Peaceful Order in the World’s Oceans

Essays in Honor of Satya N. Nandan

Edited by
Michael W. Lodge
Myron H. Nordquist

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Ambassador Satya N. Nandan
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Father of the WCPFC Convention: Ambassador Satya N. Nandan

_Nien-Tsu Alfred Hu_ (胡念祖)

Ambassador Satya N. Nandan is well-known to students and scholars in the field of international fisheries law by his service as the President of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks convened from April 1993 to August 1995, which produced the 'United Nations 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' (often referred to as the '1995 UN Fish Stocks Agreement'). The Agreement initiated new legal concepts and conventional rules in the evolution of international law and, as a result, changed the substance and practices of fisheries resources conservation and international management regimes.

From my point of view, however, Ambassador Nandan's greatest legacy to the practice of international law, especially on the substantiation and practices of the legal term and concept of 'fishing entities' comes from his service as the chairman to the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific (MHLC), which produced the Convention on the Conservation and

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1 Director and Professor, The Center for Marine Policy Studies, National Sun Yat-sen University, Kaohsiung City, Republic of China (Taiwan); Professor, College of Social Sciences, National Sun Yat-sen University, Kaohsiung City, Republic of China (Taiwan); Joint Appointment Professor, Institute of Ocean Technology and Marine Affairs, National Cheng Kung University, Tainan City, Republic of China (Taiwan).


3 Such as the term and concept of fishing entities, the empowerment of regional fisheries management organizations (RFMOs) to the fisheries resources conservation and management, the requirement of compatibility between the measures adopted by coastal States and those adopted by the relevant RFMO for the conservation and management of regional fisheries resources, the requirement of establishing a mechanism and basic procedures for high seas boarding and inspection with a view to ensuring compliance through enforcement in the context of RFMOs, etc.
Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (the WCPFC Convention, due to its being the constitutive agreement of the Western and Central Pacific Fisheries Commission, the WCPFC). Simply stated, he put into practice for the first time the spirit and letter of the 1995 UN Fish Stocks Agreement through the creation of the WCPFC Convention and the WCPFC. For that, I honour Ambassador Nandan as the ‘Father of the WCPFC Convention.’

Our First Encounter

The first time I met and engaged with Ambassador Satya N. Nandan was at the second session of MHLC (MHLC 2) held 10 to 13 June 1997 at Majuro, Marshall Islands. This was the second time that I was participating in a multilateral diplomatic conference as a national delegate.

As a young scholar in my early 40s, I actively involved myself in the negotiations in an exotic, tropical, small island environment. Recalling a Chinese phrase, ‘a new-born calf fears not the tiger’ (初生之犢不畏虎), in facing the chairman of the meeting, Ambassador Satya Nandan, a very experienced diplomat having worked actively in various United Nations conferences or meetings, I not only intervened and expressed my views on behalf of my country (the Republic of China, ROC, or Taiwan) during the four-day negotiations but also raised my concerns over the wording and grammar of the draft of the Majuro Declaration when I felt that the text did not fully reflect what had been expressed from the floor or if the flow of a sentence did not catch the mood of the deliberation precisely. Ambassador Nandan kindly considered my views and suggestions and revised the draft texts accordingly. I took his indulgence and accommodation of my recommendations as an encouragement of my engagement as well as recognition of my capability in a multilateral negotiation setting. I also believed that my performance had left an impression on him. Later on, we found that we shared similar academic and professional backgrounds—scholar and teacher in the field of law of the sea. This common experience enkindled a cordial three-year working relationship with mutual trust in the entire course of the MHLC process from June 1997 to September 2000.

When Mr. Michael Lodge, his long-time assistant and a very capable international lawyer, asked me in February 2012 to contribute an article to be published in a liber amicorum in honour of Ambassador Satya Nandan saying “since you and Satya go back as far as the WCPFC Conference,” I was delighted
to accept his invitation to write something in honour of a great legal mind and a respected diplomat.

**Chosen as the Chairman of the MHLC**

Ambassador Satya Nandan began to serve as the chairman of the MHLC at the MHLC 2. It was believed that the primary reason for his being chosen was his personal association with the Central and Western Pacific island nations—he was a Fijian diplomat enjoying a high degree of respect and trust by the islanders in the region. Another reason for his selection was that he had chaired the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks for all six sessions convened from April 1993 to August 1995 which produced the 1995 UN Fish Stocks Agreement.

