

# Non-Participation in the Fish Stocks Agreement: Status and Reasons

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## Abstract

Although the Fish Stocks Agreement was adopted by consensus after around only 2.5 years of negotiation, the final text did not fully resolve all significant differences of view. As it was feared that participation in the Fish Stocks Agreement would remain as troublesome as in the 1958 Geneva Fisheries Convention, considerable efforts have been made to promote wider participation since the Agreement's entry into force in 2001. On 22 November 2010 there were 78 parties to the Fish Stocks Agreement and 161 to the Law of the Sea Convention. This article examines the current status and reasons for non-participation in the Fish Stocks Agreement by, *inter alia*, categorizing non-participation, appraising participation in light of the current participation in the Law of the Sea Convention and examining the relationship between the Agreement and regional fisheries management organizations.

## Keywords

marine capture fisheries, international law of the sea, Fish Stocks Agreement

## Introduction

Upon its adoption in 1995, many heralded the Fish Stocks Agreement<sup>2</sup> as a significant step in the progressive development of international fisheries

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<sup>1</sup> The article is up-to-date as of 22 November 2010, and builds on a report with the same title but dated 18 November 2009 that was commissioned by the Netherlands Ministry for Agriculture, Nature and Food Quality (now part of the Ministry for Economic Affairs, Agriculture and Innovation). Updating and transforming that report into this article was facilitated by funding from the Netherlands Polar Programme and the Research Council of Norway. The author is very grateful for comments received by W. Edeson, A.G. Oude Elferink, A. Tahindro and P.A. Verlaan on the above-mentioned report.

<sup>2</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, 4 August 1995. In force 11 December 2001, 34 *International Legal Materials* 1542 (1995); <[www.un.org/Depts/los](http://www.un.org/Depts/los)>.

law.<sup>3</sup> Within the relatively short time-span of around 2.5 years—certainly compared to the Law of the Sea (LOS) Convention<sup>4</sup>—it had been possible to develop a sophisticated, complex and detailed legally binding global instrument. It also proved possible to adopt the Fish Stocks Agreement by consensus; this was another contrast with the LOS Convention.

This did not mean, however, that the negotiations always proceeded smoothly and that the final text fully resolved all significant differences of view.<sup>5</sup> The negotiation process on the Fish Stocks Agreement commenced while the consultations that eventually culminated in the Part XI Deep-Sea Mining Agreement<sup>6</sup> were still under way. The main challenge in that process was to safeguard universal participation in the LOS Convention.<sup>7</sup> Moreover, the arrest of the Spanish-flagged fishing vessel *Estai* by Canadian authorities on 9 March 1995—less than three weeks before the fifth Conference session—could have derailed the entire process and also provides the main background for the declarations of the (then) European Community (EC) and the (now) European Union (EU) Member States on signature, ratification and accession.

The entry into force of the Fish Stocks Agreement in 2001 meant merely that its requirement for entry into force had been met (30 instruments of ratification/accession),<sup>8</sup> but not that sufficient universal participation had been attained. As shown in Table B in Annex I to this article, many important high seas fishing States (e.g., China, Japan, South Korea and Spain) were then still non-parties. A widely felt concern was that participation in the Fish Stocks Agreement would remain as troublesome as participation in the 1958 Fisher-

<sup>3</sup> See, e.g., M. Hayashi, “The 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention” (1995) 29 *Ocean & Coastal Management* 51–69; A. Charlotte de Fontaubert, “The Politics of Negotiation at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks” (1995) 29 *Ocean & Coastal Management* 79–91; D.A. Balton, Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks (1996) 27 *Ocean Development & International Law* 125–151.

<sup>4</sup> United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 *United Nations Treaty Series* 396; <[www.un.org/Depts/los](http://www.un.org/Depts/los)>.

<sup>5</sup> Cf. de Fontaubert, *op. cit.*, *supra* note 3 at 82.

<sup>6</sup> Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, New York, 28 July 1994. In force 28 July 1996, 33 *International Legal Materials* 1309 (1994); <[www.un.org/Depts/los](http://www.un.org/Depts/los)>.

<sup>7</sup> See in this regard D.H. Anderson, “Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea” (1993) 42 *International and Comparative Law Quarterly* 654–664.

<sup>8</sup> See A. Serdy, “How Long has the United Nations Fish Stocks Agreement Been in Force?” (2003) 34 *Ocean Development & International Law* 29–39.

ies Convention.<sup>9</sup> Of the four conventions that were adopted by the First United Nations Conference on the Law of the Sea (UNCLOS I) in 1958, the Fisheries Convention entered into force last and attracted significantly fewer signatories and parties than the other three.<sup>10</sup>

Considerable efforts were therefore made to promote wider participation in the Fish Stocks Agreement, for instance in the context of the 2006 Session of the Review Conference of the Fish Stocks Agreement (FSA Review Conference),<sup>11</sup> the 2010 Session of the FSA Review Conference<sup>12</sup> and the annual Informal Consultations of States Parties to the Fish Stocks Agreement (ICSPs).<sup>13</sup> The lengthy debate in 2006 on the provisional rules of procedure for the FSA Review Conference—in particular those relating to decision-making—also clearly showed that parties were mindful of the need for wider participation.<sup>14</sup>

The focus of this article is on the status and reasons for non-participation by States in the Fish Stocks Agreement, with special emphasis on the process of the so-called ‘greening’ of regional fisheries management organizations (RFMOs)<sup>15</sup> by their increasing incorporation of precautionary and ecosystem approaches to fisheries management.

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<sup>9</sup> Convention on Fishing and Conservation of the Living Resources of the High Seas, Geneva, 29 April 1958. In force 20 March 1966, 559 *United Nations Treaty Series* 285; <www.un.org/law/ilc>.

<sup>10</sup> The Fisheries Convention attracted 35 signatories and—at 22 November 2010—had 38 parties, compared to 46:63, respectively, for the Convention on the High Seas; 43:58 for the Convention on the Continental Shelf and 41:52 for the Convention on the Territorial Sea and the Contiguous Zone (information obtained from <treaties.un.org> on 16 November 2010). Each of the four conventions required 22 ratifications/accessions to enter into force.

<sup>11</sup> See, *inter alia*, UN Doc. A/CONF.210/2006/15, of 5 July 2006, ‘Report of the Review Conference on 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. Prepared by the President of the Conference’, in particular paras. 123–128.

<sup>12</sup> See, *inter alia*, UN Doc. A/CONF.210/2010/7, of 27 July 2010, ‘Report of the resumed Review Conference on 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. Prepared by the President of the Conference’, at paras. 111–113.

<sup>13</sup> See, *inter alia*, the Report of ICSP4 (2005), at para. 45; the Report of ICSP5 (2006), at paras. 19–20; the Report of ICSP6 (2007), at paras. 58–64; the Report of ICSP7 (2008), at paras. 55–65; and the Report of ICSP8 (2009), in particular its section 3 entitled ‘Continuing dialogue, in particular with developing States, to promote wider participation in the Agreement’.

<sup>14</sup> See the Report of ICSP5 (2006), at paras. 43–55; UN Doc. A/CONF.210/2006/6, of 30 March 2006, ‘Provisional rules of procedure of the Review Conference’; and the Report of the 2006 Session of the FSA Review Conference, note 11 *supra*, at paras. 12–18.

<sup>15</sup> Unless specified otherwise, a reference in this article to an RFMO includes an ‘Arrangement’ as defined in Art. 1(1)(d) of the Fish Stocks Agreement. As a corollary thereto, a

This article uses the phrases ‘participation in the Fish Stocks Agreement’ and ‘non-participation in the Fish Stocks Agreement’ to indicate formal adherence to the Fish Stocks Agreement by means of ratification, accession, succession or formal confirmation, or the absence of such formal adherence, respectively.

The remainder of the article is structured as follows. The next section provides an overview of the current status of participation in the Fish Stocks Agreement. The ensuing section, entitled ‘Reasons for non-participation’, seeks to identify reasons that States may have for not becoming a party to the Fish Stocks Agreement. The following section, entitled ‘Categorizing non-participation’, then uses the analysis in the previous section to create groups of States in light of the identified reasons for non-participation. The section entitled ‘Appraising the status of participation’ examines how the current participation in the Fish Stocks Agreement should be valued, in particular in light of the current participation in the LOS Convention. In order to answer this latter issue, it is necessary, *inter alia*, to identify the most important differences between the Fish Stocks Agreement and the LOS Convention that are relevant for participation.

The section entitled ‘Relationship between the Fish Stocks Agreement and RFMOs’, focuses on the most important differences—in particular for the greening of RFMOs—between the main rights and duties of States<sup>16</sup> that are parties or non-parties to the Fish Stocks Agreement in combination with being members or non-members<sup>17</sup> of relevant RFMOs. The section entitled ‘The ‘greening’ of RFMOs’ examines, *inter alia*, the potential relevance of other international instruments for the greening of RFMOs. The article ends with a summary and conclusions.

Annex I to the article contains Tables A-C relating to the current status of participation in the Fish Stocks Agreement. Annex II contains Table D which lists the current non-parties to the LOS Convention.

## Current Status of Participation

Tables A (alphabetical) and B (chronological) in Annex I to this article list the current 78 parties to the Fish Stocks Agreement and Table C lists the current

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reference to a member or members of an RFMO includes a participant or participants in an Arrangement.

<sup>16</sup> Including the European Union (EU).

<sup>17</sup> For the purpose of this article, members include cooperating non-members unless specified otherwise.

117 non-parties.<sup>18</sup> It is difficult to predict how the status of participation in the Fish Stocks Agreement will develop in the future. Such predictions should be based on first-hand information provided by non-parties on their intent or absence thereof to participate in the Agreement. International meetings are often occasions at which such information is disseminated. At the 2006 Session of the FSA Review Conference, for instance, Indonesia, Japan, Morocco, Mozambique, the Philippines and Sierra Leone indicated their intention to become parties. At the time, Austria also indicated—on behalf of the EU—that EU Member States that were not yet parties to the Fish Stocks Agreement would become so in the near future.<sup>19</sup> Some time thereafter, Malaysia, South Korea and Suriname announced that they had taken steps to become parties as well.<sup>20</sup> Indonesia, Japan, Mozambique, South Korea and nine EU Member States have become parties since these announcements. One would assume that ratification or accession by Malaysia, Morocco, the Philippines, Sierra Leone and Suriname is forthcoming in the not too distant future.

## **Reasons for Non-Participation**

### *Introduction*

UN documents relating to the Fish Stocks Agreement mention a wide range of reasons that States have, or may have, for non-participation in the Fish Stocks Agreement. Some of these documents also contain categorizations of such reasons, for instance:

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<sup>18</sup> The number of 195 (78 + 117) is based on the ‘Table recapitulating the status of the Convention and of the related Agreements, as at 1 October 2010’, available at <[www.un.org/Depts/los](http://www.un.org/Depts/los)> at 22 November 2010. The Holy See is not included in the count.

<sup>19</sup> Cf. the Report of ICSP6 (2007), at para. 15. EU Member States are required to accede to the Fish Stocks Agreement pursuant to Council Decision 98/414/EC of 8 June 1998 on ‘the ratification by the European Community of the Agreement for the implementing 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 stocks and highly migratory fish stocks’ (*OJ* 1998, L 189/14).

