by the ICCAT Working Group on Allocation Criteria.<sup>84</sup> The main reason for establishing the working group was dissatisfaction with the current allocation practice of ICCAT, based mainly on historical catch.<sup>85</sup> The main disagreement during the discussion in the Working Group in fact concerned the weight to be given to historical catch. States seeking to diminish the role of this factor pointed to the interest of coastal states, particularly developing states, in developing their fishery. In this connection reference was made to preferential rights of coastal states in their EEZ and the concept of zonal attachment.<sup>86</sup> These arguments were rejected by other states, pointing to the changing distribution of tuna biomass and the fact that due to the migratory character of the stocks concerned they do not belong to one zone in particular.<sup>87</sup> Moreover, article 64 of the LOS Convention and article 7 of the Fish Stocks Agreement required cooperation between fishing states and coastal states, instead of recognizing coastal state preferences.<sup>88</sup>

To support the inclusion of specific allocation criteria in the list to be drawn up, reference was also made to both the LOS Convention and the Fish Stocks Agreement, in particular its articles 7 and 11.<sup>89</sup> A number of delegations expressed concern that a discussion of legal interpretations would not be conducive to progress and that the focus should

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<sup>83</sup> Recommendation by ICCAT concerning the Changes of the Closed Season for the Purse Seine Fishery for Bluefin Tuna in the Mediterranean, entered into force on 21 June 1999.

<sup>84</sup> The following account is based on the *Report of the 1st Meeting of the ICCAT Working Group on Allocation Criteria*, see note 59, 84–113. The 2nd Mtg. of the Working Group took place in April 2000. The Report of the 2nd Mtg. was not available at the time of writing of this article.

<sup>85</sup> Molenaar, see note 61, 518.

<sup>86</sup> See e.g. *Report of the 1st Meeting of the ICCAT Working Group on Allocation Criteria*, see note 59, 85, para. 4.9, 87, para. 6.12.

<sup>87</sup> See e.g. *ibid.*, at 90, paras 6.47 and 6.50–6.51. The Chairman of the Standing Committee on Research and Statistics noted that the stock biomass estimates are inferred from catch data, and that it is nearly impossible to predict precisely the proportion of a stock that will be in a particular area, especially given the yearly changes in migratory patterns, *ibid.*, 92, para. 6.76.

<sup>88</sup> *Ibid.*, 88, para. 6.17; see also *ibid.*, 86, para. 6.7.

<sup>89</sup> Three proposals on lists of allocation criteria in large part are based on these two articles, see *ibid.*, 108–110.

rather be on the list of criteria.<sup>90</sup> One issue on which there seemed to be a large degree of agreement was that allocation criteria had to be of a general nature and that they should be applied on a case by case basis.<sup>91</sup>

Since the adoption of the Fish Stocks Agreement, a number of agreements for the management for highly migratory fish stocks and straddling fish stocks have been negotiated. These agreements, to a greater or lesser extent, reflect the impact of the Fish Stocks Agreement, including its article 7. A first example in this respect is the Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the Southeast Pacific (hereinafter Galapagos Agreement).<sup>92</sup> The Agreement has as its objective the conservation of living marine resources, with special reference to straddling fish stocks and highly migratory fish stocks.<sup>93</sup> This Agreement, which was negotiated by the coastal states of the Southeast Pacific, in some respects differs considerably from the Fish Stocks Agreement.<sup>94</sup> The Galapagos Agreement applies exclusively to high seas areas of the Southeast Pacific.<sup>95</sup> On the

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<sup>90</sup> See e.g. the statement by Canada, *ibid.*, 89, para. 6.29. An example of a difference of opinion over a provision of the Fish Stocks Agreement is the partial inclusion of its article 7 para. 2 lit.(d) in a proposal on elements for allocation by Brazil, *ibid.*, 110, para. 2. The omission of reference to the phrase "biological characteristics" was criticized by Japan, *ibid.*, 112; see also the statement by the United States, *ibid.*, 113.

<sup>91</sup> See e.g. *ibid.*, 108 and 110.

<sup>92</sup> Adopted on 14 August 2000 (on file with the author).

<sup>93</sup> Article 2.

<sup>94</sup> Chile and the European Community had submitted a dispute over swordfish stocks in the Southeastern Pacific Ocean to a Chamber of the International Tribunal for the Law of the Sea (ITLOS). One of the questions submitted to the Chamber was whether the Galapagos Agreement was negotiated in keeping with the provisions of the LOS Convention, including its arts 64 and 116 to 119. The Chamber would have been able to deal with this issue to the extent that it was subject to compulsory dispute settlement procedures under Part XV of the Convention, see *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*; Order 2000/3 of 20 December 2000 ([http://www.un.org/Depts/los/ITLOS/SWORDFISH\\_STOCKS.htm](http://www.un.org/Depts/los/ITLOS/SWORDFISH_STOCKS.htm)) (24 January 2001), para. 3. On 25 January 2001, Chile and the European Community reached a negotiated settlement, resulting in the suspension of the proceedings before ITLOS.

<sup>95</sup> Article 3 of the Agreement defines the area as encompassed by the outer limits of coastal state zones and a line traced along the meridian 120° W and the parallels 5° N and 50° S.

other hand, article 7 of the Fish Stocks Agreement also applies to the conservation and management of highly migratory fish stocks and straddling fish stocks within areas under national jurisdiction, subject to the different legal regimes that apply in these areas and on the high seas as provided for in the LOS Convention.

