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REVIEWING THE UNITED NATIONS FISH STOCKS TREATY

By David A. Balton and Holly R. Koehler*

INTRODUCTION

Like a number of key stocks of fish in the world's oceans, good news on the subject of international fisheries has become less plentiful. The international community has grappled for years with growing concern over the state of the marine environment, particularly the health of living marine resources and their habitats. The conservation and management of fish stocks whose ranges extend across the lines that separate ocean areas under national jurisdiction and the high seas pose particular challenges. Without cooperation among nations, there can be no effective regulation of such resources, including for so-called "straddling fish stocks" and "highly migratory fish stocks."¹

In an effort to address these concerns, the United Nations adopted the UN Fish Stocks Agreement ("UNFSA") in 1995.² Together with the United Nations Food and Agriculture Organization's ("FAO") Code of Conduct for Responsible Fisheries³ and the High Seas Fishing Compliance Agreement,⁴ the UNFSA has established robust international principles and standards at the global level for the regulation of ocean fisheries. The UNFSA entered into force in 2001 and now has 61 States Parties. But how well is it working? How much impact is it having? What more can be done to strengthen its implementation?

The States Parties to the UNFSA and other interested participants met recently at the United Nations to answer these questions. This article will summarize the outcomes of the UNFSA Review Conference and will consider the prospects for this vital treaty in dealing with marine fisheries.

THE REVIEW CONFERENCE PROCESS

Article 36 of the UNFSA provides that within four years of the entry into force of the Agreement a conference would be convened to review and assess the adequacy of the Agreement in securing the conservation and management of straddling fish stocks and highly migratory fish stocks, and to propose means of strengthening its implementation.⁵ This Review Conference took place at the United Nations in New York from May 22–26, 2006. In preparation for the Conference, a fifth round of informal consultations of States Parties to the Agreement ("ICSPs") was held.⁶ During this fifth ICSP, two major and inter-related sentiments emerged that would shape the tenor and structure of the upcoming Review Conference: (1) that the review should be robust, balanced, and result in outcomes based on a rigorous assessment; and (2) that the Review Conference should consider and try to address certain persistent concerns expressed by non-parties regarding particular aspects of the Agreement.⁷

On the first point, many participants in the fifth ICSP, partic-

ularly States Parties to the Agreement, insisted that the Review Conference proceed in a structured and focused manner. These Parties were concerned that a haphazard review of the Agreement would be counterproductive, yielding overly negative results that unfairly blame the continued problems facing international fisheries on deficiencies in an agreement that had entered into force only four years earlier. Participants also worried that an unstructured or unbalanced review would open the door to premature proposals to amend the Agreement.⁸ As a result, the fifth ICSP developed a program of work for the Conference that laid out how the review and assessment component of the meeting would be organized.⁹ To facilitate that process, it also identified a series of framework questions and elements.¹⁰

The second issue — the concerns of non-parties — emerged several months earlier during the negotiation of the annual UN General Assembly resolution on sustainable fisheries.¹¹ There, several non-parties to the UNFSA argued that they should be able to participate in the Review Conference process on an equal footing with States Parties. A debate on this point took center stage in the fifth ICSP, which had the mandate to prepare the rules of procedure for the Review Conference. Views on this issue quickly became polarized. Many non-parties considered the Review Conference to be a United Nations meeting in which all UN members had equal standing.¹² Virtually all States Parties, by contrast, saw the Review Conference as a meeting of Parties to the Agreement: where others may also be invited, but in which only States Parties had the ultimate say on matters involving the implementation of a treaty to which only States Parties are legally bound. States Parties were also concerned with the public calls by some non-parties to either amend or reinterpret certain provisions of the Agreement in order to satisfy their specific concerns.¹³ These competing concerns shaped the discussions at the Review Conference, the work of its drafting committee, and the subsequent Conference results.

The United States played a leadership role in the Review Conference, providing a positive and constructive mediating presence. The United States chaired the Conference, as well as the fifth ICSP and several other small informal working groups during the preparatory phase. The United States also led efforts

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to craft compromises on a number of difficult issues, such as the rules of procedure and further reviews of the UNFSA.

As a result of the discussions at the fifth ICSP, the Review Conference adopted a process to review and assess the adequacy of the provisions of the Agreement and to propose means to strengthen their implementation. To facilitate this process, the fifth ICSP organized the assessment into four general cluster areas, each based on the parts of the UNFSA: (1) Conservation and management of stocks; (2) Mechanisms for international cooperation; (3) Monitoring, control and surveillance, compliance and enforcement; and (4) Developing states parties and non-parties.