<sup>20</sup> Malaysia and Suriname have indicated this in their submission for UN Doc. A/62/260, of 15 August 2007, ‘Sustainable fisheries, including through the 1995 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, and related instruments. Report of the Secretary-General’ (see para. 14 at p. 8). The information relating to South Korea is based on the Report of ICSP6 (2007), at p. 7, para. 21.

one delegation indicated that the impediments identified by States non-parties to their broader participation in the Agreement could be broadly listed into three categories: (i) impediments due to lack of capacity; (ii) technical, juridical or policy differences involving the interpretation of the Agreement; and (iii) impediments that reflected political differences.<sup>21</sup>

The categorization employed in the following subsections is as follows: objections to substantive aspects, lack of capacity and resources, lack of awareness and misconceptions, lack of direct interest, and a cost-benefit analysis.

### *Objections to Substantive Aspects*

#### *Article 4: Relationship between the Fish Stocks Agreement and the LOS Convention*

Objections to substantive aspects of the Fish Stocks Agreement are in many instances also related to diverging interpretations of its Article 4, entitled 'Relationship between this Agreement and the Convention'. This provision stipulates:

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.<sup>22</sup>

It is submitted that this provision should be interpreted in light of the Fish Stocks Agreement's overarching objective, which is to implement the basic jurisdictional framework of the LOS Convention by means of a modernized and more elaborate and operational regulatory framework.<sup>23</sup> The incorporation of an operationalized precautionary approach and a *de facto* ecosystem approach, the clarification that RFMOs are the primary vehicles for the conservation and management of straddling and highly migratory fish stocks, and the intricate provisions on high seas enforcement powers of non-flag States bear witness to that objective.

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<sup>21</sup> Report of ICSP7 (2008), at p. 14, para. 56. See also the Report of ICSP8 (2009), at p. 12, para. 6.

<sup>22</sup> Reference can also be made to the full title of the Agreement and its Art. 2, which used the phrase "effective implementation of the relevant provisions" of the LOS Convention.

<sup>23</sup> Cf. UN Doc. A/CONF.210/2006/1, of 4 January 2006, 'Report submitted in accordance with paragraph 17 of General Assembly resolution 59/25, to assist the Review Conference to implement its mandate under paragraph 2, article 36 of the United Nations Fish Stocks Agreement Report of the Secretary-General', at para. 314.

Some States may nevertheless have the view that certain provisions of the Fish Stocks Agreement amend rather than implement the LOS Convention and are therefore inconsistent with it.<sup>24</sup> The provisions on compatibility and high seas enforcement by non-flag States are examples in this regard (see the subsections below). Another example that is not examined in detail in this article is the denial to non-members of RFMOs of access to fishery resources pursuant to Article 8(4) of the Agreement, which some States are likely to regard as inconsistent with the right to fish on the high seas pursuant to Article 116 of the LOS Convention.

Article 4 appears prominently in the Lima Declaration of 5 May 2010 adopted jointly by the CPPS (Permanent South Pacific Commission), OLDEPESCA (Latin American Organization for Fisheries Development) and OSPESCA (Organization for the Central American Fisheries and Aquaculture Sector).<sup>25</sup> Concern about Article 4 is thus shared by the following States:

Belize*	Costa Rica*	Guatemala	Nicaragua
Bolivia	Cuba	Guyana	Panama*
Chile	Ecuador	Honduras	Peru
Colombia	El Salvador	Mexico	Venezuela

\* Party to the Fish Stocks Agreement.

Evidently, however, these concerns have not been an impediment to Belize, Costa Rica and Panama becoming party to the Fish Stocks Agreement.

### *Article 7: Compatibility*

The purpose of Article 7 of the Fish Stocks Agreement, entitled ‘Compatibility of conservation and management measures’, is to ensure that each straddling and highly migratory fish stock is conserved and managed in its entirety. Conservation and management measures relating to the high seas must

<sup>24</sup> In their view, therefore, the negotiation process that led to the Fish Stocks Agreement has to some extent disregarded the mandate and instructions contained in UNGA Resolution 47/192, of 22 December 1992, to ensure that the “work and results of the conference should be fully consistent with” the LOS Convention (at para. 3). On this point see also Hayashi, *op. cit.*, *supra* note 3 at 52 and Balton, *op. cit.*, *supra* note 3 at 135, who also address the impact of the (negotiations on the) Part XI Deep-Sea Mining Agreement.

<sup>25</sup> The Lima Declaration of 5 May 2010 is contained in the Annex to UN Doc. A/CONF.210/2010/6, of 1 June 2010, ‘Note verbale dated 20 May 2010 from the Permanent Missions of Chile, Colombia, Costa Rica, Ecuador, Mexico and Peru to the United Nations addressed to the Secretariat’. On Art. 4 of the Fish Stocks Agreement see, *inter alia*, Sec. II(1) (a) of the Lima Declaration.

therefore be compatible with those relating to areas under national jurisdiction and *vice-versa*.<sup>26</sup> However, the way in which this notion is incorporated in Article 7 of the Fish Stocks Agreement has met with opposition by several coastal States and high seas fishing States. These coastal States take the view that Article 7 inappropriately favours high seas fishing States. This is partly based on their view that coastal States' sovereign rights in their exclusive economic zones (EEZs) are inherently superior to the 'mere' right to fish on the high seas and that Article 116 of the LOS Convention gives coastal States a preferential status *vis-à-vis* high seas fishing States. Some high seas fishing States, on the other hand, may feel that Article 7 favours coastal States too much.

Some of the coastal States that object to Article 7 are for similar reasons also not supportive of the notion that RFMOs are the preferred vehicles for the conservation and management of straddling and highly migratory fish stocks—as laid down in Article 8 of the Agreement—unless perhaps if coastal States are given a significant preferential status in such RFMOs. Reference can here be made to the Galapagos Agreement,<sup>27</sup> whose spatial scope includes high seas areas but which was negotiated exclusively by coastal States.<sup>28</sup>

<sup>26</sup> For a discussion see A.G. Oude Elferink, "The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks" (2001) 5 *Max Planck Yearbook of United Nations Law* 551–607.

<sup>27</sup> Framework Agreement for the Conservation of the Living Marine Resources on the High Seas of the Southeast Pacific, Santiago, 14 August 2000. Not in force, *Law of the Sea Bulletin* (2001) 70–78, No. 45. At the time of writing, Chile, Peru and Ecuador had ratified the Agreement but Colombia had indicated that it was unable to ratify, although not excluding this for the future. On 27 November 2003, the four States adopted a Modification Protocol which replaces Art. 19(1) of the Galapagos Agreement with the following provision: "This [Galapagos Agreement] shall enter into force on the thirtieth day after the date of deposition of the instrument of ratification by 3 of the Coastal States." The Modification Protocol also requires 3 ratifications for entry into force. While Chile ratified the Protocol on 22 March 2004 and Ecuador on 25 June 2004, Peru still had to ratify at the time of writing (information provided by M. del Carmen González, CPPS, November 2010). It is interesting that Chile still mentioned the relevance of the Galapagos Agreement in documentation prepared for the 2010 Session of the FSA Review Conference (cf. UN Doc. A/CONF.210/2010/1, of 4 January 2010, 'Report submitted to the resumed Review Conference in accordance with paragraph 32 of General Assembly resolution 63/112 to assist it in discharging its mandate under article 36, paragraph 2, of the Agreement. Report of the Secretary-General', at para. 107).

<sup>28</sup> As mentioned in the subsection 'Addressing reasons for non-participation in the Fish Stocks Agreement at the regional level' below, all four coastal States participated in the negotiation process of the SPRFMO Convention (Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, Auckland, 14 November 2009. Not in force; <[www.southpacificrfmo.org](http://www.southpacificrfmo.org)>); its spatial scope overlaps with most of the high seas portion of the Galapagos Agreement's spatial scope.



Documentation of the 2006 Session of the FSA Review Conference, in particular a Statement on behalf of several Latin American and Caribbean States<sup>29</sup> and the Lima Declaration of 5 May 2010,<sup>30</sup> indicates that concerns about Article 7 are shared by Argentina, Uruguay<sup>31</sup> and the States that also have concerns about Article 4 (see previous subsection). However, Articles 4 and 7 have apparently not been an impediment to Belize, Costa Rica and Panama becoming parties to the Fish Stocks Agreement.

In this context, attention should also be drawn to the purpose of the Statement on behalf of these Latin American and Caribbean States submitted at the 2006 Session of the FSA Review Conference, which is described in the Statement as follows:

Our countries would like the Review Conference, in its final declaration, to include the points stated above as explanatory or interpretive criteria, since in our view they flow logically from the Agreement and its harmonization with the Convention on the Law of the Sea and with international law of the sea in general. That step would certainly promote the general acceptance of and universal adherence to the Agreement, which we believe has great value and significance.<sup>32</sup>

The Statement does not propose that, as a condition for their accession or ratification, the Fish Stocks Agreement be formally amended to address these concerns. Rather, their incorporation in a final declaration would “promote the general acceptance of and universal adherence to” the Fish Stocks Agreement. During the 2006 Session of the FSA Review Conference, however, some non-parties did in fact suggest a process for amendment, to which parties responded that the Fish Stocks Agreement already represents a carefully balanced package deal.<sup>33</sup>

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<sup>29</sup> See UN Doc. A/CONF.210/2006/12, of 23 May 2006, ‘Note verbale dated 22 May 2006 from the Permanent Missions of Argentina, Chile, Colombia, Cuba, Ecuador, El Salvador, Guatemala, Mexico and Peru to the United Nations addressed to the Secretariat’, at p. 1; UN Doc. A/CONF.210/2006/1, *op. cit.*, *supra* note 23 at footnotes 150–152; and the Report of the 2006 Session of the FSA Review Conference, *op. cit.*, *supra* note 11, at 8, para. 34, and at 27–28, para. 125. See also the Declaration by Argentina upon ratification of the LOS Convention and the ‘Statement by the Delegation of Chile on Measures to Promote Accession to the New York Agreement’, 25 May 2006, made at the 2006 Session of the FSA Review Conference, at 2.

<sup>30</sup> See note 25 *supra*, at Section II(1)(b) and (e).

<sup>31</sup> Cf. Uruguay’s declaration upon signature of the Fish Stocks Agreement.

<sup>32</sup> UN Doc. A/CONF.210/2006/12, *op. cit.*, *supra* note 29, at 3.

<sup>33</sup> Report of the 2006 Session of the FSA Review Conference, *op. cit.*, *supra* note 11, at 27–28, paras. 125–128. See also the Report of ICSP8 (2009), at 6, para. 14; at 7, para. 18; at 14–15, paras. 19–25.

As regards the 2010 Session of the FSA Review Conference, the Latin American States did not explicitly request the adoption of explanatory or interpretative declarations, but merely mentioned their support for these.<sup>34</sup> During the Session, however, Argentina—supported by, among others, Ecuador and Mexico—expressed its dissatisfaction that the Review Conference had not examined “the adequacy of the provisions of the” Fish Stocks Agreement pursuant to its Article 36(2). Argentina presumably takes the view that provisions deemed inadequate are to be amended.<sup>35</sup>

Among high seas fishing States, both Japan and the Republic of Korea (South Korea) have in the past expressed their discontent with Article 7. However, this has not prevented Japan and South Korea from acceding to the Fish Stocks Agreement since then.

