

EXECUTIVE SUMMARY

The Right of Boarding and Inspection under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

1. The Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean 2000 (“WCPFC”) is located within the context of 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 1995 (“Fish Stocks Convention”).

2. The Fish Stocks Convention provides a regulated framework for high seas fishing with regard to straddling and highly migratory fish stocks as a whole and in a comprehensive manner. This constitutes the interpretative context for both the Fish Stocks and WCPFC conventions. Taking into account also the general international law principle of effectiveness, the core purpose of the former convention is thus to sustain and manage fish stocks in the most efficacious and effective manner. It follows from this that Taiwan’s active participation, as a leading fishing nation, is a necessary and critical element in the functioning of this Convention and other relevant agreements, including the WCPFC.

3. Article 1 (3) of the Fish Stocks Convention provides that for application of the

Convention “mutatis mutandis to other fishing entities whose vessels fish on the high seas”, and the relevant part of Article 17 (3) concerning subregional and regional organisations and arrangements, provides that “Such fishing entities shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the stocks”. Further, Article 2 states that the objective of the Convention is to “ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention”. These principles lead to the conclusion that the provisions of the Fish Stocks Convention are applicable in principle to Taiwan (since the term “fishing entity” was used clearly with Taiwan in mind), subject only to the requirement of necessary changes (mutatis mutandis) which itself must relate to considerations of the special status of Taiwan as an effective territorial entity not under the sovereign control or power of any other state, but unrecognised itself as a state.

4. The terms of Articles 1 (3) and 17 (3), in referring to fishing entities “whose vessels fish on the high seas” and which “have fishing vessels in the relevant area”, amount to recognition that the vessels in question are subject to the authority and control (at the least) of the fishing entity and that such entity constitutes if not a flag state, then at least a flag entity. Therefore, such an entity in order to comply with the requirements of the Fish Stocks Convention must exercise the necessary supervision in the areas laid down in the substantive provisions, that is by resort to boarding and inspection. The Convention in dealing with fishing entities does not provide for a separate compliance and implementation system for such entities, something that might have been expected if they had been excluded from the system as laid down in the agreement. Further, the Convention does not in terms deprive fishing entities of the right to conduct boarding and

inspection activities, nor does it provide any evidence for the view that fishing entities are not entitled to exercise the rights of boarding and inspection.

5. The WCPFC is one of the first regional fisheries agreements to be signed since the Fish Stocks Convention. Its objective is “to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean” in accordance with the 1982 Law of the Sea Convention and the Fish Stocks Convention. The WCPFC is to be implemented by the establishment of a Commission with a range of functions laid down in Article 10. The members of the Commission are inter alia, to implement and enforce conservation and management measures through effective monitoring, control and surveillance. The role of the Commission is therefore critical in terms of this Convention. Decision-making is as a general rule to proceed by consensus (Article 20).

6. Article 9 (2) provides that “A fishing entity referred to in the Agreement [ie. the Fish Stocks Convention], which has agreed to be bound by the regime established by this Convention in accordance with the provisions of Annex I, may participate in the work, including decision-making, of the Commission in accordance with the provisions of this article and Annex I”. Annex I (1) states that “After the entry into force of this Convention, any fishing entity whose vessels fish for highly migratory fish stocks in the Convention Area, may, by a written instrument delivered to the depositary, agree to be bound by the regime established by this Convention”. Annex I (2) provides that such fishing entity “shall participate in the work of the Commission, including decision-making, and shall comply with the obligations under this Convention. References thereto by the Commission or members of the Commission include, for the purposes of this Convention, such fishing entity as well as Contracting Parties”. This important provision underlines

that Taiwan as such a fishing entity (under the name of Chinese Taipei) is entitled as of right to take part in the work of the Commission and is entitled as of right to be involved in the decision-making processes. This means that its vote will count both for consensus purposes and for majority voting purposes as appropriate.

7. Under international law, the right to visit and conduct boarding and inspection activities on the high seas is a prerogative of warships and similar governmental enforcement vessels in particular circumstances (see Article 110 of the Convention on the Law of the Sea 1982). Taiwan constitutes a unique case as a territorially based entity acting independently and subject to the control and authority of no external power. It functions as if it were a state and such functional activity is internationally accepted. It exercises control over the areas subject in international law to territorial jurisdiction, including land, air and sea spaces and thus can be rendered internationally accountable for activities within its effective control. This would necessarily include at the least the right to police its maritime areas and ships flying its flag. It will also permit Taiwan to exercise rights on the high seas derived from international law and which it is as a matter of effectiveness able to do, so long as there is no international consensus prohibiting this.

8. Other international agreements on fisheries (such as the Convention for the Strengthening of the Inter-American Tropical Tuna Commission, 2003, and the International Commission for the Conservation of Atlantic Tunas ("ICCAT") established in 1969 under the International Convention for the Conservation of Atlantic Tunas 1966) and bilateral agreements (see the High Seas Driftnet Fisheries agreements signed with the US in 1989, 1991 and 1992) demonstrate that Taiwan participates in the relevant supervisory organs, subject to the same obligations of implementing the various conservation and management measures specified under the particular convention as

states members. Such implementation requirements focus essentially upon the need to ensure the adequate supervision of vessels of the entity or state concerned and can also include high seas boarding rights.

9. Article 26 of the WCPFC provides that the Commission shall establish procedures for boarding and inspection of fishing vessels on the high seas in the Convention Area and that all vessels used for boarding and inspection shall be clearly marked and identifiable as being on government service and authorized to undertake high seas boarding and inspection in accordance with this Convention. The reference is to government vessels and not to “state” vessels and not to vessels of Contracting Parties. It is therefore, sufficient if the vessel concerned is exercising executive functions on behalf of a legitimate authority, whether this be de jure or de facto. This would clearly include vessels on the government service of Taiwan. Attempts to restrict the competence to board and inspect fishing vessels to Contracting Parties were not accepted at the drafting stage.

10. Under international law a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the treaty. The object and purpose of the WCPFC is to manage and conserve the fish stocks in question in the area in question efficiently and effectively. This clearly cannot be achieved without the active participation of Taiwan as one of the prime fishing nations in the region and such active participation must include the right to board and inspect under the terms of the treaty.

OPINION

The Right of Boarding and Inspection under the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean

1. I have been asked to advise the Government of Taiwan as to its rights of boarding and inspection under the terms of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean 2000 (“WCPFC”). I commence with a survey of 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 1995 (“Fish Stocks Convention”). Thereafter I consider other relevant international instruments and turn thereafter to the provisions of the WCPFC.

2. Before the international agreements in question are examined, it is important to keep in mind the correct methodological approach to treaty interpretation. The fundamental principles are laid down in the Vienna Convention on the Law of Treaties 1969. Article 31, in particular, provides that:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in

addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context;

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”¹

The Fish Stocks Convention²

3. It is important to underline that the WCPFC, opened for signature on 5 September 2000, is firmly located within the context and framework of the Fish Stocks Convention. References to the latter appear regularly in the former and it clearly forms the

¹ Article 31 has been accepted as forming part of customary international law, see, for example, the Libya/Chad case, ICJ Reports, 1994, pp. 6, 21-22.

