2022

Taking Stock of the "Compatibility Requirement": What Limitations Does It Impose for High Seas Fishing?

Sean D. Murphy
George Washington University Law School, smurphy@law.gwu.edu

Recommended Citation

Murphy, Sean D., Taking Stock of the "Compatibility Requirement": What Limitations Does It Impose for High Seas Fishing?, in Persistent and Emerging Challenges in International Fisheries Law (Bjørn Kunoy, ed.) (Brill, forthcoming).

3 October 2022

Conference on Persistent and Emerging Challenges in International Fisheries Law

Faroe Islands, 23-24 June 2022

Taking Stock of the "Compatibility Requirement": What Limitations Does It Impose for High Seas Fishing?

Sean D. Murphy

Manatt/Ahn Professor of International Law
George Washington University
Member, U.N. International Law Commission

I. Introduction

Under the contemporary law of the sea, coastal States enjoy sovereign rights within their exclusive economic zones (EEZs) to manage and exploit fishery resources. At the same time, States maintain the traditional freedom to fish on the high seas subject to some treaty obligations, including those arising from regional management fisheries organizations (RMFOs) and other treaties, such as (once it enters into force) the agreement on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ agreement). Given that straddling stocks and highly migratory species of fish move with ease between EEZs and the high seas, the 1982 U.N. Convention on the Law of the Sea (LOSC)[1] contains provisions that seek to bridge the gap for conservation and management of such stocks within the two zones.

Those provisions were elaborated in the 1995 Fish Stocks Agreement,[2] notably in its Article 7(2), which provides in part 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."[3] A similar "compatibility" concept may be found in Article 19(b) of the BBNJ agreement, albeit in the context of the compatibility of high seas marine protected areas and RFMOs or other bodies. Unfortunately, Article 7(2) contains several ambiguities as to its interpretation, which over time have not been resolved and may be inhibiting sound

[1] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter LOSC]. The Convention has 168 parties (as of October 2022).

[2] 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, Aug. 4, 1995, 2167 U.N.T.S. 3, T.I.A.S. No. 01-1211 [hereinafter Fish Stocks Agreement]. The Agreement has 92 parties (as of October 2022).

[3] *Id*. art. 7(2) (emphasis added).

conservation and management measures. Indeed, studies indicate that the current legal framework has not succeeded in addressing declines in fish stocks either within EEZs or on the high seas.[4]

The purpose of this chapter is to consider the legal framework within which this "compatibility requirement" rests and to identify the ambiguities that may be impeding international cooperation. To promote greater cooperation, this chapter considers whether an advisory opinion should be sought by an RFMO from the International Tribunal for the Law of the Sea (ITLOS) on the nature and scope of the compatibility requirement. While doubts have been expressed about addressing abstract legal questions through advisory proceedings,[5] doing so might allow for a more granular legal understanding as to how States should be cooperating in the management and conservation of straddling fish stocks and highly migratory species.

II. Legal Framework of the Compatibility Requirement

A. 1958 U.N. Conventions on the Law of the Sea

The 1958 U.N. conventions on the law of the sea provide an embryonic framework for recognizing the role of the coastal State in conserving and managing fish stocks on the high seas that are adjacent to its maritime space, and the need for all States to cooperate in that regard. While the 1958 Conventions have a limited number of States Parties, they heavily influenced the 1982 LOSC and 1995 Fish Stocks Agreement.

The 1958 Convention on the Territorial Sea and Contiguous Zone,[6] while not identifying the breadth of the territorial sea, indicates that the contiguous zone (adjacent to the territorial sea) may extend no more than 12 nautical miles from the baseline.[7] The territorial sea is under the sovereignty of the coastal State,[8] thereby implicitly providing the coastal State with full rights over the management and exploitation of fish stocks within that zone, but no express duties in that regard. At the same time, the 1958 Convention on the High Seas confirms the freedom of

[4] *See, e.g.*, FOOD AND AGRIC. ORG. OF THE U.N., THE STATE OF WORLD FISHERIES AND AQUACULTURE 7 (2020), https://www.fao.org/3/ca9229en/ca9229en.pdf (finding that the successes achieved in some States and regions have not been sufficient to reverse the global trend of overfished stocks); RAY HILBORN & ULRIKE HILBORN, OVERFISHING: WHAT EVERYONE NEEDS TO KNOW (2012) (identifying both failures and successes in fisheries management); Sarika Cullis-Suzuki & Daniel Pauly, *Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations*, 34 MARINE POLICY 1036 (2010) (noting that two-thirds of stocks fished on the high seas and under regional management are either depleted or overexploited).

[5] *See, e.g.*, Michael Wood, *Understanding the Advisory Jurisdiction of the International Tribunal for the Law of the Sea*, in ITLOS, THE CONTRIBUTION OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA TO THE RULE OF LAW: 1996-2016/LA CONTRIBUTION DU TRIBUNAL DU DROIT DE LA MER À L'ÉTAT DE DROIT: 1996-2016 (2018).

[6] Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 516 U.N.T.S. 205, 15 U.S.T. 1606. The Convention has 52 parties.

[7] *Id*. art. 24(2).

[8] *Id*. art. 1.

fishing on the high seas for both coastal and non-coastal States,[9] defining the high seas as areas outside the territorial sea or internal waters of a State.[10]

For the first time under international law, the importance of coastal State conservation and management of fish stocks on the high seas in the area adjacent to that State's territorial sea (referred to here as the "adjacent area") was addressed in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.[11] Article 1 indicates that the freedom of high seas fishing is subject to treaty obligations, to the interests and rights of coastal States as provided for in the Convention, and to other obligations in the Convention concerning conservation of the living resources of the high seas.[12] Moreover, separate from the other provisions of the convention, Article 1 generally provides that all "States have the duty to adopt, or to co-operate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."[13]

The "interests and rights of coastal States" are then identified in Articles 6 and 7. The coastal State "has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea."[14] As such, if negotiations over a period of six months has not otherwise resulted in an agreement with the other States concerned, the coastal State may "adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in" the adjacent area.[15] Those measures "shall be valid" vis-à-vis the other States if: (a) there is a need for urgent application of conservation measures in light of the existing knowledge of the fishery; (b) the measures adopted are based on appropriate scientific findings; and (c) such measures do not discriminate in form or in fact against foreign fishermen.[16] If any other State is not content with these measures, it may pursue dispute resolution procedures under the Convention.[17]

Further, the coastal State is entitled to take part on an equal footing in any system of research and regulation for purposes of conservation of the resources in the adjacent area, even if its nationals do not fish there.[18] Indeed, any State whose nationals are fishing in the adjacent area "shall, at the request of that coastal State, enter into negotiations with a view to prescribing by

---

[9] Convention on the High Seas art. 2(2), Apr. 29, 1958, 450 U.N.T.S. 11, 13 U.S.T. 2312. The Convention has 63 parties.