Finally, two paragraphs in the Report of ICSP8 (2009) are informative:

21. One participant noted the general agreement that compatibility of conservation and management measures established for the high seas and adopted for areas under national jurisdiction was necessary, but emphasized that the real issue was how to achieve compatibility, either through RFMO/As or direct cooperation. The view was expressed that article 7 was an attempt to put forward some rules to achieve compatibility, but that different approaches were needed for different stocks.

22. In terms of application, some participants stated that it was important to focus on the application of article 7 at a regional level, in particular through RFMOs. One participant noted that compatibility clauses were included in the conventions of most RFMOs, and on this basis, members of RFMOs that were not States Parties to the Agreement were encouraged to consider participating in the Agreement. (...)<sup>36</sup>

#### *Articles 21 and 22: High Seas Enforcement by Non-Flag States*

Articles 21 and 22 of the Fish Stocks Agreement on ‘Subregional and regional cooperation in enforcement’ and ‘Basic procedures for boarding and inspection pursuant to article 21’, respectively, contain a carefully defined exception to the primacy of flag State jurisdiction on the high seas, by granting limited enforcement powers to States other than the flag State.

There are four main conditions for invoking this exception. First, it applies in principle only to high seas areas that fall within the geographical competence of an RFMO.<sup>37</sup> Second, only members of that RFMO are allowed to

<sup>34</sup> See the Lima Declaration of 5 May 2010, *op. cit.*, *supra* note 25, at Section IV(3)(a).

<sup>35</sup> Cf. the ENB’s Report on the 2010 Session of the FSA Review Conference (2010) 7 *Earth Negotiations Bulletin*, No. 65; available at <[www.iisd.ca/oceans/rfsaic](http://www.iisd.ca/oceans/rfsaic)> at 11 and 13.

<sup>36</sup> At 14–15.

<sup>37</sup> See Art. 21(14) for an exception.

take enforcement measures and only for the purpose of ensuring compliance with that RFMO's conservation and management measures.

Third, the enforcement measures can only be applied to vessels flying the flag of a party to the Fish Stocks Agreement, whether or not it is also a member of that RFMO. Enforcement action on the high seas by non-flag States at the regional level is therefore based on a flag State's prior consent at the global level. That is: becoming a party to the Fish Stocks Agreement implies a flag State's consent to high seas enforcement by non-flag States even though the flag State is not a member of the relevant RFMO.

Fourth, the procedures for high seas enforcement by non-flag States, as set out in paragraphs (4) to (18) of Article 21 and in Article 22 of the Fish Stocks Agreement, shall be applicable if an RFMO does not establish its own procedures.<sup>38</sup> Moreover, Article 21(15) stipulates:

Where a subregional or regional fisheries management organization or arrangement has established an alternative mechanism which effectively discharges the obligation under this Agreement of its members or participants to ensure compliance with the conservation and management measures established by the organization or arrangement, members of such organization or participants in such arrangement may agree to limit the application of paragraph 1 as between themselves in respect of the conservation and management measures which have been established in the relevant high seas area.

This provision gives RFMOs a wide margin of discretion in agreeing on an 'alternative mechanism' for boarding and inspection procedures, provided such a mechanism effectively discharges the obligation to ensure compliance with the conservation and management measures of such RFMOs. No particulars are provided about such alternative mechanisms and their performance in terms of ensuring compliance, however. At ICSP8, several delegations referred to the compliance mechanism developed by the Inter-American Tropical Tuna Commission (IATTC)—which, *inter alia*, uses international observers—as an example of such an alternative mechanism.<sup>39</sup>

The second part of Article 21(15)—starting with “members of such organization”—confirms the nature of the aforementioned mechanism as an alternative to boarding and inspection procedures, but only “as between themselves”. It is submitted that this part also indicates that RFMOs do not have the competence to affect the rights that their members have as parties to the Fish Stocks Agreement *vis-à-vis* other parties to the Agreement that are non-members of the relevant RFMO.

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<sup>38</sup> See Art. 21(3).

<sup>39</sup> See Report of ICSP8 (2009), at p. 16, para. 31.

It should in this context be noted that research on the practice of RFMOs with regard to high seas enforcement procedures that was carried out a few years ago indicated that several RFMOs had adopted high seas enforcement procedures, but none of these applied to vessels flying the flag of non-members of the RFMOs on the condition that they were party to the Fish Stocks Agreement.<sup>40</sup>

Documentation of the 2006 Session of the FSA Review Conference<sup>41</sup> and the Lima Declaration of 5 May 2010 indicates that Argentina and the States mentioned in the discussion on Article 4 above also have concerns about Articles 21–22. As noted, however, three of these—Belize, Costa Rica and Panama—have nevertheless become parties to the Fish Stocks Agreement. It can be assumed that important high seas fishing States—including China,<sup>42</sup> Japan and South Korea—also had, and may still have, concerns about Articles 21–22, but Japan and South Korea have nevertheless become parties to the Agreement.

The view expressed by parties to the Fish Stocks Agreement during the 2006 Session of the FSA Review Conference must be mentioned, namely that:

Non-parties should consider joining the Agreement and continuing the debate on issues of concern with other States parties. Issues relating to inspection and control mechanisms, in particular, could be addressed in the context of regional fisheries management organizations in order to find regional solutions acceptable to all members, on the basis of the flexible approach provided for in the Agreement.<sup>43</sup>

The ‘flexible approach’ would seem to refer to paragraphs (3) and (15) of Article 21 of the Fish Stocks Agreement discussed above, namely tailor-made high seas boarding and inspection procedures or an ‘alternative mechanism’. At ICSP8 (2009) this flexible approach was referred to as a ‘case-by-case’ approach.<sup>44</sup>

### *Article 23: Port State Measures*

Pursuant to Article 23(1) of the Fish Stocks Agreement, a port State “has the right and the duty” to take certain measures in its ports. These measures are,

<sup>40</sup> See R.G. Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Leiden/Boston, Martinus Nijhoff Publishers: 2004).

<sup>41</sup> UN Doc. A/CONF.210/2006/12, *op. cit.*, *supra* note 29, at 3; Report of the 2006 Session of the FSA Review Conference, *op. cit.*, *supra* note 11, at 8, para. 34 and at 27–28, para. 125. See also the Chilean Statement at the 2006 Session of the FSA Review Conference, *op. cit.*, *supra* note 29, at 3.

<sup>42</sup> See China’s declaration upon signature of the Fish Stocks Agreement.

<sup>43</sup> Report of the 2006 Session of the FSA Review Conference, *op. cit.*, *supra* note 11, at 28, para. 128.

<sup>44</sup> Report of ICSP8 (2009) at 16, para. 29.

*inter alia*, the inspection of documents, fishing gear and catch and, when it has been established that the catch was “taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas”, to prohibit landings and transshipments (paragraphs (2) and (3)). However, Article 23 of the Fish Stocks Agreement does not explicitly mention the right of port States to institute proceedings or to impose monetary or other penalties. This is an important difference with Article 218 of the LOS Convention. Some uncertainty is nevertheless caused by paragraph (4) of Article 23, which reads “Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law”.

Some States interpret this provision as an acknowledgement of a port State’s residual jurisdiction, which would entitle it, for instance, to prescribe unilateral—rather than sub-regional, regional or global—conservation and management measures, as well as to impose more onerous enforcement measures (e.g., monetary penalties). However, there seems to be no unambiguous support for this aspect of the second interpretation, either in other relevant international fisheries instruments or in the practice of individual States.<sup>45</sup> A few RFMOs nevertheless authorize or even require their members to confiscate the catch of foreign vessels in their ports in a few very specific scenarios.<sup>46</sup>

Among the reasons for Chile not to accede to the Fish Stocks Agreement could possibly be that “the rights of port States under international law should be fully recognized”.<sup>47</sup> In Chile’s view, therefore, Article 23 of the Fish Stocks Agreement does not do so. It should be noted that the Statement on behalf of several Latin American and Caribbean States submitted at the 2006 Session of the FSA Review Conference also touches on Article 23 and observes:

Article 23, paragraph 4, of the Agreement recognizes and reaffirms that sovereignty. Paragraphs 1, 2 and 3 should be understood as indicative in nature, that is, as offering examples of the powers that such full sovereignty entails.<sup>48</sup>

<sup>45</sup> See E.J. Molenaar, “Port State Jurisdiction: Towards Comprehensive, Mandatory and Global Coverage” (2007) 38 *Ocean Development & International Law* 225–257 at 235.

<sup>46</sup> E.g., pursuant to para. 22(iv)(b)(i) of CCAMLR (Commission for the Conservation of Antarctic Marine Living Resources) Conservation Measure 10-07 (2009) “Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures” and Art. 23(3) of the NEAFC “Scheme of Control and Enforcement” (version in effect from 6 February 2010).

<sup>47</sup> Cf. Report of ICSP4 (2005) at para. 46. See also the Chilean Statement at the 2006 Session of the FSA Review Conference, *op. cit.*, *supra* note 29, at 3.

<sup>48</sup> See UN Doc. A/CONF.210/2006/12, *op. cit.*, *supra* note 29, at 3. See also the Report of the 2006 Session of the FSA Review Conference, *op. cit.*, *supra* note 11, at 27–28, para. 125 and at 42, para. 52.

Likewise, the Lima Declaration of 5 May 2010 notes that the “full sovereignty of the port State over its maritime terminals be reaffirmed”.<sup>49</sup> It is not clear for how many States of this group this issue is of similar importance as it is for Chile.

Since the adoption of the Port State Measures Agreement<sup>50</sup> in 2009, however, these concerns may have been largely addressed. The Port State Measures Agreement explicitly confirms a port State’s residual jurisdiction in its Article 4(1)(b). Even though the Port State Measures Agreement does not specifically address its relationship with the Fish Stocks Agreement but merely stipulates that it must be interpreted and applied in conformity with international law,<sup>51</sup> as the former is a more recent and more specific treaty, the *lex posterior derogat legi priori* rule and the *lex specialis derogat legi generali* rule imply that in principle the Port State Measures Agreement has precedence over Article 23 of the Fish Stocks Agreement, as between parties to both treaties. Support for the Port State Measures Agreement—in particular by means of formal adherence—by Chile and the other Latin American and Caribbean States mentioned above, would therefore imply that their concerns about Article 23 of the Fish Stocks Agreement have been addressed and would thereby remove an impediment to their participation in the Fish Stocks Agreement. As the Lima Agreement of 5 May 2010 explicitly and repeatedly supports the Port State Measures Agreement, it seems reasonable to conclude that this impediment has been removed.<sup>52</sup>

#### *Article 1(3): Fishing Entities*

Paragraph (3) of Article 1, entitled ‘Use of terms and scope’, provides: “This Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas.” It is widely known that this provision is aimed at making the substance of the Fish Stocks Agreement applicable to Taiwan (Chinese Taipei). Taiwan is likely to regard the incorporation of this provision in the Agreement as a success because it implicitly recognizes the existence and significance of Taiwan as a separate entity in the domain of international fisheries law, even though it does not accord Taiwan a status equal to that of a State. This modest success for Taiwan could very well be problematic for China,

<sup>49</sup> See *supra* note 25, at Section II(1)(c).

