

# Fishing Entity Enforcement in High Seas Fisheries



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in High Seas Fisheries

By

Ying-Ting Chen

**CAMBRIDGE  
SCHOLARS**

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P U B L I S H I N G

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by Ying-Ting Chen

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*For my Family*



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# INTRODUCTION

The fishery resources in the oceans used to be viewed as inexhaustible. As fishing technology has developed rapidly, however, people have gradually made efforts to adopt fishery resources reservation and management methods, rather than ways to catch as many fish as possible. Among the many aspects of fishery resources conservation and management, straddling and highly migratory stocks especially need to be protected as they stay in different areas during different stages of life and could easily face the risk of extinction.<sup>1</sup>

Within exclusive economic zones, coastal states can make laws to protect resources. As a part of customary law, however, the freedom of high seas results in flag state jurisdiction on the high seas. As global concern for the importance of conserving straddling and highly migratory stocks has risen, regulations concerning enforcement in the high seas to preserve these stocks and decrease their possibility of extinction have been created. To protect straddling and highly migratory stocks in various high-sea areas, the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA)<sup>2</sup> requires state parties to establish regional fishery management organisations (RFMOs) to conserve and manage those stocks. Through RFMOs, many conservation and management measures (CMMs) are established. For example, the primary method is to calculate the total allowable catch (TAC) of each stock and allocate quotas to members of RFMOs according to the TAC. Vessels might also be required to carry vessel monitoring systems (VMS) which use global positioning systems (GPS) to acquire the position of the vessels. The RFMOs then can conduct high seas enforcement, *i.e.*

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<sup>1</sup> Annex I of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) lists seventeen highly migratory species: albacore tuna, bluefin tuna, bigeye tuna, skipjack tuna, yellowfin tuna, blackfin tuna, little tuna, southern bluefin tuna, frigate mackerel, pomfrets, marlins, sailfish, swordfish, saury, dolphin, oceanic sharks, and cetaceans. UNCLOS was adopted on 10 December 1982 and entered into force 16 November 1994. For the full text of UNCLOS, *see A/CONF.62/122*, 1833 UNTS 397.

<sup>2</sup> Oceans and Law of the Sea, *A/CONF.164/37*, 2167 UNTS 3.

boarding and inspection, to determine if the vessels violate conservation and management measures.

Enforcement includes both negative and positive actions. The former means to arrest or clamp down on the violator, *i.e.* impose punishments after the law is broken; the latter, on the other hand, refers to preventing violation behaviours, *i.e.* taking proactive measures to prohibit a breach of law. Traditionally, flag state jurisdiction applies to most circumstances, except for piracy, illegal drugs trafficking, illegal broadcasting, slavery, etc.<sup>3</sup> Due to the international community's increased concern for fishery conservation and management, non-flag state enforcement in high seas fisheries has been extended from bilateral treaties to regional treaties. Through the management of RFMOs, members can not only exert their flag state jurisdiction but may also board and inspect each other's vessels in order to ensure compliance with related conservation and management measures.

In addition, Taiwan, officially the Republic of China, is a democratic state in East Asia neighboured by the People's Republic of China to the west, Japan to the northeast and the Philippines to the south. Taiwan's total land area is approximately 14,400 square miles, and its population 23 million. It was the world's 17th largest exporter and 18th largest importer of merchandise in 2011 and ranked the 13th in the World Economic Forum's Global Competitiveness Report 2011–2012.<sup>4</sup> However, due to political conflict with China, Taiwan has been denied participation in most international governmental organisations using the identity of a state or its official name. Therefore, Taiwan seeks to overcome this obstacle by using other identities or names in international forums.<sup>5</sup> "Fishing entity" is an identity that Taiwan uses in many RFMOs.

Although not much literature has discussed the term "fishing entity," some articles have focused on the topic of fishing entity. Andrew Serdy discussed the details of Taiwan's entry into the Commission for the Conservation of Southern Bluefin Tuna (CCSBT)<sup>6</sup>, including Taiwan's

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<sup>3</sup> See Article 110 of UNCLOS.

<sup>4</sup> More information about Taiwan can be found on the official websites of Taiwan's Ministry of Foreign Affairs <<http://taiwanindepth.tw>> (visited on 03/02/2014) and Tourism Bureau <http://eng.taiwan.net.tw/m1.aspx?sNO=0000202> (visited on 03/02/2014).

<sup>5</sup> Regarding the origins of the political conflict between Taiwan and China and Taiwan's participation in international governmental organisations using different nomenclature, please *see* Chapter 7 of this book.

<sup>6</sup> The CCSBT was established in 1994 with the aim to ensure, through appropriate management, the conservation and optimum utilisation of the global southern

view on its position in the CCBST, and precisely analysed the CCSBT 2001 Resolution, which established an extended commission and a scientific committee to introduce the concept of the fishing entity to the CCBST.<sup>7</sup> Serdy also examined Taiwan's status and different position than China during process of negotiating, drafting and forming the CCBST, International Commission for the Conservation of Atlantic Tunas (ICCAT)<sup>8</sup>, Indian Ocean Tuna Commission (IOTC)<sup>9</sup>, Western and Central

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bluefin tuna stock. The CCSBT is headquartered in Canberra, Australia; has five members (Australia, Japan, New Zealand, Korea and Indonesia); a fishing entity, (Taiwan); and three co-operating non-parties (the Philippines, South Africa and the European Union). Complete information on CCSBT can be found at <http://www.ccsbt.org/docs/about.html> (visited on 16/07/2010).