[10] *Id*. art. 1.

[11] Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285, 17 U.S.T. 138. The Convention has 39 parties. For discussion of the factors influencing regulation of high seas fishing in the period leading up to adoption of this convention, see YOSHINOBU TAKEI, FILLING REGULATORY GAPS IN HIGH SEAS FISHERIES: DISCRETE HIGH SEAS FISH STOCKS, DEEP-SEA FISHERIES AND VULNERABLE MARINE ECOSYSTEMS 16–27 (2013).

[12] Convention on Fishing and Conservation of the Living Resources of the High Seas, *supra* note 11, art. 1(1).

[13] *Id.* art. 1(2).

[14] *Id*. art. 6(1).

[15] *Id*. art. 7(1).

[16] *Id*. art. 7(2).

[17] *Id*. arts. 7(4), 9.

[18] *Id*. art. 6(2).

agreement the measures necessary for the conservation of" such resources, and shall not enforce conservation measures in the adjacent area "which are opposed to those" adopted by the coastal State.[19] If the States concerned do not reach agreement with respect to conservation measures within twelve months, either State can initiate dispute resolution procedures under the Convention.[20]

Thus, the 1958 U.N. conventions on the law of the sea confirmed the right of all States to fish on the high seas, but concomitantly recognized the sovereignty of the coastal State in its territorial sea and its interests in the productivity of the living resources found the adjacent high seas. Balancing of the interests of the coastal State with the rights of other States was to be achieved through cooperation and agreement but, when necessary, also through unilateral measures of the coastal State, deference to coastal State measures by other States, and dispute resolution procedures.

B. 1982 U.N. Convention on the Law of the Sea

The movement toward the establishment of an exclusive economic zone and the continuing strain on management and conservation of fish stocks throughout the seas led to inclusion in the 1982 LOSC of numerous provisions that replicated and extended those of the 1958 Conventions.[21] The maximum breadth of the territorial sea was set at 12 nautical miles, over which States have sovereignty.[22] Within this zone (and within archipelagic waters), the coastal (or archipelagic) State implicitly enjoys exclusive rights with respect to conservation and management of fish stocks, but only limited duties in that regard.[23] Outside this zone, the LOSC established the concept of the EEZ, which may extend up to 200 nautical miles from the baselines.[24] Within the EEZ, the coastal State has sovereign rights and jurisdiction with respect to fish stocks, but also duties, notably for conservation of the living resources and their optimal utilization.[25] Importantly, when exercising its rights and duties with respect to the EEZ, coastal States must have "due regard to the rights and duties of other States" and "act in a manner compatible with the provisions of this Convention."[26]

Outside the EEZs, a State and its flag vessels enjoy the freedom to fish, but subject to that State's treaty obligations and to "the rights and duties as well as the interests of coastal States…."[27] In that regard, the Convention recognizes the existence of fish stocks that "straddle" an EEZ and the high seas or another EEZ, and fish stocks that move even more freely across the oceans, the latter being "highly migratory species" that are listed in an annex to the

---

[19] *Id*. art. 6(3)–(4).
[20] *Id.* art. 6(5), 9.
[21] *See* TAKEI, *supra* note 11, at 27–29, 33–104 (focusing on high seas fishing).
[22] LOSC, *supra* note 1, arts. 2(1), 3.
[23] *See id*. art. 24 (duties of coastal State in the territorial sea); arts. 52–53 (addressing rights of passage through archipelagic waters).
[24] *Id*. arts. 55, 57.
[25] *Id.* arts. 56 (rights, jurisdiction and duties of coastal State); 61 (conservation of living resources); 62 (utilization).
[26] *Id.* art. 56(2).
[27] *Id.* art. 116.

Convention.[28] For stocks that straddle an EEZ and the high seas, Article 63(2) provides that "the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area."[29] This obligation "to seek to" might be characterized as one of cooperating in good faith, but without necessarily reaching agreement. For highly migratory species, Article 64(1) provides that the coastal State and other States "shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone."[30] If there is no such international organization, "the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work."[31] The Article 64(1) obligation appears less exhortatory and more specific in nature, leading some to argue that States whose nationals fish on the high seas must ensure that such activities do not undermine coastal State conservation and management measures with respect to highly migratory species.[32]

Separately, all States shall regulate their nationals (and cooperate with each other to that end) for the conservation of the living resources of the high seas.[33] Moreover, where the nationals of two or more States are exploiting the same area of the high seas, those States "shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned," and otherwise shall cooperate, as appropriate, through subregional or regional fisheries organizations.[34] Such cooperation shall pursue the maximum sustainable yield of high seas fish stocks, while paying attention to the effects of such exploitation on dependent species.[35]

Some of the same concepts arising from the 1958 conventions may be observed in the LOSC, but transformed to take account of the creation of the EEZ. Under the LOSC, the coastal State has much more detailed, sovereign rights to conservation and management of living resources adjacent to its territorial sea (in its EEZ), but also cognizable interests in exploitation

---

[28] *Id*. arts. 63 (straddling stocks), 64 (highly migratory species) & annex 1 (highly migratory species).

[29] *Id.* art. 63(2).

[30] *Id.* art. 64(1).

[31] *Id*. There are also provisions on cooperation with respect to anadromous stocks and catadromous species. *Id*. arts. 66–67.

[32] *See* W.T. BURKE, THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND 214 (1994) ("Article 116 appears to introduce a drastic change in high seas fishing rights by providing for a priority in coastal state rights and interests affecting high seas fishing states. How far this interpretation of articles 64 and 116 can be carried is not clear."); Camille Goodman, *The Cooperative Use of Coastal State Jurisdiction with Respect to Highly Migratory Stocks; Insights from the Western and Central Pacific Region*, in NATURAL RESOURCES AND THE LAW OF THE SEA 218 (Lawrence Martin et al. eds., 2017) ("This provision seems to indicate that the preferential rights of coastal States with respect to highly migratory species extend (beyond the exclusive economic zone) to affect the high seas…").

[33] LOSC, *supra* note 1, art. 117.

[34] *Id*. art. 118.

[35] *Id.* art. 119.

of straddling stocks and highly migratory species on the high seas adjacent to its EEZ. With respect to these latter interests, when balancing the coastal State's interests with the freedom to fish enjoyed by other States, the LOSC emphasizes cooperation and agreement, but less attention is paid to the possibility of unilateral measures of the coastal State and the deference to such measures by other States. Consequently, by the mid-1990s, States decided it was important to go further in addressing the balance between conservation/management measures adopted by coastal States for areas under national jurisdiction and those established by all States concerned for the high seas.