<sup>50</sup> Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome, 22 November 2009. Not in force; <[www.fao.org/Legal](http://www.fao.org/Legal)>.

<sup>51</sup> See Art. 4(4) of the Port State Measures Agreement, *ibid.*

<sup>52</sup> See *supra* note 25, at Sections 3(1)(d) and (f) and IV(1)(a) and (3)(g). At the 2010 Session of the FSA Review Conference, Chile repeatedly expressed its support for the Port State Measures Agreement (cf. the ENB’s Report on the 2010 Session of the FSA Review Conference, *op. cit.*, *supra* note 35, at 3, 4 and 8).

because China's participation in the Agreement could be interpreted as *de facto* recognition of Taiwan's separate status in international fisheries law, with potential risks of spill-over effects on other domains of international law.

It seems that China has these concerns even though there are several RFMOs<sup>53</sup> in which both China and Taiwan participate—notwithstanding the fact that Taiwan's participatory status therein is not equal to that of a State.<sup>54</sup> China's line of argument seems to be that such *de facto* recognition is less problematic because it remains confined to the regional level and does not extend to the global level. Accordingly, China normally objects to Taiwan's participation in bodies that are part of or associated with the UN family, for instance the Indian Ocean Tuna Commission (IOTC).<sup>55</sup> This does not mean, however, that China will refrain from using opportunities to emphasize that Taiwan cannot participate on an equal footing with States in RFMOs<sup>56</sup> or to prevent Taiwan from expanding its participation in relevant regional bodies.<sup>57</sup>

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<sup>53</sup> For instance the Western and Central Pacific Fisheries Commission (WCPFC) and the International Commission for the Conservation of Atlantic Tunas (ICCAT). Note also that Annex IV to the SPRFMO Convention, *op. cit., supra* note 28, allows fishing entities to become members of the Commission it established.

<sup>54</sup> Or a regional economic integration organization.

<sup>55</sup> See the Report of the Eleventh IOTC Session (2007) at 6–7, the Report of the Twelfth IOTC Session (2008) at 6 and the Report of the Thirteenth IOTC Session (2009) at 6–7. See also the Report of the IOTC Performance Review Panel, January 2009 at 1, where it reads: “The limitation on participation to this RFMO, deriving from IOTC's legal status as an Article XIV Food and Agricultural Organisation of the United Nations (FAO) body, conflicts with provisions of United Nations Fish Stocks Agreement (UNFA) and prevents major fishing players in the Indian Ocean from discharging their obligations to cooperate in the work of the Commission.”

<sup>56</sup> Note, for instance, that on the very first day of the 81st IATTC Meeting, held in Guatemala, Sep.–Oct. 2010, China announced that it would block consensus decision-making because its demands with regard to Taiwan's participation at that meeting were not accepted by the other members. China's demands were made in the context of the entry into force of the Antigua Convention (Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention Between the United States of America and the Republic of Costa Rica, Washington D.C., 14 November 2003. In force 27 August 2010, <[www.iattc.org](http://www.iattc.org)>) just prior to the 81st IATTC Meeting.

<sup>57</sup> Arguably, one of the reasons why the 23rd Annual CCAMLR Meeting (2005) saw China's first participation as an observer was that Taiwan had, several weeks before the 2005 meeting, filed an official request to attend as an observer. This request was rejected, presumably on account on the fact that the CCAMLR Convention (Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980. In force 7 April 1982, 19 *International Legal Materials* 837 (1980); <[www.ccamlr.org](http://www.ccamlr.org)>) is part of the Antarctic Treaty System but quite likely also due to Chinese diplomatic pressure. China acceded to the CCAMLR Convention on 19 October 2006 (cf. <[www.dfat.gov.au/treaties](http://www.dfat.gov.au/treaties)> accessed on 18 November 2010) and became a Member of CCAMLR on 2 October 2007 (cf. the Report of the 26th Annual CCAMLR Meeting (2007), at para. 1.7). On Taiwan, see paras. 10.71–10.74 of the

### *Lack of Capacity and Resources*

Articles 24–26 of the Fish Stocks Agreement implicitly acknowledge that developing States in particular may lack the capacity and resources that would be required to discharge a party's obligations under the Agreement.<sup>58</sup> Annual United Nations General Assembly (UNGA) Resolutions confirm this and call upon States:

to promote, through continuing dialogue and the assistance and cooperation provided in accordance with articles 24 to 26 of the Agreement, further ratification of or accession to the Agreement by seeking to address, *inter alia*, the issue of lack of capacity and resources that might stand in the way of developing States becoming parties.<sup>59</sup>

### *Lack of Awareness and Misconceptions*

Non-participation in the Fish Stocks Agreement can also be based on a lack of awareness or misconceptions related to the Fish Stocks Agreement. The UN Secretary-General's Report to assist the 2006 Session of the FSA Review Conference notes, for instance, that:

Some States, in particular developing coastal States, have not become parties to the Agreement owing to the misconception that the Agreement addresses the conservation and management of fish stocks on the high seas only and therefore does not have any relevance to the conservation and management of fishery resources in exclusive economic zones.<sup>60</sup>

In view of the complexity of the Agreement, it seems also quite likely that some States are not fully aware of the Agreement's basic objectives, its role in the broader framework of international fisheries law and the international law of the sea, as well as its relationship with RFMOs and their constitutive instruments. Lack of awareness may also relate more specifically to the advan-

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Report of the 26th Annual CCAMLR Meeting (2007) and paras. 20.13–20.15 of the Report of the 27th Annual CCAMLR Meeting (2008).

<sup>58</sup> See in this regard also the 'Continuing dialogue, in particular with developing States, to promote a wider participation in the Agreement' organized during ICSP8 and the document prepared by DOALOS in this respect (doc. ICSP8/UNFSA/INF.4/Rev, entitled 'Sources of available assistance for developing States and the needs of developing States for capacity-building and assistance in the conservation and management of straddling fish stocks and highly migratory fish stocks').

<sup>59</sup> UNGA Resolution 64/72, of 4 December 2009, at para. 141.

<sup>60</sup> UN Doc. A/CONF.210/2006/1, *op. cit.*, *supra* note 23, at para. 315.



tages and disadvantages of participation, as discussed below in the subsection entitled 'A cost-benefit analysis'.

### *Lack of Direct Interest*

Non-participation can also be based on a lack of direct interest in fisheries for straddling and/or highly migratory fish stocks. Such a lack of interest would therefore not be grounded in a lack of awareness or misconceptions related to the Agreement. It seems that the UN Secretary-General's Report to assist the 2006 Session of the FSA Review Conference implicitly refers to this category of States when it observes:

Although the Agreement may never reach the quasi-universality of adherence achieved by the [LOS] Convention, since it is not necessarily of *direct interest* to all States, participation of all key coastal States and high seas fishing States is crucial to ensure wide acceptance of the new approaches to fisheries management it contains.<sup>61</sup> (Emphasis added.)

The words "direct interest" would seem to refer to flag States that have a high seas fishing fleet or an interest in establishing such a fleet, as well as to coastal States whose maritime zones overlap with the distributional ranges of one or more straddling or highly migratory fish stocks.

The cited passage also assumes that interests that are not 'direct' are less likely to motivate participation in the Fish Stocks Agreement. Such 'non-direct interests' would include the international community's interests in the long-term conservation and sustainable use of straddling and highly migratory fish stocks as expressed in Article 2 of the Agreement, as well as in the effectiveness of international fisheries law in general. Non-direct interests could also relate to a State's other relevant capacities, for instance as a port State, a market State or with respect to its nationals that engage in, or support, fishing or fishing-related activities for straddling or highly migratory fish stocks.<sup>62</sup>

### *A Cost-Benefit Analysis*

States that have a direct interest in fisheries for straddling and highly migratory fish stocks as defined in the previous subsection and neither lack awareness nor have misconceptions related to the Agreement, may opt for

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<sup>61</sup> *Ibid.*, at para. 314.

<sup>62</sup> See also the Report of ICSP8 (2009) at 12, para. 5.

non-participation in the Agreement if a cost-benefit analysis has led to the conclusion that the disadvantages of participation outweigh the advantages. Table 1 below lists some of these disadvantages and advantages.

Table 1. Some disadvantages and advantages of participation in the Fish Stocks Agreement

<b>Disadvantages</b>	<b>Advantages</b>
(a) Compliance with the many obligations under the Agreement is costly and difficult for States that lack capacity and resources, and could also lead to incurring State responsibility	Developing States parties, <i>inter alia</i> , have access to the Part VII Assistance Fund established by the UNGA and administered by the FAO, are entitled to assistance by developed States parties pursuant to Articles 24–26 of the Agreement and could be entitled to other assistance dependent on participation in the Agreement
(b) Recognition that, pursuant to Article 8(4) of the Agreement, only members and cooperating non-members of RFMOs have access to the relevant fishery resources	Meeting one or more of the criteria for determining the “nature and extent of participatory rights” for new members of RFMOs pursuant to Articles 11 and 25(1)(b) of the Agreement
(c) Being subject to non-flag State high seas enforcement pursuant to Articles 21–22 of the Agreement	Being entitled to exercise non-flag State high seas enforcement pursuant to Articles 21–22 of the Agreement
(d) Being subject to the dispute settlement mechanism in Part V3 of the Agreement	Recourse to the dispute settlement mechanism in Part V3 of the Agreement
(e) May be perceived as reflecting a State’s lower stature in the international community due to lack of explicit support of the international community’s interests in the long-term conservation and sustainable use of straddling and highly migratory fish stocks as expressed in Article 2 of the Agreement, as well as in the effectiveness of international fisheries law in general	May be perceived as reflecting a State’s higher stature in the international community due to explicit support of the international community’s interests in the long-term conservation and sustainable use of straddling and highly migratory fish stocks as expressed in Article 2 of the Agreement, as well as in the effectiveness of international fisheries law in general (‘responsible fishing State’)

It is acknowledged that outcomes of cost-benefit analyses are difficult to predict, *inter alia* because there is no uniform and objective mechanism for attributing weight to individual elements or assigning priority among them. Nevertheless, it would not be surprising if some non-parties take the view that the disadvantages listed under (a)—(c) outweigh the advantages. As regards (b) and (c), their view may be motivated by concerns about practices within RFMOs on participation, allocation of fishing opportunities and combating illegal, unreported and unregulated (IUU) fishing and fishing activities by means of IUU vessel lists, in case such practices discriminate against non-members, including new entrants.<sup>63</sup> The section entitled ‘Relationship between the Fish Stocks Agreement and RFMOs’ below points out that participation in the Fish Stocks Agreement does not automatically entitle a State to membership of relevant RFMOs or a (fair and equitable) allocation of fishing opportunities. In some cases States may therefore prefer to first obtain membership and a fair and equitable allocation before becoming a party to the Fish Stocks Agreement. At ICSP8, several delegations expressed concerns about RFMO practices on participation and allocation.<sup>64</sup> It is submitted that these concerns challenge the fairness and equity of the extent to which developing States in particular are able to exercise their entitlement to marine living resources under the current international law of the sea.