² See generally, Burke, The New International Law of Fisheries, Oxford University Press, 1994; Orrego Vicuña, The Changing International Law of High Seas Fisheries, Cambridge University Press, 1999, Chapter 5; Stokke (ed.), Governing High Seas Fisheries, Oxford University Press, 2001; Davies and Redgwell, “The International Legal Regulation of Straddling Fish Stocks”, 67 *British Year Book of International Law*, 1996, p. 199; Anderson, “The Straddling Stocks Agreement of 1995 – An Initial Assessment”, 45 *International and Comparative Law Quarterly*, 1996, p. 463; Tahindro, “Conservation and Management of Transboundary Fish Stocks”, 28 *Ocean Development and International Law*, 1997, p. 1 and Hayashi, “Enforcement by Non-Flag States on the High Seas under the 1995 Agreement on Straddling and Highly Migratory Fish Stocks”, 9 *Georgetown International Environmental Law Review*, 1996, p. 1.

interpretative basis for any consideration of the meaning and application of the WCPFC. The latter agreement specifically refers to the Fish Stocks Convention in two places in its preamble³ and in a large number of operative provisions. The Fish Stocks Convention is referred to in the WCPFC as “the Agreement”.⁴

4. These provisions may be conveniently listed as follows:

Article 2 declares that:

“The objective of this Convention is to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 Convention and the Agreement”.

Article 4 provides that:

“Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under the 1982 Convention and the Agreement. This Convention shall be interpreted and applied in the context of and in a manner consistent with the 1982 Convention and the Agreement”;

Article 5 provides that:

³ “Recalling the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 and 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,

Recognizing that, under the 1982 Convention and the Agreement, coastal States and States fishing in the region shall cooperate with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory fish stocks throughout their range”.

⁴ See article 1 (b).

“In order to conserve and manage highly migratory fish stocks in the Convention Area in their entirety, the members of the Commission shall ...[give].. effect to their duty to cooperate in accordance with the 1982 Convention, the Agreement and this Convention”;

Article 8 provides that:

“2. In establishing compatible conservation and management measures for highly migratory fish stocks in the Convention Area, the Commission shall: ..

(b) take into account: ..

(ii) previously agreed measures established and applied in respect of the same stocks for the high seas which form part of the Convention Area by relevant coastal States and States fishing on the high seas in accordance with the 1982 Convention and the Agreement;

(c) take into account previously agreed measures established and applied in accordance with the 1982 Convention and the Agreement in respect of the same stocks by a subregional or regional fisheries management organization or arrangement”.

Article 9 (2) states that:

“A fishing entity referred to in the Agreement, which has agreed to be bound by the regime established by this Convention in accordance with the provisions of Annex I, may participate in the work, including decision-making, of the Commission in accordance with the provisions of this article and Annex I”.

Article 26 (2) provides that:

“If, within two years of the entry into force of this Convention, the Commission is not able to agree on such [boarding and inspection] procedures, or on an alternative mechanism which effectively discharges the obligations of the members of the Commission under the Agreement and this Convention to ensure compliance with the conservation and management measures established by the Commission, articles 21 and 22 of the Agreement shall be applied, subject to paragraph 3, as if they were part of this Convention and boarding and inspection of fishing vessels in the Convention Area, as well as any subsequent enforcement action, shall be conducted in accordance with the procedures set out therein and

such additional practical procedures as the Commission may decide are necessary for the implementation of articles 21 and 22 of the Agreement”.⁵

Further, Article 32 (1) states that:

“Each member of the Commission shall take measures consistent with this Convention, the Agreement and international law to deter the activities of vessels flying the flags of non-parties to this Convention which undermine the effectiveness of conservation and management measures adopted by the Commission”.

5. Accordingly, the WCPFC must be examined and interpreted in the light of the provisions of the Fish Stocks Convention. The Convention on the Law of the Sea 1982 to which reference is also made is more general with regard to fishing and does not require in this context further analysis other than to point out that Articles 117 to 120 recognise the duty of all states with regard to their nationals to take and cooperate with other states in taking such measures as may be necessary for the conservation of the living resources of the high seas and that states are to cooperate as appropriate to establish subregional or regional fisheries organisations to this end. The Fish Stocks Convention came into force on 11 December 2001. It currently has 51 parties.⁶ The preamble to the Convention notes that the states parties are: “Determined to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks” and emphasises that: “the management of high seas fisheries is inadequate in many areas and that some resources are overutilised” and that “that there are problems of unregulated fishing, over-capitalisation, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between States”.

⁵ Note that by Article 6 (1) a, the Annex II Guidelines are stated to be understood as an integral part of the WCPFC, while by Article 10 (1) d, Annex I is understood to be an integral part of the WCPFC.

⁶ See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXI/treaty9.asp>

6. Article 2 provides that:

“The objective of this Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention [ie. the 1982 Convention on the Law of the Sea]”.

7. It is therefore very clear that the object and purpose of the Fish Stocks Convention is to preserve and manage fish stocks which either straddle the high seas and two or more economic zones (as defined in Article 63 of the 1982 Convention) or are species (as defined in Annex I of the 1982 Convention) which are highly migratory (both within and beyond the exclusive economic zone, Article 64 of the 1982 Convention). It is an attempt to provide a complex and regulated framework for high seas fishing as a whole and in a manner which is as effective and comprehensive as possible. Such objectives lie at the heart of the Fish Stocks Convention as a whole and constitute the interpretative context for the specific provisions therein contained as well as the provisions of the WCPRC. This means, taking into account the principle of effectiveness,⁷ that the core purpose of the Convention is to sustain and manage fish stocks in the most efficacious and effective manner. It follows from this that Taiwan’s active participation, as a leading fishing nation, is a necessary and critical element in the functioning of this Convention and other relevant agreements, including the WCPFC. That is also important from the interpretive point of view.

⁷ Note that the International Law Commission has emphasised that: “When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purpose of the treaty demand that the former interpretation should be adopted”, Yearbook of the International Law Commission, 1966-II, p. 219.

8. Article 1 (3) of this Convention, of particular interest for present purposes, states that:

“This Agreement applies mutatis mutandis to other fishing entities whose vessels fish on the high seas”.

Article 17 (3) states that:

“States which are members of a subregional or regional fisheries management organisation or participants in a subregional or regional fisheries management arrangement shall, individually or jointly, request the fishing entities referred to in Article 1, paragraph 3, which have fishing vessels in the relevant area to cooperate fully with such organisation or arrangement in implementing the conservation and management measures it has established with a view to having such measures applied de facto as extensively as possible to fishing activities in the relevant area. Such fishing entities shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of such stocks”.

9. It is important to discuss the meaning of such provisions in the light of both the aims and objectives of this Convention and of the importance of Taiwan as a fishing nation, whose cooperation is vital to achieve the purposes of the Fish Stocks Convention and a fortiori the WCPFC. In particular, it is clear that the intention behind Articles 1 (3) and 17 (3) was to ensure that Taiwan, a major fishing power, was included within the reach of the Fish Stocks Convention. Authorities such as Professor Francisco Orrego Vicuña⁸ and Judge David Anderson⁹ have particularly expressed the view that the Conference drafting the Fish Stocks Convention had Taiwan in mind with regard to these provisions. The principle of effectiveness and interpretation in the light of the objectives of the Fish Stocks Convention and the WCPFC require no less.

⁸ The Changing International Law of High Seas Fisheries, Cambridge University Press, 1999, p. 139.

⁹ “The Straddling Stocks Agreement of 1995 – An Initial Assessment”, 45 International and Comparative Law Quarterly, 1996, pp. 463, 468.

10. The enforcement and compliance system under the Fish Stocks Convention is important and in some respects innovative. The duties of the flag state are laid out in some detail in Article 18 and include control of vessels flying its flag on the high seas by means of fishing licences, authorisations or permits; establishment of regulations inter alia prohibiting fishing on the high seas by vessels not duly licensed or authorised to fish; establishment of a national record of fishing vessels authorised to fish on the high seas and ensuring that vessels flying its flag do not conduct unauthorised fishing within areas under the national jurisdiction of other states. Flag states must also monitor, control and maintain surveillance of their vessels and fishing operations by a variety of means including the implementation of national, subregional and regional schemes for cooperation in enforcement pursuant to Articles 21 and 22.

