

**THE IMPACT OF ARTICLE 7 (2) OF
THE FISH STOCKS AGREEMENT
ON THE FORMULATION OF
CONSERVATION & MANAGEMENT
MEASURES FOR STRADDLING &
HIGHLY MIGRATORY FISH
STOCKS**

by

Alex G. Oude Elferink

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The Impact of Article 7(2) of the Fish Stocks Agreement on the Formulation of Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks

by *Alex G. Oude Elferink**

Netherlands Institute for the Law of the Sea - Utrecht University
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1. Introduction

Article 7(2) of the 1995 Fish Stocks Agreement¹ 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(2) lists the factors to be taken into account in the determination of such measures.² Article 7(2) is one of the central provisions of the Fish Stocks Agreement. It is intended to provide guidance to coastal states and states fishing on the high seas, which have to reach agreement on measures to ensure the sustainable conservation and management of straddling fish stocks and highly migratory fish stocks. The absence of such guidance in the existing international legal framework has been one of the factors contributing to disputes between coastal states and states fishing on the high seas over the conservation and management of these stocks.

Although article 7(2) indicates more specific guidelines to states than previous global instruments addressing this issue,³ its application can be expected to raise complex issues of interpretation. Article 7(2) 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 paper analyzes these factors to be taken into account in determining compatible conservation and management. It will also 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 articles 7(2)(a) to (f) also can provide guidance in this respect.

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¹ 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 (*Law of the Sea Bulletin* No. 29, p. 25) (not yet entered into force).

² The issue of compatible conservation and management measures is addressed in more general terms in the FAO Code of Conduct for Responsible Fisheries of 31 October 1995 (Code of Conduct) (*International Fisheries; Instruments with an Index* (Division for Ocean Affairs and the Law of the Sea; Office of Legal Affairs, United Nations, New York, 1998, p. 56), articles 6.12 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.

³ The most important instrument in this respect is the United Nations Convention on the Law of the Sea of 10 December 1982 (LOS Convention) (entered into force on 16 November 1994) (21 (1982) *International Legal Materials* (ILM), p. 1261; *United Nations Treaty Series* (UNTS), Vol. 1833, p. 3). Relevant provisions are contained in articles 61, 63, 64 and 116 to 119 of the Convention.

An analysis of article 7(2) has to take into account its linkage to other provisions of the Fish Stocks Agreement and provisions of the LOS Convention. Apart from the other paragraphs of article 7, *inter alia* articles 5 and 6 of the Fish Stocks Agreement and articles 61, 63, 64, 116 to 119 and 297 of the LOS Convention are relevant in this context.⁴

Although states under article 7(2) 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 agreement on compatible measures, article 7(5) provides for the possibility of provisional arrangements or measures. Article 7(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 this relationship and its possible implications.

States can invoke the procedures for the settlement of disputes provided for in Part VIII of the Agreement when they cannot agree on compatible measures or provisional arrangements.⁵ The possibility of assessing all the aspects of disputes concerning such measures and arrangements is limited by article 32 of the Fish Stocks Agreement, which stipulates that article 297(3) of the LOS Convention also applies to the Agreement. Article 297(3)(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 their exercise. As the exercise of such sovereign rights by the coastal state is one of the key elements of article 7, article 297(3)(a) of the LOS Convention seems to restrict the possibilities for compulsory settlement of disputes concerning compatible measures or the indication of provisional measures significantly.

The starting point of the present analysis will be the text of article 7(2) of the Fish Stocks Agreement, applying the rules of interpretation contained in the Vienna Convention on the Law of Treaties.⁶ The materials that can be used to interpret article 7(2) may not be always be sufficient to resolve all the major questions concerning its interpretation. The *travaux préparatoires* of the Fish Stocks Agreement only provide scant material for the

⁴ Part III of the Fish Stocks Agreement on mechanisms for international cooperation will not be discussed in detail in this paper, although it is acknowledged that the institutional framework for regional cooperation is of major importance for the process of establishing compatible conservation and management measures (see also *e.g.* P. Orebach, K. Sigurjonsson and T. McDorman, "The United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement", 13 (1998) *International Journal of Marine and Coastal Law*, pp. 119-141; and *infra* the text at footnotes 81 and 82). Discussion of this issue goes, however, beyond the scope of the present paper.

⁵ Fish Stocks Agreement, articles 7(4) and 7(5).

⁶ See Vienna Convention on the Law of the Treaties of the of 23 May 1969 (entered into force on 27 January 1980) (UNTS, Vol. 1155, p. 331), articles 31 and 32. These articles 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 (*International Court of Justice; Reports of Judgments, Advisory Opinions and Orders*) (ICJ Reports) 1994 p. 6, at pp. 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 (*ibid.* 1995, p. 6, at p. 18, para. 33).

interpretation of its provisions.⁷ There is no official record of the negotiations at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Conference), which adopted the Agreement, although documents issued at the Conference are available.⁸ Finally, there is limited practice of parties to the Fish Stocks Agreement, which has yet to enter into force, to be used in connection with the interpretation of its provisions.⁹ To circumvent these difficulties, this paper will also look at the interpretation which has been given to specific terms in other contexts.

Paragraph 2 of this paper discusses different aspects of article 7(2), including the definition of the term compatible, the factors mentioned in subparagraphs (a) to (f) and possible considerations for balancing these factors. Paragraph 3 will shortly discuss the implications of the duty to cooperate for the purpose of achieving compatible measures, elaborated in article 7(3) of the Fish Stocks Agreement. Paragraph 4 will assess the aspects of provisional arrangements and measures indicated above, and paragraph 5, the issues raised by the Agreement's dispute settlement procedures in the context of article 7.

