

Chair's Paper on Jurisdiction

Technical Committee on Allocation Criteria (TCAC15)
Zanzibar, July 2025

Introduction

In October 2024, TCAC13 requested the IOTC secretariat and TCAC Chair to prepare information papers and tables for its next in-person meeting in July 2025. These included a request for the Chair to prepare an information paper that describes jurisdictional practice for tuna RFMOs, focusing on the compatible management of migratory tunas in both high seas and EEZs, and their consideration of the sovereign rights of coastal States, REIO CPCs with an EEZ, and the avoidance of a disproportionate burden of conservation on developing States.

The Legal Framework for Jurisdiction

The 'constitution for the oceans' is provided by the United Nations Convention on the Law of the Sea (LOS).¹ This is one of the landmark successes of international cooperation, and an inspiring treaty for global governance. The Law of the Sea applied a zone-based order, dividing the oceans into areas *within* and *beyond* national jurisdiction, each zone being characterised by a different set of rights and responsibilities. Almost all IOTC CPCs are party to the LOSC,² which also arguably holds customary legal status.

Within internal waters and territorial seas out to 12 nautical miles, coastal States hold sole jurisdiction, free of external interference within internationally agreed limits.³ The fisheries framework in the Law of the Sea provides minimal obligations for these maritime zones under sovereignty.⁴ Under general international law, coastal States have absolute sovereignty in respect of the living and non-living resources out to 12 nautical miles,⁵ and that can only be limited by their express agreement.⁶ Sovereignty is qualified only by specific international obligations assumed by States. In the absence of any specific fisheries conservation and management qualifications, coastal States "have a wide

¹ Tommy T. B. Koh, "Constitution for the Oceans" in *United Nations Convention on the Law of the Sea 1982: A Commentary* ed. Myron H. Nordquist, (Netherlands: Martinus Nijhoff Publishers, 1985).

² All CPCs are party to the LOSC except for Iran which has signed, but not yet ratified or acceded.

https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en

³ Articles 2, 19, 21, 49, 52 of LOSC

⁴ The only references to fisheries in zones under sovereignty are under Article 19(2)(a),⁶ Article 21(1)(d),⁷ and Article 51(1).⁸ However, none of these provisions relate to the conservation and management of fisheries.

⁵ *Permanent Sovereignty over Natural Resources*, GA Res 1803 (XVII), UN GAOR, 17th session, 1194th plenary meeting, Agenda Item 39, UN Doc. A/RES/1803(XVII) (14 December 1962).

⁶ LOSC Art. 2(3).

margin of discretion in regulating the use of the resources in maritime internal waters, archipelagic waters and the territorial sea.”⁷

Beyond 12 nautical miles, coastal States may claim an exclusive economic zone (EEZ) out to a maximum of 200 nautical miles, within which they hold sovereign rights for the purpose of exploring, exploiting, conserving, and managing natural resources (i.e., living, and non-living resources) and a responsibility to protect the marine environment.⁸ Coastal States hold exclusive rights to determine who can access their EEZ resources, and under what conditions.⁹ Coastal States shall promote the objective of optimum utilisation and provide foreign access to any surplus allowable catch, but, they are given exclusive discretion in determining the surplus, if any, and any conditions and fees.

Beyond 200 nautical miles, the high seas are a global commons and cannot be claimed by any State. The Law of the Sea recognises the “freedom of the sea” for the high seas,¹⁰ subject to conditions, including the requirement that States cooperate with each other, conserve and manage marine living resources, and protect and preserve the marine environment.¹¹

Significantly, there are explicit requirements for cooperation in respect of straddling fish stocks and highly migratory species. LOSC Articles 63(2) and 64 require cooperation among coastal States and States fishing in the adjacent high seas to cooperate in the management of straddling fish stocks and highly migratory fish species both within and beyond the EEZ.

In the early 1990s, the global community negotiated new instruments to strengthen the global framework for fisheries management. The United Nations Fish Stocks Agreement (UNFSA)¹² is the most significant supplementary agreement regarding straddling and highly migratory fisheries. Most IOTC CPCs¹³ are also party to UNFSA, which elaborates the high seas-EEZ compatibility issue and clarifies the scope and content of the duty to cooperate in relation to straddling fish stocks and highly migratory species. It institutionalises the duty to cooperate and explicitly requires all UNFSA parties to apply all conservation and management measures established by existing Regional Fisheries Management Organisations (RFMOs). It also limits access to these fisheries to parties that participate in RFMOs, or at the very least, agree to implement the relevant RFMO.