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<sup>63</sup> These concerns constituted key objections for Argentina against incorporating unconditional linkages to RFMOs and their IUU vessel lists in the Port State Measures Agreement (*op. cit.*, *supra* note 50). In the end, these concerns were accommodated in its Art. 4(3), which reads: “In no case is a Party obliged under this Agreement to give effect to measures or decisions of a regional fisheries management organization if those measures or decisions have not been adopted in conformity with international law” (for a discussion see E.J. Molenaar “Port State Jurisdiction to Combat IUU Fishing: The Port State Measures Agreement”, in: D.A. Russell and D.L. VanderZwaag (eds.) *Recasting Transboundary Fisheries Management Arrangements in Light of Sustainability Principles: Canadian and International Perspectives* (Leiden, Brill Publishing: 2010) 369–386 at 382–385). See also M.A. Palma, M. Tsamenyi and W. Edeson, *Promoting Sustainable Fisheries. The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing* (Leiden, Martinus Nijhoff Publishers: 2010) at 212–213.

<sup>64</sup> See the Report of ICSP8 (2009) at 13, para. 12; the ENB’s description of the interventions by China, the Marshall Islands and Senegal at ICSP8 (7 *Earth Negotiations Bulletin*, No. 64 (2009); available at <[www.iisd.ca/oceans/fsaic8](http://www.iisd.ca/oceans/fsaic8)> at 5); the Report of the 2010 Session of the FSA Review Conference, *op. cit.*, *supra* note 12, at paras. 74, 83–85, 116 and 154; and the ENB’s description of the interventions by New Zealand, Peru and Iceland at the 2010 Session of the FSA Review Conference, *op. cit.*, *supra* note 35, at 6 and 8). See also UN Doc. A/CONF.210/2010/1, *op. cit.*, *supra* note 27, at paras. 301–302.

### Categorizing Non-Participation

The categorization of parties and non-parties in Table 2 below is inspired by the reasons for non-participation discussed in the previous section. Tables 3–9 further below contain lists of all the parties and non-parties that are included in the groups shown in Table 2.

This categorization follows from the identification of three groups with distinct and likely reasons for non-participation, namely land-locked States, small island developing States and Central and South American States. The first two groups were identified first, i.e., neither the Central and South American group nor any of the other regional groupings contain land-locked or small island developing States.

The most likely reasons for non-participation by land-locked States are a lack of direct interest and a cost-benefit analysis. It should be pointed out in this regard that the five land-locked States that are parties to the Agreement are all EU Member States and were in fact required to accede.<sup>65</sup> Moreover, 20 of the 36 land-locked States are non-parties to both the Agreement and the LOS Convention.<sup>66</sup> As regards small island developing States, the main reason for non-participation is likely to be lack of capacity and resources. The group of Central and South American States was then singled out in view of the likelihood of objections to substantive aspects of the Agreement. It can be noted in this context that five of the 14 non-parties in this group are also non-parties to the LOS Convention.<sup>67</sup>

Table 2. Groups of Parties and Non-Parties

Group	# parties	# non-parties
Land-locked States	5	37
Small island developing States	20	12
African States	8	26
Asian States	6	12
Central and South American States	5	14
States of the Middle East	2	10
Others	32	6
<b>Total</b>	<b>78</b>	<b>117</b>

<sup>65</sup> See *supra* note 19.

<sup>66</sup> See Table D in Annex II.

<sup>67</sup> *Ibid.* It is also worth observing that Ecuador and Peru claim a 200-nm territorial sea.

Table 3. Land-locked States Parties and Non-Parties

<b>Parties</b>	
Austria	Luxembourg
Czech Republic	Slovakia
Hungary	
<b>Non-Parties</b>	
Afghanistan	Mali
Andorra	Moldova <sup>a</sup>
Armenia	Mongolia <sup>a</sup>
Azerbaijan <sup>c</sup>	Nepal
Belarus	Niger
Bhutan	Paraguay
Bolivia	Rwanda
Botswana	San Marino
Burkina Faso	Serbia
Burundi	Swaziland
Central African Republic	Switzerland
Chad	Tajikistan
Ethiopia	The Former Yugoslav Republic of Macedonia
Kazakhstan <sup>c</sup>	Turkmenistan <sup>c</sup>
Kyrgyzstan	Uganda <sup>a</sup>
Lao People's Democratic Republic	Uzbekistan
Lesotho	Zambia
Liechtenstein	Zimbabwe
Malawi	

<sup>a</sup> Signatory of the Fish Stocks Agreement.

<sup>c</sup> Even though bordering on the Caspian Sea.

Table 4. Small Island Developing States Parties and Non-Parties

<b>Parties</b>	
Bahamas	Niue
Barbados	Palau
Cook Islands	Saint Lucia
Fiji	Saint Vincent and the Grenadines
Kiribati	Samoa
Maldives	Seychelles
Marshall Islands	Solomon Islands
Mauritius	Trinidad and Tobago
Micronesia	Tonga
Nauru	Tuvalu

Table 4 (*cont.*)

<b>Non-Parties</b>	
Antigua and Barbuda	Haiti
Cape Verde	Jamaica
Comoros	Saint Kitts and Nevis
Dominica	Sao Tome and Principe
Dominican Republic	Timor-Leste
Grenada	Vanuatu <sup>a</sup>

<sup>a</sup> Signatory of the Fish Stocks Agreement.

Table 5. African States<sup>68</sup> Parties and Non-Parties

<b>Parties</b>	
Guinea	Namibia
Kenya	Senegal
Liberia	South Africa
Mozambique	Nigeria
<b>Non-Parties</b>	
Algeria	Ghana
Angola	Guinea Bissau <sup>a</sup>
Benin	Libyan Arab Yamahiriya
Cameroon	Madagascar
Congo	Mauritania <sup>a</sup>
Côte d'Ivoire	Morocco <sup>a</sup>
Democratic Republic of the Congo	Sierra Leone
Djibouti	Somalia
Egypt	Sudan
Equatorial Guinea	Togo
Eritrea	Tunisia
Gabon <sup>a</sup>	United Republic of Tanzania
Gambia	Yemen

<sup>a</sup> Signatory of the Fish Stocks Agreement.

<sup>68</sup> Due to the sequence in identifying groups with distinct and likely reasons for non-participation (see above), this group does not include land-locked States and small island developing States.

Table 6. Asian States<sup>69</sup> Parties and Non-Parties

<b>Parties</b>	
India	Papua New Guinea
Indonesia	Republic of Korea
Japan	Sri Lanka
<b>Non-Parties</b>	
Bangladesh	Myanmar
Brunei Darussalam	Pakistan <sup>a</sup>
Cambodia	Philippines <sup>a</sup>
China	Singapore
Democratic People's Republic of Korea	Thailand
Malaysia	Viet Nam

<sup>a</sup> Signatory of the Fish Stocks Agreement.

Table 7. Central and South American States<sup>70</sup> Parties and Non-Parties

<b>Parties</b>	
Belize	Panama
Brazil	Uruguay
Costa Rica	
<b>Non-Parties</b>	
Argentina <sup>a</sup>	Guyana
Chile	Honduras
Colombia	Mexico
Cuba	Nicaragua
Ecuador	Peru
El Salvador	Suriname
Guatemala	Venezuela

<sup>a</sup> Signatory of the Fish Stocks Agreement.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

Table 8. Middle East States<sup>71</sup> Parties and Non-Parties

<b>Parties</b>	
Iran	Oman
<b>Non-Parties</b>	
Bahrain	Lebanon
Iraq	Qatar
Israel <sup>a</sup>	Saudi Arabia
Jordan	Syrian Arab Republic
Kuwait	United Arab Emirates

<sup>a</sup> Signatory of the Fish Stocks Agreement.

Table 9. Other Parties and Non-Parties

<b>Parties</b>	
Australia	Lithuania
Belgium	Malta
Bulgaria	Monaco
Canada	Netherlands
Cyprus	New Zealand
Denmark	Norway
Estonia	Poland
European Community	Portugal
Finland	Romania
France	Russian Federation
Germany	Slovenia
Greece	Spain
Iceland	Sweden
Ireland	Ukraine
Italy	United Kingdom
Latvia	United States of America
<b>Non-Parties</b>	
Albania	Georgia
Bosnia and Herzegovina	Montenegro
Croatia	Turkey

<sup>71</sup> *Ibid.*



## Appraising the Status of Participation

It is submitted that appraisals of the status of participation in the Fish Stocks Agreement must, *inter alia*, take the following aspects into account:

- (a) the time elapsed since the Agreement was opened for signature;
- (b) the substance, role and nature of the Agreement; and
- (c) what level of participation is 'necessary'.

For the purpose of examining aspect (a), Table 10 below compares the annual status of participation in the Fish Stocks Agreement with the annual status of participation in the LOS Convention from the year when the instruments were opened for signature.<sup>72</sup> The Table shows that the status of participation was roughly similar during the first 13 years but diverged considerably since then. The average number of new parties per year is nevertheless not all that different: 5.55 for the LOS Convention and 4.88 for the Fish Stocks Agreement. Given the current status of participation for both instruments, the potential for broader participation in the Agreement is higher than the potential for broader participation in the LOS Convention.

For the purpose of examining aspects (b) and (c), a comparison between the LOS Convention and the Fish Stocks Agreement offers some help. First of all, the Fish Stocks Agreement is a relatively specific single-issue instrument, in comparison with the 'Constitution for the Oceans', and therefore less likely to be of interest to States in a literal sense. In addition, compared to the Fish Stocks Agreement, the LOS Convention contains various 'new rights' that were developed during its negotiation process; these include, for instance, sovereignty over archipelagic waters, sovereign rights in the water column of the EEZ, membership of the International Seabed Authority and benefits from exploitation of the Area's resources, and the right of transit passage through straits used for international navigation. For many States the benefits of obtaining these new rights apparently outweighed the costs of having to discharge the wide range of obligations laid down in the LOS Convention. Admittedly, quite a few of them may not have seriously considered these costs or may even have consciously chosen to ignore them. It is submitted that in comparison with the LOS Convention, the Fish Stocks Agreement does not contain 'new rights' that are attractive to a large number of States. The only clear new right is non-flag State high seas enforcement and it may well be that more States are opposed to it than attracted by it.

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<sup>72</sup> The Fish Stocks Agreement was opened for signature on 4 December 1995 and the LOS Convention on 10 December 1982.