The conclusion of this Agreement was itself an historic achievement on the part of Ambassador Nandan. It is also a milestone international instrument in the development of international (fisheries) law, addressing a wide range of issues in the field of fisheries resources conservation and management. As noted on the United Nations website:

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stocks in areas under national jurisdiction and in the adjacent high seas are compatible and coherent; ensuring that there are effective mechanisms for compliance and enforcement of those measures on the high seas; and recognizing the special requirements of developing States in relation to conservation and management as well as the development and participation in fisheries for the two types of stocks mentioned above.

From Taiwan's perspective, the "novel provision on participation", as described by Francisco Orrego Vicuña, is the creation of the legal term and concept of 'fishing entities' in Article I(3) of the Agreement, which was believed by Vicuña and others to "cover the situation of Taiwan as a major fishing operator in the world". Perhaps Ambassador Nandan himself could verify that the incorporation of this term into the 1995 UN Fish Stocks Agreement originates from his personal conviction that Taiwan should be incorporated in, rather than excluded from, the international fisheries legal regime and legal order.

The situation for the conservation and management of tuna resources in the Central and Western Pacific during the 1990s was that there was a need to reconcile the interests of the Pacific island members of the already existing South Pacific Fisheries Forum Agency (FFA)7 and those of ocean-going fishing nations operating in the region for tuna and tuna-like species. The entry into force of the 1982 United Nations Convention on the Law of the Sea (LOSC) on 16 November 1994 and the process of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks prompted the FFA to convene a multilateral high-level conference (MHLC) on South Pacific tuna fisheries (this was the first session of the MHLC held at Honiara, Solomon Islands, 1 to 5 December 1994, but which did not produce any substantive results). The adoption of the UN Fish Stocks Agreement in 1995 provided the impetus for

7 FFA was established by the South Pacific Forum Fisheries Agency Convention, signed in Honiara, Solomon Islands, on 10 July 1979, and entered into force on 9 August 1979. This constitutive agreement can be found at <ftp://ftp.fao.org/FI/DOCUMENT/RFB/ffa/FFA_Covention.pdf>, accessed 27 October 2012.
the convening of a second multilateral conference, held at Majuro, Marshall Islands, 10 to 13 June 1997, in order to consider issues relating to the establishment of a 'regional mechanism' for the conservation and management of highly migratory fish stocks. Ambassador Nandan led this second session of the conference to produce a concrete output—the Majuro Declaration in which it was agreed that further sessions of the conference should be convened with a view to the establishment of a regional mechanism for conservation and management of the highly migratory fish stocks of the Central and Western Pacific within an overall time-frame of three years dating from June 1997. From then onward, Ambassador Nandan began to display his legal wisdom, diplomatic experience, and leadership throughout the entire course of the MHLC process.

Amazing Endurance

All who participated in the MHLC process were amazed by the physical and mental endurance of Ambassador Nandan. He impressed delegates with his outstanding negotiation skills which included his ability to refrain from displaying emotional reactions. His face and body language told them nothing. The only reaction coming out from the Chairman was from the 'Chair's Note' that he disseminated before each session, his opening or closing remarks for the session, or the different versions of the negotiating texts issued by him after a day of negotiation or intersessionally. This was a unique experience for me as a negotiator in a multilateral forum.

From what I can recall, there were only two occasions, one in private and the other in public, that Ambassador Nandan really showed his emotions during the negotiations.

During the entire course of the MHLC negotiations, Taiwan and mainland China did not have any direct contact. They were two delegations sitting across the negotiation table, engaging with each other only through respective interventions from the floor. At the final stage of negotiations, the critical issues concerning Taiwan's status in the soon-to-be-established regional fisheries management organization (RFMO) and rights enshrined in the conventional texts were dealt with by Ambassador Nandan through his shuttle diplomacy between the two parties. On the evening of 3 September 2000, I had an opportunity to talk to Ambassador Nandan in the Chairman's room on the issues of concern to Taiwan. I could see that something troubled him deeply. I asked him what had happened and he said to me, "In the last 30 years of my diplomatic life, I have never been called 'a liar'. This is a great humiliation to me as a person and as a diplomat. They [delegates from mainland China] were really
too much." Other than offering him my consolation, I understood the pressure that he had received in performing his role as the chairman and as a true gentleman and scholar, conscious of the need to harmonize differing positions and ensuring equality among members in this regional body.