The Galapagos Agreement contains a provision on compatibility, which provides that:

The measures adopted shall not be less strict than those established for the same species in the zones under national jurisdiction adjacent to the Agreement's area of application, shall not undermine the effectiveness of the same, and shall be fully compatible with them in all cases.<sup>96</sup>

This provision differs significantly from article 7 para. 2 of the Fish Stocks Agreement. Compatibility is not required between the two sets of measures, but measures adopted for the high seas have to be compatible with those adopted for areas under national jurisdiction. In addition, the reference to compatibility is qualified by the word "fully". The requirement that measures applicable to the high seas be no less strict than those established for zones under national jurisdiction had been espoused by coastal states in the negotiations on article 7 but had been opposed by distant water fishing states.<sup>97</sup> Finally, the compatibility provision of the Galapagos Agreement does not provide criteria to be taken into account in determining compatible measures.<sup>98</sup>

The Fish Stocks Agreement did play an important role in the negotiations of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (hereinafter Honolulu Convention).<sup>99</sup> This is reflected in the text of the Convention, which provides that it shall be interpreted and applied in the context of and in a manner consistent with the LOS Convention and the Fish Stocks Agreement.<sup>100</sup> The Convention applies to all stocks of highly migratory fish stocks throughout their range within the Convention Area, or to specific areas within the Convention Area, as de-

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<sup>96</sup> Galapagos Agreement, article 5 para. 1 lit.(e).

<sup>97</sup> See Vigneron, see note 27, 598.

<sup>98</sup> In view of the extent to which measures adopted for the high seas have to be aligned with measures adopted for areas under national jurisdiction, such a list would to a large extent appear to be superfluous.

<sup>99</sup> Adopted on 5 September 2000 (on file with the author).

<sup>100</sup> Article 4.

terminated by the Commission to be established under the Convention.<sup>101</sup> Articles 8 para. 1 and 8 para. 2 of the Honolulu Convention on compatibility of conservation and management measures basically reproduce article 7 para. 2 of the Fish Stocks Agreement.<sup>102</sup> Differences mainly result from the need to adapt article 7 para. 2 of the Fish Stocks Agreement to the context of the Honolulu Convention. Two further paragraphs of article 8 of the Convention differ from the Fish Stocks Agreement. Article 8 para. 3 of the Convention requires that coastal states shall ensure that the measures adopted and applied by it within

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<sup>101</sup> Article 3 para. 3. The Convention Area is defined in article 3 para. 1 of the Convention and includes areas under national jurisdiction.

<sup>102</sup> These articles read:

1. Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of highly migratory fish stocks in their entirety. To this end, the members of the Commission have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks.

2. In establishing compatible conservation and management measures for highly migratory fish stocks in the Convention Area, the Commission shall:

(a) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;

(b) take into account:

(i) the conservation and management measures adopted and applied in accordance with article 61 of the 1982 Convention in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the Convention Area as a whole do not undermine the effectiveness of such measures;

(ii) previously agreed measures established and applied in respect of the same stocks for the high seas which form part of the Convention Area by relevant coastal States and States fishing on the high seas in accordance with the 1982 Convention and the Agreement;

(c) take into account previously agreed measures established and applied in accordance with the 1982 Convention and the Agreement in respect of the same stocks by a subregional or regional fisheries management organization or arrangement;

(d) take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and

(e) ensure that such measures do not result in harmful impact on the living marine resources as a whole.



areas under its national jurisdiction do not undermine the effectiveness of measures adopted by the Commission under the Convention in respect of the same stocks.<sup>103</sup> Article 8 para. 4 borrows certain language from article 16 of the Fish Stocks Agreement on areas of high seas surrounded entirely by an area under the national jurisdiction of one state. However, article 8 para. 4 is applicable to areas of high seas completely surrounded by the EEZ of members of the Commission. There are a number of extensive areas of high seas completely surrounded by areas of EEZ of more than one state in the Convention Area.

The regime for fisheries in the Barents Sea and the Sea of Okhotsk has been classified as a "bilateral, or coastal state approach".<sup>104</sup> There are small areas of high seas in the Barents Sea and the Sea of Okhotsk, which are completely surrounded by the EEZs of the coastal states (in the latter case the Russian Federation and in the former case this state and Norway). In both cases, states fishing for straddling fish stocks on the high seas have refrained from this activity in exchange for access to fisheries in the EEZ of the coastal states. This arrangement obviates the need for compatibility of measures in the two areas, as fisheries are exclusively carried out in the EEZ in accordance with the conservation and management regime adopted by the coastal states.

#### IV. Provisional Arrangements and Measures

During the negotiations on the article on compatible conservation and management measures it was recognized that in the absence of an agreement over such measures there existed a need for provisional arrangements. Article 7 paras 5 and 6 of the Fish Stocks Agreement addresses this issue. Para. 5 provides that pending agreement on compatible conservation and management measures, the states concerned shall make every effort to enter into provisional arrangements of a practical nature. In case they are unable to agree on such arrangements, any of the states concerned may submit the dispute to a court or tribunal in

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<sup>103</sup> A similar provision is contained in article 19 of the draft of November 2000 of the Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean (on file with the author).

<sup>104</sup> See Oude Elferink, see note 68. For a detailed discussion of these cases see further *ibid.*; R.R. Churchill, "The Barents Sea Loophole Agreement: A "Coastal State" Solution to a Straddling Stock Problem", *International Journal of Marine and Coastal Law*, 14 (1999), 467 et seq.

accordance with the procedures for the settlement of disputes provided for in Part VIII of the Agreement, to obtain provisional measures.

Article 7 para. 6 prescribes the conditions that provisional arrangements or measures have to meet, providing that they:

shall take into account the provisions of this Part, shall have due regard to the rights and obligations of all States concerned, shall not jeopardize or hamper the reaching of final agreement on compatible conservation and management measures and shall be without prejudice to the final outcome of any dispute settlement procedure.