C. 1995 Fish Stocks Agreement

As noted in the Introduction, the "compatibility requirement" is embedded in Article 7 of the 1995 Fish Stocks Agreement. All told, Article 7 contains eight paragraphs that address the need for "compatibility" between conservation and management measures adopted by coastal States for areas under national jurisdiction and such measures established by all States concerned for the high seas.[36]

Article 7(1)(a) and (b) replicate almost verbatim the language on cooperation found in LOSC Articles 63(2) (straddling stocks) and 64(1) (highly migratory stocks), but are preceded by a chapeau that such cooperation is without prejudice to the sovereign rights of coastal States in their EEZs and the right of all States to fish on the high seas. Elferink interprets this text as signaling the need, when in doubt, to balance neutrally the rights of the coastal States and all other States when considering the compatibility of measures.[37]

The principal advance with respect to compatibility is found in Article 7(2), which consists of a chapeau followed by a series of subparagraphs (a) through (f) that indicate factors that shall be taken into account when assessing compatibilty. The chapeau reads:

> Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction *shall be compatible* in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. To this end, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving *compatible* measures in respect of such stocks. In determining compatible conservation and management measures, States shall….[38]

Generally speaking, this chapeau text requires a coastal State that is adopting a conservation or management measure with respect to straddling or highly migratory stocks to do so in a manner that is "compatible" with the measures adopted by other States for the high seas, and vice versa. The chapeau does not itself dictate that one side must conform its measure to that of the other. Rather, it underscores the possibility of competing measures, and calls for a

---

[36] Such compatibility is also addressed and reinforced in sections 6.12, 7.3.1 and 7.3.2 of the legally nonbinding FAO Code of Conduct for Responsible Fisheries. *See* Food & Agric. Org. of the U.N., *Code of Conduct for Responsible Fisheries*, FAO Conf. Res. 4/95 (Oct. 31, 1995) [hereinafter FAO Code of Conduct].

[37] Alex G. Oude Elferink, *The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks*, 5 MAX PLANCK Y.B. OF U.N. L. 551, 555–56 (2001).

[38] Fish Stocks Agreement, *supra* note 2, art. 7(2) (emphasis added).

cooperative approach whose "purpose" is the conservation and management of the stocks "in their entirety," given that neither side is able to achieve this goal on its own. The chapeau, including when it is read in light of the associated subparagraphs, presents several ambiguities that might be clarified to strengthen its effects.

Ambiguity # 1. A threshold ambiguity to resolve before applying this provision is whether the compatibility requirement is solely an obligation arising under the Fish Stocks Agreement, or whether it also provides content to LOSC obligations. If solely the former, then the requirement's significance is somewhat diminished, given that the Fish Stocks Agreement has attracted only 92 States Parties as of October 2022—a respectable number of adherents, but far less than the 168 States Parties to the LOSC. If, however, the compatibility requirement provides a means for determining the content of the general obligations arising under the LOSC, then the requirement has much greater salience.[39] In this regard, it is noted that the Fish Stocks Agreement was designed to implement the LOSC, not to change it.[40] The status of the compatibility requirement as a matter of customary international law is also relevant for those States not bound to the Fish Stocks Agreement as a matter of conventional law. To the extent that at least some of the LOSC rules on cooperation (whether in relation to the EEZ or high seas fishing) reflect customary international law,[41] perhaps Article 7 is simply clarifying LOSC rules that constitute customary international law, binding upon all States. Further, the practice of non-Parties in adhering to compatibility requirements as they exist elsewhere (such as for RFMOs) may suggest acceptance of the rule reflected in Article 7 as customary in nature.[42]

Ambiguity # 2. The legal status of the compatibility requirement in Article 7(2) is linked to a second ambiguity, which is its temporal focus. Arguably, the requirement is addressing only conservation and management measures adopted after entry into force of the Fish Stocks Agreement, an approach consistent with the non-retroactivity provision of the Vienna Convention on the Law of Treaties.[43] At the same time, Article 7(2) might be read as calling upon States to bring about compatibility as between all measures that are or have been adopted (past, present and future), given that the purpose appears to be to achieve overall compatibility in the measures adopted for conservation and management of straddling or highly migratory stocks.

Ambiguity # 3. A third ambiguity concerns the geographic range of Article 7(2). While the Fish Stocks Agreement is focused on the conservation and management of straddling fish

---

[39] *See* Richard Barnes, *The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?*, in THE LAW OF THE SEA: PROGRESS AND PROSPECTS 233, 249 (David Freestone et al. eds., 2006) (finding that "the provisions of the [Fish Stocks Agreement] may become a means of determining the content of the general obligations set forth in the LOSC.").

[40] *See* Fish Stocks Agreement, *supra* note 2, art. 4 ("Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention."); *see also* Barnes, *supra* note 39, at 248 (noting that, while some of its provisions are innovatory, "it is also difficult to see how the provisions of the [Fish Stocks Agreement] deviate in principle from the object and purpose of the LOSC").

[41] *See* J. Ashley Roach, *Today's Customary International Law of the Sea*, 45 OCEAN DEV. & INT'L L. 239, 246–49 (2014).

[42] *See infra* note 76.

[43] Vienna Convention on the Law of Treaties art. 28, May 23, 1969, 1155 U.N.T.S. 331.

stocks and highly migratory fish stocks "beyond areas under national jurisdiction,"[44] Article 7 (as well as Article 6 on the precautionary approach[45]) also applies to conservation and management of such stocks "within areas under national jurisdiction." This latter term is not defined in the Agreement. The term can be construed as covering only EEZs,[46] but Article 7(2) could be construed even more broadly as encompassing territorial, archipelagic and even internal waters.[47] Resolving such ambiguity may be of particular importance for the conservation and management of straddling and highly migratory stocks that traverse large maritime spaces that are enclosed as archipelagic waters.

Ambiguity # 4. A fourth ambiguity with respect to Article 7(2) is whether it binds States only when they unilaterally adopt measures or also when they act collectively to adopt measures within RFMOs. On one hand, the text only addresses the cooperation of "States" and not "international organizations," even though international organizations can participate in the Fish Stocks Agreement.[48] Further, Article 7(2)(c) (as discussed below) addresses the issue of RFMOs, but only in the context of how States must take account of measures adopted by RFMOs (rather than how RFMOs must take account of measures adopted by States). On the other hand, because States act through RFMOs in order to adopt conservation and management measures on the high seas, regarding RFMO measures as outside the scope of Article 7(2) seems inconsistent with the Agreement's object and purpose and could lead to an unreasonable result.