11. Article 19 provides that the flag state “shall ensure compliance by vessels flying its flag with subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks”. To this end, flag states must inter alia enforce such measures irrespective of where such violations occur and investigate immediately and fully any alleged violation of subregional or regional conservation and management measures. This, it is to be noted, may include the physical inspection of the vessels concerned. Reports should be made promptly to the state alleging the violation and the relevant subregional or regional organization or arrangement on the progress and outcome of the investigation. Any vessel flying its flag is to be required to give information to the investigating authority regarding vessel position, catches, fishing gear, fishing operations and related activities in the area of an alleged violation. If satisfied that sufficient evidence is available in respect of an alleged violation, the flag state is to refer the case to its authorities with a view to instituting proceedings without delay in accordance with its laws and, where appropriate, detain the vessel concerned.¹⁰

¹⁰ As to the responsibilities of the flag state, see also the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, 33

12. Article 20 deals with international cooperation in enforcement and provides that:

“1. States shall cooperate, either directly or through subregional or regional fisheries management organizations or arrangements, to ensure compliance with and enforcement of subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks.

2. A flag state conducting an investigation of an alleged violation of conservation and management measures for straddling fish stocks or highly migratory fish stocks may request the assistance of any other state whose cooperation may be useful in the conduct of that investigation. All states shall endeavour to meet reasonable requests made by a flag state in connection with such investigations.

3. A flag state may undertake such investigations directly, in cooperation with other interested states or through the relevant subregional or regional fisheries management organization or arrangement. Information on the progress and outcome of the investigations shall be provided to all states having an interest in, or affected by, the alleged violation.

4. States shall assist each other in identifying vessels reported to have engaged in activities undermining the effectiveness of subregional, regional or global conservation and management measures.

5. States shall, to the extent permitted by national laws and regulations, establish arrangements for making available to prosecuting authorities in other states evidence relating to alleged violations of such measures.

6. Where there are reasonable grounds for believing that a vessel on the high seas has been engaged in unauthorized fishing within an area under the jurisdiction of a coastal state, the flag

International Legal Materials, 1993, p. 368 and the Code of Conduct for Responsible Fisheries adopted by the FAO in 1995, see <http://www.fao.org/DOCREP/005/v9878e/v9878e00.htm>.

state of that vessel, at the request of the coastal state concerned, shall immediately and fully investigate the matter. The flag state shall cooperate with the coastal state in taking appropriate enforcement action in such cases and may authorize the relevant authorities of the coastal state to board and inspect the vessel on the high seas. This paragraph is without prejudice to article 111 of the Convention.

7. States parties which are members of a subregional or regional fisheries management organization or participants in a subregional or regional fisheries management arrangement may take action in accordance with international law, including through recourse to subregional or regional procedures established for this purpose, to deter vessels which have engaged in activities which undermine the effectiveness of or otherwise violate the conservation and management measures established by that organization or arrangement from fishing on the high seas in the subregion or region until such time as appropriate action is taken by the flag state”.

13. Article 21 is critical and needs to be quoted extensively. It concerns subregional and regional cooperation in enforcement and provides inter alia that:

“1. In any high seas area covered by a subregional or regional fisheries management organization or arrangement, a state party which is a member of such organization or a participant in such arrangement may, through its duly authorized inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another state party to this Agreement, whether or not such state party is also a member of the organization or a participant in the arrangement, for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement.

2. States shall establish, through subregional or regional fisheries management organizations or arrangements, procedures for boarding and inspection pursuant to paragraph 1, as well as procedures to implement other provisions of this article. Such procedures shall be consistent with this article and the basic procedures set out in article 22 and shall not discriminate against non-members of the organization or non-participants in the arrangement. Boarding and inspection as well as any subsequent enforcement action shall be conducted in accordance with such procedures. States shall give due publicity to procedures established pursuant to this paragraph.

3. If, within two years of the adoption of this Agreement, any organization or arrangement has not established such procedures, boarding and inspection pursuant to paragraph 1, as well as any subsequent enforcement action, shall, pending the establishment of such procedures, be conducted in accordance with this article and the basic procedures set out in article 22.

4. Prior to taking action under this article, inspecting states shall, either directly or through the relevant subregional or regional fisheries management organization or arrangement, inform all states whose vessels fish on the high seas in the subregion or region of the form of identification issued to their duly authorized inspectors. The vessels used for boarding and inspection shall be clearly marked and identifiable as being on government service....

5. Where, following a boarding and inspection, there are clear grounds for believing that a vessel has engaged in any activity contrary to the conservation and management measures referred to in paragraph 1, the inspecting state shall, where appropriate, secure evidence and shall promptly notify the flag state of the alleged violation.

6. The flag state shall respond to the notification referred to in paragraph 5 within three working days of its receipt, or such other period as may be prescribed in procedures established in accordance with paragraph 2, and shall either:

(a) fulfil, without delay, its obligations under article 19 to investigate and, if evidence so warrants, take enforcement action with respect to the vessel, in which case it shall promptly inform the inspecting state of the results of the investigation and of any enforcement action taken; or

(b) authorize the inspecting state to investigate.

7. Where the flag state authorizes the inspecting state to investigate an alleged violation, the inspecting state shall, without delay, communicate the results of that investigation to the flag state. The flag state shall, if evidence so warrants, fulfil its obligations to take enforcement action with respect to the vessel. Alternatively, the flag state may authorize the inspecting state to take such enforcement action as the flag state may specify with respect to the vessel, consistent with the rights and obligations of the flag state under this Agreement.

8. Where, following boarding and inspection, there are clear grounds for believing that a vessel has committed a serious violation, and the flag state has either failed to respond or failed to take action as required under paragraphs 6 or 7, the inspectors may remain on board and secure evidence and may require the master to assist in further investigation including, where appropriate, by bringing the vessel without delay to the nearest appropriate port, or to such other port as may be specified in procedures established in accordance with paragraph 2. The inspecting state shall immediately inform the flag state of the name of the port to which the vessel is to proceed. The inspecting state and the flag state and, as appropriate, the port state shall take all necessary steps to ensure the well-being of the crew regardless of their nationality.

9. The inspecting state shall inform the flag state and the relevant organization or the participants in the relevant arrangement of the results of any further investigation.

10.....The inspecting state shall ensure that boarding and inspection is not conducted in a manner that would constitute harassment of any fishing vessel....

14. This article applies mutatis mutandis to boarding and inspection by a state party which is a member of a subregional or regional fisheries management organization or a participant in a subregional or regional fisheries management arrangement and which has clear grounds for believing that a fishing vessel flying the flag of another state party has engaged in any activity contrary to relevant conservation and management measures referred to in paragraph 1 in the high seas area covered by such organization or arrangement, and such vessel has subsequently, during the same fishing trip, entered into an area under the national jurisdiction of the inspecting state.

15. 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.....

17. Where there are reasonable grounds for suspecting that a fishing vessel on the high seas is without nationality, a state may board and inspect the vessel. Where evidence so warrants, the state may take such action as may be appropriate in accordance with international law...”.