Table 10. Historical Overview of Participation in the LOS Convention and the Fish Stocks Agreement<sup>73</sup>

Participation in LOS Convention				Participation in Fish Stocks Agreement			
Year	New	Cumulative	% of 195	Year	New	Cumulative	% of 195
1982	1	1	0,5	1995	0	0	0
1983	8	9	4,6	1996	7	7	3,6
1984	5	14	7,2	1997	8	15	7,7
1985	11	25	12,8	1998	4	19	9,7
1986	6	31	15,9	1999	6	25	12,8
1987	3	34	17,4	2000	2	27	13,8
1988	2	36	18,5	2001	4	31	15,9
1989	5	41	21,0	2002	1	32	16,4
1990	3	44	22,6	2003	19	51	26,2
1991	6	50	25,6	2004	1	52	26,7
1992	2	52	26,7	2005	4	56	28,7
1993	7	59	30,3	2006	7	63	32,3
1994	10	69	35,4	2007	4	67	34,4
1995	13	82	42,1	2008	7	74	37,9
1996	27	109	55,9	2009	3	77	39,5
1997	13	122	62,6	2010	1	78	40,0
1998	7	129	66,2	Average No. new parties/year:			4,88
1999	2	131	67,2				
2000	3	134	68,7				
2001	3	137	70,3				
2002	4	141	72,3				
2003	4	145	74,4				
2004	2	147	75,4				
2005	2	149	76,4				
2006	3	152	77,9				
2007	3	155	79,5				
2008	2	157	80,5				
2009	3	160	82,1				
2010	1	161	82,6				
Average No. of new parties/year:			5,55				

Table D in Annex II to this article contains a list of the current non-parties to the LOS Convention. In addition to the specific reasons for non-participation that some individual non-parties have, attention is drawn to the fact that 18 of the 35 non-parties are land-locked States and 5 of the remaining 17 non-parties are part of the Central and South American group identified earlier. Some of the land-locked States may not be interested—in a literal sense—in the marine domain at all. And several other non-parties may per-

<sup>73</sup> See *supra* note 18 for an explanation of the number 195.

haps take the view there is no need for participation because, arguably, much of the LOS Convention is already part of customary international law and in that way creates rights and obligations for them.

As regards the role and nature of the Fish Stocks Agreement, it was already observed that it implements the basic jurisdictional framework of the LOS Convention by means of a modernized and more elaborate and operational regulatory framework and that it accords RFMOs a pivotal role therein.<sup>74</sup> Broader participation in the Fish Stocks Agreement would widen acceptance and applicability of its relatively modern, elaborate and operational regulatory framework—including the central role accorded to RFMOs therein—as the cornerstone of international fisheries law and at the same time restrict the applicability of the relatively general provisions of the LOS Convention on straddling and highly migratory fish stocks. Moreover, as the Fish Stocks Agreement is predominantly a framework convention that requires regional implementation, wider applicability will also contribute to inter-regional uniformity.

It is submitted, however, that the significance of wider acceptance and applicability of the Fish Stocks Agreement should not be overstated either. As a framework convention, the Fish Stocks Agreement does not deal with the actual regulation of marine capture fisheries, including the sensitive issues of restricting access and allocating fishing opportunities, which take place at the (sub-)regional level. The success of the Fish Stocks Agreement thus depends to a significant degree on the extent to which such (sub-)regional cooperation is 'compatible' with the Agreement. Ultimately, this is more important than (near-)universal participation in the Fish Stocks Agreement. It is therefore especially problematic that there is no formal linkage between the Fish Stocks Agreement and RFMOs or a procedure for assessing whether the constitutive instruments of RFMOs and their performance are compatible with the Agreement.<sup>75</sup>

In view of the above, participation in the Fish Stocks Agreement is not expected to ever reach the extent of universality that is currently enjoyed by the LOS Convention. This is mainly due to the higher probability that a non-party's cost-benefit analysis of participation in the LOS Convention will conclude that the advantages of participation outweigh the disadvantages. However, as argued above, a comparable status of participation is also not essential for ensuring the success of the Fish Stocks Agreement.

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<sup>74</sup> See also the section entitled 'Relationship between the Fish Stocks Agreement and RFMOs' below.

<sup>75</sup> *Ibid.*

## Relationship between the Fish Stocks Agreement and RFMOs

### *General*

The Fish Stocks Agreement does not stipulate or envisage a formal linkage between the Agreement and the constitutive instruments of RFMOs. The constitutive instruments of some—but by no means all—RFMOs that were adopted or amended after 1995 include prominent references to the Agreement in their Preambles or contain provisions that require consistency with the Fish Stocks Agreement, and thereby establish the latter's predominance.<sup>76</sup> As regards the institutional relationship, the main point is that the Fish Stocks Agreement does not establish a body and also contains no provisions which are directly aimed at RFMOs. Provisions that contain references to RFMOs are directly aimed at their members. The Agreement also lacks a procedure for assessing whether or not the constitutive instruments of RFMOs and their performance are compatible with the Agreement. The annual ICSPs, the FSA Review Conference and the UNGA have nevertheless been used as fora for dialogue and exchange of views on the functioning of the Fish Stocks Agreement and its implementation by States individually and jointly, in particular through RFMOs.

### *Comparative Scenarios*

Several comparative scenarios can be used to identify the most important differences—in particular for the greening of RFMOs—between the main rights and duties of, on the one hand, States that are both parties to the Fish Stocks Agreement and members<sup>77</sup> of relevant RFMOs and, on the other hand, States that are

- (a) parties to the Fish Stocks Agreement but non-members of relevant RFMOs;

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<sup>76</sup> See, for instance, Art. 4 of the WCPFC Convention (Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Honolulu, 5 September 2000. In force 19 June 2004, 40 *International Legal Materials* 277 (2001); <[www.wcpfc.int](http://www.wcpfc.int)>) and Art. XXI(2) of the new NAFO Convention (2007 Amendment, Lisbon, 28 September 2007. Not in force, NAFO/GC Doc. 07/4. The 2007 Amendment consists of eight Articles which replace the original title with "Convention on Cooperation in the Northwest Atlantic Fisheries" and the existing Preamble, Annexes and almost all provisions by new ones).

<sup>77</sup> For the purpose of this article, members include cooperating non-members unless specified otherwise.

- (b) members of relevant RFMOs but non-parties to the Fish Stocks Agreement; and
- (c) non-parties to the Fish Stocks Agreement and also non-members of relevant RFMOs.

As regards comparative scenario (a), even though non-members are not directly bound to an RFMO's actual regulation of fishing activities, they are still indirectly bound as a consequence of the duty to cooperate pursuant to Article 8(3) of the Fish Stocks Agreement. Moreover, being party to the Fish Stocks Agreement does not automatically entitle a State to membership of relevant RFMOs or a (fair and equitable) allocation of fishing opportunities. Finally, vessels flying the flag of non-members that engage in, or support, relevant fishing activities are presumed to be IUU vessels. These vessels may be listed on IUU Vessel Lists and be subjected to a suite of measures imposed by members. At a later stage and under certain conditions, the flag States of such vessels—i.e., non-members—may also be subjected to trade-restrictive measures.

As regards comparative scenario (b), reference can be made to the disadvantages and advantages of participation in the Fish Stocks Agreement incorporated in Table 1 in the subsection entitled 'A cost-benefit analysis'. These disadvantages and advantages are also relevant for comparative scenario (c). In addition, the observations made in relation to comparative scenario (a) on membership, allocation of fishing opportunities and combating IUU fishing activities apply to comparative scenario (c) as well. Furthermore, even though non-members are not directly bound to an RFMO's actual regulation of fishing activities or indirectly bound pursuant to Article 8(3) of the Fish Stocks Agreement, if they are parties to the LOS Convention they are to some extent<sup>78</sup> still indirectly bound as a consequence of the duty to cooperate laid down in Articles 63(2), 64 and 118 of the LOS Convention.

With respect to the implications for the 'greening' of RFMOs, it is noted here that there are no indications that the precautionary and ecosystem approaches to fisheries management incorporated in the Fish Stocks Agreement are prominent reasons for non-participation. It is nevertheless possible that non-parties to the Agreement have identified the need to comply with the obligations related to these precautionary and ecosystem approaches as a disadvantage in their cost-benefit analysis on participation.

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<sup>78</sup> See the discussion by T. Henriksen, "Revisiting the Freedom of Fishing and Legal Obligations on States Not Party to Regional Fisheries Management Organizations" (2009) 40 *Ocean Development & International Law* 80–96 at 87–92.

It is also submitted that being bound to precautionary and ecosystem approaches to fisheries management incorporated in a framework convention like the Fish Stocks Agreement is fundamentally different from being bound to an RFMO's conservation and management measures that implement such precautionary and ecosystem approaches. While the effect of the former operates more at the level of principle, the latter will have more tangible implications, for instance fewer fishing opportunities or higher operating costs. It is submitted that States are in general less resistant to be bound to the former rather than the latter, *inter alia* because the implementation of the former obligations requires their interpretation and application in a specific set of circumstances. The tangible implications referred to above may therefore in the end never be agreed on, whether justifiably or not.

Finally, members of relevant RFMOs that are non-parties to the Fish Stocks Agreement are not exempt from their obligations as parties to the LOS Convention, the CBD,<sup>79</sup> other treaties and their obligations under customary international law. For instance, although the argument that the LOS Convention as a whole or certain of its provisions essentially amount to an obligation to pursue an ecosystem approach *avant la lettre* is not really convincing,<sup>80</sup> the LOS Convention *does* oblige States to take ecosystem considerations into account—such as the need to take account of associated and dependent species as well as of environmental factors—pursuant to its Articles 61 and 119. Complying with these obligations already requires a considerable measure of greening RFMOs.

#### *Addressing Reasons for Non-Participation in the Fish Stocks Agreement at the Regional Level*

The previous subsections on 'compatibility' and 'high seas enforcement by non-flag States' already emphasized the crucial nature of regional cooperation—in particular through RFMOs—for addressing the concerns of non-parties to the Fish Stocks Agreement. It is submitted that the challenge of implementing the Fish Stocks Agreement is to use its margin of discretion and flexibility without losing sight of the need to ensure that the establishment and operation of RFMOs must be compatible with the Agreement, thus safeguarding inter-regional uniformity. Such inter-regional uniformity can be

<sup>79</sup> Convention on Biological Diversity, Nairobi, 22 May 1992. In force 29 December 1993, 31 *International Legal Materials* 822 (1992); <www.biodiv.org>.

<sup>80</sup> Advocates of this view commonly cite the following paragraph of the LOS Convention: "Conscious that the problems of ocean space are closely interrelated and need to be considered as a whole".

important for States that participate in a coastal State capacity in one or more RFMOs and as a high seas fishing State in one or more other RFMOs. More fundamentally, inter-regional uniformity reflects the guiding nature and predominance of global international law and is necessary to bring an end to discriminatory practices by regional fisheries management mechanisms.

An important test case and confidence-building opportunity in this regard are the negotiation process for the SPRFMO Convention<sup>81</sup> and the currently ongoing Preparatory Conference,<sup>82</sup> because eight participants in the negotiation process<sup>83</sup> are non-parties to the Fish Stocks Agreement and four of these adopted the controversial Galapagos Agreement.<sup>84</sup> Other opportunities exist in relation to non-parties to the Fish Stocks Agreement that are considering to formalize cooperation with RFMOs or that have expressed an interest to become members, for instance Viet Nam in relation to the WCPFC.<sup>85</sup>

### The 'Greening' of RFMOs

In addition to the Fish Stocks Agreement, there are other international instruments and international organizations that can have an impact on the process of 'greening' of RFMOs. It is useful in this context to distinguish between 'fisheries' instruments and 'other' instruments and the bodies established by them. With respect to the former, States can undertake action individually or jointly—in particular through RFMOs—to implement legally

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<sup>81</sup> See note 28 and accompanying text.