<sup>7</sup> Andrew Serdy, "Bringing Taiwan into the International Fisheries Fold: The Legal Personality of a Fishing Entity," in James Crawford and Vaughan Lowe, eds., *The British Year Book of International Law 2004* (Oxford: Clarendon Press, 2005 Vol. 75), pp. 183–221.

<sup>8</sup> The ICCAT is an inter-governmental fishery organisation founded in 1969 which is responsible for the conservation of tunas and tuna-like species in the Atlantic Ocean and its adjacent seas. It has 47 members: Albania, Algeria, Angola, Barbados, Belize, Brazil, Canada, Cape Verde, China, Sierra Leone, Côte d'Ivoire, Egypt, Equatorial Guinea, the European Union, France, Gabon, Ghana, Guatemala, Guinea, Honduras, Iceland, Japan, Libya, Morocco, Mauritania, Mexico, Namibia, Nicaragua, Nigeria, Norway, Panama, the Philippines, Republic of Korea, Russian Federation, Saint Vincent/Grenadines, Sao Tome and Principe, Senegal, Sierra Leone, South Africa, Syrian Arab Republic, Trinidad and Tobago, Tunisia, Turkey, the United Kingdom, United States of America, Uruguay, Vanuatu and Venezuela. In addition, the ICCAT has five co-operators: Bolivia, Chinese Taipei, Curacao, Suriname and El Salvador. Complete information can be found on the official ICCAT website <<http://www.iccat.int/en/introduction.htm>> (visited on 03/02/2014).

<sup>9</sup> The IOTC was set up in 1997 as an intergovernmental organisation mandated to manage tuna and tuna-like species in the Indian Ocean and adjacent seas. Its objective is to promote cooperation among its members in order to ensure the conservation and optimum utilisation of stocks and to encourage sustainable development of fisheries based on such stocks. Its members are Australia, Belize, China, Comoros, Eritrea, the European Community, France, Guinea, India, Indonesia, Iran, Japan, Kenya, Korea, Madagascar, Malaysia, Maldives, Mauritius, Mozambique, Oman, Pakistan, Philippines, Seychelles, Sierra Leone, Sri Lanka, Sudan, Tanzania, Thailand, the United Kingdom, Vanuatu and Yemen; Senegal and South Africa are cooperating non-contracting parties. Complete information can be found on the official IOTC website <http://www.iotc.org/English/about.php>> (visited on 04/02/2014).

Pacific Fisheries Commission (WCPFC)<sup>10</sup> and South East Atlantic Fisheries Organization (SEAFO).<sup>11</sup> Serdy focused on the subject of Taiwan, rather than “fishing entity,” which seemed to be a consequence of Taiwan’s participation in the RFMOs. It can be argued that the term “fishing entity” was coined mainly to refer to Taiwan, so addressing Taiwan cannot be avoided, particularly when discussing Taiwan’s participation in RFMOs. In “The Emergence of the Concept of Fishing Entities: A Note,” Hasjim Djalal noted that the concept of fishing entities first appeared in the UNFSA in order, he argued, to deal with the fishing vessels of Taiwan.<sup>12</sup> Djalal apparently regarded “fishing entity” as equivalent to Taiwan. He saw Taiwan as acting as a subject under international law and contended that, “under emerging international law, a fishing entity has also gradually become a subject of international law having the rights, obligations, and legal capacity similar to other subjects under modern international law.”<sup>13</sup>

While considering the issue of whether fishing entities have international legal personality, Martin Tsamenyi took the positive view. He did not emphasise the links between Taiwan and fishing entities but

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<sup>10</sup> The WCPFC was established in 2004 to address problems in the management of high seas fisheries resulting from unregulated fishing, over-capitalisation, excessive fleet capacity, vessel re-flagging to escape controls, insufficiently selective gear, unreliable databases and insufficient multilateral cooperation in the conservation and management of highly migratory fish stocks. The WCPFC’s members are Australia, China, Canada, Cook Islands, the European Union, Federated States of Micronesia, Fiji, France, Japan, Kiribati, Republic of Korea, Republic of Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Samoa, Solomon Islands, Chinese Taipei, Tonga, Tuvalu, the United States of America and Vanuatu. American Samoa, the Commonwealth of the Northern Mariana Islands, French Polynesia, Guam, New Caledonia, Tokelau and Wallis and Futuna are participating territories. Belize, the Democratic People’s Republic of Korea, Ecuador, El Salvador, Indonesia, Mexico, Senegal, St Kitts and Nevis, Panama, Thailand and Vietnam are cooperating non-members. Complete information can be found on the official WCPFC website

<http://www.wcpfc.int/about-wcpfc> (visited on 03/02/2014).

<sup>11</sup> See Serdy, *supra* note 7, pp. 200-216. The SEAFO was founded in 2003 with the objective to ensure the long-term conservation and sustainable use of the fishery resources in SEAFO’s area of competence. Its members are Angola, the European Union, Japan, Namibia, Norway, Republic of Korea and South Africa. Complete information can be found on the official SEAFO website

<http://www.seafo.org/index.html> (visited on 04/02/2014).

<sup>12</sup> Hasjim Djalal, “The Emergence of the Concept of Fishing Entities: A Note,” *Ocean Development and International Law*, Vol. 37(2006), pp. 119.