Ambiguity # 5. A fifth ambiguity concerns the proper balance to be struck between the measures adopted by coastal States and the measures adopted by other States. As noted above, the chapeau of Article 7(2) precedes a series of six factors for States to "take into account" when "determining compatible conservation and management measures." Subparagraph (a) provides that States shall take into account measures adopted by coastal States for the conservation and management of straddling and highly migratory fish stocks in their EEZs (under LOSC Article 61), and shall ensure that such measures are not undermined by measures adopted by other States with respect to fishing these stocks on high seas.[49] When read in comparison with subparagraphs (b) and (c), this factor is clearly focused on measures adopted by other States unilaterally with respect to high seas fishing; those measures must take account of and must not undermine measures adopted by relevant coastal States.

Subparagraph (b) provides that, in determining compatible measures, States shall take into account previously agreed measures reached by relevant coastal States and States fishing on the high seas that have been established for the conservation and management of straddling and

---

[44] Fish Stocks Agreement, *supra* note 2, art. 3(1).

[45] *Id*. art 6. For discussion, see W.T. Burke, *Compatibility and precaution in the 1995 Straddling Stock Agreement*, *in* LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES 119–25 (Harry N. Scheiber ed., 2000).

[46] *See, e.g.*, Martin Tsamenyi & Quentin Hanich, *Fisheries Jurisdiction under the Law of the Sea Convention: Rights and Obligations in Maritime Zones under a Sovereignty of Coastal States, in* THE 1982 LAW OF THE SEA CONVENTION AT 30: SUCCESSES, CHALLENGES AND NEW AGENDAS 116–18 (David Freestone ed. 2013).

[47] *See* Barnes, *supra* note 39, at 115.

[48] Fish Stocks Agreement*, supra* note 2, art. 47.

[49] *Id.* art. 7(2)(a). Collaterally, Article 7(7) requires coastal States to regularly inform States fishing on the high seas in the region as to the coastal States' measures.

highly migratory fish stocks on the high seas.[50] Here, both the coastal States and other States must take account of any measures they have previously agreed upon when determining if measures they adopt are compatible.

Subparagraph (c) provides that, in determining compatible measures, States shall take into account previously agreed measures reached by an RFMO that have been established for conservation and management of straddling and highly migratory fish stocks.[51] Here, there is no focus on whether the RFMO measures are directed solely at EEZs or solely at the high seas, given that RFMOs may have authority in both zones. Both the coastal States and other States must take account of any measures previously agreed upon within the context of an RFMO when those States are determining whether measures they adopt are compatible.

Read together, Article 7(2)(a) goes a bit further than (b) and (c) by also saying that States shall "ensure" that measures taken with respect to high seas fishing "do not undermine the effectiveness" of the coastal State's measures. Such language is not found in (b) or (c). This difference squarely introduces the fifth ambiguity. Arguably, the additional language in subparagraph (a) expressly and decisively tips the balance in favor of coastal States, an outcome that can be justified for a few reasons.[52] First, the coastal State is obligated to ensure that fish stocks in its EEZ are harvested at a sustainable level, an obligation that States fishing on the adjacent high seas do not have. Second, in setting the sustainable level, the coastal State has incentives relating to efficiency and risk that are not shared by States fishing on the high seas. Third, the coastal State cannot uphold its obligation without assistance from other States that are fishing adjacent to the EEZ.[53]

Yet perhaps this is overreading subparagraph (a). The difference in wording in subparagraph (a) may simply be taking into account the lack of competence of a non-coastal State to regulate for others with respect to high seas fishing (and perhaps the lack of competence of an RFMO to regulate for non-parties). In other words, coastal States should not be obliged to "avoid undermining" regulations unilaterally adopted by other States regarding high seas fishing, given that such other States are not competent in that regard except with respect to regulation of

[50] *Id.* art. 7(2)(b). Collaterally, Article 7(7) provides that coastal States shall regularly inform States fishing on the high seas in the subregion or region of the measures they have adopted, while Article 7(8) requires any State fishing on the high seas to regularly inform "other interested States" (hence, any coastal States or other States fishing in the region or subregion) as to the measures the State has adopted for regulating the fishing activities of its vessels in the area.

[51] *Id.* art. 7(2)(c).

[52] Tore Henriksen & Alf Håkon Hoel, *Determining Allocation: From Paper to Practice in the Distribution of Fishing Rights Between Countries*, 42 OCEAN DEV. & INT'L L. 66, 73 (2011) (finding that the provision gives the coastal State "decisive influence"); Peter Davies & Catherine Redgwell, *The International Legal Regulation of Straddling Fish Stocks*, 67 B.Y.I.L. 199, 263 (1997) (finding a prioritization of the coastal State's interests).

[53] *See* Burke, *Compatibility and precaution in the 1995 Straddling Stock Agreement*, *supra* note 45, at 111–15.

their own nationals.[54] Resolution of this ambiguity might draw upon practice, instruments and jurisprudence since the adoption of the Fish Stocks Agreement.[55]

Ambiguity # 6. Subparagraph (d) provides that States shall take into account the biological unity and other biological characteristics of the fish stocks, as well as the relationship between the distribution of stocks, the fisheries and the geographical particularities of the region concerned.[56] This subparagraph introduces a sixth ambiguity, in that the reference to "biological unity" appears to be inviting an ecosystem approach to management and conservation, one that takes account not just of the life-cycle of a species (mating, spawning, foraging) across zones, but also of the inter-relationship of different species and their habits.[57] Such an approach may be sensible given that such species are susceptible to regulation in numerous EEZs and different high seas regions adjacent to those EEZs, rather than just one coastal State's EEZ. Therefore, the "compatibility" of any one coastal State's regulation needs to be considered vis-à-vis a much wider geographic area than just the EEZ of that coastal State or even of the sub-region or region. Further, it is increasingly thought that species-specific regulation is inferior to an ecosystem approach to regulation.[58] At the same time, several RFMOs are focused on a specific type of species (e.g., species of tuna) and are limited to a specific region or sub-region. As such, it is unclear whether States are obliged to adjust their measures, unilateral or collective, in order to pursue an ecosystem approach.

Subparagraph (e) provides that States shall take into account the dependence on the stocks concerned by the coastal State and by the States fishing on the high seas.[59]

---

[54] *See* Elferink, *supra* note 37, at 563–65; FRANCISCO ORREGO VICUÑA, THE CHANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES 193–94 (1999).

[55] *See, e.g.*, Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Advisory Opinion, Apr. 2, 2015, 2015 ITLOS Rep. 4, paras. 124-29 (analyzing the content of a flag State's "responsibility to ensure" compliance with the laws and regulations enacted by a coastal State with respect to the EEZ) [hereinafter ITLOS 2015 Advisory Opinion]; Responsibilities and Obligations of States with respect to Activities in the Area, Advisory Opinion, Feb. 1, 2011, 2011 ITLOS Rep. 10, paras. 107-116 (analyzing the content of a sponsoring State's "responsibility to ensure" compliance with rules concerning activities in the seabed area); Award in the Arbitration regarding the Chagos Marine Protected Area, Mauritius v. United Kingdom (Mar. 18, 2015), *reprinted in* XXXI R.I.A.A. 359, 579, para. 535 (2018) (analyzing the balancing of the U.K.'s rights and interests with those of Mauritius) [hereinafter 2015 Chagos Award]; International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, art. 10 (2001) (identifying factors for an equitable balancing of interests).