<sup>82</sup> The first session of the Preparatory Conference took place in July 2010 and the second session is scheduled for January 2011 (information obtained from <[www.southpacificrfmo.org](http://www.southpacificrfmo.org)> on 18 November 2010).

<sup>83</sup> Chile, China, Colombia, Cuba, Ecuador, Peru, Vanuatu and Venezuela. The 'Final Act of the International Consultations on the Establishment of the Proposed South Pacific Regional Fisheries Management Organisation' (Auckland, 14 November 2009), lists Malaysia and Mexico (both non-parties to the Fish Stocks Agreement) as 'observers' to the International Consultations (see Annex I).

<sup>84</sup> See *supra* note 27 and accompanying text.

<sup>85</sup> In its application for the status of cooperating non-member (CNM) with the WCPFC for 2010 and in its application to renew CNM status for 2011, Viet Nam has indicated that it would like to be invited to accede to the WCPFC Convention. The case of Viet Nam *vis-à-vis* the WCPFC Convention is unique. The failure to agree on a northern and western boundary of the WCPFC Convention Area means that some members do not regard Viet Nam as a coastal State with regard to the WCPFC Convention. However, the distributional range of some of the tuna species caught by Vietnamese fishing vessels in Viet Nam's own maritime zones also includes waters that are indisputably part of the WCPFC Convention Area. According to the LOS Convention, therefore, Viet Nam is a coastal State with respect to these tuna species managed by the WCPFC.

binding and non-legally binding international 'fisheries' instruments, such as the FAO International Guidelines on Deep-sea Fisheries,<sup>86</sup> the FAO Code of Conduct<sup>87</sup>—including its Technical Guidelines<sup>88</sup> and international plans of action (IPOAs)<sup>89</sup>—, and relevant UNGA Resolutions.

As regards 'other' instruments, first of all to be mentioned are the CBD and international instruments aimed predominantly or exclusively at the conservation of species and habitats, for instance CITES,<sup>90</sup> the CMS Convention<sup>91</sup> and associated instruments,<sup>92</sup> and the ICRW.<sup>93</sup> Also relevant are instruments that pursue—or have culminated in pursuing—integrated, cross-sectoral ecosystem-based oceans management, for instance the OSPAR Convention.<sup>94</sup> The performance of all these 'other' instruments and the bodies established by them can depend significantly on the performance of RFMOs with regard to non-target species, habitats and the broader ecosystem, for instance by-catch, predator-prey relationships and impacts on benthic communities.

<sup>86</sup> International Guidelines for the Management of Deep-sea Fisheries in the High Seas, Rome, 29 August 2008 (contained in Appendix F to the Report of the Technical Consultation on International Guidelines for the Management of Deep-sea Fisheries in the High Seas, Rome, 4–8 February and 25–29 August 2008 (*FAO Fisheries and Aquaculture Report* No. 881)).

<sup>87</sup> Code of Conduct for Responsible Fisheries. Adopted by the Twenty-eight Session of the FAO Conference, Rome, 31 October 1995, <[www.fao.org/fi](http://www.fao.org/fi)>.

<sup>88</sup> E.g., the 'Guidelines to Reduce Sea Turtle Mortality in Fishing Operations', contained in Appendix E of the Report of the Technical Consultation on Sea Turtles Conservation and Fisheries, Bangkok, Thailand, 29 November–2 December 2004' (*FAO Fisheries Report* No. 765).

<sup>89</sup> E.g., International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA-SEABIRDS; adopted by consensus by FAO's Committee on Fisheries in February 1999 and endorsed by the FAO Council in June 1999; text available at <[www.fao.org/fi](http://www.fao.org/fi)>) and International Plan of Action for the Conservation and Management of Sharks (IPOA-SHARKS; adopted by FAO's Committee on Fisheries in February 1999 and endorsed by the FAO Council in June 1999; text available at <[www.fao.org/fi](http://www.fao.org/fi)>).

<sup>90</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, D.C., 3 March 1973. In force 1 July 1975, 993 *United Nations Treaty Series* 243; <[www.cites.org](http://www.cites.org)>.

<sup>91</sup> Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979. In force 1 November 1983, 1651 *United Nations Treaty Series* 355; <[www.cms.int](http://www.cms.int)>.

<sup>92</sup> See <[www.cms.int](http://www.cms.int)>.

<sup>93</sup> International Convention for the Regulation of Whaling, Washington D.C., 2 December 1946. In force 10 November 1948, 161 *United Nations Treaty Series* 72; <[www.iwcoffice.org](http://www.iwcoffice.org)>.

<sup>94</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992. In force 25 March 1998, <[www.ospar.org](http://www.ospar.org)>. Annex V, Sintra, 23 September 1998. In force 30 August 2000; amended and updated text available at <[www.ospar.org](http://www.ospar.org)>. See also the reference by the EU to the OSPAR Convention in UN Doc. A/CONF.210/2010/1, *supra* note 27, at para. 102.



The relationship between these instruments and their bodies on the one hand, and RFMOs and their constitutive instruments on the other, is largely similar to that between the Fish Stocks Agreement and RFMOs discussed above. In the absence of a formal linkage or hierarchical relationship, RFMOs and their constitutive instruments are in principle independent and free-standing. But as RFMOs and the international bodies discussed here are collectivities of States and participatory overlaps are often significant, there is ample opportunity for cross-fertilization on greening issues. It must be acknowledged, however, that a State's position on a particular issue may not be identical in all fora, *inter alia* because it is represented by different government agencies. The ability of other international bodies to influence the greening of RFMOs depends on the breadth of support in the context of applicable decision-making procedures. Although an entirely cooperative stance aimed at dialogue and synergy between objectives and mandates will often deliver the best results, a stance that also asserts primacy *vis-à-vis* the other body may be necessary in some scenarios.

## Summary and Conclusions

As of 22 November 2010, the Fish Stocks Agreement had 78 parties (and therefore 117 non-parties),<sup>95</sup> and the LOS Convention had 161 parties (and therefore 34 non-parties). The following seem to be the main types of reasons for States not to become parties to the Fish Stocks Agreement:

- (a) Objections to substantive aspects, namely (i) Article 4 on the relationship between the Fish Stocks Agreement and the LOS Convention; (ii) Article 7 on compatibility; (3) Articles 21 and 22 on high seas enforcement by non-flag States; (iv) Article 23 on port State measures; and (v) Article 1(3) on fishing entities;
- (b) Lack of capacity and resources;
- (c) Lack of awareness and misconceptions, for instance on the Agreement's spatial scope, basic objectives, role in the broader framework of international fisheries law and the international law of the sea, as well as its relationship with RFMOs and their constitutive instruments;
- (d) Lack of direct interest, namely States without a high seas fishing fleet or an interest to establish such a fleet, as well as coastal States whose maritime zones do not overlap with the distributional ranges of one or more straddling or highly migratory fish stocks; and

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<sup>95</sup> See note 18 *supra*.

- (e) A cost-benefit analysis which has led to the conclusion that the disadvantages of participation outweigh the advantages.

There are no indications that the precautionary and ecosystem approaches to fisheries management incorporated in the Fish Stocks Agreement are prominent reasons for non-participation. It is nevertheless possible that non-parties to the Agreement have identified the need to comply with the obligations related to these precautionary and ecosystem approaches as a disadvantage in their cost-benefit analysis on participation. It is submitted that a distinction must be made between being bound to precautionary and ecosystem approaches to fisheries management incorporated in a framework convention like the Fish Stocks Agreement and being bound to an RFMO's conservation and management measures that implement such precautionary and ecosystem approaches. While the effect of the former operates more at the level of principle, the latter will have more tangible implications, for instance fewer fishing opportunities or higher operating costs.

The categorization of parties and non-parties in Table 2 in the section entitled 'Categorizing non-participation' is inspired by reasons (a)—(e) and follows from the identification of three groups with distinct and likely reasons for non-participation, namely land-locked States, small island developing States and Central and South American States. The most likely reasons for non-participation by land-locked States are a lack of direct interest and a negative cost-benefit analysis. As regards small island developing States, the main reason for non-participation is likely to be lack of capacity and resources. The group of Central and South American States was singled out because of these States' objections to substantive aspects of the Agreement.

It is submitted that appraisals of the status of participation in the Fish Stocks Agreement must, *inter alia*, take into account (a) the time elapsed since it was opened for signature; (b) the substance, role and nature of the Agreement; and (c) what level of participation is necessary. As regards (a), the annual status of participation in the Agreement was roughly similar to that of the LOS Convention during the first 13 years, but diverged considerably since then. The average number of new parties per year is nevertheless not very different: 5.55 for the LOS Convention and 4.88 for the Agreement.<sup>96</sup>

In examining (b) and (c), a comparison between the LOS Convention and the Fish Stocks Agreement offers some help. Whereas the LOS Convention is often characterized as the 'Constitution for the Oceans' and contains various 'new rights', the Agreement is a relatively specific single-issue instrument and does not contain 'new rights' that are attractive to a large number of States.

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<sup>96</sup> See the section entitled 'Appraising the status of participation'.

Moreover, the significance of wider acceptance and applicability of the Fish Stocks Agreement should not be overstated. As a framework convention, the Fish Stocks Agreement does not deal with the actual regulation of marine capture fisheries, including the sensitive issues of restricting access and allocating fishing opportunities, which take place at the (sub-) regional level. The success of the Fish Stocks Agreement depends to a significant degree on the extent to which such (sub-)regional cooperation is 'compatible' with the Agreement. In summary, although participation in the Fish Stocks Agreement is not expected to ever reach the extent of universality that is currently enjoyed by the LOS Convention, this is also not essential for ensuring the success of the Agreement.

One of the conclusions in this article on the relationship between the Fish Stocks Agreement and RFMOs is that participation in the Fish Stocks Agreement does not automatically entitle a State to membership of relevant RFMOs or a (fair and equitable) allocation of fishing opportunities. Furthermore, although a State that is a non-party to the Agreement and a non-member to a relevant RFMO is not directly bound to that RFMO's actual regulation of fishing activities or indirectly bound pursuant to Article 8(3) of the Fish Stocks Agreement, if it is a party to the LOS Convention, it is to some extent still indirectly bound as a consequence of the duty to cooperate laid down in Articles 63(2), 64 and 118 of the LOS Convention.

It is submitted that some reasons for non-participation in the Fish Stocks Agreement are best addressed in the context of implementing the Fish Stocks Agreement. The challenge is then to use the Agreement's margin of discretion and flexibility without losing sight of the need to ensure that the establishment and operation of RFMOs must be compatible with the Agreement, thus safeguarding inter-regional uniformity. Such inter-regional uniformity reflects the guiding nature and predominance of global international law and is necessary to bring an end to discriminatory practices by regional fisheries management mechanisms. An important test case and confidence-building opportunity in this regard are the negotiation process for the SPRFMO Convention and the currently ongoing Preparatory Conference because eight participants in the negotiation process are non-parties to the Fish Stocks Agreement and four of these adopted the controversial Galapagos Agreement.<sup>97</sup> Other opportunities exist in relation to non-parties to the Fish Stocks Agreement that are considering to formalize cooperation with RFMOs or that have expressed an interest to become members.<sup>98</sup>

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<sup>97</sup> See footnotes 83 and 84 and accompanying text.