<sup>13</sup> *Ibid.*, p. 120.

analysed international fisheries instruments, such as the UNFSA, Convention of the WCPFC, Antigua Convention, Cooperating Non-Party Schemes of the CCSBT, Inter-American Tropical Tuna Commission (IATTC)<sup>14</sup> and ICCAT.<sup>15</sup> He concluded “the international legal personality of fishing entities was confirmed by their recognition in international fisheries instruments and the creation of obligations for such entities.”<sup>16</sup>

Michael W. Lodge, who served as the executive secretary to the Multilateral High Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in West and Central Pacific from 1997 to 2000, recorded Taiwan’s participation in the conference that drafted the Convention of the WCPFC. His article was entitled “The Practice of Fishing Entities in Regional Fisheries Management Organizations: The Case of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean,” but he directly used the term “Taiwan,” rather than “fishing entities,” throughout the article.<sup>17</sup> Lodge clearly considered fishing entities as equivalent to Taiwan, although he described Taiwan as a major fishing entity.<sup>18</sup>

Nien-Tsu Alfred Hu discussed the concept of fishing entities from Taiwan’s perspective.<sup>19</sup> He analysed Taiwan’s agreement to regard itself as

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<sup>14</sup> The IATTC is the first tuna regional fisheries management organisation, set up by United States and Costa Rica in 1950 in order to conserve and manage tuna and other marine resources in the eastern Pacific Ocean and enhance scientific research and cooperation on these resources. Its members are Belize, Canada, China, Chinese Taipei, Colombia, Costa Rica, Ecuador, El Salvador, the European Union, France, Guatemala, Japan, Korea, Mexico, Nicaragua, Panama, Peru, the United States, Vanuatu and Venezuela. The Cook Islands and Kiribati are cooperating non-parties. Complete information can be found on the official IATTC website <http://www.iatct.org/HomeENG.htm> (visited on 07/08/2010).

<sup>15</sup> Tsamenyi had stated that only Taiwan was considered a fishing entity but did not deal with the political problems concerning Taiwan’s status in international law. Instead, he focused on the legal status and content of a fishing entity. See Martin Tsamenyi, “The Legal Substance and Status of Fishing Entities in International Law: A Note,” *Ocean Development and International Law*, Vol. 37(2006), pp. 123–131.

<sup>16</sup> *Ibid.*, p. 130.

<sup>17</sup> See Michael W. Lodge, “The Practice of Fishing Entities in Regional Fisheries Management Organizations: The Case of the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean,” *Ocean Development and International Law*, Vol. 37(2006), pp. 185–207.

<sup>18</sup> *Ibid.*, p. 200.

<sup>19</sup> Nien-Tsu Alfred Hu, “Fishing Entities: Their Emergence, Evolution, and Practice from Taiwan’s Perspective,” *Ocean Development and International Law*, Vol. 37(2006), pp. 149–183.

a fishing entity as set out in the UNFSA and Taiwan's use of the identity of fishing entity to participate in the International Scientific Committee for Tuna and Tuna-like Species in the North Pacific Ocean (ISC)<sup>20</sup>, IATTC and WCPFC.<sup>21</sup> Hu stated that a fishing entity is a subject of international law and should be regarded as "an entity possessing full autonomy in the conduct of its external fisheries relations and of all matters provided for in relevant international law."<sup>22</sup> In addition, Peter S. C. Ho discussed the impact of the UNFSA on Taiwan's participation in RFMOs.<sup>23</sup> He observed that, before the adoption of the UNFSA, Taiwan did not belong to any RFMO, but the creation of the term "fishing entity" by the UNFSA allowed Taiwan to join some RFMOs and become further involved in their decision making.<sup>24</sup> Similarly to Hu, Ho also discussed Taiwan's decision to be regarded as a fishing entity and the process through which Taiwan participated in some RFMOs, including the ICCAT, WCPFC, CCSBT and IATTC.<sup>25</sup>

Dustin Kuan-Hsiung Wang examined Taiwan's role during the drafting of the Antigua Convention, including the application of the term "fishing entities" in the convention, Taiwan's viewpoint in each meeting, other states' views of Taiwan's position in the convention and the conflicts between Taiwan and China.<sup>26</sup> Furthermore, William Edeson in his article

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<sup>20</sup> The United States and Japan founded the ISC in 1995 with the objective to improve scientific research and cooperation in the conservation and rational utilisation of the species of tuna and tuna-like fishes which inhabit the North Pacific Ocean during part or all of their life cycle. The ISC was also charged with laying the scientific groundwork, if at some point in the future, it is decided to create a multilateral regime for the conservation and rational utilisation of these species in this region. ISC members are: Canada, Chinese Taipei, Japan, Republic of Korea, Mexico, People's Republic of China and the United States of America. Observers include the IATTC, FAO, North Pacific Marine Science Organization (PICES), Secretariat of the Pacific Community (SPC) and WCPFC. Further information can be found on the official ISC website <http://isc.ac.affrc.go.jp/> (visited on 05/08/2010).

<sup>21</sup> Hu, *supra* note 19.

<sup>22</sup> *Ibid.*, p. 175.