[56] Fish Stocks Agreement, *supra* note 2, art. 7(2)(d). For analysis, *see* Elferink, *supra* note 37, at 566–67; *see also* TAKEI, *supra* note 11, at 85–91.

[57] *See generally* DANIELA DIZ PEREIRA PINTO, FISHERIES MANAGEMENT IN AREAS BEYOND NATIONAL JURISDICTION: THE IMPACT OF ECOSYSTEM BASED LAW-MAKING 95–96 (2013); Burke, *Compatibility and precaution in the 1995 Straddling Stock Agreement*, *supra* note 45, at 125–26.

[58] *See, e.g.,* PINTO, *supra* note 57, at ix.

[59] Fish Stocks Agreement, *supra* note 2, art. 7(2)(e); *see also id*. art. 11(d)–(e) (noting the needs of coastal fishing communities and coastal economies that are dependent on fish stocks) *and* art. 24 (on the special requirements of developing States). For analysis, see Elferink, *supra* note 37, at 567–70.

Subparagraph (f) provides that States "shall ensure" that such measures do not result in harmful impact on the living marine resources as a whole.[60] Thus, this subparagraph begins with stronger language ("shall ensure") than the prior subparagraphs ("take into account"), suggesting that States must always exercise due diligence to ensure that measures adopted do not harm the marine environment.[61] The stronger text is warranted, given that measures having a harmful impact on the living marine resources (such as those allowing fishing gear destructive to habitats) by definition are not advancing a management and conservation scheme.

Article 7(3) provides that "States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time."[62] If a lack of compatible measures leads to a dispute between States, paragraph 4 allows one of the States to invoke the dispute resolution procedures of the Fish Stocks Agreement.[63] Further, pending agreement on compatible measures, paragraphs 5 and 6 call for provisional arrangements of a practical nature by the States concerned which, again, can be submitted to dispute resolution if no agreement is reached.[64] Article 32 of the Fish Stocks Agreement, however, maintains the limitation that exists in LOSC Article 297(3), to the effect that the coastal State is not obliged to accept binding dispute settlement procedures for any dispute relating to its sovereign rights in the EEZ or the exercise of those rights.

Ambiguity # 7. The six factors set forth in the subparagraphs to Article 7(2) are valuable, but they provide little guidance on how they should be balanced in context, which presents a seventh ambiguity.[65] Such ambiguity might be addressed, in part, by identifying a *process* for States to follow when fulfilling their Article 7(2) obligation. Thus, for any given EEZ and adjacent high seas, one might imagine a series of specific steps that must be taken along the following lines. First, ascertain whether there exist coastal State conservation and management measures, RFMO measures, and measures adopted by States engaged in high seas fishing in the region.[66] Second, determine whether any of those measures appear to be incompatible with one another. Third, if the existing measures are incompatible, then any measure deemed harmful to living marine resources must be revised by the States concerned so as to be compatible. In this regard, there may be a presumption in favor of upholding the coastal State's measure. Alternatively, or additionally, one might envisage certain overarching approaches or legal principles (beyond the precautionary approach set forth in Article 6) that would animate application of Article 7(2) factors. For example, it might be argued that such factors should be

---

[60] Fish Stocks Agreement, *supra* note 2, art. 7(2)(f); *see also id*. art. 5(f) (listing steps for avoiding harmful impacts); FAO Code of Conduct, §§ 6.5–6.8, 7.2.2–.3, 7.6.9 and 8.5. For analysis, see Elferink, *supra* note 37, at 570–72.

[61] *See* Elferink, *supra* note 37, at 560.

[62] Fish Stocks Agreement, *supra* note 2, art. 7(3).

[63] *Id*. art. 7(4). Those procedures are found in Part VIII of the agreement. *See* Elferink, *supra* note 37, at 598–602.

[64] Fish Stocks Agreement, *supra* note 2, art. 7(5)–(6); *see* Elferink, *supra* note 37, at 591–97.

[65] *See, e.g.,* Goodman, *supra* note 32, at 234 (finding that the framework established by the LOSC for the management of tuna "is highly ambiguous, and notwithstanding the clarifications and improvements later introduced by the [Fish Stocks Agreement], there remains a significant tension between the duty to cooperate in the conservation of highly migratory species, and the sovereign rights of the coastal State over the resources of the" EEZ).

[66] Elferink, *supra* note 37, at 578.

balanced using a principle of equity (*infra legum*) in order to arrive at an equitable solution.[67] Fourth, any new measures that are to be introduced must be tested against all previously agreed or coastal State measures. Fifth, if States cannot agree on an issue of compatibility, they should pursue dispute resolution pursuant to Article 7(4).[68]

D. RFMOs

RFMOs play an important role in coordinating the measures taken by States for addressing straddling and migratory fish stocks. While each RFMO operates differently based on its constituent instrument, an RFMO generally can be defined as an inter-governmental organization that is competent under international law to adopt legally binding conservation and management measures regarding fisheries covering, at least in part, the high seas.[69] Each RFMO typically has a scientific committee that gathers data annually so as to recommend, for each regulated species, the sustainable catch level for the following year. States participating in the RFMO then must agree on the catch level and its distribution, after which each State regulates its nationals to stay within its allocated catch.[70] Further, there may be various rules regarding the permissible means and methods for fishing of the relevant stocks in the region.

As of October 2022, there are approximately seventeen RFMOs, covering various geographic areas and various species of fish (principally those that are commercially valuable).[71] Some RFMOs, such as the North Pacific Fisheries Commission, have legal competence over all or most fisheries within their area,[72] while other RFMOs, such as the Inter-American Tropical

---

[67] *Id*. at 573–77.

[68] Such dispute resolution procedures, themselves, present certain ambiguities. While Article 7(4) and Part VIII of the Fish Stocks Agreement contemplate non-compulsory and then compulsory dispute resolution, the procedures set out in LOSC Part XV apply *mutatis mutandis*. *See* Fish Stocks Agreement, *supra* note 2, art. 30. Moreover, the Fish Stocks Agreement explicitly states that LOSC Article 297(3) applies to the Fish Stocks Agreement. *Id*. art. 32. LOSC Article 297(3)(a), in turn, provides that "the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise…." LOSC, *supra* note 1, art. 297(3)(a). Thus, certain disputes against a coastal State can be excluded by the coastal State from compulsory dispute settlement. Yet, it might be argued that the exclusion is not intended to apply to a dispute that relates to the compatibility of measures concerning *both* EEZ *and* high seas fishing. *Compare* 2015 Chagos Award, paras. 300-01 (finding that the Fish Stocks Agreement on its face concerns measures subject to that exclusion), *with* ITLOS 2015 Advisory Opinion, Separate Opinion of Judge Paik, 102 at 117, para. 37 (finding that disputes concerning straddling stocks are subject to compulsory dispute settlement).

