



行政院農業委員會漁業署

FISHERIES AGENCY

Council of Agriculture, Executive Yuan

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March 17, 2006

Mr. William Gibbons-Fly

Convener

Intersessional Working Group on High Seas Boarding and Inspection Procedures

Dear Mr. Gibbons-Fly:

In response to your earlier request, and on behalf of my Government, I would like to provide to you my observation, comments and suggestions as follows respecting the Draft Revised Boarding and Inspection Scheme coded WCPFC/TCC.15 (Rev.1). I wish that you will take them into your favorable consideration when you are developing draft procedures for high seas boarding and inspection in the Convention Area as mandated in the Terms of Reference for the Intersessional Working Group on High Seas Boarding and Inspection Procedures.

1. In terms of the structure of the draft procedures, the current sections of "Purpose", "Area of Application", "General Rights and Obligations" and "General Principles", or Paragraphs 2 to 9, could be deleted entirely, if appropriate within the whole context of this scheme, since these paragraphs to a large degree repeat what have been presented in the WCPFC Convention.

For instance, Article 26 paragraph 1 of the said Convention already clearly presented the "purpose" and "area of application" for such procedures by stipulating: "For the purpose of ensuring compliance with conservation and management measures, the Commission shall establish procedures for boarding and inspection of fishing vessels on the high seas in the Convention Area." (emphasis added) The general or common rights and obligations of all members of the Commission to take part in the work of the Commission, including the work of undertaking boarding and inspection on the high seas of fishing vessels operating in the high seas of the Convention Area, and to ensure those fishing vessels flying any member's flag to cooperate with the high seas boarding and inspection practice under these procedures or this particular scheme are also built in the said Convention, such as, *inter alia*, Article 23 paragraph 1, Article 25 paragraph 1, Article 26 paragraph 3, Annex I paragraph 2, Article 9 paragraph 2,

and Annex III Article 6.1 and 6.2. Furthermore, paragraphs 6 to 9 are redundant in the sense that they either repeat the purpose of this scheme or repeat themselves with the wording of the last paragraph 45 of the same scheme.

2. In view of cultural diversity and differences as well as potential communication barriers between/among crew members on board of inspected fishing vessels and inspecting officers, it is conceivable that future misunderstanding and conflicts on the high seas boarding and inspection practices are inevitable. Thus, procedures for solving the disagreement concerning the interpretation and/or application of the provisions of this scheme should be built in. Similar provisions in line with the spirit of Article 38 of the NAFO Conservation and Enforcement Measures are suggested to be included in the scheme.

The suggested wordings to address the disagreement concerning the interpretation and/or application of the provisions of this scheme are as follows:

Paragraph 42 bis

1. In the event of a disagreement concerning the interpretation or application of the provisions of this scheme, the parties concerned shall consult in an attempt to resolve the disagreement.
2. If the disagreement remains unsolved following the consultations, the Executive Director of the Commission shall, at the request of one of the parties concerned, refer the disagreement to a special meeting of the Technical and Compliance Committee (TCC).
3. A report on the disagreement shall be drawn up by the TCC and forwarded to the Commission within two (2) months of the TCC special meeting.
4. Upon receipt of the TCC report, the Commission shall take appropriate action respecting the disagreement in its regular or special session.

Furthermore, unnecessary, unjustified, unreasonable or even wrongful actions in the boarding and inspection activities might cause damage or loss to the inspected fishing vessel and/or its crew members. Thus, other than the procedures for solving the disagreement respecting the interpretation and/or application of the provisions of this scheme, a speedy procedure as a recourse is also needed for the

ones who suffer from unjustified or even wrongful boarding and inspection actions and who seek for remedy.

The suggested wordings to address the dispute concerning damage or loss resulted from boarding and inspection actions and to establish a speedy remedial mechanism in the scheme for such claim or dispute are as follows:

Paragraph 42 bis

1. In the event of a dispute concerning the liability for damage or loss arising from action taken pursuant to this scheme attributable to a boarding and inspecting party, the parties in dispute shall consult in an attempt to resolve the dispute.
 2. If the dispute remains unresolved within forty-five (45) days from the beginning of consultation, at the request of any party concerned to the dispute, an Ad Hoc Review Panel on Damages and Losses shall be established within ninety (90) days to review and assess the claimed damages and losses.
 3. The Ad Hoc Review Panel shall be composed of three members. The party instituting the proceeding shall appoint one member, who may be its national, to the Panel. The other party to the disagreement shall appoint one member, who may be its national, to the Panel. And, the third member to the Panel shall be appointed by agreement between the two concerned parties and shall be preferable from the nationals of other Commission Members not in dispute unless the parties to the dispute otherwise agree.
 4. The Ad Hoc Review Panel shall aim to resolve the dispute without any undue delay and the decision of such Panel will be binding on the parties to dispute.
3. It is suggested that the term “authorized enforcement vessel” or “authorized inspection vessel” used in the current text of these procedures be modified to “authorized boarding and inspecting vessel” for the sake of consistency. For example, the term “authorized enforcement vessel” is used in paragraphs 15, 23, 24, 26, 39 and 41 while the term “authorized inspection vessel” or “inspection

vessel” is used in paragraphs 12, 18, 33, 38 and 43. In addition, as expressed in paragraph 37 of the boarding and inspection procedures and as stipulated in Article 25 paragraph 1 of the WCPFC Convention, it is “each member of the Commission” who shall ultimately “enforce” the provisions of the WCPFC Convention, not the “authorized vessel”.