The question how article 7(2) is linked to other provisions of the Fish Stocks Agreement and the LOS Convention provisions on straddling fish stocks and highly migratory fish stocks will be raised where appropriate in these paragraphs. A final paragraph reviews the main findings of the paper and presents conclusions. The present analysis should make it possible to provide some indications concerning the possible impact of article 7(2) of the Fish Stocks Agreement on the formulation of conservation and management measures for straddling fish stocks and highly migratory fish stocks.

Although it is possible to provide quite detailed answers to the above-mentioned questions, reading too much detail into article 7(2) should be avoided. As has been noted by Ambassador Satya Nandan, the Chairman of the Fish Stocks Conference, the Fish Stocks Agreement is a globally agreed framework for regional cooperation in the field of fisheries conservation and management, consistent with the situation prevailing in each region.¹⁰ In consequence, the Agreement had to be formulated at a sufficient level of abstraction to be equally applicable to all regional situations.¹¹ Certain issues of interpretation can only be decided in applying the Agreement in the specific circumstances of each particular region.

⁷ Although the *travaux préparatoires* of a treaty in general are of secondary importance for its interpretation (see Vienna Convention on the Law of Treaties, article 32), additional care should be taken if there is only limited information on the contents of the negotiations leading up to its conclusion (see also 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, pp. 21-22, para. 41); *Affaire concernant le Filetage à l'Intérieur du Golfe du Saint-Laurent entre le Canada et la France* (*United Nations Reports of International Arbitral Awards* (UNRIAA), Vol. XIX, p. 225, at p. 261, para. 57)).

⁸ A useful summary of the Conference proceedings is provided by Volume 7 of the *Earth Negotiations Bulletin* (ENB) prepared by the International Institute for Sustainable Development, which is available at URL <http://www.iisd.ca/linkages/vol07/0700000e.html> (last accessed 22 March 1999).

⁹ For the relevance of such subsequent practice see Vienna Convention on the Law of Treaties, article 31(3)(b).

¹⁰ See '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 J. Lévy, G.G. Schram, *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks; Selected Documents* (Martinus Nijhoff Publishers, The Hague, 1996, p. 653), para. 5.

¹¹ The Agreement 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. These articles hardly develop on the legal framework the Agreement

2. The Determination of Compatible Conservation and Management Measures

2.1 Introduction

Article 7(2) addresses the achievement of compatible conservation and management measures for areas under national jurisdiction and the high seas for straddling fish stocks and highly migratory fish stocks. To this end, it charges coastal states and states fishing on the high seas to cooperate and indicates the factors to be taken into consideration in determining such measures. This paragraph starts with a discussion of the meaning of the term 'compatible' in article 7(2) of the Agreement. Next, each of the factors to be taken into account in the determination of compatible conservation and management measures is discussed separately in paragraph 2.3. Finally, it is considered how a balancing of these factors can be achieved.

2.2 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.¹² 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(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. To establish how to achieve compatibility in a particular case further guidance is required. Article 7(2) provides this guidance for establishing 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(2) defines the objective of the compatibility requirement by providing that [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.¹³

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", 26 (1996) *Ocean and Coastal Development*, pp. 51-69, at pp. 64-65; E. Hey, "Global Fisheries Regulations in the First Half of the 1990s", 11(1996) *International Journal of Marine and Coastal Law*, pp. 459-490, at pp. 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), Chapter VII.

¹² See e.g. the use of the term 'compatible' in articles 18(4) and 44(1) of the Fish Stocks Agreement and articles 56, 58, 240 and 266 of the LOS Convention.

¹³ 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, op. cit.*, p. 69, at pp. 69-70); D. Balton, "Strengthening the Law of the Sea: The New Agreement on Straddling

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 articles 2, 5 and 6 of the Fish Stocks Agreement. Article 2 defines the objective of the Agreement as 'to ensure long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through the 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.¹⁴ These detailed provisions can contribute significantly to assessing whether compatible measures ensure the objective of conservation and management of stocks of article 7(2).

However, the definition of the maximum sustainable yield in article 5(b) of the Fish Stocks Agreement, which refers to this yield 'as qualified by the relevant environmental and economic factors, including the special requirements of developing States',¹⁵ indicates that states may have different views on the considerations to be taken into account in assessing whether this objective is met.¹⁶ For instance, in a multi-species fisheries, larger harvests of one species may require lesser harvests of other species. This may become a problem 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 articles 7(2)(d) and (e).¹⁷ 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(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.¹⁸

Fish Stocks and Highly Migratory Fish Stocks", 27 (1996) *Ocean Development and International Law*, pp. 125-151, at p. 137). However, the mechanisms to be established for achieving the implementation of this objective were controversial.

¹⁴ 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 articles 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.

¹⁵ See also article 61(3) and 119(1)(a) of the LOS Convention.

¹⁶ See also L. Juda, "The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique" 28 (1997) *Ocean Development & International Law*, pp. 147-166, at pp. 152-154; O. Thébaud, "Transboundary Marine Fisheries Management. Recent Developments and Elements of Analysis", 21 (1997) *Marine Policy*, pp. 237-253.

¹⁷ See also *infra*.

¹⁸ 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,

2.3 The Factors to Be Taken into Account in the Determination of Compatible Measures

Subparagraphs (a) to (f) of article 7(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 subparagraph (a) and subparagraph (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 subparagraph (a) and subparagraph (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.

2.3.1 Existing Measures

Subparagraphs (a), (b) and (c) of article 7(2) require that in determining compatible conservation and management measures states shall take into account existing conservation and management measures. Subparagraph (a) requires states to take into account the conservation and management 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; subparagraph (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 subparagraph (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.