The other occasion was at the final session of MHLC (or MHLC 7). In that session, the Japanese Delegation introduced a totally revised full-version of the negotiation texts to the floor. This move was seen by all other delegations as a challenge to the entire process of negotiations or as an intention to negate all the efforts that had been made by all other delegations up to the final stage. The Japanese proposal was rejected immediately and the Chairman expressed his dissatisfaction with this incident in his closing remarks:

...[W]hen we arrived at this session, we found that the issues we were confronted with were much more than we had anticipated. In particular, the delegation of Japan proposed a number of substantial changes to the draft Convention. Some of them would have been a radical departure from the discussions over the past five years, while others were matters which had already been considered during the negotiations and which were not accepted to the Conference as a whole. While opportunity was given to the delegation of Japan to explain its new proposals, it was very clear from the reactions of others and the history of the negotiations that the major proposals would not be widely accepted. The unfortunate aspect of this development was that the Japanese delegation was completely new and not familiar with the history of the negotiations over the past five years. This created an added problem in the dialogue and communication. It is not surprising, therefore, that the Japanese delegation feels dissatisfied with the results.8

Cross-Strait Struggles between Taiwan and the PRC

In the last several decades, the PRC Government has insisted on its 'One China Policy' on the international plane by which anything having relevance to the co-existence of 'One China, One Taiwan' or 'Two Chinas', or suggesting Taiwan's 'sovereign status,' has been rejected by the PRC Government. However, at the

same time, the Republic of China (ROC, or Taiwan) Government has insisted on its continued existence as a sovereign State since its establishment by Dr. Sun Yat-sen in 1912, although it lost its effective control over mainland China in 1949 after the civil war with the Chinese Communist Party and withdrew from the United Nations (UN) in 1971 due to the UN General Assembly Resolution 2758.9 Struggles across the Taiwan Strait have continued for many years, over a wide range of issues. The MHLC process is no exception.

One of the key or troublesome issues during the MHLC negotiations was the uncompromising efforts of the PRC to diminish Taiwan's political status and rights. Taiwanese delegates who have attended multilateral international organizations or negotiations in which the PRC is a participant might justifiably be of the impression that a major reason for the PRC to attend a multilateral negotiation process or to participate in a multilateral international body is to ward off the participation of Taiwan or guard against the representation, presentation or potential existence of Taiwan in such negotiations or bodies. In his closing remarks to the MHLC 7 in September 2000, Ambassador Nandan observed:

Before we came to this final session we identified three key issues that needed further consideration. These were the issue of decision-making in the Commission, the issue of the participation of fishing entities, and the issue of participation by territories.10

The so-called ‘issue of the participation of fishing entities’ is essentially the status and rights of Taiwan in the to-be-established WCPFC under the framework of the WCPFC Convention, and the modality of Taiwan's legal linkage with the Convention.

Some of the events, incidents or exchanges in the ‘tug-of-war’ between Taiwan and the PRC in the MHLC negotiations over the status and rights of Taiwan were recorded and presented by another published article of mine,11 and will not be fully repeated here. From such historical account, one can


10 Supra note 8, p. 65.

easily understand the pressure that Ambassador Nandan endured as the chair­man of the MHLC negotiations.

One extreme incident of particular note occurred during the sixth session of the MHLC in April 2000. In its opening statement, the Taiwan delegation alluded to the recent Taiwanese presidential election in March 2000, which had resulted in a change of the ruling party for the first time in the modern history of Taiwan, and to the potential co-existence by the end of 2000 of Taiwan and the PRC in the World Trade Organization (WTO) as two full members. The purpose of this statement was to emphasize that (1) a genuine democratic institution was functioning in Taiwan so that a Contracting Party status to the Convention was needed for Taiwan in order to secure the approval from its Parliament, and (2) in light of the development in the WTO, equal, full and concurrent participation of both Taiwan and the PRC in an intergovernmental organization was probable, thus, there should be no concern over or political barrier to the co-existence of Taiwan and the PRC in this RFMO.