As this definition indicates, provisional arrangements or measures are intended to be of a transitional nature, only to be applied until compatible conservation and management measures are agreed upon.

The present analysis of provisional arrangements and measures seeks to establish to what extent their contents differ from those of compatible conservation and management measures and how they are related to such measures and to conservation and management measures already in place to which reference is made in lit.(a) to (c) of article 7 para. 2. Another issue, which is addressed in Section V below, is in which instances a court or tribunal can indicate provisional measures.

The indication of provisional measures is a mechanism widely applied in international dispute settlement. For instance, the ICJ, under Article 41 of its Statute, has the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. The Fish Stocks Agreement provides, apart from article 7 para. 5, for the establishment of provisional arrangements or measures under articles 16 para. 2 and 31. Under this latter article, the court or tribunal to which a dispute has been submitted may prescribe any provisional measures which it considers appropriate under the circumstances of the case to preserve the respective rights of the parties to the dispute or to prevent damage to the stocks which are the subject of the dispute.<sup>105</sup>

Provisional measures under article 7 para. 5 differ from provisional measures under article 31 para. 2 of the Fish Stocks Agreement, Article 41 of the Statute of the ICJ and article 290 of the LOS Convention in that they can be requested outside the framework of a dispute which has been submitted for compulsory settlement. This may make a request for provisional measures under article 7 para. 5 in certain in-

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<sup>105</sup> Fish Stocks Agreement, article 31 para. 2.

stances an interesting alternative to submitting a dispute over compatible measures as such.

A first question concerning provisional arrangements and measures is what is meant by the qualification "of a practical nature", which is only used in connection with provisional arrangements entered into by the states concerned and not for provisional measures indicated by a court or tribunal. This difference can be explained by the fact that provisional measures are to be prescribed by a court or tribunal, which is to decide on the basis of the applicable law. A similar consideration is not applicable to states involved in negotiations, which can adopt, within certain margins, any arrangement they agree upon.<sup>106</sup> In agreeing upon provisional arrangements, states have to respect their obligations concerning the conservation and management of stocks under the Fish Stocks Agreement and other international instruments and the rights of third states. Apart from this consideration, the nature of provisional arrangements and provisional measures would not seem to be different.<sup>107</sup> Article 7 para. 6 is applicable to provisional arrangements and measures without distinction.

Provisional arrangements or measures are to be entered into or to be prescribed if the states involved cannot agree upon compatible conservation and management measures. Disagreement can concern either the condition of the stock concerned or how the stock is to be divided between the states involved. In the former case, it would seem to be justified to adopt or prescribe cautious management and conservation measures, which are more stringent than existing measures. In the latter

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<sup>106</sup> Cf. *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland v. Iceland); Continuation of Interim Measures of Protection; Order of 12 July 1973, ICJ Reports 1973, 302 et seq., (303, paras 6–8); *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland); Continuation of Interim Measures of Protection; Order of 12 July 1973, *ibid.*, 313 et seq., (314, paras 6–8). In these cases, the ICJ seems to have suggested that the parties in direct negotiations could arrive at a more detailed interim arrangement than the measures indicated by the Court. At the same time, the existence of such negotiations, and the fact that Iceland did not appear before the Court, may explain the restraint exercised by the Court.

<sup>107</sup> Cf. *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland v. Iceland); Continuation of Interim Measures of Protection; Order of 12 July 1973, ICJ Reports 1973, 302 et seq., (303, paras 6–7); *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland); Continuation of Interim Measures of Protection; Order of 12 July 1973, *ibid.*, 313 et seq., (314, paras 6–7).

case, it would, in principle, seem to be justified to arrive at a compromise solution between the positions of the states concerned, taking into account to what extent these positions are in conformity with the relevant provisions of the Fish Stocks Agreement. For instance, a claim for a share of the TAC which is based on non-sustainable catches in previous years should not be given the same weight as a claim based on sustainable catches in previous years.

Any provisional measure or arrangement has to be in conformity with the obligations under Part II of the Fish Stocks Agreement concerning the conservation and management of stocks. The importance of this latter consideration in case a court or tribunal prescribes provisional measures is confirmed by the fact that article 31 para. 2 makes separate mention of the prevention of damage to stocks as a title for prescribing such measures.<sup>108</sup> This standard set by article 31 para. 2 seem to be lower than that of "serious harm" set out in the LOS Convention.<sup>109</sup>

In its order for provisional measures, indicated under article 290 para. 5 of the LOS Convention, in the *Southern Bluefin Tuna Cases*, ITLOS considered that "the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna" and to avert further deterioration of the stock.<sup>110</sup> Taking into account the considerations indicated by the Tribunal, there certainly

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<sup>108</sup> Similarly, article 30 para. 5 of the Fish Stocks Agreement stipulates a court or tribunal to which a dispute has been submitted to apply the relevant rules of international law "with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned".

<sup>109</sup> In his Separate Opinion in the *Southern Bluefin Tuna Cases* (*Southern Bluefin Tuna Cases* (New Zealand v. Japan) – Case No. 3, (Australia v. Japan) – Case No. 4; Request for Provisional Measures, Order of 27 August 1999 (<http://www.un.org/Depts/los/ITLOS/Order-tuna34.htm>) (9 February 2001), Judge Treves indicated that this was the case, para. 11.