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' (subparagraph (a)) or established and applied 'in accordance with the [LOS] Convention' (subparagraphs (b) and c)). This implies that both the procedural and substantive requirements of the LOS

reproduced in J. Lévy, G.G. Schram, *United Nations Conference, op. cit.*, p. 621), article 7(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.*, p. 671), article 7(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 ENB, Vol. 7, issue 47); see also A. Tahindro, "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" 28 (1997) *Ocean Development and International Law*, pp. 1-58, at p. 15, who suggests that 'in their entirety' refers to the stocks concerned 'throughout their geographical range'.

Convention in this respect have to be met. In case of subparagraphs (b) and (c) the relevant provisions of the LOS Convention are articles 63(2), 64 and 116 to 119.¹⁹

Subparagraph (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 subparagraph (a) raises the question how they are related. An interpretation of subparagraph (a) of article 7(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 also 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.²⁰ If this were the case, only high seas measures can be adapted in determining compatible measures.

If subparagraph 7(2)(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.²¹ Article 7(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.²²

¹⁹ For an analysis of these article see *e.g.* S. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982; A Commentary*, Vol. II (Martinus Nijhoff Publishers, Dordrecht, 1993), pp. 639-658; *ibid.*, Vol. III (Martinus Nijhoff Publishers, The Hague, 1995), pp. 279-313; *The Law of the Sea; The Regime for High-Sea Fisheries* (Division for Ocean Affairs and the Law of the Sea; Office of Legal Affairs, United Nations, New York, 1992), pp. 6-12.

²⁰ The words 'such measures' in article 7(2)(a) refers to the conservation and management measures adopted and applied by the coastal state.

²¹ The drafting history of article 7(2)(a) may be considered to provide some support for the interpretation that the cross-reference to coastal states measures in article 7(2)(a) does not necessarily imply identical content. An earlier draft of this subparagraph read:

(a) 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 *ibid.*, p. 671).

According to the Chairman of the Conference the changes made by the Secretariat to this version of article 7(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 of the national measures mentioned in the two parts of article 7(2)(a) as article 7(2)(a) of the Agreement.

²² See *supra*; see also P. Davies and C. Redgwell, "The International Legal Regulation of Straddling Fish Stocks", 67 (1997) *British Yearbook of International Law*, pp. 199-274, at pp. 262-263 and 269; A. Tahindro, "Conservation and Management of Transboundary Fish Stocks", *op. cit.*, p. 17.

States, in determining compatible measures, taking into account the factors set out in subparagraphs (a) to (f) of article 7(2), may reach agreement that the objective of article 7(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 sovereign rights of the coastal state in its area under national jurisdiction.²³

If it is accepted that article 7(2)(a) does not exclude the adjustment of measures established by the coastal state, without prejudice to the coastal state's sovereign rights, 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. Measures for the high seas may have some negative impact on coastal state measures, but all the same 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 hardly can be 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 both subparagraphs (b) and (c) of article 7(2). The absence of this requirement can be explained by the fact that article 7(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.²⁴

Too much weight should not be attached to the above-mentioned difference in formulation in subparagraphs (a) and (b) of article 7(2).²⁵ In the case of subparagraph (b) the

²³ As is noted by Orrego Vicuña, citing Ambassador Nandan:

De la redacción [del párrafo 2 del artículo 7] se deduce claramente que no se trata de que las medidas relativas a la alta mar se apliquen a las zonas sometidas a jurisdicción nacional, ni que las medidas de la legislación interna sean aplicables a la alta mar, sino tan solo de que ambas, adoptadas con arreglo a la autoridad jurisdiccional correspondiente, asegurarán la compatibilidad debido a que se basan en normas de ordenación similares que no alteren el equilibrio del sistema en su conjunto (F. Orrego Vicuña, "El Régimen de la Pesca en Alta Mar y los Derechos e Intereses del Estado Ribereño", paper presented at the conference *Prospettive del Diritto del Mare all'Alba del XXI Secolo*, Istituto Italo Latino Americano, Rome, 12-13 November 1998, pp. 26-27).

²⁴ Orrego Vicuña notes that

[p]recisamente porque en la zona económica exclusiva el Estado ribereño es la única autoridad competente, el Acuerdo solo se ocupa de asegurar que las medidas que se adopten para la alta mar no menoscaben la eficacia de las que haya adoptado el Estado ribereño y no la inversa (Orrego Vicuña, "El Régimen de la Pesca", *op. cit.*, p. 36).

²⁵ For the argument that this difference is significant see G. Vigneron, "Compliance and International Environmental Agreements: A Case Study of the 1995 United Nations Straddling Fish Stocks Agreement", 10 (1998) *Georgetown International Environmental Law Review*, pp. 581-623, at pp. 598-599.

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.²⁶

A final question in respect of existing measures as listed in subparagraphs 7(2)(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(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(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.

These two stages logically are sequential, but, due to the fact that they involve the same actors, it may in many cases not be possible to distinguish them in practice. In fact, it would seem that under article 7(1), which in its two subparagraphs copies the obligations of article 63(2) and 64(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(1). For highly migratory fish stocks, reference is made to conservation and optimum utilization within and beyond areas of national jurisdiction.

Measures agreed upon under article 7(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 articles 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(2).

The inclusion of a separate paragraph on the establishment of 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(1) reaffirms the respective rights of coastal states and states fishing on the high seas and the continued significance of articles 63(2) and 64(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(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.²⁷

²⁶ Cf. Fish Stocks Agreement, article 34.

²⁷ Cf. ENB Vol. 7, issue 41, part II.