Taiwan's opening statement triggered a strong reaction from the PRC delegation. The PRC delegation not only characterized Taiwan's presidential election as a "local election", accused the Taiwan delegation of politicizing the fishing issue by linking the element of democratic institution with the participation issue, but also emotionally attacked Taiwan's statement by saying that "Adolf Hitler was also elected by popular votes", "do not squeeze your Central Government", "barrels of gun powder are ready for a small handful of separatists, if they dare to try it". PRC's basic stance toward Taiwan's participation and status in the future WCPFC was clearly presented in its opening statement that: "We hold that the status of fishing entities has no inevitable and direct link with the conservation and management measures". This stance conflicts with the central purpose of the 1995 UN Fish Stocks Agreement in which it not only incorporates a term and definition of 'fishing entities' but also provides that this Agreement "applies mutatis mutandis" to fishing entities.

After this round of exchanges, Chairman Nandan immediately, and wisely, called off the issue and proceeded further with other matters. However, the gap between Taiwan, which intended to become a Contracting Party to the Convention in the capacity of fishing entity, and the PRC which intended to downgrade Taiwan's status as a non-State observer to the WCPFC, remained a thorny issue in the last two sessions of the MHLC negotiations. The unenviable task of resolving this issue rested mostly with the Chairman.

Similar struggles between Taiwan and the PRC also occurred during the debates about other issues in the MHLC process that were dealt with by Ambassador Nandan.
Boundaries of the Convention Area

As a constitutive agreement of a RFMO, the WCPFC Convention should have clearly delineated the jurisdictional boundaries of the organization for its application and implementation of its fisheries measures. However, the Convention only lays down eastern and southern boundaries by clearly defined geographical delineation.\(^\text{12}\) This is an odd but inevitable result.

Chairman Nandan once suggested two versions of full boundaries for the 'Convention Area' or 'Area of Application' in the MHLC 4, held 10 to 19 February 1999 at Honolulu.\(^\text{13}\) The Taiwan Delegation echoed the Japanese proposal in the plenary on a western boundary of 120 degrees meridian of east longitude north of 10 degrees parallel to south latitude since the migratory range as well as the spawning and nursing grounds of the highly migratory fish stocks potentially covered by this Convention were all situated in the eastern waters of Taiwan. It was understood that the PRC did not oppose the Japanese proposal originally, however, due to Taiwan's intervention in the plenary, the Chinese Delegation responded by saying that eastern waters of Taiwan were a part of China's Exclusive Economic Zone (EEZ), hence, as an internal issue of China, it could not concur with Japanese proposal. Accordingly, it suggested a

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\(^{12}\) See Article 3 paragraph 1 of the WCPFC Convention.

\(^{13}\) On the eve of the convening of MHLC 4, the PRC already exerted pressure on Chairman Nandan and requested that Taiwan should participate as an observer under the designation of 'Taipei, China' and this issue was dealt with by the Chairman with his personal intervention and negotiations with the PRC. The Chairman's opening remarks at the MHLC 4 alluded to this episode in which Chairman Nandan stated: 'Participation in this Conference is based on the fact that the participants are either coastal States or territories in the region or have fishing interests in the region. If we are going to have an effective regime for fisheries conservation and management in the region then it is obvious that all those who belong to the region or fish in the region must be involved. The participation of Chinese Taipei in this regard is on that basis. The present arrangement for participation, however, does not determine its final relationship to any agreement that this Conference might adopt. In arriving at such a relationship I shall certainly consult with all parties concerned in order to find a solution which is not only practical and realistic but also appropriate.' Following this basic principle of approach to the participation issue of Taiwan, Chairman Nandan also called for constraint by relevant parties by stating: 'In the meantime I urge all participants not to raise political issues which detract us from the basic purpose of our meeting here which is to agree on a regime for the conservation and management of the highly migratory species in the central and western Pacific. I therefore ask for restraint on all sides in this matter.' See the 'Opening Remarks by the Chairman' as Annex 2 to the MHLC 4 Report, pp. 8–9, at p. 8. The Report is on file with the author.
150 degrees meridian of east longitude north of 23.5 degrees parallel of north latitude as the western boundary, instead. Precise delimitation of the northern boundary could not be achieved because of Japan's disapproval as a result of its disputes with Russia over the 'Northern Territories'.

These boundary issues were then addressed in an informal meeting held in the Chairman's room where a group of delegates consulted a huge map displayed on the table. During the discussion, I suggested that from the perspective of fisheries resources conservation, the northern and western boundaries should be pushed as far north and west as possible. This approach prevailed among all delegates until an official from Taiwan's Ministry of Foreign Affairs Legal Department pointed out the overlapping maritime zone and disputed issues between Taiwan and the Philippines to the Chairman. His move alarmed the Chinese delegates and the 'One China Policy' issue was raised again in that informal meeting and the following plenary meetings. China argued that since 'Taiwan was a part of China,' it could not allow a part of its EEZ waters to be included in the Convention Area while other parts were not. Although a version of full boundaries was tentatively agreed at the end of the MHLC 4, controversies remained through MHLC 5.