14. The following points may be made. First, the objective is to produce an effective compliance system to conserve and manage the fish stocks in question and to this end detailed provisions are made. Secondly, a state party which is a member of subregional or regional organisation or a participant in such an arrangement may board and inspect fishing vessels flying the flag of another state party whether or not the latter is a member or a participant in the organisation or arrangement in order to ensure compliance with fish stocks conservation and management measures. This provision for non-flag state action is innovative and underlines the need for effective enforcement procedures and mechanisms.¹¹ Thirdly, procedures as to boarding and inspection are to be established through such organisations or arrangements. Such provisions have to be seen in the context of the law of the sea which heretofore has restricted the right to board and inspect to the flag state of the vessel concerned on the high seas.¹²

15. Fourthly, in relation to Taiwan in particular, one needs to consider Article 1 (3) of the Fish Stocks Convention, which provides that “This Agreement applies mutatis mutandis to other fishing entities whose vessels fish on the high seas”, and the relevant part of Article 17 (3) concerning subregional and regional organisations and arrangements, which provides that “Such fishing entities shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the stocks”. Further, the guiding provision in Article 2 of the

¹¹ See eg. Hiyashi, loc.cit.

¹² See eg. Article 92 of the Convention on the Law of the Sea 1982.

Convention needs to be borne in mind, for this states that “The objective of this Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention”. These principles lead to the conclusion that the provisions of the Fish Stocks Convention are applicable in principle to Taiwan, subject only to the requirement of necessary changes (mutatis mutandis) which itself must relate to considerations of the special status of Taiwan as an effective territorial entity not under the sovereign control or power of any other state, but unrecognised itself as a state.

16. The necessary methodology for interpreting the phrase “mutatis mutandis” requires that one takes an existing situation and modifies it as necessary in the circumstances, bearing in mind the prescriptions of the original situation. This may be illustrated, for example, with regard to Article 110 (4) of the Law of the Sea Convention 1982 which provides that the provisions relating to boarding and verification of vessels on the high seas apply mutatis mutandis to military aircraft.¹³ It is clear that several of the situations and powers in the provision cannot refer to aircraft by virtue of their nature and thus must be subtracted from the application of the Article.

17. It therefore follows that one must commence from the proposition that all of the Fish Stocks Convention is capable of application to Taiwan and then withdraw such provisions as are clearly inapplicable. Any other approach would be inconsistent with the meaning of the phrase itself. Accordingly, to put it in other words, there is a presumption that all of the agreement’s provisions are applicable to Taiwan. This presumption can only be rebutted by clear inapplicability on the basis of circumstances particular to Taiwan’s own political situation. In addition, one needs to keep in mind the essential objective of the

¹³ See below, paragraph 30.

Convention, which is to ensure the effective implementation of provisions concerning the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks.

18. This means that compliance and enforcement issues are critical to the interpretation framework and thus an approach which would have the effect in practice of excluding one of the major fishing nations from the process must in principle be contrary to a correct understanding of the conventions in question. Within such a context, the ability to undertake action to enforce and comply with the operative provisions of the Convention is clearly critical and one of the mechanisms to implement such action is by way of boarding and inspection whether by the flag state or by a non-flag state as laid down in the Articles 19-21 and rendered applicable to Taiwan as a “fishing entity” by Articles 1 (3) and 17 (3).

19. There is one further point. Both Articles 1 (3) and 17 (3) refer in terms to fishing entities “whose vessels fish on the high seas” and which “have fishing vessels in the relevant area” respectively. This means that the vessels in question are accepted as being subject to the authority and control (at the least) of the fishing entity. More than this, it means that such vessels in order to be recognised as belonging to the fishing entity must be demonstrating the same, that is flying its flag. This is an implicit acceptance of fishing entities constituting if not flag states as such, then at least flag entities. From this it flows that the entity both controls the vessels in question and is so recognised by third parties. Therefore, such an entity in order to comply with the requirements of the Fish Stocks Convention must exercise the necessary supervision in the areas laid down in the substantive provisions, that is by resort to boarding and inspection. The Convention in dealing with fishing entities does not provide for a separate compliance and

implementation system for such entities, something that might have been expected if they had been excluded from the system as laid down in the agreement. Further, the Convention does not in terms deprive fishing entities of the right to conduct boarding and inspection activities, nor does it provide any evidence for the view that fishing entities are not entitled to exercise the rights of boarding and inspection

20. Indeed, for such a fishing entity to fail to exercise the necessary control over its vessels would in the circumstances of the operation of the Fish Stocks Convention constitute a breach and a failure of the purposes of the Convention and one that could hardly have been envisaged. Further, for a third party to fail to recognise this would also constitute a breach since the Convention system is built upon the application and indeed extension of flag state and non-flag state inspection. Thus, Taiwan as a “fishing entity” within the meaning of the Fish Stocks Convention and in the context of subregional and regional organisations therein mentioned is entitled as such to benefit from participation in such arrangements commensurate with “their commitment to comply with conservation and management measures”. These conservation and management measures are those laid down in Article 21 and quoted (in part) above. They include therefore by necessary implication and in the light of the principle of effectiveness as applied to treaty interpretation the provisions as to boarding and inspection.

The WCPFC¹⁴

21. As noted above,¹⁵ the WCPFC is firmly embedded within the context of the Fish Stocks Convention. The WCPFC was opened for signature on 5 September 2000 by the

¹⁴ See eg. Cordonnery, “A Note on the 2000 Convention for the Conservation and Management of Tuna in the Western and Central Pacific Ocean”, 33 *Ocean Development and International Law*, 2002, p. 1.

¹⁵ Paragraph 2 and following.

states that had participated in the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific (“MHLC”).¹⁶ By 19 December 2003 thirteen states situated south of the 20° parallel of north latitude had deposited instruments of ratification, acceptance, approval or accession with the New Zealand Government. In accordance with Article 36 (2), this Convention will enter into force 30 days after the deposit of instruments of ratification, acceptance, approval or accession by three of the States situated north of the 20° parallel of north latitude, or on 19 June 2004, being six months after the deposit of the thirteenth instrument of ratification, acceptance, approval or accession, whichever is the earlier.

22. This Convention was adopted after four years of negotiations between relevant states and constitutes one of the first regional fisheries agreements to be signed since the Fish Stocks Convention. It evolved after the adoption of the Majuro Declaration in 1997 at the second meeting of the MHLC negotiations and was approved not by consensus but by a vote of 19 states in favour and 2 against (Japan and Korea) with 3 abstentions (China, France and Tonga).¹⁷ The objective of the WCPFC is to “to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 Convention and the Agreement [i.e. the Fish Stocks Convention]”.¹⁸ The geographical area of

¹⁶ Australia, Canada, China, Cook Islands, Federated States of Micronesia, Fiji Islands, France, Indonesia, Japan, Republic of Kiribati, Republic of the Marshall Islands, Republic of Nauru, New Zealand, Niue, Republic of Palau, Independent State of Papua-New Guinea, Republic of the Philippines, Republic of Korea, Independent State of Samoa, Solomon Islands, Kingdom of Tonga, Tuvalu, UK, USA and Republic of Vanuatu. New Zealand acts as the depositary.

¹⁷ See eg. Cordonnery, *loc.cit.*, pp. 3-4.

¹⁸ Article 2.

application is defined in Article 3¹⁹ and the Convention is deemed applicable to all stock of highly migratory fish in that area except sauries.