⁷ E. Hey, “The Fisheries Provisions of the LOS Convention”, in Hey (ed) *Development in International Fisheries Law* (Netherlands: Kluwer Law International 1999); See also R. R. Churchill and A. V. Lowe, *The Law of the Sea* (3rd ed, Manchester: Manchester University Press 1999).

⁸ Article 56(1)(b)(i-iii) of LOSC

⁹ Article 56 of LOSC: “In the exclusive economic zone, the coastal state has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds [...]”

¹⁰ Part VII of LOSC

¹¹ Articles 117, 118, 119 of LOSC

¹² UNFSA, *Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*. (New York, USA. International Legal Materials, vol. 34. 1995).

¹³ Most CPCs are party to the UNFSA except for: Madagascar, Somalia, Sudan, Tanzania, Yemen; and China and Pakistan which have signed, but not yet ratified or acceded.

https://www.un.org/Depts/los/reference_files/StatusTablesEnglish.pdf

However, neither the LOSC framework nor UNFSA address fisheries jurisdiction in maritime zones under the sovereignty of coastal States, such as archipelagic waters. In 2024, the Legal Office of the Food and Agriculture Organisation (FAO) was unable to provide definitive advice on this matter in its advisory note on the jurisdiction of the IOTC in regard to archipelagic waters. But, the FAO did usefully advise:¹⁴

... whatever the interpretation that the Commission decides to apply, for the purposes of establishing certain CMMs consistent with the functions and responsibilities of the IOTC, including CMMs establishing an allocation regime, the IOTC Agreement, expressly and implicitly requires a nuanced approach and the application and implementation of such CMMs in the Area of Competence of the IOTC. Not only should CMMs be established and applied in a way that does not undermine sovereignty and sovereign rights of coastal States under the LOSC and UNFSA; such CMMs must also ensure that Members of the Commission meet their obligations to implement the precautionary approach and compatibility and the special requirements of developing States, as well as their obligation to cooperate in the conservation and sustainable utilization of straddling and highly migratory fish stocks...

... Ultimately the CMM on allocation that should be established must make the Agreement effective, and able to achieve its object and purpose. Based on the Commission's and Contracting Parties' practice to date, this concern could be addressed by the action a member takes in respect of each CMM that the Commission adopts. The fact that the IOTC Agreement makes it possible for Members to object to Resolutions adopted by the IOTC is an inherent recognition that the IOTC must strive to achieve effective yet balanced Resolutions in terms of their objectives, substantive measures and scope but achieving such a balance may not always be possible, thus the right provided to Members to object when this is unavoidable.

UNFSA also included important provisions that recognise the special needs, rights and aspirations of developing States, particularly the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers, women fishworkers, and Indigenous Peoples. It also explicitly requires parties to ensure that conservation measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing States. It is important to note that this requirement only applies to developing States, as its scope has sometimes been confused during RFMO negotiations.

The FAO Code of Conduct for Responsible Fisheries¹⁵ also similarly recognised development concerns, noting that the capacity of developing countries to implement fisheries management should be duly taken into account. Paragraph 5.2 of the Code of Conduct states:

¹⁴ <https://iotc.org/documents/communications-chair-technical-committee-allocation-criteria>

¹⁵ FAO. Code of Conduct for Responsible Fisheries. 1995.

<https://openknowledge.fao.org/server/api/core/bitstreams/4a456053-db08-4362-875a-2fdc723c1346/content>

In order to achieve the objectives of this Code and to support its effective implementation, countries, relevant international' organizations, whether governmental or non-governmental, and financial institutions should give full recognition to the special circumstances and requirements of developing countries, including in particular the least-developed among them, and small island developing countries. States, relevant intergovernmental and non-governmental organizations and financial institutions should work for the adoption of measures to address the needs of developing countries, especially in the areas of financial and technical assistance, technology transfer, training and scientific cooperation and in enhancing their ability to develop their own fisheries as well as to participate in high seas fisheries, including access to such fisheries.

REIO CPCs with an EEZ

Article IV of the Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC Agreement)¹⁶ defines who may join the IOTC and become a member. This includes:

(iii) regional economic integration organisations of which any State referred to in subparagraphs (i) or (ii) above is a member and to which that State has transferred competence over matters within the purview of this Agreement.