<sup>110</sup> *Southern Bluefin Tuna Cases*, para. 77 and 80. The Tribunal pointed out that the conservation of living resources of the sea is an element of the protection and preservation of the marine environment, *ibid.*, para. 70, bringing it within the scope of the provision on the marine environment of article 290 para. 1 of the Convention, see also the Separate Opinion of Judge Treves, para. 6; M. Hayashi, "The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea", *Tul. Environ. L. J.* 13 (2000), 361 et seq., (381).

seems room for different outcomes under articles 290 para. 5 and article 31 para. 2 Fish Stocks Agreement.<sup>111</sup>

The reference to “damage to the stock” (or “serious harm to the marine environment”) does not provide an independent title for indicating provisional measures.<sup>112</sup> A court or tribunal may prescribe, modify or revoke provisional measures only at the request of a party to the dispute and after the parties have been given an opportunity to be heard.<sup>113</sup> Although this provision does not require a court or tribunal to prescribe the measures as requested,<sup>114</sup> it cannot go beyond what is requested by a party solely to prevent damage to the stock.<sup>115</sup>

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<sup>111</sup> The Tribunal observed that there was no disagreement between the parties that the stock was severely depleted and at its historically lowest levels and that this was a cause for serious concern (*Southern Bluefin Tuna Cases*, para. 71). The parties differed about the impact of the experimental fishing program conducted by Japan. Australia and New Zealand contended that it could endanger the existence of the stock, whereas Japan considered that the program was necessary to reach a more reliable assessment of the stock to recover, *ibid.*, paras 73 and 74. The Tribunal noted there was scientific uncertainty regarding measures to be taken to conserve the stock and that the parties did not agree as to whether measures taken so far had improved the stock. Finally, the Tribunal observed that catches of the stock by other states had increased considerably since 1996, *ibid.*, para. 76.

<sup>112</sup> See also *Southern Bluefin Tuna Cases Separate Opinions of Judge Laing*, para. 18 and Judge Treves, para. 6. In respect of the similar provision in article 30 para. 5 of the Fish Stocks Agreement it has been observed that: allowing conservation/environmental issues to trump well established legal rules [as this] may encourage unilateral state action under the guise of conservation and thus encourage chaotic high seas practices [...]. The real hope of article 30(5) must be, not that resource morality will trump the law, but that legal rules will be interpreted and developed to take into account more fully the needs of marine living resource conservation. T. McDorman, “The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention”, *CYIL* 25 (1997), 57 et seq., (72–73).

<sup>113</sup> LOS Convention, article 290 para. 3.

<sup>114</sup> See e.g., Sh. Rosenne, *The International Court of Justice; An Essay in Political and Legal Theory*, 1961, 329.

<sup>115</sup> In the *Southern Bluefin Tuna Cases*, ITLOS prescribed Australia, Japan and New Zealand *inter alia* to ensure, unless they agreed otherwise, that their annual catches did not exceed the annual allocations at the levels last agreed upon by them. In calculating these figures for 1999 and 2000 account was to be taken of the catch during 1999 as part of an experimental fishing program. The three states were also charged to refrain from conducting an experimental fishing program involving southern bluefin tuna,

The fact that provisional arrangements and measures cover the same subject matter as compatible conservation and management measures makes the relationship between the two of particular interest. Article 7 para. 6 lists three considerations which are relevant in this respect, indicating that provisional arrangements or measures shall have due regard to the rights and obligations of all states concerned, shall not jeopardize or hamper the reaching of final agreement on compatible conservation and management measures and shall be without prejudice to the outcome of any dispute settlement procedure.<sup>116</sup> These provisions imply

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expect with the agreement of the other parties or unless catches under such a program were counted against the annual national allocation of the state involved (*Southern Bluefin Tuna Cases*, para. 90 (c) and (d)). These provisional measures differed in part from those requested by the parties, but did not materially go beyond what was requested (for the measures requested by the parties see *ibid.*, paras 28–35; see also the Separate Opinion of Judge *ad hoc* Shearer in the *Southern Bluefin Tuna Cases*). The formulation in respect of catches indicate the parties remain at liberty to change the catch level agreed upon by them and prescribed by the Tribunal. This autonomy of the parties is also confirmed by the joint declaration of Vice-President Wolfrum and Judges Caminos, Marotta Rangel, Yankov, Anderson and Eiriksson, who observe that:

In the circumstances, a reduction in the catches of all those concerned in the fishery in the immediate short term would assist the stock to recover over the medium to long term. Article 64 of the [LOS] Convention lays down, as stated in the Order, a duty to cooperate to that end.

In the *Fisheries Jurisdiction Cases* the ICJ indicated a number of provisional measures, including an annual catch for the United Kingdom and the Federal Republic in the "Sea Area of Iceland" (*Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland v. Iceland); Request for the Indication of Interim Measures of Protection; Order of 17 August 1972, ICJ Reports 1972, 12 et seq., (17, para. 26); *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland); Request for the Indication of Interim Measures of Protection; Order of 17 August 1972, *ibid.*, 30 et seq., (35, para. 27). In establishing these measures the Court adopted a catch figure below the figure suggested by the United Kingdom and the Federal Republic. This figure was intended to reflect the present situation concerning fisheries of different species in the Iceland area, *ibid.*, 17, paras 25 and 26; 34–35, paras 25–27. The United Kingdom has requested 185,000 tons and Germany 120,000 tons. The figures indicated by the Court were respectively 170,000 and 119,000 tons, see *ibid.* In this case, Iceland, which did not participate in the proceedings, had different views on these catch levels.

<sup>116</sup> There seems to be some overlap between these elements of article 7 para. 6. This may be explained by the wish to include all the elements of articles 74

that provisional arrangements or measures do not have any legal effect on the outcome of any dispute concerning the conservation and management of straddling fish stocks or highly migratory fish stocks.