During MHLC 5, held 6 to 15 September 1999 at Honolulu, I suggested to Chairman Nandan, privately, that in light of the controversies, the only way out seemed to be not to have geographically-defined western and northern boundaries. If a definition were needed, taking the migratory range of highly migratory fish stocks as a conceptual and managerial concept might be the only approach, since it was justifiable on the grounds of biological conservation and ecosystem protection. Chairman Nandan listened to my suggestion quietly. In the absence of any public interventions by any other delegations from the floor for a set of 'open, undefined' western and northern boundaries, Chairman Nandan apparently took my suggestion into his draft Convention at this stage and this approach survived all the way to the end:

This Convention applies to all stocks of highly migratory fish within the Convention Area except sauries. Conservation and management measures under this Convention shall be applied throughout the range of the

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I admired Ambassador Nandan's courage in taking my lonely voice into consideration when he drafted the Convention texts and his judgment that my suggestion would survive the difficult negotiations.

New Creations of International Law Practices

Similar to his contribution to the emergence of the legal term and concept of 'fishing entities' in the 1995 UN Fish Stocks Agreement, Ambassador Nandan's legacy is also seen in the new creation of international law practices through the 2000 WCPFC Convention.

'In the eyes of international law, States are subjects of international law and enjoy international legal personalities. When a State expresses its consent to be bound by a treaty by an act of ratification, acceptance, approval or accession, etc., and for that particular State that treaty has entered into force, such a State is a Contracting Party to that treaty. If that treaty is a constitutive agreement by which an intergovernmental organization (IGO) is established, the Contracting Parties to that treaty automatically become members of that organization. Consequently, almost all treaties, especially multilateral treaties, commence their text with phrases such as 'The (High) Contracting Parties to this Convention,' or 'The (State) Parties to this Convention' as their subjects; and conclude with a set of 'final provisions' which are similar or even identical among all treaties to such a degree that the United Nations could develop a reference tool or a practical guide by its publication entitled 'Final Clauses of Multilateral Treaties Handbook'. It has become customary practice in international law and international multilateral treaty making when final provisions of a multilateral treaty are drafted. By the same token, there is little need to specify the organizational status of Contracting Parties in an intergovernmental organization by specific provisions in the corresponding constitutive agreement. As a result, little attention is paid by international lawyers and/or treaty negotiators to the issues of:

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15 Article 3 paragraph 3 of the WCPFC Convention.
(1) How does a State in a non-State legal capacity due to international non-recognition (fishing entities in the case of MHLC process) or a non-State actor (such as regional economic integration organizations in this and other cases) that has been a negotiating party which took part in the drawing up and adoption of the text of a treaty establish its 'contractual relationship' with that treaty?; and,

(2) What 'organizational status' should be granted to such non-State actor in the IGO established by that treaty?

The development and the final form of the WCPFC Convention have established precedents to be followed by other RFMOs' constitutive agreements. In other words, the way of approaching these two issues as formulated by the WCPFC Convention created new precedents and practices in international law and thereby wrote a new chapter in international law.

Immediately before the official opening of and during the MHLC 5, I began to discuss the legal linkage issue with Chairman Nandan. At that time, the policy goal of Taiwan was to obtain a Contracting Party status like other States. The only difference was that Taiwan was going to accept 'fishing entity' as its legal capacity as a political concession so as to circumvent the statehood issue. Thus, Taiwan wanted to sign and ratify the Convention like other States while the 'modalities' of signing the Convention could be left for further discussion. I also suggested to Chairman Nandan, that if the PRC insisted that Taiwan's signature could not appear along with its own (since this might imply the co-existence of 'one China, one Taiwan' or 'two Chinas'), then signing on different pages of the Convention under different categories (such as States, fishing entities, territories), or on different documents or instruments might be a wise approach. Chairman Nandan expressed his interest in considering my suggestion and I believed that my suggestion inspired him on the final approach to the issue of creating a legal linkage and hence a 'contractual relationship' between the fishing entities as a subject of international law and the Convention—a legally binding multilateral instrument.