23. The way in which the WCPFC is to be implemented is by the establishment of a Commission²⁰ with a range of functions laid down in Article 10. These include the following: to -

“(a) determine the total allowable catch or total level of fishing effort within the Convention Area for such highly migratory fish stocks as the Commission may decide and adopt such other conservation and management measures and recommendations as may be necessary to ensure the long-term sustainability of such stocks;

(b) promote cooperation and coordination between members of the Commission to ensure that conservation and management measures for highly migratory fish stocks in areas under national jurisdiction and measures for the same stocks on the high seas are compatible;

(c) adopt, where necessary, conservation and management measures and recommendations for non-target species and species dependent on or associated with the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened;

(g) develop, where necessary, criteria for the allocation of the total allowable catch or the total level of fishing effort for highly migratory fish stocks in the Convention Area;

¹⁹ It comprises all waters of the Pacific Ocean bounded to the south and to the east by the following line: From the south coast of Australia due south along the 141° meridian of east longitude to its intersection with the 55° parallel of south latitude; thence due east along the 55° parallel of south latitude to its intersection with the 150° meridian of east longitude; thence due south along the 150° meridian of east longitude to its intersection with the 60° parallel of south latitude; thence due east along the 60° parallel of south latitude to its intersection with the 130° meridian of west longitude; thence due north along the 130° meridian of west longitude to its intersection with the 4° parallel of south latitude; thence due west along the 4° parallel of south latitude to its intersection with the 150° meridian of west longitude; thence due north along the 150° meridian of west longitude.

²⁰ Article 9 (1).

(h) adopt generally recommended international minimum standards for the responsible conduct of fishing operations;

(i) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement, including a vessel monitoring system; ...

(k) agree on means by which the fishing interests of any new member of the Commission may be accommodated; ...

(n) promote the peaceful settlement of disputes; and

(o) discuss any question or matter within the competence of the Commission and adopt any measures or recommendations necessary for achieving the objective of this Convention”.

24. In order to conserve and manage highly migratory fish stocks in the Convention Area in their entirety, the members of the Commission, in giving effect to their duty to cooperate in accordance with the 1982 Law of the Sea Convention, the Fish Stocks Convention and the WCPFC, are inter alia, to implement and enforce conservation and management measures through effective monitoring, control and surveillance.²¹ The role of the Commission is therefore critical in terms of this Convention.²² Article 20 of the WCPFC deals with decision-making by the Commission and paragraph 1 of this article provides that:

“As a general rule, decision-making in the Commission shall be by consensus. For the purposes of this article, ‘consensus’ means the absence of any formal objection made at the time the decision was taken”.

25. In the absence of consensus, and unless that is mandated in any given case, the

²¹ Article 5 (j).

²² Two subsidiary bodies are also established by virtue of Article 11, the Scientific Committee and the Technical and Compliance Committee in each case each member of the Commission is entitled to appoint one representative to each Committee. Under Article 15, a Secretariat may be established by the Commission.

Commission may adopt decisions on procedural questions by a majority vote and substantive questions by a three-quarters majority of those present and voting. There is also a procedure for seeking a review of a decision in certain situations by a panel on behalf of a member which voted against or was absent.²³

26. Having briefly noted the main elements of the WCPFC, I turn to the question of fishing entities. Article 9 (2) provides that:

“A fishing entity referred to in the Agreement [ie. the Fish Stocks Convention], which has agreed to be bound by the regime established by this Convention in accordance with the provisions of Annex I, may participate in the work, including decision-making, of the Commission in accordance with the provisions of this article and Annex I”.

Annex I (1)²⁴ states that:

“1. After the entry into force of this Convention, any fishing entity whose vessels fish for highly migratory fish stocks in the Convention Area, may, by a written instrument delivered to the depositary, agree to be bound by the regime established by this Convention. Such agreement shall become effective thirty days following the delivery of the instrument. Any such fishing entity may withdraw such agreement by written notification addressed to the depositary. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date”.

27. Several points may be made. First, the provisions are specifically linked to the Fish Stocks Convention and the position of Taiwan with regard to this has been discussed. Secondly, and unlike the Fish Stocks Convention, there is an explicit reference to the consent of the fishing entity being required. Thirdly, the entity can only agree to be bound

²³ Article 20.

²⁴ Note that by Article 41 (1), the Annexes to the WCPFC form “an integral part” of the Convention.

after the entry into force of the Convention, although it should be noted that Taiwan (using the name ‘Chinese Taipei’) came to an arrangement dated 5 September 2000, the date the Convention was adopted, whereby it was invited by the MHLC Conference and declared its intention to participate in the Preparatory Conference established by the resolution attached to the Final Act of the Conference and to be bound by the WCPFC subject to the fulfilment of domestic legal requirements. Fourthly, it should be noted that the WCPFC provides for a separate dispute resolution mechanism to settle disputes between a fishing entity and Contracting Parties to the Convention.²⁵

28. Annex I (2) provides that:

“Such fishing entity shall participate in the work of the Commission, including decision-making, and shall comply with the obligations under this Convention. References thereto by the Commission or members of the Commission include, for the purposes of this Convention, such fishing entity as well as Contracting Parties”.

29. This is an important provision. It underlines that Taiwan as such a fishing entity (under the name of Chinese Taipei) is entitled as of right to take part in the work of the Commission and is entitled as of right to be involved in the decision-making processes. This means that its vote will count both for consensus purposes and for majority voting purposes as appropriate. It also means that Taiwan will be able to challenge any majority vote under Article 20 (6) and seek a review by a review panel where the decision is inconsistent with the provisions of the 1982 Convention on the Law of the Sea, the Fish Stocks Convention or the WCPFC; or where the decision “unjustifiably discriminates in form or in fact against the member concerned”. Should a dispute arise over the interpretation of this provision, the dispute settlement arrangement in Annex I (3) would be applicable.

Boarding and Inspection

²⁵ See Annex I (3).

i) General

30. The right to visit and conduct boarding and inspection activities on the high seas is a prerogative of warships and similar governmental enforcement vessels in particular circumstances. Article 110 of the Convention on the Law of the Sea 1982 provides that:

“1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

- (a) the ship is engaged in piracy;
- (b) the ship is engaged in the slave trade;
- (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply mutatis mutandis to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service”.²⁶

²⁶ See also Article 22 of the Geneva Convention on the High Seas 1958 and Jennings and Watts (eds.), Oppenheim's International Law, 9th ed., London, 1992, p. 1162.

31. There are also a number of treaties providing for board and inspection.²⁷ However, there is no Convention definition of “warships” or “other duly authorized ships or aircraft clearly marked and identifiable as being on government service”. Essentially such ships are organs of state and so regarded both internally and internationally. Taiwan constitutes a unique case. It constitutes a territorially based entity acting independently and subject to the control and authority of no external power. It is not as such a recognised state, since it has not so proclaimed itself. Nevertheless, it functions as if it were a state and such functional activity is internationally accepted. It is crucial to reiterate this point. Taiwan is not under the de facto sovereignty or territorial or jurisdictional control of any other state or entity. It is as a matter of fact an independent entity fully in control of its own territory and fully capable of exercising control over the areas subject in international law to territorial jurisdiction, including land, air and sea spaces and being recognised as such. This factual circumstance has legal relevance and for present purposes means that Taiwan is not under the direction (de jure or de facto) of any other international person. It follows from this that Taiwan can be rendered internationally accountable for activities within its effective control and that therefore it must be able to exercise its power to ensure, for example, that activities contrary to international law do not take place within the area under its effective control. This would necessarily include at the least the right to police its maritime areas and ships flying its flag. It will also permit Taiwan to exercise rights on the high seas derived from international law and which it is as a matter of effectiveness able to do, so long as there is no international consensus prohibiting this.