<sup>23</sup> Peter S.C. Ho, "The Impact of the Fish Stocks Agreement on Taiwan's Participation in International Fisheries Fora," *Ocean Development and International Law*, Vol. 37(2006), pp. 133–148.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> Dustin Kung-Hsiung Wang, "Taiwan's Participation in Regional Fisheries Management Organizations and the Conceptual Revolution on Fishing Entity: The



“Some Future Directions for Fishing Entities in Certain Regional Fisheries Management Bodies” identified two types of RFMOs: those outside the Food and Agriculture Organization (FAO) of the United Nations (UN) framework and those within the UN context.<sup>27</sup> Regarding the first type, Edeson roughly described the RFMOs which have regulations about fishing entities, including the CCBST, IATTC and WCPFC.<sup>28</sup> He suggested that the ICCAT, in particular, consider the experience of the CCSBT in establishing an extended commission and scientific committee to ensure that “Taiwan gained benefits from its participation in the fisheries covered by ICCAT commensurate with its commitment to comply with applicable conservation and management measure.”<sup>29</sup> Edeson mainly focused on the second type of RFMOs, specifically the IOTC, which he pointed out was so far the only RFMO concerned with tuna which ruled out the participation of fishing entities.<sup>30</sup> He analysed the problem facing the IOTC and suggested that the practical option to position the IOTC outside the FAO framework would be to adopt amendments to the IOTC Agreement without creating new obligations for the contracting parties.<sup>31</sup> In another article, “An International Legal Extravaganza in the Indian Ocean: Placing the Indian Ocean Tuna Commission outside the Framework of FAO,” Edeson focused more about the legal obstacles placed in the way of this process by the FAO’s internal legal advisers.<sup>32</sup>

The only fishing entity at present is Taiwan, so the discussed research on fishing entities focused mainly on Taiwan’s participation in various tuna RFMOs. Most authors attended the relevant meetings of the RFMOs, so they could provide first-hand records of the meetings and share their perspectives of the negotiation process, resulting in significant research on fishing entities. Thus, most of the literature discussed Taiwan’s perspective

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Case of IATTC,” *Ocean Development and International Law*, Vol. 37(2006), pp. 209–219.

<sup>27</sup> William Edeson, “Some Future Directions for Fishing Entities in Certain Regional Fisheries Management Bodies,” *Ocean Development and International Law*, Vol. 37(2006), pp. 245–264.

<sup>28</sup> *Ibid.*, pp. 248–251.

<sup>29</sup> *Ibid.*, pp. 248–250.

<sup>30</sup> *Ibid.*, pp. 251–261.

<sup>31</sup> *Ibid.*

<sup>32</sup> W.R. Edeson, “An International Legal Extravaganza in the Indian Ocean: Placing the Indian Ocean Tuna Commission outside the Framework of FAO,” *The International Journal of Marine and Coastal Law*, Vol. 22, No.4(2007), pp. 485–515.

on fishing entities, rather than fishing entities themselves. Although the term “fishing entities” was coined primarily to resolve the difficulty of Taiwan’s participation in relevant fisheries organisations, the term itself needs to be further discussed as it is included in international fisheries law. Therefore, this book will focus on the topic of fishing entities as a new concept in international fisheries law. It is impossible to avoid mentioning Taiwan while discussing fishing entities; however, this book will concentrate on fishing entities themselves and treat Taiwan as an example, not as a synonym.

In addition, a fishing entity, as an actor in the international law of the sea, might, like Taiwan, possess advanced technology in fishing skills, so it cannot be ignored in global and regional conservation and management of fishery resources. Although there is not a legal or normal definition of fishing entity, a fishing entity is definitely categorised as an “entity” rather than a “state,” resulting in certain unclear circumstances for its involvement in global or regional agreements whose subjects are assumed to be states. This ambiguity is especially strong in high seas enforcement actions concerning the jurisdiction of a state, such as boarding and inspection.

However, the concept of conservation and management should be based on the premise that all actors must be brought under regulations; otherwise, the actors’ efforts within regulations would be in vain and lead to failure. Therefore, it is necessary and important to study the enforcement of fishing entities on the high seas in order to ensure the effectiveness of the rules conserving and managing the straddling and highly migratory stocks. Since the WCPFC became the first RFMO to adopt its own boarding and inspection procedure, no relevant literature discussing fishing entities’ position in high seas enforcement has been produced. This book thus stands as the first research to consider together fishing entities and high seas enforcement in the international law of the sea.

In this book, I link fishing entities to high seas enforcement by discussing the role of fishing entities in international law of the sea and clarifying their obligations and rights in high seas fishery enforcement, especially regarding regulations concerning conservation and management of straddling and highly migratory stocks. This book also discusses RFMOs which focus on the protection of straddling and highly migratory stocks and allow participation by fishing entities. Before moving to the linkage between fishing entities and high seas fisheries enforcement, it is necessary to review the concept of fishing entities, including the international instruments in which the term “fishing entities” originates.

Thus, the first question this book attempts to answer is: (a) Why is the issue of fishing entities important? What is the legal status of the fishing entity in the international law of the sea and in RFMOs?

After introducing the concept of fishing entities, the book further considers the position of fishing entities in fisheries enforcement on the high seas and seeks to answer the following research questions: (b) How does fisheries enforcement on the high seas treat the fishing entity which possesses two disparate identities—a flag state and a non-flag state? Based on the role that fishing entities should play, the next question asked is: (c) What problems might fishing entities and the international community face under present fishery regulations? The regulations of fisheries enforcement on the high seas are mostly set out in the UNFSA, which requires RFMOs to adopt their own boarding and inspection procedures; therefore, while understanding the concept of the fishing entity and its status in international fisheries enforcement on the high seas, the book examines the practices of high seas fisheries enforcement performed by fishing entities within RFMOs. Thus arises the question: (d) What practices for fishing entity enforcement on high seas do RFMOs adopt?