During the MHLC 5, on 10 September 1999, Chairman Nandan issued his revised texts in which all the texts relevant to the rights of Contracting Parties had been changed to 'members of the Commission' with a definition that 'members of the Commission' included Contracting Parties and fishing entities. By such an arrangement, Chair Nandan intended to specify that Taiwan's participation would be characterized as a member of the Commission, rather than a Contracting Party to the Convention. At the same time, Taiwan would enjoy the same rights as Parties and the opportunity for substantive participation. Not surprisingly, both Taiwan and the PRC expressed their dissatisfaction
over the changes. Taiwan still wished to obtain equal status with other States by becoming a Contracting Party to the Convention, while the PRC argued that it could not accept that Taiwan would become a member of the Commission or a Contracting Party to the Convention under the so-called 'one-China international system,' and insisted that Taiwan could only participate as a non-party or non-member under the relevant provisions of the Convention. While the 'tug-of-war' between Taiwan and the PRC continued during the negotiation process, Chairman Nandan began to formulate a 'two-tier structure' for the future WCPFC in which two groups of actors would be involved; those Contracting Parties to the Convention who would be members of the Commission, and those fishing entities who would be members of the Commission but without the Contracting Party status. This 'two-tier structure' in a multilateral intergovernmental constitutive agreement was a new creation and also a new demarche in the practice of international law and intergovernmental organizations, and established a new paradigm for the later formed RFMOs.

By MHLC 6 (11–19 April 2000), the tug-of-war over Taiwan's participation status and rights still lingered. While the PRC insisted that Taiwan could participate as an observer in this regional fisheries body, the United States openly supported Taiwan's meaningful participation in the work of the Commission and its right to enjoy equal rights and obligations as other members. The United States argued that the 'best way' for Taiwan's participation was to make it a Contracting Party to the Convention.17 Taiwan continued to note that it had already made a tremendous concession by accepting 'Chinese Taipei' as its designation and 'fishing entity' as its legal capacity. It also noted that the PRC’s argument was invalid since both China and Taiwan would soon become co-existing members of the World Trade Organization (WTO) without generating a 'two Chinas' situation since Taiwan would be a member of the WTO in the capacity of 'Separate Customs Territory' under the designation of 'Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei).’ Taiwan provided the explanatory notes of the Marrakesh Agreement Establishing the World Trade Organization to Chairman Nandan for his reference and he indicated to me that the WTO precedent could be invaluable for the solution of Taiwan's participation issue. The texts of the explanatory notes to the WTO Agreement read:18

17 The United States delegation made its position known openly with its opening statement at the MHLC 6.
The terms “country” or “countries” as used in this Agreement and the Multilateral Trade Agreements are to be understood to include any separate customs territory Member of the WTO.

In the case of a separate customs territory Member of the WTO, where an expression in this Agreement and the Multilateral Trade Agreements is qualified by the term "national", such expression shall be read as pertaining to that customs territory, unless otherwise specified.

With these explanatory notes, it is clear that the WTO Agreement has taken a ‘to be understood to include’ and ‘shall be read as pertaining to’ approach to the applicability of the terms ‘country,’ or ‘countries,’ and ‘national’ to the separate customs territory Member of the WTO. By comparison, the WCPFC Convention has taken a ‘references thereto’ approach to the organizational status of the fishing entity member with its texts in paragraph 2 of the Annex I FISHING ENTITIES to the Convention by reading as:

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.

The original draft by Chairman Nandan was “Contracting Parties as well as such fishing entity” at the end of this sentence. I suggested to the Chairman, during a private negotiation, to switch the order on the ground that the subject of this particular annex is ‘fishing entities’, thus ‘fishing entity’ should precede the words ‘the Contracting Parties’. He agreed and the switch was made. Interestingly, due to the lack of any expressly-defined term of ‘members of the Commission’ in the Convention (which once appeared in a draft Convention version as Article 1 Paragraph 2(2) during MHLC 5 but was taken from another draft Convention version during MHLC 6 on 18 April 2000), this approach also provides a legal basis for the Contracting Parties to become members of the Commission.

By the end of MHLC 6, Taiwan's participation issue was not solved and was further complicated by another factor that the French delegation actively sought for Contracting Party status for its territories of New Caledonia and French Polynesia. However, the development in the WTO did cast a certain degree of influence on the development in the MHLC negotiation process.