32. Taiwan has indeed manifested its competence to exercise law of the sea rights. It has, for example, proclaimed a 12 nautical miles territorial sea, a 24 nautical miles contiguous zone and a 200 nautical mile exclusive economic zone. These claims made in 1979 were reaffirmed in 1998.²⁸ Such claims are, of course, fully consistent with the provisions of

²⁷ See eg. the UN Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988; the Council of Europe Agreement on Illicit Traffic by Sea 1995; the proposed European Union Convention on the Suppression by Customs Administrations of Illicit Drug Trafficking on the High Seas and a number of bilateral agreements such as the US-UK Agreement of 1981 concerning areas of the Caribbean and Gulf of Mexico and the Spain-Italy Agreement of 23 March 1990.

²⁸ See the Gazette of the Presidential Office, No. 6200, 21 January 1998, pp. 22-30.

the Law of the Sea Convention 1982.²⁹ Such claims, to the best of my knowledge, have met with no objections from third states. This absence of protest is of legal significance. It amounts to a phenomenon characterised by the International Court as “the general toleration of the international community”³⁰ which could evidence or reinforce a legal title. Such absence of protest may well give rise to estoppels.

33. Taiwan has also acted positively to enforce its jurisdiction over its maritime zones. Fishing vessels, for example, illegally operating in its maritime zones are regularly prosecuted. These and other exercises of jurisdictional enforcement actions have not occasioned protest from relevant states such as, for example, Japan.³¹

34. Some guidance may be obtained from a consideration of other international instruments. From these it will be seen that fishing entities are accepted as participants in international fishing arrangements with certain enforcement powers. The Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the USA and Costa Rica (“the Antigua Convention”) was opened for signature on 14 November 2003.³² Taiwan signed this Convention on that date (using the name Chinese Taipei) as a fishing entity under Article XXVIII. By virtue of Article I (7) such fishing entity becomes a Member of the Commission. Under the heading of Rights and Obligations of Members of the Commission, Article XVIII provides that:

²⁹ See Articles 3, 33, 55, 57, 76 and 77. A series of straight baselines was established in 1999, see Ministry of the Interior 88 [1999] Tai-Nei-Tzu No. 06161, Administrative Order of 10 February 1999; see also Article 7 of the 1982 Convention.

³⁰ The Anglo-Norwegian Fisheries case, ICJ Reports, 1951, p. 138.

³¹ One example of the exercise of Taiwan’s criminal jurisdiction is provided by the case before the Keelung District Court of Taiwan Province of Goel and Others, 85 [1996] Su-tzu-no. 125 reported in 15 Chinese Yearbook of International Law, 1996-7, p. 171. Goel was the Indian captain of a Japanese-owned and Panamanian flagged vessel accused (and ultimately convicted) of causing death by abandonment as a consequence of a collision taking place within Taiwan’s 24 mile contiguous zone.

³² See www.iattc.org/IATTCdocumentationENG.htm

“1. Each Party shall take the measures necessary to ensure the implementation of and compliance with this Convention and any conservation and management measures adopted pursuant thereto, including the adoption of the necessary laws and regulations”

and:

“5. Each Party shall take measures to ensure that vessels operating in waters under its national jurisdiction comply with this Convention and the measures adopted pursuant thereto”

and:

“6. Each Party, where it had reasonable grounds to believe that a vessel flying the flag of another state has engaged in any activity that undermines the effectiveness of conservation and management measures adopted for the Convention Area, shall draw this to the attention of the flag state concerned and may, as appropriate, draw the matter to the attention of the Convention..”

and:

“10. If the Commission determines that vessels fishing in the Convention Area have engaged in activities which undermine the effectiveness of or otherwise violate the conservation and management measures adopted by the Commission, the Parties may take action, following the recommendations adopted by the Commission and in accordance with this Convention and international law, to deter such vessels from such activities until such time as appropriate action is taken by the flag state to ensure that such vessels do not continue those activities”.

Article XIX provides that:

“Article XVIII of the Convention applies, mutatis mutandis, to fishing entities that are members of the Commission”.

35. Article XX lays down a series of duties upon flag states so that their vessels comply with the provisions of the Convention and that they are authorised to fish for fish stocks

covered by the Convention.³³ Article XXI states that the foregoing provision applies, mutatis mutandis, to fishing entities that are members of the Commission”.

36. Two points may be made on this. First, Taiwan as a fishing entity under this Convention has the right and duty to supervise its vessels so that they comply with the requirements of the Convention. Any other interpretation would render its adherence to this Convention pointless. Secondly, although the Antigua Convention does not in terms permit members of the Commission to visit, board and inspect fishing vessels in the Convention Area, the necessary implication of Article XVIII (10) is that the Commission has the power to authorise the parties (and Taiwan under the name of Chinese Taipei mutatis mutandis) to take action to deter vessels fishing in the Convention Area and suspected of violating conservation and management activities from such behaviour. This can only reasonably be interpreted to include rights of boarding and inspection to verify what is being fished and where.

37. Secondly, the International Commission for the Conservation of Atlantic Tunas (“ICCAT”) was established in 1969 under the International Convention for the Conservation of Atlantic Tunas 1966. Taiwan, under the name of Chinese Taipei, has the status of “Cooperating Party, Entity or Fishing Entity”. In its Recommendation on Criteria for Attaining the Status of Cooperating Non-Contracting Party, Entity or Fishing Entity 2003, the Commission states that those seeking such status should provide details “on its historical fisheries in the Convention area, including nominal catches, number/type of vessels, name of fishing vessels, fishing effort and fishing areas” and “on current fishing presence in the Convention area, number of vessels and vessel characteristics”. Applicants for such status have to confirm their commitment to respect the Commission’s conservation and management measures and to inform the Commission

³³ Stocks of tuna and tuna-like species and other species of fish taken by vessels fishing for tuna and tuna-like species in the Convention Area, ie. the area of the Pacific Ocean bounded by the coastline of North, Central and Southern America and by the 50 degree North parallel from the coast of North America to its intersection with the 150 degree West meridian; the 150 degree West meridian to its intersection with the 50 degree South parallel; and the 50 degree South parallel to its intersection with the coast of South America, Articles I (1) and III.

of measures taken “to ensure compliance by its vessels” with such measures.³⁴ Recommendation 03-12 provides that “In order to control vessels entitled to fly their flags and authorised to fish species managed by ICCAT in the Convention area, flag Contracting Parties, Cooperating Non-Contracting Parties, Entities or Fishing Entities” must adopt measures ensuring such compliance and provide authorisations to fish.

38. From this convention system, it is possible to conclude that fishing entities are recognised as controlling vessels and as being able to flag such vessels, as well as being able to enforce ICCAT conservation and management measures.

39. Finally, in terms of international agreements, the Convention for the Conservation of Southern Bluefin Tuna was adopted in 1993. This established a Commission, while an Extended Commission was created by a resolution adopted in 2001 and revised in 2003 with Taiwan as a member (from 30 August 2002). The function of the Extended Commission includes deciding upon a total allowable catch and its allocation among members, each member having an equal voting right. The Fishing Entity of Taiwan was allocated a catch of 1,140 tonnes for the year 2003-4.³⁵

40. These international agreements on fisheries demonstrate that fishing entities are accepted as members of the relevant supervisory organs and subject to the same obligations of implementing the various conservation and management measures specified under the particular convention. Such implementation requirements focus essentially upon the need to ensure the adequate supervision of vessels of the entity or state concerned and occasionally note the possibility of something more than this.

³⁴ Recommendation 03-20, see www.iccat.es.

³⁵ See <http://www.ccsbt.org/docs/management.html>.