The following section will examine the major themes that emerged from the review and assessment of each cluster area, and will highlight recommendations made to strengthen the implementation of the Agreement.¹⁴

RESULTS OF THE REVIEW CONFERENCE¹⁵

The Conference first reviewed progress made by States and regional fisheries management organizations and arrangements (“RFMOs”) in conserving and managing highly migratory stocks and straddling fish stocks. While progress has been made in this area since the adoption of UNFSA, more must be done to strengthen and reinforce conservation and management measures. According to the FAO, nearly 30 percent of the stocks of highly migratory tuna and tuna-like species and nearly two-thirds of the straddling fish stocks and the stocks of other high-seas fishery resources are overexploited or depleted. In light of this information, the Conference called for greater reliance on the precautionary approach to manage fisheries in accordance with the best available scientific information.¹⁶ The Conference found that timely and accurate data collection remains a challenge and that the lack of good data undermines scientific advice and sound management decisions. The Conference called for the elimination of fishing subsidies that result in over-fishing and illegal, unreported, and unregulated (“IUU”) fishing activities.¹⁷ The Conference also acknowledged that two new RFMOs had been developed since the adoption of the UNFSA, with negotiations underway for a third in the South Pacific. However, a number of developing States reported that the costs associated with participating in RFMOs can be prohibitively high.¹⁸

Second, in the area of international cooperation, the Conference emphasized the importance of RFMOs in the conservation and management of highly migratory and straddling fish stocks. While progress has been made to strengthen the mandates of RFMOs, particularly with respect to compliance and enforcement, member States of these regional management organiza-

tions must do much more to modernize the functions of the RFMOs and to enhance their performance. RFMOs are adopting a range of measures to cooperate in the conservation and management of stocks under their purview, particularly in dealing with IUU fishing. These measures include the establishment of positive and negative vessel lists, market-related measures, catch and trade documentation schemes, port control measures, satellite vessel monitoring systems, and regulations for transshipment.¹⁹ However gaps in RFMO coverage remain, both geographically and with respect to the fisheries covered.²⁰

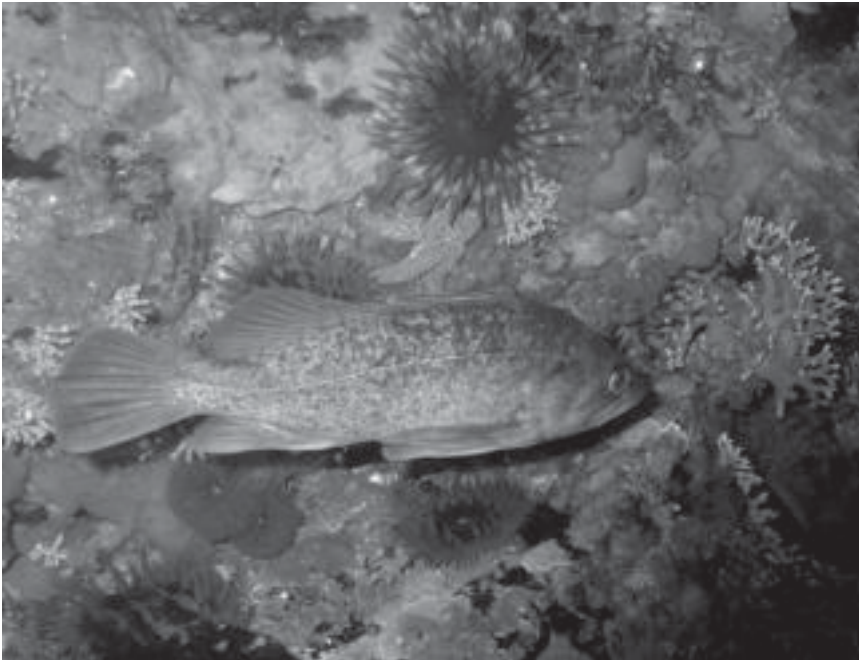
Third, in the monitoring, control and surveillance, and compliance and enforcement cluster area, the Conference noted that both States and RFMOs have taken significant strides but, once again, more work needs to be done by RFMOs and States that

either authorize vessels to fish on the high seas or provide ports and markets for fish and fish products. The Conference further recognized that significant levels of IUU fishing continue to occur due to ineffective control over vessels, inadequate investigations of violations and levels of penalties imposed, a lack of enforcement capacity in developing countries, the porous nature of some port State control systems, and insufficient cooperation and coordination among States and RFMOs.