[69] *See generally* Erik J. Molenaar, *Regional Fisheries Management Organizations*, in GLOBAL CHALLENGES AND THE LAW OF THE SEA 81 (Marta Chantal Riberio et al. eds., 2020); MARY ANN PALMA ET AL., PROMOTING SUSTAINABLE FISHERIES: THE INTERNATIONAL LEGAL AND POLICY FRAMEWORK TO COMBAT ILLEGAL, UNREPORTED AND UNREGULATED FISHING 201–38 (2010); TORE HENRIKSEN ET AL., LAW AND POLITICS IN OCEAN GOVERNANCE: THE UN FISH STOCKS AGREEMENT AND REGIONAL FISHERIES MANAGEMENT REGIMES (2006).

[70] *See* PINTO, *supra* note 57, at 119–33.

[71] "Approximate" because there are some organizations that might be regarded as RFMOs, such as the North Atlantic Marine Mammal Commission (NAMMCO) (albeit dealing with mammals not fish), or the International Whaling Commission (dealing with mammals and on a global not regional scale).

[72] There are eight general RFMOs: Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR); General Fisheries Commission for the Mediterranean (GFCM); North East Atlantic Fisheries Commission (NEAFC); North Pacific Fisheries Commission (NPFC); Northwest Atlantic Fisheries Organization

Tuna Commission (IATTC), have legal competence regarding specific species or groups of species, notably tuna.[73] Even some of the more specialized RFMOs, however, have begun using an ecosystem approach, whereby it considers all the marine species within the convention area.[74]

RFMOs have been created both before and after entry into force of the 1982 LOSC and the 1995 Fish Stocks Agreement. RFMOs established after the Fish Stocks Agreement typically contain provisions that address compatibility of measures, drawing upon the language of Article 7(2).[75] Even for RFMOs that predate the Fish Stocks Agreement, provisions addressing management and conservation typically address the need for consistency between RFMO measures and coastal State measures,[76] or at least the importance of considering straddling and migratory stocks in their entirety and the interdependence of stocks.[77] In principle, an RFMO might defer to management and conservation measures adopted by a coastal State, which are then taken into account in the development of fishing quotas on adjacent high seas. Alternatively, the RFMO might seek to adopt management and conservation measures that are intended to operate both on the high seas and within the EEZs throughout the region of the RFMO's mandate.[78] In practice, however, it appears that a balancing of interests between coastal States and other States is inevitable, such that negotiation on compatibility among the competing States is necessary.

E. Is the Compatibility Requirement Working? Case Study of Tuna in the Western and Central Pacific Ocean

As is well-known, regional fisheries management has met with decidedly mixed results. The proportion of fish stocks within biologically sustainable levels has decreased steadily, falling from 90 percent in 1974 to 65.8 percent in 2017.[79] There is, however, a high level of variation in these decreases across different species and subspecies of fish.[80] For example, the fish stock status of three out of seven major species of tuna (a straddling and highly migratory fish) has

(NAFO); South East Atlantic Fisheries Organisation (SEAFO); South Indian Ocean Fisheries Agreement (SIOFA); and South Pacific Regional Fisheries Management Organisation (SPRFMO).

[73] There are five tuna RFMOs: Commission for the Conservation of Southern Bluefin Tuna (CCSBT); Indian Ocean Tuna Commission (IOTC); International Commission for the Conservation of Atlantic Tunas (ICCAT); Inter-American Tropical Tuna Commission (IATTC); and Western and Central Pacific Fisheries Commission (WCPFC). Three other specialized RFMOs are: North Atlantic Salmon Conservation Organization (NASCO); North Pacific Anadromous Fish Commission (NPAFC); and Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea (CCBSP).

[74] *See* PINTO, *supra* note 57, at 133–56.

[75] *See*, *e.g.*, Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean art. 4, Nov. 14, 2009, 2899 U.N.T.S. 211 (on compatibility of conservation and management measures).

[76] *See*, *e.g.*, Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries art. XI(3), Oct. 24, 1978, 1135 U.N.T.S. 370, T.I.A.S. No. 95-1129 (NAFO Convention).

[77] *See*, *e.g.*, International Convention for the Conservation of Atlantic Tunas art. VI, May 14, 1966, 673 U.N.T.S. 64, 20 U.S.T. 2887 (ICCAT Convention).

[78] P. Örebach et al., *The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement*, 13 INT'L J. MARINE & COASTAL L. 119, 128 (1998).

[79] THE STATE OF WORLD FISHERIES AND AQUACULTURE, *supra* note 4, at 7.

[80] *Id.* at 48.

improved from unsustainable to sustainable.[81] While intensive fisheries management has led to successes in some areas, serious problems persist in preventing illegal, unreported or unregulated fishing of straddling and highly migratory stocks.[82]

The most detailed study to date of the operation of the compatibility requirement for a particular region is a 2018 doctoral thesis by Eric Kekoa Kingma concerning tuna in the Western and Central Pacific Ocean.[83] The relevant RFMO for the region is the Western and Central Pacific Fisheries Commission (WCPFC). The WCPFC was established by the Honolulu Convention, the first treaty designed in part to implement the Fish Stocks Agreement's compatibility requirement.[84] The Convention is imbued with some of the ambiguities identified above contained in the 1995 Fish Stocks Agreement, such as the meaning of the term "areas under national jurisdiction."[85]

Kingma's thesis uses a scoring system to evaluate implementation pursuant to Article 8 of the Honolulu Convention, which provides 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 highly migratory fish stocks in their entirety."[86] Article 8 then goes on to lay out a series of provisions that seek to promote such compatibility (and that echo the factors contained in Article 7 of the Fish Stocks Agreement).

For measures adopted by the WCPFC from its inception in 2004 through 2017 on catch or effort limit restrictions, the thesis asks questions that generally follow the provisions set forth in Article 8: (1) does the measure reference Article 8 of the Honolulu Convention?; (2) does the measure recognize prior measures established for EEZs or on the high seas?; (3) what is the extent of the measure's area of application and does it take into account the biological unity of the stocks concerned and associated fisheries?; (4) to what extent are considerations of respective dependence on the stocks concerned taken into account?; (5) to what extent does the measure accommodate considerations for areas of high seas entirely surrounded by the EEZs of Commission members ("high seas pockets")?; and (6) what is the status of the stocks concerned given the collective obligation to ensure long-term conservation through effective management?[87]

---

[81] *Id.* at 49.