41. Such agreements are buttressed in Taiwan's case by bilateral arrangements. Taiwan is currently recognised by 29 states and has signed a number of bilateral fishing agreements with such states. Such agreements, concluded on a government to government basis, permit its vessels to fish in the 200 mile fishing limits of the other state and set total allowable catches for the vessels concerned. These agreements also provide for no less favourable treatment to be accorded to the "nationals and vessels of the Republic of China" than that accorded to any third country.³⁶

42. Of particular importance are the bilateral agreements signed with the US concerning driftnet fishing on the high seas. These came about following increasing international activity to deal with the problem. For example, the Tarawa Declaration of July 1989 adopted by the South Pacific Forum called upon Japan and Taiwan to abandon their driftnet operations in the South Pacific,³⁷ while the UN has adopted resolutions on the issue.³⁸ The first agreement between the Coordination Council for North American Affairs ("CCNAA")³⁹ and the American Institute in Taiwan ("AIT")⁴⁰ on High Seas Driftnet Fisheries in the North Pacific Ocean was signed in 1989, followed thereafter by the agreements of 1991 and 1992. These contain certain common provisions of interest.

43. First, common article 4 (headed "Enforcement") provides that:

³⁶ See, for example, the agreements with Tuvalu signed on 5 November 1981, Treaties Between the Republic of China and Foreign Nations, vol. 6, 1977-81, p. 270; and with the Solomon Islands signed on 11 October 1983, *ibid.*, vol. 7, 1982-85, p. 220.

³⁷ See also the Convention for Prohibition of Fishing with Long Drift Nets in the South Pacific, 1989.

³⁸ See eg. General Assembly resolutions 44/225 and 46/215.

³⁹ Taiwan.

⁴⁰ USA.

“(a) Enforcement boardings of driftnet fishing vessels shall be conducted by personnel of the authorities represented by CCNAA, both dockside and at sea within and beyond the fishing area authorised by the authorities represented by CCNAA.

(b) The authorities represented by AIT and CCNAA may exchange enforcement observers to facilitate driftnet fishery enforcement activities. These exchanges may include:

(i) participation by enforcement observers of the authorities represented by AIT on enforcement cruises conducted by the authorities represented by CCNAA;

(ii) participation by enforcement observers of the authorities represented by CCNAA on enforcement patrols conducted by the authorities represented by AIT”.

44. Common Article V (Article VI in the 1989 agreement) provided for the deployment of an agreed number of dedicated patrol vessels of the territory represented by CCNAA during the period covered by the respective agreements.

45. Records of Discussions are attached to the agreements and these detail the temporary arrangements agreed to by the parties. These arrangements deal extensively with the powers of visit and verification given to each party with regard to driftnet vessels of the other party in order to ensure compliance with driftnet fishing regulations. This is initially to be done by a request to conduct a cooperative visit to the appropriate enforcement personnel of the other party. If such cooperative visit is not possible, the enforcement personnel of the requesting party may still initiate the visit and verification of the vessel of the other party and thereafter notify the authorities of the other party of the results of the visit and verification and consult with regard to the disposition of any violations detected. In other words, Taiwan and the US agreed to the visit and inspection of each party's fishing vessels by the appropriate vessels of the other party. By definition, each party recognised the right of the other to conduct such activities with regard to high seas driftnet fisheries in the North Pacific.

46. Article 39 of the WCPFC preserves and recognises the legal competences that Taiwan derives from its agreements with other parties in providing that:

“This Convention shall not alter the rights and obligations of Contracting Parties, and fishing entities referred to in Article 9, paragraph 2, which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other Contracting Parties of their rights or the performance of their obligations under this Convention”.

ii) The WCPFC

47. In discussing specifically questions as to boarding and inspection under the WCPFC, it is important to bear in mind the preceding general discussion. There is one preliminary argument to be addressed at this stage. Article 4 of the WCPFC provides that:

“Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under the 1982 Convention and the Agreement. This Convention shall be interpreted and applied in the context of and in a manner consistent with the 1982 Convention and the Agreement”.

while Article 17 (3) of the Fish Stocks Convention declares that:

“States which are members of a subregional or regional fisheries management organisation or participants in a subregional or regional fisheries management arrangement shall, individually or jointly, request the fishing entities referred to in Article 1, paragraph 3, which have fishing vessels in the relevant area to cooperate fully with such organisation or arrangement in implementing the conservation and management measures it has established with a view to having such measures applied de facto as extensively as possible to fishing activities in the relevant area. Such fishing entities shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of such stocks”.

48. It is my understanding that the People's Republic of China has used the combination of the two provisions to argue that a fishing entity cannot have boarding and inspection rights. It is an argument that is a little difficult to follow. Article 17 (3) authorises member states of subregional or regional fisheries organisations or arrangements to invite fishing entities that fish in the relevant area to cooperate for implementation purposes. The subsequent reference to relevant measure thus applying "de facto" as widely as possible has two purposes and consequences, it seems to me. First, it preserves the position of those who argue that Taiwan (since the term fishing entity is clearly intended to refer to Taiwan)⁴¹ is not a de jure sovereign and cannot therefore exercise de jure sovereignty as an internationally recognised state. Secondly, it recognises that Taiwan is capable of exercising de facto control over relevant issues and thus may implement the measures laid down in the Convention "de facto" as appropriate. The effect of Article 4 is therefore to sustain this position insofar as all parties to the WCPFC are concerned.

49. Article 26 of this Convention deals specifically with boarding and inspection and provides as follows:

"1. For the purposes 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. All vessels used for boarding and inspection of fishing vessels on the high seas in the Convention Area shall be clearly marked and identifiable as being on government service and authorized to undertake high seas boarding and inspection in accordance with this Convention.

2. If, within two years of the entry into force of this Convention, the Commission is not able to agree on such procedures, or on an alternative mechanism which effectively discharges the obligations of the members of the Commission under the Agreement and this Convention to ensure compliance with the conservation and management measures established by the Commission, articles 21 and 22 of the Agreement shall be applied, subject to paragraph 3, as if they were part of this Convention and boarding and inspection of fishing vessels in the Convention Area, as well as any subsequent enforcement action, shall be conducted in accordance with the procedures set out therein and such additional practical procedures as the Commission may decide are necessary for the implementation of articles 21 and 22 of the Agreement.

⁴¹ See above, paragraph 9.

3. Each member of the Commission shall ensure that fishing vessels flying its flag accept boarding by duly authorized inspectors in accordance with such procedures. Such duly authorized inspectors shall comply with the procedures for boarding and inspection”.

50. The only requirement of relevance to the immediate discussion is that the vessels being used for boarding and inspection are to be identifiable as being “on government service”. The reference is not to “state” vessels and not to vessels of Contracting Parties (see below). It is therefore, sufficient if the vessel concerned is exercising executive functions on behalf of a legitimate authority, whether this be de jure or de facto. Annex III deals with the terms and conditions for fishing. Article 6 on Enforcement provides in part that:

“1. The authorization issued by the flag state of the vessel and, if applicable, any licence issued by a coastal state party to this Convention, or a duly certified copy, facsimile or telex confirmation thereof, shall be carried on board the vessel at all times and produced at the request of an authorized enforcement official of any member of the Commission.

2. The master and each member of the crew of the vessel shall immediately comply with every instruction and direction given by an authorized and identified officer of a member of the Commission ...,”.

51. Annex III, like all the annexes to this Convention, is to be regarded as an integral part of the Convention (Article 41). Article 32 (1) of the Convention provides in addition that:

“Each member of the Commission shall take measures consistent with this Convention, the Agreement and international law to deter the activities of vessels flying the flags of non-parties to this Convention which undermine the effectiveness of conservation and management measures adopted by the Commission” (emphasis added).

Annex I, paragraph 2 provides, it will be remembered, that:

“2. Such fishing entity shall participate in the work of the Commission, including decision-making, and shall comply with the obligations under this Convention. References thereto by the Commission or members of the Commission include, for the purposes of this Convention, such fishing entity as well as Contracting Parties”.