Nonetheless, the practical impact of provisional arrangements or measures can be considerable,<sup>117</sup> especially if the time the settlement of an underlying dispute may require is taken into consideration.<sup>118</sup> The possibility for a party to ask a court or tribunal to modify or revoke existing measures makes this less problematic,<sup>119</sup> although it may be difficult to achieve this in practice. There is a margin of appreciation in establishing such measures and to modify or revoke them would seem to require a significant change in the circumstances existing at the time of their adoption. For instance, a deterioration in the condition of the stock could require a downward adjustment of effort or catch levels previously agreed upon. Another possibility for their modification or revocation could be the fact that the measures are not effective.

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para. 3 and 83 para. 3 of the LOS Convention, on which article 7 para. 6 was based (for this latter point see M. Hayashi, "The 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention", *Ocean and Coastal Development* 26 (1996), 51 et seq., (64)). In this latter case a similar overlap is not present, as these articles are structured differently.

<sup>117</sup> See also R. Lagoni, "Interim Measures Pending Maritime Delimitation Agreements", *AJIL* 78 (1984), 345 et seq., (358); Orrego Vicuña, see note 5, 192.

<sup>118</sup> For instance, over two years passed between the institution of proceedings and the judgment on the merits in the *Fisheries Jurisdiction Cases* in 1974. In the *Fisheries Jurisdiction Case* (Spain v. Canada), the ICJ gave its judgment on whether it had jurisdiction to adjudicate upon the dispute brought before it by Spain on 28 March 1995 on 4 December 1998.

<sup>119</sup> The assumption is that provisional arrangements can be terminated unilaterally if there is no clause about their termination and they have been concluded for an indefinite period, see also Lagoni, see note 117, 358-359. Nonetheless, if the alternative is the absence of any arrangement, states may be reluctant to take such a step. Measures indicated by a court or tribunal can only be modified or revoked in accordance with the applicable procedural rules.

## V. Procedures for the Settlement of Disputes Arising under article 7

Article 7 of the Fish Stocks Agreement explicitly provides for the possibility of compulsory settlement of disputes in two instances. Under article 7 para. 4 any of the states involved may, if no agreement can be reached on compatible conservation and management measures, invoke the procedures for the settlement of disputes provided for in Part VIII of the Agreement. Under article 7 para. 5 any of the states concerned may, in the event that they are unable to agree on provisional arrangements pending agreement on compatible conservation and management measures, submit the dispute to a court or tribunal in accordance with the procedure for the settlement of disputes provided for in Part VIII of the Agreement. Moreover, Part VIII provides that the provisions relating to the settlement of disputes set out in Part XV of the LOS Convention apply *mutatis mutandis* to any dispute concerning the interpretation or application of the Fish Stocks Agreement.<sup>120</sup> This makes it, for instance, possible for states to submit disputes concerning articles 7 para. 1 lit.(a) and (b) to the compulsory dispute settlement mechanisms of the Agreement.

Part VIII of the Fish Stocks Agreement sets one very significant limitation on the applicability of procedures for the settlement of disputes. This concerns the provision of article 32 to the effect that article 297 para. 3 of the LOS Convention also applies to the Agreement.

Article 297 para. 3 lit.(a) of the LOS Convention provides that the coastal state shall not be obliged to accept the submission to dispute settlement of any dispute relating to its sovereign rights with respect to the living resources in the EEZ or their exercise, including its discretionary powers for determining the allowable catch.<sup>121</sup>

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<sup>120</sup> Fish Stocks Agreement, article 30.

<sup>121</sup> In a number of cases in which the coastal state has not accepted submission to compulsory dispute settlement there is a possibility to submit such disputes to conciliation under Annex V of the LOS Convention. One such case arises when it is alleged that a coastal state has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the EEZ is not seriously endangered (LOS Convention, article 297 para. 3 lit.(b)(i)). The competence of a conciliation commission under Annex V is limited by the requirement that it shall in no case substitute its discretion for that of the coastal state, *ibid.*, article 297 para. 3 lit.(c). Moreover, con-



This limitation on the possibilities for the compulsory settlement of disputes is especially relevant for article 7 of the Fish Stocks Agreement, which addresses the issue of compatibility of conservation and management measures for areas under national jurisdiction and the high seas.<sup>122</sup> Most disputes under article 7 supposedly will concern the question how compatibility of such measures has to be achieved. In this context, an evaluation of conservation and management measures established for the high seas cannot be carried out in isolation, but has to be performed in conjunction with an evaluation of the measures adopted for areas under national jurisdiction. This linkage between the two sets of measures indicates that the application of Part VIII to resolve disputes over the contents of conservation and management measures adopted for the high seas is not possible if the coastal state does not accept the submission to dispute settlement of the measures it has adopted for its area under national jurisdiction.<sup>123</sup> If the coastal state rejects the inclusion in the dispute of questions involving its sovereign

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ciliation excludes the indication of provisional measures upon request of one the parties, see also LOS Convention, article 290; Fish Stocks Agreement, article 31 para. 2.

<sup>122</sup> Some authors consider that dispute settlement should apply to all aspects of disputes over straddling fish stocks and highly migratory fish stocks, see A. Boyle, "Problems of Compulsory Jurisdiction and the Settlement of Disputes relating to Straddling Fish Stocks" *International Journal of Marine and Coastal Law* 14 (1999), 1 et seq., (25); and the literature cited in Orrego Vicuña, see note 5, 286, n. 91. Orrego Vicuña concludes his discussion of this issue by noting that:

If at any point in time the [Fish Stocks] Agreement is construed in a way amounting to the derogation of a coastal state's sovereign rights in the exclusive economic zone, either directly by means of the expansive interpretation of the principle of compatibility or indirectly by means of restricting the limitation that safeguards these rights in the context of dispute settlement, the end result will be the breakdown, not of the exclusive economic zone that has ample backing in the [LOS] Convention, state practice, and customary international law, but of the [Fish Stocks] Agreement itself, since it would have failed to maintain the essential balance that made possible its very existence, *ibid.*, 286-287.