[82] *See, e.g.,* Kristina M. Gjerde, *High Seas Fisheries Management under the Convention on the Law of the Sea*, in THE LAW OF THE SEA: PROGRESS AND PROSPECTS, *supra* note 39, at 280, 289–90

[83] Eric Kekoa Kingma, *The Principle of Compatibility: Its application within the world's largest tuna fishery*, Doctor of Philosophy thesis, AUSTRALIAN NAT'L CTR. FOR OCEAN RES. & SEC., UNIV. OF WOLLONGONG (2018). For a briefer study for the same region, see Goodman, *supra* note 32. An analysis of the effectiveness of three other RFMOs from a constructivist perspective is LEANDRA R. GONÇALVES, REGIONAL FISHERIES MANAGEMENT ORGANIZATIONS: THE INTERPLAY BETWEEN GOVERNANCE AND SCIENCE (2021).

[84] Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean art. 5, Sept. 5, 2000, 2275 U.N.T.S. 43.

[85] *See*, *e.g.*, *id.* arts. 7–8.

[86] *Id*. art. 8(1).

[87] Kingma, *supra* note 83, at 185–88.

Based on the scoring,[88] the thesis concludes that the WCPFC has applied the compatibility principle inconsistently.[89] While its measures relating to tropical tunas (skipjack, yellowfin and bigeye) received a relatively high rating, the WCPFC's measures for other species, such as South Pacific albacore or Pacific bluefin, received much lower ratings. Kingma criticizes, in particular, the WCPFC for following an *ad hoc* process when developing its measures, as the RFMO has no formal process in place for methodically evaluating new proposals against Article 8 of the Honolulu Convention.[90]

By contrast, Kingma applauds a particular type of management approach, called the "harvest strategy approach," which was adopted by the WCPFC in 2014. This "high-level" management approach "involves assessing the consequences of a range of management options and presenting the results as trade-offs with respect to fisheries performance across a range of management objectives."[91] According to Kingma, such a mechanism can "facilitate a more consistent application of the [compatibility requirement] by recognizing compatibility as a political management objective which sits on an equal footing with social, economic and biological management objectives."[92] Further, "the process would involve defining operational indicators that focus on the balance of catch or fishing effort between EEZ and the high seas, including acceptable ratios of catch or effort between jurisdictions."[93] In short, he favors broadening the lens when engaging in a compatibility analysis, so as to bring about a more deliberative process to achieve compatibility.

III. Proposal for an ITLOS Advisory Opinion

The life of international law entails not just codification of rules, but their illumination over time through the practice of States and the jurisprudence of international courts and tribunals. With respect to straddling and highly migratory fish stocks, ample practice of States and RFMOs has emerged in the form of measures for conservation and management, but there appears to be room for further clarification through jurisprudence. Litigation by means of an inter-State dispute is one possibility, but a more comprehensive path is available in the form of an ITLOS advisory opinion.

A. Ability of ITLOS to Issue an Advisory Opinion

In 2015, ITLOS issued its first advisory opinion based on a request from the Sub-Regional Fisheries Commission (SRFC), a fisheries commission comprising seven West African nations.[94] The backdrop to this request were allegations by West African States that third-State flag vessels were engaged in illegal, unreported or unregulated fishing off the coast of West Africa that was imperiling fish stocks. The SRFC asked ITLOS four questions relating to the

[88] *Id*. at 299–303.
[89] *Id*., at 296–97
[90] *Id*. at 297–98.
[91] *Id*. at 304–05.
[92] *Id*. at 327.
[93] *Id*.
[94] Those States are: Cape Verde; The Gambia; Guinea; Guinea-Bissau; Mauritania; Senegal; and Sierra Leone.

rights and obligations of the flag and coastal States regarding fishing *in the exclusive economic zones* of the SRFC Members;[95] the request did not relate to rights and obligations existing on the high seas, or the compatibility of measures taken with respect to both zones.

ITLOS invited all States Parties to the LOSC to file written and oral submissions, as well as the United Nations, all RFMOs, and certain other inter-governmental organizations.[96] Twenty-two LOSC States Parties filed written statements with ITLOS on these questions, as did the SRFC and six other international organizations,[97] and thereafter some filed additional written statements.[98] An oral hearing was held in 2014, at which ten States Parties appeared, in addition to the SRFC and two other international organizations.[99] Post-hearing written responses and comments were also filed.[100]

Importantly, ITLOS found that it is empowered to issue an advisory opinion.[101] Whether ITLOS is so empowered under the LOSC was contested, with many States Parties arguing that it had no such advisory function (there being no provision in LOSC clearly allowing it to do so).[102] Even so, ITLOS found that it had such jurisdiction, provided three prerequisites were met: the existence of an international agreement related to the purposes of LOSC that specifically provides for the submission to the Tribunal of a request for an advisory opinion; a request transmitted to ITLOS by a body authorized by or in accordance with that agreement; and a request that seeks an ITLOS opinion on "a legal question."[103] Even if those prerequisites are met, ITLOS has the discretion to decline to answer the question(s) if there are compelling reasons not to do so.[104]

With respect to substance, the advisory opinion provided a robust analysis of the obligations of States (and their vessels) with respect to conservation and management of the living resources within the EEZs, which provides relevant guidance for conduct not just off the

---

[95] ITLOS 2015 Advisory Opinion, paras. 89 (noting that question 1 only relates to EEZs), 147 (question 2 concerns flag State due diligence regarding its vessels in foreign EEZs), 154 (question 3 relates to fisheries access agreements for EEZs), 179, 200, 204 (question 4 concerns rights and obligation of coastal States in EEZs).

[96] *See* Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Order of 24 May 2013, 2013 ITLOS Rep. 202; Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No. 21, Order of 14 April 2014, 2014 ITLOS Rep. 404.

[97] ITLOS 2015 Advisory Opinion, para. 17. Interestingly, the United States was also permitted to file a written statement even though it is not a party to the LOSC, perhaps because it is a party to the Fish Stocks Agreement. *Id*. para. 24.

[98] *Id*. para. 21.

[99] *Id*. para. 29.

[100] *Id*. paras. 31–35.

[101] *Id*. paras. 37–69.

[102] For a critique of the Tribunal's assumption of this role, see Tom Ruys & Anemoon Soete, *"Creeping" Advisory Jurisdiction of International Courts and Tribunals? The Case of the International Tribunal for the Law of the Sea*, 29 LEIDEN J. INT'L L. 155 (2016); Massimo Lando, *The Advisory Jurisdiction of the International Tribunal for the Law of the Sea: Comments on the Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, 29 LEIDEN J. INT'L L. 441 (2016).

[103] ITLOS 2015 Advisory Opinion, para. 60.