Finally, with regard to developing States and non-parties, the Conference underscored the importance of the Agreement in achieving sustainable fisheries, but also emphasized the need to encourage additional States to adhere to the Agreement. The Conference further recognized that developing States require assistance to fulfill their obligations under the Agreement. To participate effectively in RFMOs and implement conservation and management measures domestically, developing States need assistance in the areas of human resource development, training, technology transfer, scientific stock assessment and research, and implementing compliance and enforcement measures. In addition, with respect to broadening participation in the Agreement, several non-parties identified certain concerns they have with provisions of the Agreement itself, specifically Articles 7, 21, 22, and 23, that they view as obstacles to their becoming a party.

The Review Conference agreed on a comprehensive set of recommendations in each cluster area that called upon States, RFMOs, and technical bodies of the United Nations to undertake certain actions and initiatives to strengthen the substance and methods of implementation of the Agreement. The recommendations in each area serve to focus attention on particular implementation needs, such as the enhanced use of science in decision-making, increased cooperation among States and

The UNFSA has established robust international principles and standards at the global level for the regulation of ocean fisheries.



Sebastes in Alaska waters.

organizations, the incorporation of ecosystem considerations into fisheries management, strengthened control over vessels, companies, and nationals that engage in IUU fishing activities, better and more timely collection and sharing of fisheries data, the modernization of RFMOs to include new principles and practices of international fisheries conservation and management, and further provision of assistance to developing countries.

Many of the Conference recommendations built upon other recent calls to action, such as by the UN General Assembly and FAO. However, there are several distinct recommendations from the Conference that define this meeting as taking a step forward to address ongoing problems with international fisheries management. These recommendations include commitments to:

- establish new RFMOs where none exist and to agree on interim management measures until such organizations are established;
- urgently reduce the capacity of the world's fishing fleets to sustainable levels by establishing targets and plans for ongoing assessments;
- strengthen data collection and reporting, including through regular audits of compliance with such obligations;
- initiate negotiations through the FAO to develop a legally binding instrument on port State measures;
- undertake performance reviews of RFMOs based on transparent criteria, which would include some element of independent evaluation, and make these reviews publicly available;
- adopt stringent measures to regulate transshipment, particularly at sea; and
- develop processes to assess the performance of States in implementing their obligations regarding their fishing vessels (*i.e.*, flag State duties).

PROSPECTS FOR THE UNFSA

Perhaps most significantly, the Review Conference revealed widespread support for the UNFSA as the preeminent instrument in the field of international fisheries management. This reflects a considerable improvement in overall attitudes toward the treaty. At the time of its adoption in 1995, and even as it entered into force in 2001, a number of influential governments continued to express doubts about the UNFSA. Their concerns focused particularly on several of its innovative provisions, such as the precautionary approach to fisheries management, the requirement that management measures be compatible throughout the range of a fish stock, and certain enforcement rules. By contrast, virtually all governments represented at the Review Conference — even those not yet party to the UNFSA — indicated their acceptance of the treaty as an expression of basic standards for the management of ocean fisheries.

One telling example of these changing attitudes toward the UNFSA was the general willingness of the Parties to expand its scope for use in the management of fisheries for other categories of stocks. The UNFSA, by its terms, applies only to the conservation and management of two select categories of fisheries, namely, fisheries for “straddling fish stocks” and for “highly migratory fish stocks.” The participants in the Review Conference nevertheless “encouraged States, as appropriate, to recognize that the general principles of the Agreement should also apply to fisheries for discrete fish stocks on the high seas,” — *i.e.*, those stocks of fish that occur solely on the high seas.

The growing number of States Parties to the UNFSA provides further evidence of increasing support for this treaty. At the time of the Review Conference in May 2006, the UNFSA had 57 States Parties, including most States with significant interests in international fisheries.²¹ Some 14 non-Parties also announced or reaffirmed their intention to adhere to the treaty in the near future. Four of those (Trinidad and Tobago, Slovenia, Estonia, and Japan) have become States Parties in the few months since the end of the Review Conference.²²

Additionally, many States — both parties and non-parties to the UNFSA — have begun to incorporate its provisions into their domestic laws and regulations. Many States are now requiring fishing vessels to observe all relevant fishing rules before authorizing them to fish on the high seas. Some nations have also begun to contribute funds and other resources to assist developing countries in the implementation of the UNFSA, with the goals of improving fisheries management within the vast areas under the jurisdiction of developing States and of monitoring the high seas fishing operations of vessels that fly the flags of developing States.