Subparagraphs (i) and (ii) refer to coastal States and flag States that engage in fishing within the IOTC Area of Competence. This grants the European Union (EU), as a regional economic integration organisation (REIO), full membership of the IOTC, both in regard to the fishing operations of its member States (for example, Spain and France), and the EEZs of its outermost regions (under the competence of the EU).

The EU has two outermost regions in the IOTC Area of Competence: Mayotte and La Reunion. Both are granted this status under Articles 349 and 355 of the Treaty on the Functioning of the European Union.¹⁷ The EU has the authority to represent Mayotte and La Reunion, and their EEZs are considered part of the EU, effectively granting the EU membership as a coastal State. Within the terms of the EU Treaty, France does not represent these territories, having transferred this competence to the EU.

France also has overseas territories in the IOTC Area: the French Southern and Antarctic Territories. These islands are represented by France and are within the competence of France as per Article 198 of the EU Treaty. These EEZs belong to France and do not grant the EU membership as a coastal State.

Compatible Management

While States may have differing views on how to design or prioritise compatible measures over EEZs and high seas, all t-RFMOs have adopted a practice of applying their

¹⁶ <https://iotc.org/sites/default/files/documents/2012/5/25/IOTC%20Agreement.pdf>

¹⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legisum:4301854>

conservation and management throughout the range of the stock. This is reflected in the IOTC which defines the area of competence in Article II of the IOTC Agreement:

ARTICLE II. AREA OF COMPETENCE

The area of competence of the Commission (hereinafter referred to as the “Area”) shall be the Indian Ocean (defined for the purpose of this Agreement as being FAO statistical areas 51 and 57 as shown on the map set out in Annex A to this Agreement) and adjacent seas, north of the Antarctic Convergence, insofar as it is necessary to cover such seas for the purpose of conserving and managing stocks that migrate into or out of the Indian Ocean.

Similar to other RFMOs, the IOTC simultaneously provides for the protection of coastal State sovereign rights (i.e. EEZ sovereign rights) in Article XVI of the Agreement.

ARTICLE XVI. COASTAL STATES’ RIGHTS

This Agreement shall not prejudice the exercise of sovereign rights of a coastal state in accordance with the international law of the sea for the purposes of exploring and exploiting, conserving and managing the living resources, including the highly migratory species, within a zone of up to 200 nautical miles under its jurisdiction.

Like other RFMOs, the IOTC implements its jurisdiction across EEZs and high seas through the application of compatible measures that recognise coastal State rights. This is necessary because tuna and other migratory species are free-ranging and pay no attention to maritime boundaries. Their migratory nature inherently requires cooperation between numerous coastal and distant-water fishing States across multiple zones of jurisdiction in order to sustainably manage them throughout their transboundary range. Non-cooperation by one State can negatively impact other States. The LOSC, UNFSA and tuna RFMOs recognise this by applying their jurisdiction across both EEZs and high seas, requiring compatible measures to be applied across the range of the stock.¹⁸ Key relevant provisions of the UNFSA include:

ARTICLE 7: COMPATIBILITY OF CONSERVATION AND MANAGEMENT MEASURES

1. Without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in the Convention, and the right of all States for their nationals to engage in fishing on the high seas in accordance with the Convention:

- (a) with respect to straddling fish stocks, the relevant coastal States and the States whose nationals fish for such stocks in the adjacent high seas area shall seek, either directly or through the appropriate mechanisms for cooperation provided for in Part III, to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas area;*
- (b) with respect to highly migratory fish stocks, the relevant coastal States and other States whose nationals fish for such stocks in the region shall*

¹⁸ Article 7: Compatibility of Conservation and Management Measures. UNFSA.

cooperate, either directly or through the appropriate mechanisms for cooperation provided for in Part III, with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction.

2. 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:

- (a) take into account the conservation and management measures adopted and applied in accordance with article 61 of the Convention in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures;*
- (b) take into account previously agreed measures established and applied for the high seas in accordance with the Convention in respect of the same stocks by relevant coastal States and States fishing on the high seas;*
- (c) take into account previously agreed measures established and applied in accordance with the Convention in respect of the same stocks by a subregional or regional fisheries management organization or arrangement;*
- (d) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;*
- (e) take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and*
- (f) ensure that such measures do not result in harmful impact on the living marine resources as a whole.*

The practical reality of migratory fisheries requires compatible conservation and management across the entire range of the stock, sometimes necessarily including; high seas, EEZs and archipelagic waters. A relevant example of compatible management across all three jurisdictions that balances these obligations is the WCPFC tropical tuna conservation and management measure. Many IOTC members are also party to this measure.¹⁹ This measure is helpful in that it also includes explicit reference to archipelagic waters and territorial seas:²⁰

¹⁹ IOTC CPCs that are party to WCPFC include: Australia, China, EU, France, Indonesia, Japan, Korea, and Philippines.