2.3.2 The Factual Circumstances Listed in Articles 7(2)(d) and (e)

Subparagraphs (d) and (e) of article 7(2) list a number of factual circumstances which states shall take into account in determining compatible conservation and management measures. Subparagraph (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. Other biological characteristics of the stocks concerned include a stock's diffusion, and ontogenetic and seasonal migration.²⁸ To the extent that these other biological characteristics indicate a 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 subparagraph (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 simultaneously, 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.²⁹ Although such a comparative perspective is not explicitly included, it is implicit in the structure of this part of subparagraph (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.

Subparagraph (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.

Subparagraph 7(2)(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 articles 11 and 24 of the Fish Stocks Agreement. Articles 11(1)(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 for new participants in a subregional or regional fisheries management arrangement, states shall take into account:

²⁸ See 'Some High Seas Aspects relating to Straddling Fish Stocks and Highly Migratory Fish Stocks' (Doc A/CONF.164/INF/4 of 15 June 1993, reproduced in J. Lévy, G.G. Schram, *United Nations Conference, op. cit.*, p. 377), Annex V.

²⁹ Both the 'other biological characteristics' of the stocks concerned and these other factors listed under subparagraph (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 former primarily are intended to provide guidance in dividing the total allowable catch between the interested states.

(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(2)(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 International Court of Justice (ICJ) in the *Fisheries Jurisdiction* cases between the United Kingdom and Iceland and the Federal Republic of Germany and Iceland.³⁰ 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.³¹ On the other hand, the Court found that dependence of sections of the British fishing industry on the fisheries concerned also was of relevance.³²

³⁰ Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974 (ICJ Reports 1974, p. 3); Fisheries Jurisdiction case (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974 (*ibid.*, p. 175).

³¹ *Ibid.*, p. 34, para. 79 and p. 206, para. 77.

³² *Ibid.*, pp. 28-29, paras 64-66 and p. 34, para. 79; for the same conclusion with respect to the Federal Republic see *ibid.*, p. 206, para. 77. Dependence on fisheries also figured in two cases concerning maritime delimitation before the ICJ. In the Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (*Gulf of Maine* case), Judgment of 12 October 1984 (ICJ Reports 1984, p. 246), the Chamber recognized the potential significance of the livelihood and economic well-being of the population of the countries concerned for the case (*ibid.*, p. 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 (*ibid.* 1993, p. 38) the Court took into account the geographical distribution of certain fisheries resources to delimit part of the 200 nautical mile fishery zone boundary between Greenland and Jan Mayen (*ibid.*, p. 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.*, p. 71, para. 74). In the Case concerning the Delimitation of

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 have to use more resources to address 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(2)(e) another consideration can be whether alternative fishing grounds are available for the vessels involved in the fisheries.³³ Whether this is the case may depend on the possibility of access to other fisheries and whether the characteristics of the vessels make the participation in such fisheries viable.

The factor of dependence may in certain instances hinder the participation of re-flagged vessels in a fishery. If a vessel is re-flagged to a state with which it has no links, this state would be hard pressed to argue its dependence on the fishery.

2.3.3 The Impact on Living Marine Resources

Subparagraph (f) of article 7(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’.³⁴ Subparagraph (f) provides a benchmark against which to evaluate any system of compatible management and conservation measures. Any such system which does not meet the requirement set out in subparagraph (f) would require amendment to guarantee that no harmful impact on the living marine resources as a whole results.

Subparagraph (f) reconfirms that in conserving and managing fisheries resources states have an obligation to protect living marine resources.³⁵ The reference to living marine resources *as a whole* indicates that not only no harmful impact should result on individual species but also that no such impact should result on the ecosystems of which they form a part.³⁶

Assessing whether specific compatible conservation and management measures have a harmful impact on the living marine resources as a whole may be complicated by limited

Maritime Areas between Canada and the French Republic the Court of Arbitration defined dependence by reference to coastal communities (31 (1992) ILM, p. 1149, at p. 1173, paras 83 *et seq.*).

³³ See also Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, ICJ Reports 1974, p. 28, para. 64.

³⁴ A concern for the marine environment is expressed in the 7th preambular 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(g) of the Agreement enjoins states to protect biodiversity in the marine environment and article 6(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.

³⁵ See also article 5(e) of the Fish Stocks Agreement.

³⁶ See also *supra* footnote 34.

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.³⁷ Where the status of such stocks is of concern states shall subject them to enhanced monitoring.³⁸ Secondly, Article 6(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(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(2)(f) have considerable consequences for the formulation of compatible conservation and management measures.

The need to prevent a harmful impact on living marine resources under article 7(2)(f) may influence the content of conservation and management measures in two ways. A harmful impact may result from specific conservation and management measures. 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 on this point can be found in article 5(f) of the Agreement, which lays down a number of specific measures to minimize pollution and protect living marine resources. The FAO Code of Conduct contains more detailed provisions in this respect.³⁹ Secondly, catch and/or effort level for the target species may have to be adjusted if it is found that these levels as such have a harmful impact on the living marine resources as a whole.

2.4 Considerations for Balancing the Factors Mentioned in Article 7(2)

Article 7(2) does not indicate 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(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(2)(a)) and that no harmful impact on the living marine resources as a whole results (article 7(2)(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(2) in different ways.⁴⁰

Two considerations seem to be relevant to balance the factors to be taken into account in determining compatible conservation and management measures. The balancing process

³⁷ Fish Stocks Agreement, article 5(d); see also article 6(3)(d).

³⁸ *Ibid.*, article 6(5).

³⁹ Code of Conduct, articles 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, Rome, 1997).