Similarly, most of the RFMOs created to regulate fisheries for straddling or highly migratory fish stocks have incorporated key provisions of the UNFSA into their charters or regulatory schemes. Some other long-standing RFMOs, including the Inter-

American Tropical Tuna Commission and the General Fisheries Commission for the Mediterranean, have revised their charters to incorporate provisions of the UNFSA. Other RFMOs may soon follow this trend. For example, the Northwest Atlantic Fisheries Organization embarked on an ambitious reassessment of its founding treaty and may incorporate elements of UNFSA. Finally, the UNFSA has become the point of departure for negotiations to establish new RFMOs, including the Western and Central Pacific Fisheries Commission, the Southeast Atlantic Fisheries Organization, and the South West Indian Ocean Fisheries Commission.

However, daunting challenges to full implementation of the UNFSA certainly remain. The treaty still does not enjoy universal — or even near-universal — adherence. Several nations with major fishing fleets, including the People's Republic of China, the Republic of Korea, Indonesia, and many Latin American and African countries, remain outside the circle of States Parties. The recent ratification by Japan may prompt some of those nations to adhere, but this is not certain by any means. Both parties and non-parties struggle to collect and analyze the scientific and fisheries data necessary to support sound management decisions, and to secure the resources necessary to monitor fishing activities.

As noted above, some non-parties took the occasion of the Review Conference to reiterate long-held concerns about particular aspects of the UNFSA that, in their view, remain obstacles to their adherence. For some non-parties, the principal issue arises from Articles 21 and 22 of the treaty. These provisions authorize fisheries enforcement personnel from States Parties under limited circumstances to board and inspect high seas fishing vessels of other States Parties to monitor for compliance with regionally agreed fishing rules. Some non-parties voiced concern that these provisions unduly undermine the basic rule of exclusive flag State jurisdiction over fishing vessels on the high seas. Other non-parties feared that the authority to board and inspect high seas fishing vessels could be abused; *e.g.*, to interfere with the legitimate fishing activities of a competing fishing fleet.

Some non-parties are also concerned about preserving the privileges of coastal States. These non-parties called for assurances that Article 7 of the UNFSA, which requires that measures for a fish stock be compatible throughout the range of that stock, be implemented in ways that preserve the exclusive jurisdiction of coastal States to manage fisheries within waters under their jurisdiction. Despite the lack of evidence that implementation of Article 7 has undermined coastal State prerogatives, the issue remains a sensitive point for some nations.

The problems confronting the UNFSA and its supporters unfortunately go much deeper than the concerns voiced by some non-parties. Four major challenges confront effective management of ocean fisheries; each obstacle is discussed below.

OVERFISHING AND OVERCAPACITY

Too many ocean fisheries suffer from overfishing and excess fishing capacity, despite requirements in the UNFSA and other international instruments to deal with these phenomena. The FAO statistics on the poor status of marine fish stocks, including many straddling stocks and highly migratory stocks, cannot be ignored. Efforts to cap and reduce excess fishing capacity and to eliminate subsidies that contribute to overcapacity and overfishing have met with limited success. Though many governments (and industry representatives) recognize the general need to end overcapacity, few have been willing to make the sacrifices necessary to achieve it.

IUU FISHING

Despite sustained efforts on many levels to combat IUU fishing, such activities persist, and may even be growing in some regions and fisheries. As key stocks dwindle, the potential profits available to cheaters can increase. The difficulty of monitoring fishing operations far from shore, particularly in high seas areas and areas under the jurisdiction of developing countries, exacerbates the situation. Governments, individually and collectively, are trying to deal with this classic “free rider” problem by improving monitoring, control and surveillance of fishing operations at sea and in port (during landing and transshipment), by reducing market access to illegally caught fish, and by stiffening penalties imposed on violators. However, as the Review Conference acknowledged, much more needs to be done.