To answer these questions, the book is divided into three parts: the fishing entity, the link between the fishing entity and its fisheries enforcement on the high seas, and the practice of fishing entity and of others regarding it in RFMOs. In Part 1 of this book entitled “The Existence of the Fishing Entity,” I first introduce the concept of the fishing entity in the first chapter. As the fishing entity exists, it leads us to consider its legal status in the international law of the sea, which is the topic of Chapter 2. While discussing the fishing entity’s status in international law, especially under the UNFSA, it is found that the fishing entity primarily plays a role in many individual RFMOs. Therefore, Chapter 3 “Fishing Entities in RFMOs” addresses the regulations concerning fishing entities in the main eight RFMOs governing most high sea areas regarding the conservation and management of straddling and highly migratory fish stocks.

In the second part of this book entitled “Enforcement in High Seas Fisheries by Fishing Entities,” it first is shown that a state’s enforcement on the high seas can be categorised as enforcement against its own vessels, which falls under flag state jurisdiction, and as enforcement against other state’s vessels, which is called non-flag state enforcement. I explore these two concepts in Chapters 4 and 5, specifically whether fishing entities can exercise flag state jurisdiction and non-flag state enforcement. Although a fishing entity might be similar to a state in flag state and non-flag state enforcement, it is not a state after all and moreover is a new concept in the

international law of the sea. Thus, it might encounter some problems in this field, which are addressed in Chapter 6, “The Problematic Consequences of Fishing Entity Enforcement on the High Seas.”

In the third part of this book entitled “Practice with RFMOs—The Example of Taiwan,” I first introduce the background of and reasons why Taiwan became a fishing entity and how it participated as a members in three RFMOs (WCPFC, IATTC and ISC), as discussed in Chapter 7. Chapter 8 continues to examine Taiwan’s participation in three other RFMOs (CCSBT, ICCAT and IOTC) as a non-member. I do not discuss the North Pacific Anadromous Fish Commission (NPAFC)<sup>33</sup> or the SEAFO because Taiwan does not participate in the SEAFO at all, and although it has occasionally attended meetings of the NPAFC as an observer since 2005, Taiwan’s involvement in this organisation is different than in the ICCAT. Taiwan is not bound by the NPAFC’s regulations but only provides scientific information to it. Most importantly, while attending NPAFC meetings, Taiwan does not use the identity of a fishing entity but the name “Taiwan” and is not introduced or recorded as a fishing entity.<sup>34</sup>

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<sup>33</sup> The NPAFC was established in 1993 with the objective to promote the conservation of anadromous stocks in the convention area. The contracting parties are Canada, Japan, Republic of Korea, the Russian Federation and the United States. Complete information can be found on the official NPAFC site [http://www.npafc.org/new/about\\_convention.html](http://www.npafc.org/new/about_convention.html) (visited on 07/02/2014).

<sup>34</sup> See the 2005–2010 and 2012 annual reports of the NPAFC, available at [http://www.npafc.org/new/pub\\_annualreport.html](http://www.npafc.org/new/pub_annualreport.html) (visited on 07/02/2014).

## LIST OF ABBREVIATIONS

APEC	Asia–Pacific Economic Cooperation
CCLM	Committee on Constitutional and Legal Matters
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CIESIN	Center for International Earth Science Information Network
CITES	Convention on International Trade in Endangered Species
CMM	Conservation and management measure
COFI	Committee on Fisheries
EEC	European Economic Community
EEZ	Exclusive economic zone
FAO	Food and Agriculture Organization of the United Nations
FFA	Pacific Islands Forum Fisheries Agency
GPS	Global positioning system
KMT	Kuo Min Tang party
IATTC	Inter-American Tropical Tuna Commission
ICA	International Council for Information Technology in Government Administration
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICN	International Competition Network
ICNAF	International Commission for the Northwest Atlantic Fisheries
ICJ	International Court of Justice
INPFC	International North Pacific Fisheries Commission
IOC	International Olympic Committee
IOTC	Indian Ocean Tuna Commission
IPOA	International plan of action
IUU	Illegal, unregulated and unreported fishing
MCS	Monitoring, control and surveillance
MHLC	Multilateral High-Level Conference in the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific
NAFO	Northwest Atlantic Fisheries Organization
NGOs	Non-governmental organisations

NPAFC	North Pacific Anadromous Fish Commission
PICES	North Pacific Marine Science Organization
PLO	Palestine Liberation Organization
PRC	People's Republic of China
PSI	Proliferation Security Initiative
PWG	Permanent Working Group for the Improvement of ICCAT Statistics and Conservation Measures
RFMO	Regional fisheries management organization
ROC	Republic of China
SBT	Southern bluefin tuna
SEAFO	South East Atlantic Fisheries Organisation
SIOFA	South Indian Ocean Fisheries Agreement
SPC	Secretariat of the Pacific Community
TAC	Total allowable catch
TCC	Technical and compliance committee
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNFSA/	Agreement for the Implementation of the Provisions of the
UNIA	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
US	United States
VMS	Vessel monitoring system
WCPFC	Western and Central Pacific Fisheries Commission
WMDs	Weapons of mass destruction
WTO	World Trade Organization