<sup>123</sup> Cf. A. Boyle, "Settlement of Disputes relating to the Law of the Sea", *Thesaurus Acroasium* Vol. 26, 295 et seq., (328); D. Vignes, "Le Gommage de Différences entre Haute Mer et Zone Economique Exclusive Opéré par l'Accord du 4 Décembre 1995 sur les Stocks Chevauchants et de Grand Migrateurs: Vers l'Assimilation de la Haute Mer à la Zone de 200 Milles et la Disparition de la Liberté de la Pêche en Haute Mer", *Revue de l'Indemer* 4 (1996), 93 et seq., (108).

rights, it is not possible to rule on questions concerning measures established for the high seas, to the extent that they also require an evaluation of measures adopted by the coastal state for areas under its national jurisdiction.<sup>124</sup>

A court or tribunal also cannot take measures adopted by the coastal state into account as a factual element to determine compatible measures for the high seas. Such an approach would contradict the terms of article 7 para. 2 which require the compatibility of both sets of measures and not that high seas measures are compatible with coastal state measures.<sup>125</sup>

The exclusion of disputes relating to the coastal state's sovereign rights from compulsory procedures for the settlement of disputes under article 297 para. 3 lit.(a) of the LOS Convention is optional. As this article indicates, the coastal state "shall not be obliged" to accept submission of such disputes. This leaves the coastal state the possibility to decide whether or not in a particular case to accept submission of such a dispute, giving it an important leverage in negotiations over compatible conservation and management measures.<sup>126</sup> The coastal state's position in this respect is clear if it explicitly accepts or rejects the submission of a dispute involving its sovereign rights. However, in some cases the position of the coastal state may not be altogether clear. If the coastal state submits a question concerning compatible measures for the high seas to compulsory dispute settlement, the issue of measures adopted for areas under national jurisdiction may also be raised. The doctrine of *forum*

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<sup>124</sup> In certain circumstances it may be possible to look at measures established for the high seas without looking at the same time at measures adopted for areas under national jurisdiction. For instance, it can be alleged that specific measures established for the high sea always result in the non-sustainable conservation and management of stocks, independently of the question what measures are applicable to areas under national jurisdiction. However, in such cases the compatibility of measures is not at issue.

<sup>125</sup> In this connection it is relevant to note that in the *Diversion of Water from the Meuse Case* (Netherlands v. Belgium) the PCIJ held that: It would only be possible to agree with the contention of the Netherlands Agent that the Treaty had created a position of inequality between the contracting Parties if that were expressly indicated by the terms of the Treaty; but the text of article I is not sufficient to justify such an interpretation. The text of this article is general; it furnishes no evidence of any differentiation between the two Parties (PCIJ, Judgments, Orders and Advisory Opinions, Series A/B, No. 70, 20).

<sup>126</sup> See also McDorman, see note 112, 66–67.

*prorogatum* as developed by the PCIJ and the ICJ indicates that such measures can then become the subject of adjudication.<sup>127</sup> Under this doctrine, jurisdiction may be conferred by the tacit consent of the parties, deduced from their conduct in pleading to the merits of a claim (including a counter-claim) without raising the question of jurisdiction.<sup>128</sup>

In case of doubt about the existence of tacit consent, the assumption would seem to be that the coastal state has accepted the submission of such measures to dispute settlement. The formulation of article 297 para. 3 lit.(a) of the LOS Convention indicates that a coastal state has to indicate explicitly that it does not accept submission of any dispute relating to its sovereign rights. Silence on this point can in principle be construed as acceptance of submission.<sup>129</sup> Tacit consent will not be presumed in certain instances. A court will not exercise jurisdiction if the whole of a state's conduct in the case is consistent with an intent that the court should not exercise jurisdiction.<sup>130</sup>

Although article 297 para. 3 of the LOS Convention potentially limits the possibility for compulsory dispute settlement with respect to compatible conservation and management measures, any question concerning the interpretation of aspects of article 7 para. 2 not involving the coastal state's sovereign rights can be the subject of compulsory dispute settlement. This can include such important questions as how states are to balance the different considerations mentioned in this article's subparagraphs. There would seem to be a "grey area" concerning the reach of article 297 para. 3 of the LOS Convention in this respect. In considering how the factors mentioned in the subparagraphs of article 7 para. 2 have to be balanced, a court or tribunal may be called upon to give an interpretation of article 7 para. 2 lit.(a). There may be different views on the question at what point an interpretation of article 7 para. 2 lit.(a) involves issues falling under article 297 para. 3 lit.(a) of the LOS Convention.

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<sup>127</sup> For an overview of the development of this doctrine see Sh. Rosenne, *The Law and Practice of the International Court, 1920-1996*; 3rd edition, 1997, 696 et seq.

<sup>128</sup> *Ibid.*, 714. For the limitations on prorogated jurisdiction see *ibid.*, 716.

<sup>129</sup> However, as is noted by Rosenne there is a need for restraint in applying the doctrine of *forum prorogatum* because of the grave political consequences this may entail, *ibid.*, 711.

<sup>130</sup> *Ibid.*, 718.