⁴⁰ See also L. Juda, "The 1995 United Nations Agreement", *op. cit.*, pp. 154-155; A. Tahindro, "Conservation and Management of Transboundary Fish Stocks", *op. cit.*, p. 17 and *supra* text at notes 16 and 17.

can be viewed as a process requiring the application of equity in the light of the need to arrive at an equitable solution. Secondly, the nature of the factors mentioned in the subparagraphs of article 7(2) also gives some indication how they have to be balanced.

2.4.1 Equity

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(2).⁴¹ First of all, the structure of article 7(2) indicates the possibility to take into account these considerations. Article 7(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.⁴²

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 in one instance by the ICJ. In the *Fisheries Jurisdiction* cases the ICJ noted 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.⁴³

⁴¹ Whether equity and need to arrive at an equitable solution will have a significant impact in practice may be open to some doubt. Their elaboration has been carried out primarily by the judiciary 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* paragraph 5). Even if this will be the case, 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, p. 290, paras 80-81 and p. 299, para. 111; *Affaire de la Délimitation de la Frontière Maritime entre la Guinée et la Guinée-Bissau*; Sentence du 14 Février 1985 (UNRIAA Vol. XIX, pp. 181-182, para. 88).

⁴² 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 (UNTS Vol. 516, p. 205) (entered into force on 10 September 1964), article 12; Convention on the Continental Shelf of 29 April 1958 (UNTS Vol. 499, p. 312) (entered into force on 10 June 1964), article 6). For an overview of the relevant case law see e.g. L. Lucchini and M. Vøelckel, *Droit de la Mer*, Tome 2, Vol. I (Pedone, Paris, 1996), pp. 207-316; P. Weil, *The Law of Maritime Delimitation – Reflections* (Grotius Publications, Cambridge, 1989), pp. 191-276; R.Y. Jennings and A. Watts (eds), *Oppenheim's International Law, 9th edition* (Longman, Harlow, 1992), pp. 776-782 and 804-807; *International Boundary Cases: The Continental Shelf* (Grotius Publications, Cambridge, 1992), pp. 10-55.

⁴³ *Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland)*, Merits, Judgment of 25 July 1974, ICJ Reports 1974, p. 30, para. 69; *Fisheries Jurisdiction case (Federal Republic of Germany v. Iceland)*, Merits, Judgment of 25 July 1974, *ibid.*, p. 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

Although the legal framework existing in 1974 differs significantly from the legal regime contained in the LOS Convention and the Fish Stocks Agreement, the similarities are also apparent. This concerns 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.⁴⁴ 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(2) of the Fish Stocks Agreement.

The following discussion of equity and the need to arrive at an equitable solution is based on the 1974 *Fisheries Jurisdiction* cases and the case law on the delimitation of maritime boundaries between states. 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.⁴⁵

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'.⁴⁶ In the *Libya/Malta Continental Shelf* case the ICJ addressed the implications of this proposition, noting 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.⁴⁷

States enshrined in Article 2 of the Geneva Convention on the High Seas of 1958 requires Iceland and the United Kingdom to have due regard to each other's interests, and to the interests of other States, in those resources (*ibid.*, p. 29, para. 68).

⁴⁴ See e.g. LOS Convention, 4th preambular consideration, articles 59, 69, 70, 74, 76, 82, 83, 140, 155, 266 and 269.

⁴⁵ See also North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/the Netherlands) (*North Sea Continental Shelf* cases), Judgment of 20 February 1969, ICJ Reports 1969, p. 3, at p. 48, para. 88; Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, *ibid.* 1974, p. 33, para. 78; Fisheries Jurisdiction case (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, *ibid.*, p. 202, para. 69.

⁴⁶ Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, ICJ Reports 1974, p. 33, para. 78; Fisheries Jurisdiction case (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, *ibid.*, p. 202, para. 69.

⁴⁷ Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta) (*Libya/Malta Continental Shelf* case), Judgment of 3 June 1985, *ibid.* 1985, p. 13, at p. 40, para. 48.

In the context of article 7(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 noted that this implies that 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.⁴⁸

The question how to balance different considerations has been addressed by the ICJ in the *North Sea Continental Shelf* cases. The Court noted 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.⁴⁹

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.⁵⁰

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

2.4.2 The Characteristics of the Factors Listed in Article 7(2)

A second possibility to assess how to balance the factors to be taken into account in determining compatible conservation and management measures is to look more closely at the characteristics of each of them. A distinction can be made between subparagraphs (a) to (c), which concern existing management measures, and subparagraphs (d) and (e), which concern factual circumstances related to the stocks concerned and the coastal states and the states fishing on the high seas.

⁴⁸ ICJ Reports 1969, pp. 49-50, para. 91.

⁴⁹ *Ibid.*, p. 50, para. 93; see also *Gulf of Maine* case, *ibid.* 1984, p. 313, para. 158.

⁵⁰ Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, *ibid.*, p. 32, para.73; see also Fisheries Jurisdiction case (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, *ibid.* p. 201, para. 65.

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(2) and appropriately take into account the factors mentioned in subparagraphs (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(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 subparagraphs (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(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(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 an adjustment still would not realize the objectives of article 7(2) sharpening of all measures would be required.

If existing measures do not take the factors mentioned in subparagraphs (d) and (e) of article 7(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 subparagraphs (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 subparagraph (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 and the share of the states involved in the fisheries.

The requirement of subparagraph (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 the total allowable catch. This respective dependence can be a consideration to adjust the division of the total allowable catch 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 article 24(2) referred to above, article 24(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.