**PART I:**

**FISHING ENTITY**

# CHAPTER ONE

## THE EXISTENCE OF THE FISHING ENTITY

### 1. Introduction

After decades of efforts to establish an effective regime to maintain the sustainability of straddling and highly migratory fish stocks, the Fish Stock Agreement was adopted on 4 August 1995 and entered into force on 11 December 2001 after deposit of the thirtieth instrument of accession by the Republic of Malta. Due to the necessity of cooperating in and the indivisibility of the fields of fisheries conservation and management, the UNFSA introduces the concept of fishing entity into its regulations.<sup>1</sup> Although the agreement does not give the term “fishing entity” a clear definition, it implies not only the special status of the fishing entity in the international law of the sea but also the concern that the fishing entities should not be excluded from international collaboration in conserving and managing fisheries resources.

According to FAO statistics, more than 70% of fisheries are overexploited or depleted. Highly migratory and straddling stocks are affected particularly seriously. Global fish production has continued to increase and reached 148.5 million tonnes in 2010.<sup>2</sup> Although catches of

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<sup>1</sup> Article 1(3) states that “[t]his Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas,” and article 17(3) also mentions “fishing entity:” “States which are members of a subregional or regional fisheries management organization 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 organization 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 the stocks.”

<sup>2</sup> Food and Agriculture Organization of the United Nations, *FAO Yearbook: Fishery and Aquaculture Statistics* (Rome: FAO Fisheries Department, 2012), p. xvi.



tuna and tuna-like species have decreased by 1.7 per cent and remained stable since 2010 after an upward trend which led to the historical peak catch in 2006,<sup>3</sup> they still belong to species urgently needing to be protected. During the 13–25 March 2010 Conference of the Parties at the 15<sup>th</sup> Meeting of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>4</sup> in Doha (Qatar), Morocco proposed a ban on the trade of Atlantic bluefin tuna.<sup>5</sup> Although this proposal was not adopted, it proved useful in drawing international attention to not only the high possibility of commercial extinction faced by the bluefin tuna but also the importance of the conservation and sustainable development of fishery resources. Due to the vulnerability of the highly migratory and straddling stocks, their conservation and management is of global concern. A fishing entity would be exempt from international fishery conservation and management regimes if it were not regarded as an actor in international fishery regulations, a situation which would worsen if the entity possessed the ability to severely deplete the stocks and cause tension within the regime.

This chapter aims to introduce the concept of fishing entity and review the stipulations on fishing entities concerning fishery resources conservation and sustainable development by considering the relations between the fishing entity and the related international instruments.

## 2. The Concept of the Fishing Entity

States are the primary subjects in the traditional international law of the sea, as well as the main actors in international society.<sup>6</sup> After the two

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<sup>3</sup> *Ibid.*, also see Food and Agriculture Organization of the United Nations, *FAO Yearbook: Fishery and Aquaculture Statistics* (Rome: FAO Fisheries Department, 2009), p. xxii.

<sup>4</sup> CITES is an international agreement between governments. It was drafted as a result of a resolution adopted in 1963. The text of the convention was finally agreed upon at a meeting of representatives of 80 countries in Washington, D.C. on 3 March 1973, and it entered into force on 1 July 1975. The aim of CITES is to ensure that the international trade in specimens of wild animals and plants does not threaten their survival. For further information, see the official CITES website, <<http://www.cites.org/>> (visited on 15/03/2010).

<sup>5</sup> See CITES, <http://www.cites.org/eng/cop/15/sum/E15-Com-I-Rec08.pdf> (visited on 30/09/2010).

<sup>6</sup> In the theory of international relations, the neo-realist emphasises the role of state as an actor, whereas the idealist focuses on the important roles of other actors, such as international organisations, transnational corporations and individuals, etc.

World Wars, actors other than states have emerged as subjects of international law have emerged, such as international organisations, international non-government organisations, and entities.<sup>7</sup> It is thought that an entity with limited rights and obligations and limited capacity to make an international claim can be regarded as a legal person.<sup>8</sup> However, an entity which does not satisfy those conditions might still have a legal personality generated by certain international agreements.<sup>9</sup> The most prominent example is the Holy See, whose exclusive sovereignty and jurisdiction over the City of the Vatican was recognised in the international domain by Italy in the 1929 Treaty and Concordat;<sup>10</sup> afterward, it was recognised by most states as well.<sup>11</sup>

In addition to this religious entity, non-self-governing territories are another well-known entity. The mandate territories under the League of Nations and the trust territories of the UN are regarded as political entities. National liberation movements can also be recognised as political entities, for example, the Palestine Liberation Organization (PLO) was granted observer status in the UN General Assembly.<sup>12</sup> Similar to national liberation movements, insurgent communities *de facto* occupy and control a specific territory during a civil war within a country and can be recognised as belligerents, which possess a certain international personality.<sup>13</sup>

In addition to religious and political entities, the concept of entity extends to the economic sphere. All members of the Asia-Pacific Economic Cooperation (APEC) are called “economies,” which are economic entities.<sup>14</sup> Parallel to its status as an economic entity, Taiwan became a member of the World Trade Organization (WTO) under the

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However, both claim that states are the primary, not the only actors, in international relations.