²⁰ WCPFC CMM 2023-01 Conservation and Management Measure for Bigeye, Yellowfin and Skipjack Tuna in the Western and Central Pacific Ocean. <https://cmm.wcpfc.int/>

Paragraph 4. Coastal states are encouraged to take measures in archipelagic waters and territorial seas which are consistent with the objectives of this Measure and to inform the Commission Secretariat of the relevant measures that they will apply in these waters.

Compatibility, Sustainability and the Special Requirements of Developing States

International fisheries law requires RFMOs to balance compatibility, sustainability and the special requirements of developing States. Allocation must consider the impact on the interests of diverse coastal and fishing State members, and ensure that the chosen approach achieves sustainability objectives while avoiding a disproportionate burden on developing States. This is not to say that RFMOs must avoid applying any conservation burden on to developing States, but that it must not be disproportionate.

This is often a difficult challenge, particularly when data is limited, or in circumstances where developing States have not had the opportunity to develop their own fisheries aspirations. For example, applying a conservation limit for an overfished stock that is primarily based on historical catch may inadvertently lock out developing States that have not had fishing opportunities. Such an outcome might contradict international equity commitments noted previously and be considered disproportionate. However, some developing coastal States may also have significant catch history (or proxies) due to extensive artisanal fisheries that provide critical food security and livelihoods, requiring special consideration, or their own domestically based and/or foreign industrial fisheries. Failure to consider this catch history or proxy might also contradict international equity commitments and apply a disproportionate burden of conservation.

Failure to act at all clearly contradicts international commitments. Within the IOTC, CPCs can opt out of measures that they oppose. These opt-out procedures have been used by a number of CPCs due to perceived inequities in a resolution, but in opting out, these decisions undermine the effectiveness of the resolution and exacerbate conservation burden concerns for other CPCs that implement the resolution.

In comparison, the WCPFC does not allow for opt outs, but has adopted measures that ensure that the Commission must explicitly consider the special requirements of developing States and avoid a disproportionate burden.²¹ For example, the WCPFC conservation and management measure for tropical tuna includes measures that exempt small island developing States from some provisions so as to avoid a disproportionate burden.²² While such exemptions may address equity concerns, they similarly undermine the integrity of conservation and management measures and may also inadvertently exacerbate equity concerns for other members.²³ As a result, the WCPFC has also agreed to negotiate allocation frameworks to address equity concerns and enable the removal of exemptions.²⁴

²¹ CMM 2013-06 on the criteria for the consideration of conservation and management proposals.

²² CMM 2023-01 for Bigeye, Yellowfin and Skipjack Tuna in the Western and Central Pacific Ocean

²³ Bianca Haas, Kamal Azmi and Quentin Hanich, "The unintended consequences of exemptions in conservation and management measures for fisheries management," *Ocean & Coastal Management* 237 (2023): 106544.

²⁴ Allocation frameworks are in discussion by the WCPFC for tropical purse seine, tropical longline, and sub-tropical south pacific albacore.

RFMOs generally apply a consensus-based decision-making approach, even when they have the option to vote. While the consensus-focused approach is often criticised for resulting in weak outcomes, consensus is important as decisions can only be implemented through domestic jurisdictions; as flag States, coastal States, port States and market States. If a State objects to a proposed measure, or does not have the capacity to implement it, then that State is unlikely to comply.²⁵

In conclusion, all IOTC CPCs have both a legal obligation to cooperate, but also a vested interest – the future integrity and viability of their tuna and related fisheries depends inherently on an integrated conservation and management framework across the range of the stock. For some stocks, such as neritic tunas, this range might be localised and may only require cooperation of immediate neighbours and adjacent high seas, but for many stocks – it will require compatible measures across the IOTC Area of Competence.

²⁵ Quentin Hanich, Feleti Teo and Martin Tsamenyi, “A collective approach to Pacific islands fisheries management: Moving beyond regional agreements,” *Marine Policy* 34 (2010): 85-91.