If conservation and management measures as defined in subparagraphs (a) to (c) of article 7(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(2). In this case, measures adopted by the states fishing on the high seas without involvement of the coastal state would likely become relevant for the determination of compatible conservation and management measures. In the absence of measures under subparagraphs (b) and (c) coastal state measures would gain importance in establishing compatible measures. However, in this case it also would seem relevant to inquire into the reasons for the absence of measures under subparagraphs (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.

3. The Duty to Cooperate

Article 7(2) provides that coastal states and states fishing on the high seas ‘have a duty to cooperate for the purpose of achieving compatible measures’ in respect of straddling fish stocks and highly migratory fish stocks. This duty to cooperate is elaborated in paragraph 3 of article 7, which provides that

In giving effect to their duty to cooperate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.

The phrase ‘shall make every effort to agree’ indicates that there exists an obligation for the states involved to negotiate in good faith on compatible conservation and management measures.⁵¹ The implications of the duty to cooperate have been elaborated by the ICJ in the *North Sea Continental Shelf* cases and the 1974 *Fisheries Jurisdiction* cases. In the *North Sea Continental Shelf* cases the Court found that this duty entailed that

the parties are under an obligation to enter into the negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.⁵²

In the context of article 7(2), this pronouncement would seem to imply that there should not be a formal process of negotiation as a prior condition for the automatic application of a particular set of existing measures.

In the 1974 *Fisheries Jurisdiction* cases the Court indicated that in the fresh negotiations which were to take place following its Judgments the task before the parties was

⁵¹ The duty to cooperate is also included in articles 63, 64 and 118 of the LOS Convention.

⁵² ICJ Reports 1969, p. 47, para. 85.

‘to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other’.⁵³

The duty to cooperate does not involve the duty to agree on compatible measures.⁵⁴ This is also implicit in article 7(4) of the Fish Stocks Agreement, which provides that states can invoke the procedures for the settlement of disputes of Part VIII if no agreement on compatible measures can be reached within a reasonable period of time.

What constitutes a ‘reasonable period of time’ under article 7(3) depends on the circumstances of the specific case. If the condition of the stocks concerned is critical and their sustainable conservation and management depends on the expeditious determination of compatible measures, a ‘reasonable’ period of time will be relatively short.

An innovation of article 7(3) is its explicit reference to a time limit, and consequences if this limit is not met.⁵⁵ This can be an additional incentive for states to agree on compatible conservation and management measures.⁵⁶

4. Provisional Arrangements and Measures

During the negotiations on the article on compatible conservation and management measures it was recognized that in the absence of agreement over such measures there existed a need for provisional arrangements. Articles 7(5) and 7(6) of the Fish Stocks Agreement address this issue. Paragraph 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 accordance with the procedures for the settlement of disputes provided for in Part VIII of the Agreement, to obtain provisional measures.

Article 7(6) prescribes the conditions 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.

⁵³ Fisheries Jurisdiction case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, *ibid.* 1974, p. 33, para. 78; Fisheries Jurisdiction case (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, *ibid.*, p. 202, para. 69.

⁵⁴ See also W. Burke, *The New International Law of Fisheries; UNCLOS 1982 and Beyond* (Clarendon Press, Oxford, 1994), p. 125; R. Lagoni, “Interim Measures Pending Maritime Delimitation Agreements”, 78 (1984) *American Journal of International Law*, pp. 345-368, at p. 354; S. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982; A Commentary*, Vol. II, *op. cit.*, p. 646; J. de Yturriaga, *The International Regime of Fisheries; From UNCLOS 1982 to the Presential Sea* (Martinus Nijhoff Publishers, The Hague, 1997), p. 160; *The Law of the Sea; The Regime for High-Seas Fisheries, op. cit.*, p. 25.

⁵⁵ See also *The Law of the Sea; The Regime for High-Seas Fisheries, op. cit.*, p. 26.

⁵⁶ See also T. McDorman, “The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention”, 25 (1997) *Canadian Yearbook of International Law*, pp. 57-79, at p. 74.

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 subparagraphs (a) to (c) of article 7(2). Another issue, to be addressed further in connection with the provisions on the settlement of disputes, is what kind of provisional measures a court or tribunal can indicate.

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(5), for the establishment of provisional arrangements or measures under articles 16(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.⁵⁷

Provisional measures under article 7(5) differ from provisional measures under article 31(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(5) in certain instances 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.⁵⁸ In agreeing upon provisional arrangements, states have to respect their obligations concerning the conservation

⁵⁷ Fish Stocks Agreement, article 31(2). Article 31(2) provides that it is without prejudice to article 290 of the LOS Convention. Article 290(1) provides that a court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.

⁵⁸ 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, p. 302, at p. 303, paras 6-8; Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland); Continuation of Interim Measures of Protection; Order of 12 July 1973, ICJ Reports 1973, p. 313, at p. 314, paras 6-8. In these cases the ICJ seems to have suggested that the parties in direct negotiations could arrive at more detailed interim arrangements 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 Court's restraint.

and management of stocks under the Fish Stocks Agreement and other international instruments and the rights of third states.

Apart from the greater latitude of states to agree upon arrangements, the nature of provisional arrangements and provisional measures would not seem to be different.⁵⁹ Article 7(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 allowable catch 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.⁶⁰ In the latter case, it would in principle seem to be justified to arrive at a compromise solution between the positions of the states concerned.⁶¹ However, such a compromise would also have to reflect 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 total allowable catch 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 in any case has to be in conformity with the obligations under Part II of the 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(2) makes separate mention of the prevention of damage of stocks as a title for prescribing such measures.⁶²

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(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

⁵⁹Cf. Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland); Continuance of Interim Measures of Protection; Order of 12 July 1973, ICJ Reports 1973, p. 302, at p. 303, paras 6-7; Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland); Continuance of Interim Measures of Protection; Order of 12 July 1973, ICJ Reports 1973, p. 313, at p. 314, paras 6-7.