The cross-reference to article 297 para. 3 of the LOS Convention in article 32 of the Agreement also raises the question to what extent it limits the possibilities for a court or tribunal to prescribe provisional measures pending agreement on compatible conservation and management measures. Article 32 is applicable to the prescription of provisional measures, indicating that, in this case, the same considerations apply as in case of disputes involving the establishment of compatible conservation and management measures.

The ICJ has held that it ought not to indicate provisional measures for the protection of any disputed rights other than those which might ultimately form the basis of a judgment in the exercise of the jurisdiction it has established to have *prima facie*.<sup>131</sup> There is no reason to suppose that the situation is different in this respect in the case of provisional measures pending agreement on compatible measures. If the court or tribunal has no jurisdiction to rule on measures adopted and applied by the coastal state for its area under national jurisdiction, it also cannot prescribe provisional measures for this area.

## VI. Conclusions

At the level of the basic legal framework, article 7 of the Fish Stocks Agreement can be seen as an attempt to leave the balance between the rights of coastal states and distant water fishing states as contained in the LOS Convention intact. The present analysis suggests that article 7 has been successful in this respect. What is more, it provides a tool which can be used by states and courts alike in addressing issues of compatibility, by listing a number of considerations to be taken into account. This approach, which gives pride of place to the circumstances of each specific fishery, should make it possible to go about the business of establishing conservation and management measures, without revisiting the basic legal framework of international fisheries management.

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<sup>131</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)); Further Requests for the Indication of Provisional Measures; Order of 13 September 1993, ICJ Reports 1993, 325 et seq., (342, para. 35); see also *Fisheries Jurisdiction Case* (United Kingdom v. Iceland), Interim Protection Order of 17 August 1972, ICJ Reports 1972, 12 et seq., (16, para. 21).

A further achievement of article 7, and the Fish Stocks Agreement in general, is that the significance of protecting the marine environment and living marine resources as a whole in conserving and managing such stocks is clearly recognized. This consideration, especially as it includes the obligation to apply the precautionary approach to the conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks, indicates that states have to be cautious in adopting compatible conservation and management measures. This can *inter alia* have an impact in situations where there is a difference over the division of the TAC. Sometimes, such differences have been resolved by establishing a TAC above the level recommended by scientists.<sup>132</sup> The need for caution under the Fish Stocks Agreement may make it more difficult to justify such compromises in certain cases.

The analysis of article 7 para. 2 points out that there does not exist *ipso facto* precedence for either measures applicable to areas under national jurisdiction or the high seas in determining compatible measures. The difference in formulation in article 7 para. 2 lit.(a) as compared to the other two subparagraphs should not be accorded too much weight. This is confirmed by the inclusion of similar obligations for coastal states in respect of high seas measures in two recent agreements on regional management mechanisms. The analysis also indicates that there has to be compatibility between the different sets of measures and not that one set of measures has to be made compatible with another set of measures.

The balancing of these measures always depends on the circumstances of the specific case, including the contents of the measures concerned. Article 7 para. 2 should result in according precedence to those measures that ensure the sustainable management and conservation over measures that do not. This does not resolve cases in which all existing measures in principle are sustainable, but are not compatible because states have, for instance, a preference for the exploitation of different stocks in a multi-species fishery. The factors listed in article 7 para. 2 should provide guidance for these cases.

Article 7 para. 2 defines the factors to be taken into account in determining compatible conservation and management measures in some detail. Existing conservation and management measures listed in lit.(a) to (c) of article 7 para. 2, in principle, provide the starting point for the

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<sup>132</sup> See e.g. S. Sen, "The Evolution of High-Seas Fisheries Management in the North-East Atlantic", *Ocean & Coastal Management* 35 (1997), 85 et seq., (90-91).

determination of compatible measures. If existing measures ensure the objective of article 7 para. 2 and reflect appropriately the other factors to be taken into account under article 7 para. 2, there is no need for their adjustment. This objective can be defined in considerable detail, with regard to other provisions of the Fish Stocks Agreement and international law in general.

In establishing how all factors listed in article 7 para. 2 can be balanced, the present analysis indicates the potential role of equity and the need to arrive at an equitable solution and the nature of the factors involved. The analysis shows that these mechanisms are complementary, as both indicate the need to take all the factors involved into account simultaneously, instead of focussing on one factor to the exclusion of others. The position of developing states, to some extent, forms an exception to the rule that all factors have to be considered equally, to the extent the Agreement recognizes the special position of these states.

Both equity and the factors listed in the subparagraphs of article 7 para. 2 reconfirm the importance of the circumstances of the particular case to establish the contents of compatible conservation and management measures. The importance of factual circumstances particular to different regions also follows from the nature of the Fish Stocks Agreement, which is of a global nature, but has to be implemented at the regional level.<sup>133</sup> Regional differences may lead to diverging outcomes in this respect. For instance, negotiations can be influenced by the structure of a regional organization or arrangement, the number of states participating in them and the characteristics of the stocks concerned (including the distinction between highly migratory stocks and straddling stocks), as is also illustrated by the experience of existing regional organizations and arrangements.

The use of equity in maritime boundary delimitation by the judiciary has been criticized on the ground that it has resulted in treating each delimitation as a *unicum*, detracting from the predictability of the law.<sup>134</sup> It seems that this criticism, to the extent it is justified, may be less relevant for article 7 para. 2 of the Fish Stocks Agreement. In the case of maritime boundary delimitation there has never been drawn up a closed list of the considerations to be taken into account in applying

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<sup>133</sup> See also "Statement made by the Chairman of the Conference at the Closing of the Fourth Session. Held on 26 August 1994", Doc. A/CONF.164/24 of 8 September 1994, reproduced in: Lévy, see note 11, 653, para. 5.