<sup>7</sup> Hasjim Djalal, “The Emergence of the Concept of Fishing Entities: A Note,” *Ocean Development and International Law*, Vol. 37(2006), p. 117.

<sup>8</sup> Ian Brownlie, *Principles of Public International Law*, 6<sup>th</sup> ed. (New York: Oxford University Press, 2003), p. 57.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, p. 63.

<sup>11</sup> See Robert A. Graham, *Vatican Diplomacy* (Princeton: Princeton University Press, 1959), pp. 19–21. However, it now recognised as a state, instead of an entity.

<sup>12</sup> Brownlie, *supra* note 8, pp. 61–62.

<sup>13</sup> *Ibid.*, p. 63.

<sup>14</sup> APEC, [http://www.apec.org/apec/member\\_economies.html](http://www.apec.org/apec/member_economies.html) (visited on 19/02/2010).

identity of customs entity using the name “the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu” in 2002.<sup>15</sup>

Another type of entity characterised by its economic functions is the fishing entity. The 1995 Fish Stock Agreement marked the first time that the concept of fishing entity was written into the provisions of a formal international agreement. However, the agreement does not definitely define a fishing entity’s legal status and its specific rights and obligations in international law. Further regulation directly related to fishing entities can be seen in the 1995 Code of Conduct for Responsible Fisheries.<sup>16</sup> Article 1(2) states that “[t]he Code is global in scope, and is directed toward members and non-members of FAO, fishing entities, subregional, regional and global organizations,” and Article 4(1) that “[a]ll members and non-members of FAO, fishing entities and relevant subregional, regional and global organizations ... management and utilization of fisheries resources and trade in fish and fishery products should collaborate in the fulfilment and implementation of the objectives and principles contained in this Code.”<sup>17</sup>

Provisions related to fishing entities can usually be seen in RFMOs as well. To encourage entities with vessels fishing for southern bluefin tuna to implement the CCSBT’s conservation and management measures, the commission’s members tried to settle the difficulty of Taiwan’s participation as a member in CCSBT, leading to the Resolution to Establish an Extended Commission and an Extended Scientific Committee adopted in April 2001.<sup>18</sup> Taiwan, named “Fishing Entity of

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<sup>15</sup> See Andrew Serdy, “Bringing Taiwan into the International Fisheries Fold: The Legal Personality of a Fishing Entity,” in James Crawford and Vaughan Lowe, eds., *The British Year Book of International Law 2004* (Oxford: Clarendon Press, 2005, Vol. 75), pp. 217–218. Also see WTO, [http://www.wto.org/english/thewto\\_e/countries\\_e/chinese\\_taipei\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/chinese_taipei_e.htm) (visited on 19/02/2010).

<sup>16</sup> To ensure the sustainable development of global fisheries, the FAO in 1995 adopted the Code of Conduct for Responsible Fisheries, which regulates the principles and international standards of behaviour for responsible practices in order to ensure the effective conservation, management and development of living aquatic resources with respect for the ecosystem and biodiversity. It is a non-binding instrument but contains a large number of regulations in 12 articles.

<sup>17</sup> See FAO, <http://www.fao.org/DOCREP/005/v9878e/v9878e00.htm> (visited on 22/02/2010).

<sup>18</sup> See Serdy, *supra* note 15, pp. 184–199. The full text of the resolution can be seen on the CCSBT website, [http://www.ccsbt.org/docs/pdf/about\\_the\\_commission/the\\_Extended\\_commission.pdf](http://www.ccsbt.org/docs/pdf/about_the_commission/the_Extended_commission.pdf) (visited on 16/08/2010).

Taiwan,” became a member of the Extended Commission in 2002 through an exchange of letters.<sup>19</sup>

In addition to the CCSBT, the Charter of the ISC provides that coastal states, other states, and fishing entities in the region, or with vessels fishing for these species in the region are eligible to become members of ISC. Pursuant to the charter, Taiwan, as a fishing entity, became a member under the name of “Chinese Taipei” in 2002.<sup>20</sup>

Furthermore, in July 2003, the IATTC replaced the 1949 IATTC Convention with the Convention for the Strengthening of the Inter-American Tropical Tuna Commission Established by the 1949 Convention between the United States of America and the Republic of Costa Rica (hereinafter the Antigua Convention),<sup>21</sup> with stipulations concerning fishing entities as well. Article XIX states that “Article XVIII of this Convention applies, *mutatis mutandis*, to fishing entities that are members of the Commission,” while Article XXI stipulates that the responsibilities of fishing entities as members of the commission are the same as those of other flag states outlined in Article XX. Article XVIII contains further provisions directly applicable to fishing entities. Previously an observer, Taiwan became a member as a fishing entity with the name of “Chinese Taipei” when the Antigua Convention entered into force on 27 August 2010.

In addition to the Antigua Convention, Annex I of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean<sup>22</sup> has particular stipulations for fishing entities. Article 9(2) states that “[a] fishing entity referred to in the Agreement, which has agreed to be bound by ... this Convention in accordance with the provisions of Annex I, may participate in the work ... of the Commission.” Annex I of the convention further clarifies fishing entities’ status in the IATTC. Firstly, any fishing entity whose vessels fish

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<sup>19</sup> Peter S.C. Ho, “The Impact of the Fish Stocks Agreement on Taiwan’s Participation in International Fisheries Fora,” *Ocean Development and International Law*, Vol. 37(2006), p. 141.