ECOSYSTEM CONCERNS

Overfishing can deplete both the stocks that are the target of the fisheries as well as populations of species that are associated with, or dependent on, the target stocks. Some tuna fisheries, for example, result in significant accidental catch of seabirds and sea turtles, although States and RFMOs are introducing measures to mitigate such “bycatch.” The catch of many sharks, either as targets of fisheries or as bycatch, is poorly regulated. Some fishing methods can also harm sensitive areas of the ocean floor, for example where sponge fields or corals live, or in the vicinity of some seamounts. The UNFSA sparked a concerted effort to implement an “ecosystem approach to fisheries management.” Because implementing this approach requires considerable scientific research necessary to understand the marine environment,

The Conference emphasized the importance of RFMOs in the conservation and management of highly migratory and straddling fish stocks.

which is difficult and costly for nations with even the most sophisticated fisheries management systems, this approach remains far from being fully realized.²³

LACK OF CAPACITY AMONG DEVELOPING STATES

The majority of nations that lack sophisticated fisheries management systems — including most developing States — cannot yet implement the UNFSA completely. They lack not only financial resources, but also the technical know-how, human resources, and infrastructure necessary to conduct proper stock assessments, develop and implement management measures, monitor fisheries for compliance, and impose penalties on violators. In the pursuit of economic development, a number of developing States (and some developed States) allow high seas fishing vessels to fly their flags without any meaningful ability or intention to control the operations of those vessels.

POLICY RECOMMENDATIONS FROM THE REVIEW CONFERENCE

Although these challenges are daunting, the Review Conference reaffirmed the commitment of nations to tackle them, including through some of the specific undertakings described below.

One recommendation to emerge from the Review Conference starts from the recognition that the best vehicles for regulating fisheries for straddling fish stocks and highly migratory fish stocks are the RFMOs. Unfortunately, the performance of the various RFMOs in fulfilling the responsibilities set forth in both their own charters and in other instruments, such as the UNFSA, has been uneven. The Review Conference recommended that RFMOs be subject to a systematic performance review. If such reviews were thorough and candid, they could, for example, create a “report card” revealing those areas in which each RFMO

needed to improve its effectiveness.

The Review Conference also developed some stronger commitments to redress the overcapacity problem and to crack down on IUU fishing. In particular, the Review Conference called for greater coordination of measures across ocean regions and among two or more RFMOs. One opportunity to make progress on this front will occur in January 2007, when Japan will host the first-ever meeting of the five RFMOs that regulate fisheries for highly migratory stocks.²⁴

Finally, the Review Conference gave rise to new commitments to assist developing States Parties in the implementation of the UNFSA. A number of vehicles for transmitting such assistance exist, including a trust fund established by the States Parties pursuant to Part VII of the treaty, which is jointly administered by the United Nations and the FAO. The FAO also maintains other assistance programs in this field, as does the World Bank and other international financial institutions,

and some of the RFMOs. A number of developed States provide additional assistance for fisheries management directly to developing States.

CONCLUSION

The Review Conference brought the UNFSA to the attention of governments, international organizations, and a large number of non-governmental stakeholders that participated in the process. The very attention the treaty received during the preparatory meetings and at the Review Conference has catalyzed action to improve its implementation. In that regard, a notable outcome of the Review Conference was to keep the treaty under review, through both annual informal consultations at the United Nations and a resumption of the formal Review Conference no later than 2011.



Too many ocean fisheries suffer from overfishing and excess fishing capacity, despite requirements in the UNFSA.

Endnotes: Fish Stocks Treaty Law

¹ Though not clearly defined in international law, a “straddling fish stock” is commonly understood to mean a stock of fish referred to in Article 63(2) of the 1982 United Nations Convention on the Law of the Sea (“UNLOS”), namely, a “stock or stocks of associated species [that] occur both within the exclusive economic zone (“EEZ”) and in an area beyond and adjacent to the zone.” Examples include cod and other demersal fish stocks in the Northwest Atlantic Ocean. “Highly migratory fish stocks” also occur both within and beyond the EEZ, but are distinguished from straddling stocks by the vast distances they typically migrate. Annex I to the 1982 Convention lists highly migratory species, both fish (such as tunas and swordfish) and certain non-fish (such as whales and other cetaceans). See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

² United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, July 24–Aug. 4, 1995, *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10*

December Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, U.N. DOCA/Conf. 164/37 [hereinafter UNFSA].