⁶⁰ See also *supra* paragraph 2.3.3.

⁶¹ 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, p. 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.*, p. 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.*, p. 17, paras 25 and 26; pp. 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.*).

⁶² The competence to indicate these latter measures is limited to some extent. A court or tribunal cannot indicate measures which do not have due regard to the rights and obligations of the states concerned. Moreover, measures can only be indicated upon a request of the parties, although a court or tribunal can indicate other measures than those requested by the parties.

agreement on compatible conservation and management measures and shall be without prejudice to the outcome of any dispute settlement procedure.⁶³ These provisions imply 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,⁶⁴ especially if the time the settlement of an underlying dispute may require is taken into consideration.⁶⁵ The possibility of modifying or revoking existing arrangements or measures makes this less problematic, although it may be difficult to achieve modification or revocation in practice.⁶⁶ There is a margin of appreciation in establishing such arrangements or 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 can be the fact that arrangements or measures do not suffice to attain the goals they are intended to meet.

5. 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(4) any of the states involved in negotiations over the determination of compatible conservation and management measures may invoke the procedures for the settlement of disputes provided for in Part VIII of the Agreement. Under article 7(5) any of the states concerned may, in the event 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.⁶⁷ This makes it for instance possible for states to submit disputes concerning articles 7(1)(a) and 7(1)(b) to the compulsory dispute settlement mechanisms of the Agreement.

⁶³ There seems to be some overlap between these elements of article 7(6). This may be explained by the wish to include all the elements of articles 74(3) and 83(3) of the LOS Convention, on which article 7(6) was based (for this latter point see M. Hayashi, "The 1995 Agreement", *op. cit.*, p. 64). In this latter case a similar overlap is not present, as these articles are structured differently.

⁶⁴ See also R. Lagoni, "Interim Measures", *op. cit.*, p. 358; F. Orrego Vicuña, "El Régimen de la Pesca", *op. cit.*, p. 33.

⁶⁵ For instance, over two years passed between the institution of proceedings and the judgment on the merits in the *Fisheries Jurisdiction* cases. 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.

⁶⁶ 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 R. Lagoni, "Interim Measures", *op. cit.*, pp. 358-359). Measures indicated by a court or tribunal can only be modified or revoked in accordance with the applicable procedural rules.

⁶⁷ Fish Stocks Agreement, article 30. Article 29 of the Fish Stocks Agreement provides that states may refer disputes of a technical nature to an ad hoc expert panel established by them. This provision can contribute to the expeditious resolution of certain technical disputes in those cases in which parties agree to opt for this procedure.

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(3) of the LOS Convention also applies to the Agreement. Article 297(3)(a) of the 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. In a number of cases in which the coastal state has not accepted submission to compulsory dispute settlement there is the possibility of submitting 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.⁶⁸ 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.⁶⁹ Moreover, conciliation excludes the indication of provisional measures upon request of one the parties.⁷⁰

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. 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.⁷¹ If the coastal state rejects the inclusion in the dispute of questions involving its sovereign rights, it is not possible to rule on questions concerning measures established for the high seas, to the extent they also require an evaluation of measures adopted by the coastal state for areas under its national jurisdiction.⁷²

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

⁶⁸ LOS Convention, article 297(3)(b)(i).

⁶⁹ *Ibid.*, article 297(3)(c).

⁷⁰ See also LOS Convention, article 290; Fish Stocks Agreement, article 31(2).

⁷¹ Cf. A. Boyle, "Settlement of Disputes relating to the Law of the Sea", *Thesaurus Acroasium* Vol. 26, p. 295-356, at p. 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" 4 (1996) *Revue de l'Indemer*, pp. 93-122, at p. 108

⁷² 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.

would contradict the terms of article 7(2) which require the compatibility of both sets of measures and not that high seas measures are compatible with coastal state measures.⁷³

The exclusion of disputes relating to the coastal state's sovereign rights from compulsory procedures for the settlement of disputes under article 297(3)(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 of deciding whether or not in a particular case to accept submission of such a dispute. 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 prorogatum* as developed by the Permanent Court of International Justice and the ICJ suggests that such measures can then become the subject of adjudication.⁷⁴ 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.⁷⁵

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(3)(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.⁷⁶ 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.⁷⁷

Although article 297(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(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 'gray area' concerning the reach of article 297(3) of the LOS Convention in this connection. In considering how the

⁷³ In this connection it is relevant to note that in the *Diversion of Water from the Meuse* case (Netherlands v. Belgium) the Permanent Court of International Justice 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 (Permanent Court of International Justice; Judgments, Orders and Advisory Opinions, Series A/B, No. 70, p. 20).

⁷⁴ For an overview of the development of this doctrine see S. Rosenne, *The Law and Practice of the International Court, 1920-1996*; 3rd edition (Martinus Nijhoff Publishers, The Hague, 1997), pp. 696-725.

⁷⁵ *Ibid.*, p. 714. For the limitations on jurisdiction based on *forum prorogatum*, see *ibid.*, p. 716.

⁷⁶ 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.*, p. 711).

⁷⁷ *Ibid.*, p. 718.

factors mentioned in the subparagraphs of article 7(2) have to be balanced, a court or tribunal may be called upon to give an interpretation of article 7(2)(a). There may be different views on the question at what point an interpretation of article 7(2)(a) involves issues falling under article 297(3)(a) of the LOS Convention.

The cross-reference to article 297(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*.⁷⁸ 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.⁷⁹ 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 adopt provisional measures for this area. The coastal state can also invoke article 297(3)(a) directly to exclude the indication of provisional measures for its area under national jurisdiction under article 7(5).