4. Another issue that my Government attached great importance is the “subject” who shall be able to undertake the high seas boarding and inspection task under this scheme or whether the authority to board and inspect on the high seas should be available to all Members of the Commission or limited only to Contracting Parties. My Government holds the view that the authority to board and inspect fishing vessels on the high seas in the Convention Area shall be available to all Members of the Commission.

The relevant provisions of the WCPFC Convention (such as, *inter alia*, Article 9(2), Annex I(2), Annex III Article 6.1 and 6.2) as well as the drafting history and the results of MHLC negotiations that led to the adoption of the said Convention (i.e., the proposition and its insertion into later drafts of the Convention, as of MHLC/Draft Convention/Rev. 1 of 19 April 2000, for the restriction of the competence to board and inspect fishing vessels on the high seas in the Convention Area to Contracting Parties alone was not sustainable and was subsequently defeated, and thus not appeared in the final draft Convention for the adoption) all point to one conclusion that a fishing entity with the status of Member of the Commission has the right to participate in the work of the Commission, including undertaking of boarding and inspection of fishing vessels on the high seas in the Convention Area by its public vessels on government service. It should not be argued again at this stage that the right to boarding and inspection is to be limited to Contracting Parties alone if the WCPFC Convention is going to be interpreted in good faith.

If the collective wisdom could prevail in the final phase of the MHLC negotiations during the year of 2000 to come out with the current text of Article 26 of the WCPFC Convention, the same wisdom and legal technicality should be employed to overcome this issue. Thus, it is suggested that there should be no distinction made between bracketed “Contracting Parties” and “Members of the

Commission” and the principle of “equal and full participation of all Members of the Commission” in the work of the Commission should be employed in selecting appropriate wordings.

For example, the wording for paragraph 16 of the draft scheme could be drafted as follows: “Any inspector authorized to engage in boarding and inspection pursuant to this Scheme (or authorized inspector) shall carry credentials issued by [designating authorities] [the Commission] in the format [approved] [decided] by the Commission.” The design for the “designating authorities” to issue credentials is a pragmatic arrangement as long as the Secretariat of the Commission maintains a list of designating authorities from each Member of the Commission. The credential for authorized inspectors can also be issued under the name of the Commission as long as the Secretariat of the Commission is authorized by the Commission under this boarding and inspection scheme to certified inspectors.

These two differing approaches share the same advantage that they are not to create a situation in which the terms of participation in the work of the Commission are applied in a manner which discriminates against any particular Member of the Commission. Any discrimination of this nature is a departure from the treaty obligations generated from the WCPFC Convention (Article 23 paragraph 1 and Article 25 paragraph 1 in particular) and the 1995 UN Fish Stock Agreement (Article 8 paragraph 3 in particular).

5. Furthermore, an intentional distinction being made between the Contracting Parties and Members of the Commission could generate unnecessary omissions in terms of the rights and obligations of any fishing entity that is a Member of the Commission but not a Contracting Party to the WCPFC Convention. For example, in paragraph 14 of the draft scheme, “all Contracting Parties” and “Each Contracting Party” should be changed to “all Members of the Commission” and “Each Member of the Commission”, otherwise Taiwan as a Member of the Commission will be left alone without knowledge of the register of authorized boarding and inspecting vessels and inspectors in one sense, and Taiwan as a Member of Commission will be immune from the obligation to ensure that the list of vessels and inspectors appearing on the register will be circulated to its fishing



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vessels operating in the Convention Area in another sense. Omissions of this nature appearing in this draft scheme should be avoided and the best policy to address this kind of omissions is to adhere to the letter and spirit of the WCPFC Convention and to include all Members of the Commission in the work of the Commission, including the implementation of boarding and inspection scheme in particular.

In addition to the above items of observation, comments and suggestions, attached please also find a piece of legal opinion and its summary written by one of the international law authorities, Prof. Malcolm N Shaw, to address the issue of boarding and inspection right under the framework of the WCPFC Convention. I trust that Shaw's legal opinion will clarify the confusion and contention that some Members of the Commission may have on the issue.

All of the above-mentioned observation, comments, suggestions and legal opinion are for your consideration. It is my sincere hope that terms of equal and full participation for all Members of the Commission in the boarding and inspection scheme can be developed through your efforts and collective wisdom. You have my reassurance that I will assist you in every possible way to achieve an equal and workable boarding and inspection scheme for the objective of the WCPFC Convention.

Sincerely yours,

Dah-Wen Shieh

Director-General

Fisheries Agency