³ Food and Agriculture Organization of the United Nations, Code of Conduct for Responsible Fisheries, available at <http://www.fao.org/DOCREP/005/v9878e/v9878e00.htm> (last visited Sept. 11, 2006).

⁴ Food and Agriculture Organization of the United Nations, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, available at www.fao.org/DOCREP/MEETING/003/X3130m/X3130E00.HTM (last visited Sept. 11, 2006).

⁵ UNFSA, *supra* note 2.

⁶ These informal consultations have met annually since 2002 to discuss issues related to the implementation of the Agreement. See Overview, Conventions

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and Related Agreements, United Nations Division of Ocean Affairs and Law of the Sea website, www.un.org/Depts/los/convention_agreements/review_conf_fish_stocks.htm (last visited Sept. 11, 2006).

⁷ 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 (“Review Conference”), May 22–26, 2006, *Report of the Review Conference*, ¶ 136, U.N. Doc. A/CONF.210/2006/15 (July 3, 2006), available at http://www.un.org/Depts/los/convention_agreements/review_conf_fish_stocks.htm (last visited Sept. 11, 2006) [hereinafter Conference Report].

⁸ Conference Report, *id.* at ¶ 32.

⁹ Review Conference, May 22–26, 2006, *Organization of work*, Item 9, U.N. Doc. A/CONF.210/2006/4 (March 28, 2006), available at http://www.un.org/Depts/los/convention_agreements/review_conf_fish_stocks.htm (last visited Sept. 11, 2006).

¹⁰ Review Conference, May 22–26, 2006, *Elements for assessing the adequacy and effectiveness of the Agreement*, ¶ 136, U.N. Doc. A/CONF.210/2006/5 (March 29, 2006), available at http://www.un.org/Depts/los/convention_agreements/review_conf_fish_stocks.htm (last visited Sept. 11, 2006).

¹¹ G.A. Res. 47/1, ¶ 25, U.N. Doc. A/RES/60/31 (Nov. 29, 2005), available at www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm (last visited Sept. 11, 2006).

¹² Conference Report, *supra* note 7, at ¶ 13.

¹³ Several non-parties have for years raised concerns about Articles 7, 21 and 22 of the UNFSA and have called for re-negotiation or statements of interpretation of these provisions before agreeing to accede to the Agreement. However, States Parties generally believe that such steps would upset the delicate balance on those complex and sensitive issues that was achieved during the negotiation of the UNFSA.

¹⁴ For an alternative perspective on the Review Conference process, as well as its outcomes, a useful resource is the daily reporting by the Earth Negotiations Bulletin, a non-profit organization that provides independent and on-going reporting of international environmental negotiations worldwide. See Earth Negotiations Bulletin, *UNFSA Review Conference Ends in Consensus* (May 26, 2006), www.iisd.ca/oceans/sfsrc/ (last visited Sept. 11, 2006).

¹⁵ The Report of the Review Conference, which includes all agreed outcomes, can be found at United Nations, A/CONF.210/2006/15; www.un.org/Depts/los/convention_agreements/review_conf_fish_stocks.htm (last visited Oct. 30, 2006).

¹⁶ Conference Report, *supra* note 7, at ¶ 43.

¹⁷ Conference Report, *supra* note 7, at ¶ 51.

¹⁸ Conference Report, *supra* note 7, at ¶ 62.

¹⁹ Conference Report, *supra* note 7, at ¶ 72–75.

²⁰ Conference Report, *supra* note 7, at ¶ 76.

²¹ Among the States Parties is the European Commission, as well as 16 Member States of the European Union. During the course of the Review Conference, the delegation of Austria, in its capacity as President of the European Union, indicated that the nine EU Member States that had not yet adhered to the UNFSA would do so in the near term.

²² There are 61 States Parties to the UNFSA as of October 26, 2006. A list of parties is available at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Oct. 26, 2006).

²³ Seventh Session of the UN Informal Consultations on Oceans and the Law of the Sea, June 12–16, 2006, *Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its seventh meeting*, ¶ 4, U.N. Doc. A/61/156 (July 17, 2006), available at http://www.un.org/Depts/los/consultative_process/consultative_process_info.htm (last visited Sept. 11, 2006).

²⁴ The five RFMOs in question are: the Commission for the Conservation of Southern Bluefin Tuna, the Indian Ocean Tuna Commission, the Inter-American Tropic Tuna Commission, the International Commission for the Conservation of Atlantic Tunas and the Western.