6. Conclusions

A major achievement of article 7, and the Fish Stocks Agreement in general, is the reinforcement of the rules applicable to the conservation and management of straddling fish stocks and highly migratory fish stocks, without upsetting the balance of rights and obligations of coastal states and states fishing on the high seas. Moreover, the significance of protecting the marine environment and living marine resources as a whole in conserving and managing such stocks is clearly recognized. This latter 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 total allowable catch. Sometimes, such differences have been resolved by establishing a total

⁷⁸ 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, p. 325, at p. 342, para. 35; see also Fisheries Jurisdiction case (United Kingdom v. Iceland) (Interim Protection) Order of 17 August 1972, *ibid.* 1972, p. 16, para. 21.

⁷⁹ It would seem that there is some tension between the coastal state's sovereign rights and other considerations underlying the Fish Stocks Agreement. This is illustrated by the fact that article 31 on provisional measures not only makes reference to the need to preserve the respective rights of the parties to the dispute but also to the need to prevent damage to the stocks in question. This latter consideration to some extent is independent from the former. A court or tribunal can indicate measures to prevent damage to stocks, which it would not otherwise indicate to preserve the rights of the parties. However, these former measures have to be indicated taking into account the basis of jurisdiction of the court or tribunal.

allowable catch above the level recommended by scientists.⁸⁰ 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(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 balancing of these measures always depends on the circumstances of the specific case, including the contents of the measures concerned. Article 7(2) should result in according precedence to those measures that ensure the sustainable management and conservation over measures that do not. Clearly 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(2) should provide guidance for these cases.

Article 7(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 subparagraphs (a) to (c) of article 7(2) in principle provide the starting point for the determination of compatible measures. If existing measures ensure the objectives of articles 7(2) and reflect appropriately the other factors to be taken into account under article 7(2), there is no need for their adjustment.

In establishing how all factors listed in article 7(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 indicates that these mechanisms are complementary, as they suggest similar approaches to the questions raised by the need to balance the factors mentioned in article 7(2). Both indicate the need to take all the factors involved into account simultaneously, instead of focussing on one factor to the exclusion of the others. The position of developing states to some extent forms an exception to this rule that all factors have to be considered equally, to the extent that the Agreement recognizes a special position of these states.

Both equity and the factors listed in the subparagraphs of article 7(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. 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

⁸⁰ See *e.g.* S. Sen, "The Evolution of High-Seas Fisheries Management in the North-East Atlantic", 35 (1997) *Ocean & Coastal Management*, pp. 85-100, at pp. 90-91.

and the characteristics of the stocks concerned,⁸¹ as is also illustrated by the experience of existing regional organizations and arrangements.⁸²

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.⁸³ It seems that this criticism, to the extent it is justified, may be less relevant for article 7(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 equity. On the other hand, article 7(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(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.⁸⁴

If equity were to be applied in the interpretation of article 7(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(2).

The duty to cooperate for the purpose of achieving compatible measures in article 7(3) of the Fish Stocks Agreement does not go beyond existing obligations under the LOS Convention and general international law. An innovation of article 7(3) is its explicit reference to a time limit, and consequences if this limit is not met. This can be an additional incentive for states to agree on compatible conservation and management measures.

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 may indicate that if states cannot agree on the latter, they will have also serious difficulty to agree on the former. The significance provisional arrangements or measures can take on in practice, notwithstanding the savings clause in article 7(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.

⁸¹ See also A.C. de Fontaubert, "The Politics of Negotiation at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks", 29 (1995) *Ocean & Coastal Management*, pp. 79-91, at p. 88; O. Thébaud, "Transboundary Marine Fisheries Management. Recent Developments and Elements of Analysis", 21 (1997) *Marine Policy*, pp. 237-253, at p. 249-250.

⁸² For instance, the difference of the number of coastal states involved in the management of straddling fish stocks and highly migratory fish stocks can have an impact on the form regional cooperation takes (see D. Balton, "Strengthening the Law of the Sea, *op. cit.*", pp. 128-129).

⁸³ See e.g. P. Weil, *The Law of Maritime Delimitation*, pp. 13, 160 and 213.

⁸⁴ Cf. O. Schachter, *International Law in Theory and Practice*, (Martinus Nijhoff Publishers, Dordrecht, 1991), pp. 59-60.

The fact that provisional measures under article 7(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.

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(3) of the LOS Convention in article 32 of the Fish Stocks Agreement. If the coastal state uses its faculty 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(3) were to be excluded, there still remains significant scope for submitting 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(2) has to be achieved.

The impact of the judiciary on the further elaboration of article 7(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.⁸⁵ 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.⁸⁶ 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.

The analysis of article 7(2) indicates that it offers more detailed rules for determining compatible measures than previously existed. The analysis also indicates 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(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.

⁸⁵ Cf. D.W. Bowett "The Conduct of International Litigation", in J.P. Gardner and C. Wikremasinghe (eds), *The International Court of Justice: Process, Practice and Procedure* (British Institute of International and Comparative Law, London, 1997), pp. 1-20, at p. 11. Various aspects of article 7(2) of the Fish Stocks Agreement leave room for different interpretations, providing a possibility for alternative outcomes in this respect.

⁸⁶ Even if states will not easily submit their disputes to the procedures for compulsory dispute settlement (see also T. McDorman, "The Dispute Settlement Regime" *op. cit.*, pp. 59-60), the existence of these mechanisms may have an impact on the willingness of states to reach agreement on compatible measures (see D. Balton, "Strengthening the Law of the Sea, *op. cit.*, p. 137).