<sup>98</sup> See footnote 85 and accompanying text.

**ANNEX I: Current Status of Participation in the Fish Stocks Agreement**Table A. Current Parties to the Fish Stocks Agreement; Alphabetical List<sup>99</sup>

Australia (23 December 1999)	Mauritius (25 March 1997)
Austria (19 December 2003)	Micronesia (Federated States of) (23 May 1997)
Bahamas (16 January 1997)	Monaco (9 June 1999)
Barbados (22 September 2000)	Mozambique (10 December 2008)
Belgium (19 December 2003)	Namibia (8 April 1998)
Belize (14 July 2005)	Nauru (10 January 1997)
Brazil (8 March 2000)	Netherlands (19 December 2003) <sup>a</sup>
Bulgaria (13 December 2006)	New Zealand (18 April 2001)
Canada (3 August 1999)	Nigeria (2 November 2009)
Cook Islands (1 April 1999)	Niue (11 October 2006)
Costa Rica (18 June 2001)	Norway (30 December 1996)
Cyprus (25 September 2002)	Oman (14 May 2008)
Czech Republic (19 March 2007)	Palau (26 March 2008)
Denmark (19 December 2003)	Panama (16 December 2008)
Estonia (7 August 2006)	Papua New Guinea (4 June 1999)
European Community (19 December 2003)	Poland (14 March 2006)
Fiji (12 December 1996)	Portugal (19 December 2003)
Finland (19 December 2003)	Republic of Korea (1 February 2008)
France (19 December 2003)	Romania (16 July 2007)
Germany (19 December 2003)	Russian Federation (4 August 1997)
Greece (19 December 2003)	Saint Lucia (9 August 1996)
Guinea (16 September 2005)	Saint Vincent and the Grenadines (29 October 2010)
Hungary (16 May 2008)	Samoa (25 October 1996)
Iceland (14 February 1997)	Senegal (30 January 1997)
India (19 August 2003)	Seychelles (20 March 1998)
Indonesia (28 September 2009)	Slovakia (6 November 2008)
Iran (Islamic Republic of) (17 April 1998) <sup>b</sup>	Slovenia (15 June 2006)
Ireland (19 December 2003)	Solomon Islands (13 February 1997)
Italy (19 December 2003)	South Africa (14 August 2003)
Japan (7 August 2006)	Spain (19 December 2003)
Kenya (13 July 2004)	Sri Lanka (24 October 1996)
Kiribati (15 September 2005)	Sweden (19 December 2003)
Latvia (5 February 2007)	Trinidad & Tobago (13 September 2006)
Liberia (16 September 2005)	Tonga (31 July 1996)

<sup>99</sup> Information obtained from <www.un.org/Depts/los> on 1 November 2010.

Table A (cont.)

Lithuania (1 March 2007)	Tuvalu (2 February 2009)
Luxembourg (19 December 2003)	Ukraine (27 February 2003)
Maldives (30 December 1998)	United Kingdom of Great Britain and Northern Ireland (10 December 2001)
Malta (11 November 2001)	United States of America (21 August 1996) <sup>b</sup>
Marshall Islands (19 March 2003)	Uruguay (10 September 1999)

<sup>a</sup> Not on behalf of Aruba.

<sup>b</sup> Non-party to the LOS Convention.

Cells shaded in grey: land-locked State

Table B. Current Parties to the Fish Stocks Agreement; Chronological List<sup>100</sup>

78	Saint Vincent and the Grenadines (29 October 2010)	39	Belgium (19 December 2003)
77	Nigeria (2 November 2009)	38	Austria (19 December 2003)
76	Indonesia (28 September 2009)	37	European Community (19 December 2003)
75	Tuvalu (2 February 2009)	36	India (19 August 2003)
74	Panama (16 December 2008)	35	South Africa (14 August 2003)
73	Mozambique (10 December 2008)	34	Marshall Islands (19 March 2003)
72	Slovakia (6 November 2008)	33	Ukraine (27 February 2003)
71	Hungary (16 May 2008)	32	Cyprus (25 September 2002)
70	Oman (14 May 2008)	31	United Kingdom of Great Britain and Northern Ireland (10 December 2001); (19 December 2003)
69	Palau (26 March 2008)	30	Malta (11 November 2001)
68	Republic of Korea (1 February 2008)	29	Costa Rica (18 June 2001)
67	Romania (16 July 2007)	28	New Zealand (18 April 2001)
66	Czech Republic (19 March 2007)	27	Barbados (22 September 2000)
65	Lithuania (1 March 2007)	26	Brazil (8 March 2000)
64	Latvia (5 February 2007)	25	Australia (23 December 1999)
63	Bulgaria (13 December 2006)	24	Uruguay (10 September 1999)
62	Niue (11 October 2006)	23	Canada (3 August 1999)
61	Trinidad & Tobago (13 September 2006)	22	Monaco (9 June 1999)
60	Japan (7 August 2006)	21	Papua New Guinea (4 June 1999)
59	Estonia (7 August 2006)	20	Cook Islands (1 April 1999)
58	Slovenia (15 June 2006)	19	Maldives (30 December 1998)
57	Poland (14 March 2006)	18	Iran (Islamic Republic of) (17 April 1998) <sup>b</sup>
56	Liberia (16 September 2005)	17	Namibia (8 April 1998)
55	Guinea (16 September 2005)	16	Seychelles (20 March 1998)
54	Kiribati (15 September 2005)	15	Russian Federation (4 August 1997)
53	Belize (14 July 2005)	14	Micronesia (Federated States of) (23 May 1997)

<sup>100</sup> *Ibid.* See also Serdy, note 8 *supra*.

Table B (cont.)

52	Kenya (13 July 2004)	13	Mauritius (25 March 1997)
51	Sweden (19 December 2003)	12	Iceland (14 February 1997)
50	Spain (19 December 2003)	11	Solomon Islands (13 February 1997)
49	Portugal (19 December 2003)	10	Senegal (30 January 1997)
48	Netherlands (19 December 2003) <sup>a</sup>	9	Bahamas (16 January 1997)
47	Luxembourg (19 December 2003)	8	Nauru (10 January 1997)
46	Italy (19 December 2003)	7	Norway (30 December 1996)
45	Ireland (19 December 2003)	6	Fiji (12 December 1996)
44	Greece (19 December 2003)	5	Samoa (25 October 1996)
43	Germany (19 December 2003)	4	Sri Lanka (24 October 1996)
42	France (19 December 2003)	3	United States of America (21 August 1996) <sup>b</sup>
41	Finland (19 December 2003)	2	Saint Lucia (9 August 1996)
40	Denmark (19 December 2003)	1	Tonga (31 July 1996)

<sup>a</sup> Not on behalf of Aruba;

<sup>b</sup> Non-party to the LOS Convention.

□ Cells shaded in grey: land-locked State

Table C. Current Non-Parties to the Fish Stocks Agreement<sup>101</sup>

Afghanistan <sup>d</sup>	Kuwait
Albania	Kyrgyzstan <sup>d</sup>
Algeria	Lao People's Democratic Republic
Andorra <sup>d</sup>	Lebanon
Angola	Lesotho
Antigua and Barbuda	Libyan Arab Yamahiriya <sup>d</sup>
Argentina <sup>a</sup>	Liechtenstein <sup>d</sup>
Armenia	Madagascar
Azerbaijan <sup>b d</sup>	Malawi
Bahrain	Malaysia
Bangladesh	Mali
Belarus	Mauritania <sup>a</sup>
Benin	Mexico
Bhutan <sup>d</sup>	Moldova <sup>a</sup>
Bolivia	Mongolia <sup>a</sup>
Bosnia and Herzegovina	Montenegro
Botswana	Morocco <sup>a</sup>
Brunei Darussalam	Myanmar
Burkina Faso	Nepal
Burundi <sup>d</sup>	Nicaragua
Cambodia <sup>d</sup>	Niger <sup>d</sup>
Cameroon	Pakistan <sup>a</sup>
Cape Verde	Paraguay

<sup>101</sup> Information obtained from <www.un.org/Depts/los> on 22 November 2010. The Holy See is not listed.

Table C (*cont.*)


Central African Republic <sup>d</sup>	Peru <sup>d</sup>
Chad <sup>d</sup>	Philippines <sup>a</sup>
Chile	Qatar
China	Rwanda <sup>d</sup>
Colombia <sup>d</sup>	Saint Kitts and Nevis
Comoros	
Congo	San Marino <sup>d</sup>
Côte d'Ivoire	Sao Tome and Principe
Croatia	Saudi Arabia
Cuba	Serbia
Democratic People's Republic of Korea <sup>d</sup>	Sierra Leone
Democratic Republic of the Congo	Singapore
Djibouti	Somalia
Dominica	Sudan
Dominican Republic	Suriname
Ecuador <sup>d</sup>	Swaziland <sup>d</sup>
Egypt	Switzerland
El Salvador <sup>d</sup>	Syrian Arab Republic <sup>d</sup>
Equatorial Guinea	Tajikistan <sup>d</sup>
Eritrea <sup>d</sup>	Thailand <sup>d</sup>
Ethiopia <sup>d</sup>	The Former Yugoslav Republic of Macedonia
Gabon <sup>a</sup>	Timor-Leste <sup>d</sup>
Gambia	Togo
Georgia	Tunisia
Ghana	Turkey <sup>d</sup>
Guatemala	Turkmenistan <sup>b d</sup>
Grenada	Uganda <sup>a</sup>
Guinea Bissau <sup>a</sup>	United Arab Emirates <sup>d</sup>
Guyana	United Republic of Tanzania
Haiti	Uzbekistan <sup>d</sup>
Honduras	Vanuatu <sup>a</sup>
Iraq	Venezuela <sup>d</sup>
Israel <sup>a d</sup>	Viet Nam
Jamaica <sup>a</sup>	Yemen
Jordan	Zambia
Kazakhstan <sup>b d</sup>	Zimbabwe

<sup>a</sup> Signatory of the Fish Stocks Agreement.

<sup>b</sup> Even though bordering on the Caspian Sea.

<sup>c</sup> Member of the EU.

<sup>d</sup> Non-party to the LOS Convention.


 Cells shaded in grey: land-locked State

**ANNEX II: Current Status of Participation in the LOS Convention**Table D: Current Non-Parties to the LOS Convention<sup>102</sup>

Afghanistan	Libyan Arab Yamahiriya
Andorra	Liechtenstein
Azerbaijan <sup>b</sup>	Niger
Bhutan	Peru
Burundi	Rwanda
Cambodia	San Marino
Central African Republic	Swaziland
Chad	Syrian Arab Republic
Colombia	Tajikistan
Democratic People's Republic of Korea	Thailand
Ecuador	Timor-Leste
El Salvador	Turkey
Eritrea	Turkmenistan <sup>b</sup>
Ethiopia	United Arab Emirates
Iran	United States of America
Israel <sup>a</sup>	Uzbekistan
Kazakhstan <sup>b</sup>	Venezuela
Kyrgyzstan	

<sup>a</sup> Signatory of the Fish Stocks Agreement.

<sup>b</sup> Even though bordering on the Caspian Sea.

 Cells shaded in grey: land-locked State.

<sup>102</sup> *Ibid.*