[104] *Id*. para. 71.

coast of West Africa but worldwide.[105] Much of the opinion's discussion of the general obligation of flag States under LOSC Articles 94 and 192-93 may be applicable as well to fishing activities outside of and adjacent to EEZs,[106] just as its analysis of Article 61(1) on stocks straddling EEZs may be applicable to Article 61(2) on stocks straddling EEZs and the high seas.[107] Yet ITLOS stopped short of expressly addressing compatibility issues between coastal State measures and measures of other States or RFMOs. In responding to the fourth question, ITLOS noted that the LOSC called for "cooperation between the States concerned on issues pertaining to the conservation and management of shared fisheries resources, as well as the promotion of the optimum utilization of those resources,"[108] and further noted that "that fisheries conservation and management measures, to be effective, should concern the whole stock unit over its entire area of distribution or migration routes."[109] Yet the tribunal went no further, saying that it "has limited its examination and conclusions to the shared stocks in the exclusive economic zones of the SRFC Member States, constrained as it is by the limited scope of its jurisdiction in the present case."[110]

B. Proposed Request for an Advisory Opinion on the Compatibility Requirement

If requested by a competent RFMO, ITLOS might provide comparably robust advice relating to the compatibility of measures adopted for the conservation and management of straddling and highly migratory fish stocks. Securing agreement within an RFMO to request such advice may not be easy to achieve politically, but given the problems faced with the regulation of such stocks and the value of greater legal certainty, such a request may be deemed desirable.

To that end, a discrete set of questions for an advisory opinion might be centered on the compatibility requirement of the Fish Stocks Agreement and the ambiguities that remain in its implementation. In light of the analysis above, such questions might include: (1) is the compatibility requirement set forth in Article 7(2) of the Fish Stocks Agreement a clarification of LOSC obligations and, further, is it a codification of customary international law?;[111] (2) if the compatibility requirement set forth in Article 7(2) is not customary international law, does it only address the compatibility of measures adopted after entry into force of the agreement for the States concerned or does it require those States to revisit existing measures?; (3) does the term "areas under national jurisdiction" in Article 7(2) of the Fish Stocks Agreement refer solely to the exclusive economic zone or does it also encompass internal waters, the territorial sea and archipelagic waters?; (4) does Article 7(2) bind States only when they unilaterally adopt

[105] *Id*. paras. 85–219.
[106] *Id*. paras 116–20, 136–40.
[107] *Id*. paras. 188–218.
[108] *Id*. para. 213.
[109] *Id*. para. 214.
[110] *Id*.
[111] It might be objected that ITLOS is only empowered to interpret the Fish Stocks Agreement and not whether rules within it reflect customary international law. In response, it might be argued that ITLOS is empowered to advise States Parties on the application of the Agreement's rules in complex relationships involving both Parties and non-Parties.

measures or also when they act collectively to adopt measures, such as within RFMOs?; (5) what is the legal significance of the presence in Article 7(2)(a) of its second clause ("and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures") and its absence Article 7(2)(b) and (c)?; (6) to what extent should Article 7(2) be understood as calling upon States to adopt an ecosystem approach for the sustainable management and conservation of straddling and highly migratory fish stocks?; and (7) is there a process or overarching legal principle or approach by which the factors set forth in Article 7(2) should be balanced?

A draft text of such a request for an advisory opinion appears at the end of this chapter.

V. Conclusion

The codification that began with the 1958 Conventions and continued through the 1982 LOSC and 1995 Fish Stocks Agreement has laid an important legal framework for the conservation and management of straddling and highly migratory fish stocks. Yet the compatibility requirement contained in Article 7(2) of the Fish Stocks Agreement, which seeks to harmonize measures adopted by coastal States with those adopted for high seas fishing, appears not to have led to uniform results. There may be advantages at present—more than 25 years after adoption of the Fish Stocks Agreement—in securing an advisory opinion from ITLOS that addresses certain outstanding ambiguities. While such an advisory opinion would have no legally binding force as such, and formally is given only to the RFMO that seeks the opinion,[112] ITLOS advice on this matter could nevertheless provide a third- or fourth-generation layer of guidance for States and others in their continued quest for sustainable management of the ocean's living resources.

[112] ITLOS 2015 Advisory Opinion, para. 76.

Annex

Proposed Resolution Requesting an Advisory Opinion from ITLOS

The States Parties of the [name of RFMO],

Considering the United Nations Convention on the Law of the Sea signed at Montego Bay on 10 December 1982;

Considering also the 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 adopted at New York on 8 September 1995 (1995 Fish Stocks Agreement);

Reaffirming their commitment to supporting the principles and standards stipulated in the Code of Conduct for Responsible Fisheries of the United Nations Food and Agriculture Organization (FAO);

Recalling their resolve to implement the International Plan of Action for preventing, opposing and eliminating illegal, unreported and unregulated fishing adopted by the Food and Agriculture Organization Conference;

Considering the Convention of [date] on the establishment of the [name of RFMO], especially with respect to its articles on [compatibility requirement];

Desiring to align the [RFMO] Convention and the practice thereunder to the requirements of the 1995 Fish Stocks Agreement, in particular with respect to the compatibility requirement set forth in its Article 7;

Considering the provisions of Article [XX] of the [relevant RFMO Resolution], which stipulates that [the Meeting of States Parties shall authorize the Permanent Secretary of the RFMO to seize the International Tribunal for the Law of the Sea on a specific legal matter for its advisory opinion];

Considering also Article 20 of the Statute of the Tribunal and Article 138 of its Rules of Procedure;

Decides, in accordance with Article [XX] of the [relevant RFMO Resolution], to authorize the Permanent Secretary of the [RFMO] to seize the International Tribunal for the Law of the Sea, pursuant to Article 138 of the Rules of the said Tribunal, in order to obtain its advisory opinion on the following matters:

1. Is the compatibility requirement set forth in Article 7(2) of the Fish Stocks Agreement a clarification of obligations existing in the LOSC? Can Article 7(2) also be regarded as a codification of customary international law?

2. If the compatibility requirement set forth in Article 7(2) is not customary international law, does it only address the compatibility of measures adopted after

entry into force of the agreement for the States concerned or does it require those States to revisit existing measures?

3. Does the term "areas under national jurisdiction" in Article 7(2) of the Fish Stocks Agreement refer solely to the exclusive economic zone or does it also encompass internal waters, the territorial sea and archipelagic waters?

4. Does Article 7(2) bind States only when they unilaterally adopt measures or also when they act collectively to adopt measures, such as within RFMOs?

5. What is the legal significance of the presence in Article 7(2)(a) of its second clause ("and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures") and its absence Article 7(2)(b) and (c)?

6. To what extent should Article 7(2) be understood as calling upon States to adopt an ecosystem approach for the sustainable management and conservation of straddling and highly migratory fish stocks?

7. Is there a process or overarching legal principle or approach by which the considerations set forth in Article 7(2) should be balanced?