<sup>134</sup> See e.g. Weil, see note 49, 13, 160 and 213.

equity. On the other hand, article 7 para. 2 gives a closed list of factors to be taken into account in determining compatible conservation and management measures. Moreover, a court or tribunal that has to rule on article 7 para. 2 can take advantage of the experience that has been gained in the context of maritime boundary delimitation in striking a balance between the predictability of the law and the particulars of the individual case.<sup>135</sup>

If equity were to be applied in the interpretation of article 7 para. 2, it can be expected that the general principles outlined above will be given further content. This can also be of assistance to states which have to balance the factors mentioned in article 7 para. 2.

The practice of fisheries management organizations and arrangements shows that it can provide a significant contribution to the interpretation of the compatibility provision of the Fish Stocks Agreement. At the same time, the Galapagos Agreement in particular, points out that the compromise on this point contained in the Fish Stocks Agreement is not generally accepted. Practice in other regional organizations and arrangements also indicates the continued differences in views over the division of rights between coastal states and high seas fishing states. Nonetheless, this practice also indicates that these differences need not obstruct the agreement on conservation and management measures, taking into account similar considerations as contained in article 7 of the Fish Stocks Agreement. The discussion of the application of the factors contained in article 7 to the individual case can contribute significantly to an understanding of that article's practical implications. At the same time, the specificity of each case makes it difficult to generalize such findings.

The analysis of the practice of organizations and arrangements indicates the existence of significant differences in their management regime. It has been observed that this freedom of action may result in a legal regime of atomized legal decisions at the level of organizations and arrangements.<sup>136</sup>

The establishment of provisional arrangements and measures to a large extent requires the taking into account of similar considerations as compatible conservation and management measures. This suggests that if states cannot agree on the latter, they will have also serious difficulty to agree on the former. The significance provisional arrangements or

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<sup>135</sup> Cf. O. Schachter, *International Law in Theory and Practice*, 1991, 59–60.

<sup>136</sup> Örebach, see note 23, 128–129.

measures can take on in practice, notwithstanding the saving clause in article 7 para. 6, may be another factor impeding their adoption. It may be difficult to amend or revoke provisional arrangements once they have been established, making states hesitant to enter into them.

The possibility for a court to indicate provisional measures is limited if the coastal state does not accept the submission of the part of the dispute related to the measures applicable to its area under national jurisdiction. This gives the coastal state some leverage in negotiations over compatible conservation and management measures.

The fact that provisional measures under article 7 para. 5 can be requested outside the framework of a dispute which has been submitted for compulsory settlement, may make a request for such measures in certain instances an attractive alternative to submitting a dispute on compatible measures. As is also pointed out by the Order of the ITLOS in the recent *Southern Bluefin Tuna Cases*, the views of the parties remain the main consideration in establishing what provisional measures to prescribe. This is not changed by the reference to considerations other than the rights of the parties in Part VIII of the Agreement.

The possibility for the compulsory settlement of disputes related to the establishment of compatible conservation and management measures is limited by the cross-reference to article 297 para. 3 of the LOS Convention in article 32 of the Fish Stocks Agreement. If the coastal state uses its power under this article to exclude measures established by it under article 61 of the LOS Convention from compulsory dispute settlement, the close link between such measures and compatible measures for the high seas also excludes any ruling on the latter. Although this limitation on compulsory dispute settlement might be regretted, it is explained by the need to preserve the legal framework contained in the LOS Convention as a necessary prerequisite for reaching agreement on the Fish Stocks Agreement.

Even if all disputes within the scope of article 297 para. 3 were to be excluded, there still remains significant scope to submit questions regarding the interpretation of article 7 to dispute settlement. This concerns, for instance, how specific terms employed in article 7 have to be interpreted or how the balancing of the factors mentioned in article 7 para. 2 has to be achieved. At times, this may give rise to a dispute over the applicability or not of article 297 para. 3 of the Convention.

The impact of the judiciary on the further elaboration of article 7 para. 2 may depend on its willingness to uphold those measures which result in the sustainable use of the resources involved, instead of seeking



a compromise between the states involved in a dispute.<sup>137</sup> If the former approach is adopted, coastal states having an effective management and conservation policy may more easily submit disputes involving their sovereign rights to compulsory dispute settlement.<sup>138</sup> In any case, the discretionary power of the coastal state under article 32 of the Agreement gives it an important leverage in negotiations over the establishment of compatible measures, especially if measures for its area under national jurisdiction ensure sustainable conservation and management of the stocks involved and those for the high seas do not.

To sum up, the analysis of article 7 para. 2 indicates that it offers, both to states and the judiciary, more detailed rules for determining compatible measures than previously existed, without upsetting the delicate balance between coastal state rights and rights of states fishing on the high seas. The analysis also shows that it is possible to clarify how the compatibility of conservation and management measures for areas under national jurisdiction and the high seas is to be achieved, balancing the factors listed in article 7 para. 2. If this process gathers momentum, it can significantly contribute to the attainment of long-term sustainable conservation and management of straddling fish stocks and highly migratory fish stocks in their entirety.

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<sup>137</sup> Cf. D.W. Bowett "The Conduct of International Litigation", in: J.P. Gardner/ C. Wikremasinghe (eds), *The International Court of Justice: Process, Practice and Procedure*, 1997, 1 et seq., (11).

<sup>138</sup> Even if states will not easily submit their disputes to the procedures for compulsory dispute settlement, see also McDorman, see note 112, 59–60, the existence of these mechanisms may have an impact on the willingness of states to reach agreement on compatible measures, see Balton, see note 11, 137.