<sup>20</sup> The full text of the charter can be seen on the official ISC website, [http://isc.ac.affrc.go.jp/about\\_isc/charter.html](http://isc.ac.affrc.go.jp/about_isc/charter.html) (visited on 05/08/2010).

<sup>21</sup> See IATTC, [http://www.iattc.org/PDFFiles2/Antigua\\_Convention\\_Jun\\_2003.pdf](http://www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf) (visited on 05/08/2010).

<sup>22</sup> The full text of the convention is available at <http://www.wcpfc.int/doc/convention-conservation-and-management-highly-migratory-fish-stocks-western-and-central-pacific-> (visited on 22/08/2010). This convention established the WCPFC, which was the first regional fisheries agreement to be drafted after the adoption of the 1995 Fish Stock Agreement.

for highly migratory fish stocks in the convention area has the right to agree to be bound by the convention and withdraw from such agreement. Secondly, fishing entities shall participate in the work of the commission and comply with the obligations in this convention. References to the IATTC or its members include, for the purposes of the convention, such fishing entities as well as contracting parties. In addition, the Permanent Court of Arbitration will settle any disputes concerning the interpretation or application of the convention involving a fishing entity. Under those articles, Taiwan, as a fishing entity, signed a document called “Arrangement for the Participation of Fishing Entities”<sup>23</sup> under the name of “Chinese Taipei.”

Obviously, although most RFMOs established certain provisions related to fishing entities in order to fulfil the organisations’ conservation and management measures, they do not create any definition or give any explanation of “entity” and “fishing entity” but simply use this term. The term “fishing entities” is used by most RFMOs; however, their status within RFMOs is different than that of states and varies among RFMOs.

### 3. International Instruments Concerning Fishing Entities

#### 3.1 Food and Agriculture Organization

In the 1992, the FAO Technical Consultation on High Seas Fishing made the first reference to fishing entities in a paper entitled “International Fishery Bodies: Considerations for High Seas Management.”<sup>24</sup> In this

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<sup>23</sup> See WCPFC, <http://www.wcpfc.int/doc/arrangement-participation-fishing-entities> (visited on 22/08/2010). This arrangement states, “The Conference HEREBY INVITES Chinese Taipei, as a fishing entity, and Chinese Taipei HEREBY DECLARES its intent:

(a) to participate in the Preparatory Conference established by the resolution attached to the Final Act of the Conference,

(b) subject to the fulfilment of its domestic legal requirements, to agree to be bound by the regime established by the Convention in accordance with article 9, paragraph 2, of the Convention, and to participate in the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean in accordance with the Convention.”

<sup>24</sup> Food and Agriculture Organization of the United Nations, *Fisheries Report No. 484 Supplement*, FIPL/R484(Suppl.), Papers presented at the FAO Technical Consultation on High Seas Fishing, Rome, 7–15 September 1992, pp. 44–54. Also see Jean-Pierre Lévy and Gunnar G. Schram, eds., *United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks—Selected Documents* (Hague: Kluwer Law International, 1996), pp. 346–358. Also see Nien-Tsu Alfred

paper, the issue of non-contracting parties is emphasised in paragraph 45: “The treatment of non-contracting parties is an important and real issue that should be addressed in the context of high-seas fisheries management. Some nations or other entities operating in a fishery may opt not to participate in a high seas management body or they may be excluded from it (e.g., for political or other reasons). The effectiveness of high seas management will therefore be significantly reduced if a major entity in a fishery does not participate in determining management decisions and in turn is not bound by those decisions.”<sup>25</sup>

Although paragraph 45 uses the phrases “entities operating in a fishery” and “a major entity in a fishery” rather than “fishing entities,” paragraph 46 makes an explicit reference to “fishing entities:” “The exclusion of parties from management bodies for political or other reasons poses particular difficulties. Taiwan (Province of China) is a major international fishing entity. Its high seas fishing capacity is extensive and likely to increase, especially in the Indian and South Pacific Oceans. However, due to political non-recognition, Taiwan (Province of China) does not participate fully in any fishery management bodies. Similarly, legal constraints prevent the EEC from participating in some fishery bodies.”<sup>26</sup>

This FAO document not only discusses the problems that the non-contracting parties and fishing entities may face but also implies the close connection between non-contracting parties and fishing entities: fishing entities are usually also non-contracting parties in RFMOs.<sup>27</sup> This paper also clearly points out that non-contracting parties can cause the problem of unregulated fishing, which undermines the benefits generated by conservation and management measures. This document intimates the importance and necessity of bringing fishing entities into the decision-making process of high seas management measures in order to ensure that each body will be bound by those decisions, increasing the effectiveness of the related measures.

### 3.2 The United Nations Fish Stock Agreement

The provisions in the Fish Stock Agreement which mention fishing entities are Articles 1(3) and 17(3). Article 1(3) states “[t]his Agreement applies

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Hu, “Fishing Entities: Their Emergence, Evolution, and Practice from Taiwan’s Perspective,” *Ocean Development and International Law*, Vol. 37(2006), p. 150.

<sup>25</sup> Food and Agriculture Organization of the United Nations, *ibid.*, p. 52.

<sup>26</sup> *Ibid.*

<sup>27</sup> For example, Taiwan is a member of the IATTC and WCPFC as a fishing entity, but is not a contracting party of the conventions that created them.