52. This proposition that any reference to obligations under the WCPFC applies also to fishing entities and that this also applies to obligations referred to by either the Commission or members of the Commission is critical to the scheme of the Convention. An examination of the travaux préparatoires of the WCPFC bears this out in particular with regard to the question of boarding and inspection.

53. The drafting history of what became Article 26 (1) of the Convention is instructive. The Revised Draft Articles issued at the third session of the MHLC in June 1998 provided in Article 19 that:

“The Commission shall establish procedures for boarding and inspection of fishing vessels flying the flags of Contracting Parties in the Convention Area. Pending the establishment of such procedures, boarding and inspection of fishing vessels flying the flags of Contracting Parties in the Convention Area as well as any subsequent enforcement action, shall be conducted in accordance with articles 21 and 22 of the Agreement”.

54. The following year, draft Article 26 appeared:

“1. The Commission shall establish procedures for boarding and inspection of fishing vessels on the high seas in the Convention Area.

2. If, within two years of the entry into force of this Convention, the Commission is not able to agree on such procedures, or on an alternative mechanism which effectively discharges the obligations of the members of the Commission under the Agreement and this Convention to ensure compliance with the conservation and management measures established by the Commission, articles 21 and 22 of the Agreement shall apply as if they were part of this Convention and boarding and inspection of fishing

vessels in the Convention Area, as well as any subsequent enforcement action, shall be conducted in accordance with the procedures set out therein.

3. All vessels used for boarding and inspection in the Convention Area shall be clearly marked and identifiable as being on government service”.⁴²

55. By April 2000, certain critical changes had occurred. Draft Article 26 read as follows:

“1. The Commission shall establish procedures for boarding and inspection of fishing vessels on the high seas in the Convention Area. Each member of the Commission shall ensure that fishing vessels flying its flag accept boarding by duly authorised inspectors in accordance with such procedures. Each member of the Commission shall also ensure that its duly authorised inspectors comply with the procedures for boarding and inspection.

2. If, within two years of the entry into force of this Convention, the Commission is not able to agree on such procedures, or on an alternative mechanism which effectively discharges the obligations of the members of the Commission under the Agreement and this Convention to ensure compliance with the conservation and management measures established by the Commission, the Contracting Parties to this Convention shall apply articles 21 and 22 of the Agreement as if they were part of this Convention and boarding and inspection of fishing vessels in the Convention Area, as well as any subsequent enforcement action, shall be conducted by the Contracting Parties in accordance with the procedures set out therein and such additional practical procedures as the Commission may decide are necessary for the implementation of articles 21 and 22 of the Agreement.

3. All vessels used by Contracting Parties for boarding and inspection of fishing vessels on the high seas in the Convention Area shall be clearly marked and identifiable as being on government service and authorised to undertake high seas boarding and inspection in accordance with this Convention” (emphasis added).⁴³

⁴² MHLC/WP.1/Rev.4, 16 September 1999.

⁴³ MHLC/Draft Convention/Rev.1, 19 April 2000.

56. Thus, specific references were inserted to ensure that boarding and inspection would only be carried out by Contracting Parties to the Convention, a formulation that would clearly exclude Taiwan. However, such changes had disappeared by the time the Convention was finally adopted in September 2000. The only possible interpretation of this is that the parties to the conference had decided that this restriction of the competence to board and inspect fishing vessels in the area in question to Contracting Parties alone was not sustainable and that a more flexible version was to be preferred. One must also bear in mind the rules of treaty interpretation,⁴⁴ which require that a treaty must be interpreted in good faith⁴⁵ in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the treaty. The object and purpose of the WCPFC is to manage and conserve the fish stocks in question in the area in question efficiently and effectively. This clearly cannot be achieved without the active participation of Taiwan as one of the prime fishing nations in the region.⁴⁶ Accordingly, it cannot be argued that the right to boarding and inspection is to be limited to Contracting Parties alone since this very proposition, having been inserted into later drafts was subsequently defeated.

57. This approach is underlined by practice. In August 2003, Taiwan sent a coastguard vessel to a part of the high seas which includes the Convention Area and conducted boarding and inspection activities. Two Taiwanese vessels were boarded and inspected. This episode was mentioned openly and publicly by the delegate of Chinese Taipei in his

⁴⁴ See above, paragraph 2.

⁴⁵ Note also that this requirement appears in Article 33 of the WCPFC.

⁴⁶ Cordonnery writes that “Given the substantial fishing activities of Taiwan in the region, it was imperative for the effectiveness of the new regime to ensure Taiwan’s participation in and compliance with the decisions taken by the future commission”, *loc.cit.*, p. 6.

speech to PrepCon V in the Cook Islands in Autumn 2003. To the best of my knowledge, no protest was issued and no objection made as a result of this statement. It cannot, therefore, have been regarded as controversial or deemed necessary of contradiction or dissension. One can argue that as a consequence of such an important matter having been made in such a public and relevant forum without challenge, the other participants acquiesced in the correctness and legitimacy of the course of action described in the oral statement.

Conclusions

58. My conclusions are as follows:

1. The WCPFC needs to be read together with the Fish Stocks Convention. This Convention recognises the status of fishing entities and provides for the application its provisions to such entities mutatis mutandis. Both the principle of effectiveness and the principles of interpretation mean that this application cannot be understood in a way that restricts the proper implementation of the Convention. The Fish Stocks Convention also authorises states members of a subregional or regional fisheries management organisation or arrangement to invite fishing entities to cooperate in the implementation of the measures taken by the organisation or arrangement in question. Extensive powers are recognised as far as flag states are concerned and these apply by necessary implication and interpretation to fishing entities. The Convention also provides for the rights of boarding and inspection by states parties to a subregional or regional fisheries management organisation or arrangement of vessels flying the flag of another state party, irrespective of whether they are members of the particular organisation or arrangement. This power also applies to fishing entities mutatis mutandis, and this qualifying phrase refers to issues of status (that is, non-recognition of sovereign status) and not powers since otherwise the object and purpose of the Convention would be prejudiced.

2. The WCPFC provides for the implementation of its provisions through the creation of a Commission with a wide range of functions. Fishing entities have a right to participate in the work of the Commission, including its decision-making processes and are bound to comply with the obligations laid down in this Convention.

3. The right to board and visit ships on the high seas is limited. It may be applied as regards ships of the same nationality as the warship or duly authorised ship on government service or ships of no nationality, or exercised to prevent piracy, the slave trade, unauthorised broadcasting or pursuant to powers conferred by treaty. The right to board and visit is a manifestation of uncontested de facto control of a territory with a coast and is not limited to recognised states. Taiwan by virtue of its membership of particular organisations is competent to exercise effective control in the geographical areas covered by the agreement concerned and by virtue of bilateral agreements with the US has been accepted as competent to board and visit vessels of the other party for verification purposes.

4. The WCPFC builds upon the provisions of the Fish Stocks Convention and requires the Commission to establish procedures for boarding and inspection of fishing vessels in the Convention Area. Such vessels must be identifiable as “being on government service”, that is, they must be acting in an executive capacity for (at the least) a de facto authority. Fishing entities are not precluded from this and it is a necessary implication from the stated objectives of the Convention that Taiwan as a major fishing nation expressly consenting to be bound by the obligations of the WCPFC should be competent to exercise such powers. Indeed, the drafting history of the provision in question shows that an attempt to restrict powers of boarding and inspection to Contracting Parties was rejected. This approach is sustained by practice and the absence

of protest to a manifestation of the competence to board and inspect in the Convention
Area.

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