Before MHLC 7 was held in Honolulu on 30 August to 5 September 2000, with informal meetings held from 28–29 August as pre-Conference consultations, Taiwan had already decided to take a new approach to the issue of establishing a ‘contractual relationship’ to the Convention by advocating the
adoption of a protocol to the Convention as a separate instrument to substantively amend certain provisions of the Convention so as to address Taiwan's participation issue and to establish a formal legal linkage between Taiwan and the Convention. This approach was seen as creative, innovative and imaginative by the Chairman and some negotiating parties.

It was at the beginning of these pre-conference informal meetings that the Japanese delegation first expressed dissatisfaction with the draft texts. Korea soon followed suit. More issues than anticipated by the Chairman (i.e., decision-making, Taiwan's participation and French territories' participation) were brought out by other delegations that eventually led to a confrontation between the Pacific Island countries block (or the Forum Fisheries Committee, FFC block) and the distant-water fishing nations block in an informal meeting held in the Chairman's room in the afternoon of 29 August 2000. During that confrontation on the decision-making mechanism, I intervened by offering my suggestion for the solution, calling for an arrangement which could offer a 'sense of security' required by both sides, and urging all the participating delegations not to take a confrontational attitude but try to work with the Chairman for a final solution. My intervention gained immediate support from a number of delegations and pacified the situation. After that, Chairman Nandan expressed his personal appreciation to me privately. Due to the divergent positions between the two blocks on the decision-making mechanism and the threat of a walk out or rejection of the draft Convention by Japan, Korea, United States and Taiwan, the acceptance of the new US proposal of 'two-chamber voting' (a mechanism intended to provide a 'sense of security' to both sides as indicated and urged by me) thus avoiding the withdrawal of Taiwan as a leading distant water fishing nation in the region from the regime to be established by this regional convention, suddenly became critical.

On the 'protocol' issue, on the morning of 1 September, the Chairman indicated to me and Mr. Andrew L.Y. Hsia (夏立言), the Director-General of the Department of the International Organizations of the ROC Ministry of

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19 At the final stage of MHLC 7 negotiations, Taiwan was facing a situation in which, with a sudden revision by Chairman Nandan of the draft Convention texts from the MLC 6 version, Taiwan was deprived of even the member of the Commission status under pressure from Communist China. On 1 September and 2 September 2000, the Taiwan delegation issued two letters to Chairman Nandan and the heads of all delegations, respectively, in which Taiwan indicated that Taiwan would not adopt the draft Convention nor to participate in the future work of the Preparatory Conference and the Commission if Taiwan could not be offered by the Convention with a Commission membership and all the equalities with other Contracting Parties in the Commission. These two letters were drafted by the author and are on file with the author.
Foreign Affairs that the term ‘protocol’ was too treaty-like and could not be accepted. He sought another form of instrument and suggested the expression ‘Declaration by Chinese Taipei.’ I immediately rejected this suggestion since ‘Declaration’ signifies a unilateral instrument. I suggested to the Chairman another option, i.e., ‘Arrangement to Facilitate the Participation of Fishing Entities’, since ‘arrangement’ was a term used widely and was juxtaposed with the term ‘organizations’ in the 1995 UN Fish Stocks Agreement. My suggestion was immediately accepted by the Chairman and after further bilateral negotiations on the texts between us, the final instrument that was co-signed by the Chairman and the Head of the Taiwan Delegation during the Ministerial Meeting ‘for a ceremony of signature of the Convention and the Final Act’ on 5 September was termed ‘Arrangement for the Participation of Fishing Entities’. This instrument was actually a ‘substitutive instrument for the purpose of or to the effect of signing the Convention for Taiwan since the authentic texts of the Convention were appended thereto. It also serves as an international instrument by which and under the name of the MHLC Taiwan was invited to and Taiwan expressed its intent to undertake the following two things:

(a) to participate in the Preparatory Conference established by the resolution attached to the Final Act of the Conference, and
(b) subject to the fulfillment 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.

Item (b) indicated that Taiwan was to agree to be bound by the Convention only after it fulfilled its domestic legal requirements which implied the legal

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20 See the texts of the ‘Arrangement for the Participation of Fishing Entities’ on the WCPFC official website at <http://www.wcpfc.int/doc/arrangement-participation-fishing-entities>, accessed 7 January 2013. The official report of the MHLC 7 also recorded the signing of this instrument by Chinese Taipei that “In addition, on 5 September 2000, in accordance with the decision of the Conference, the representative of Chinese Taipei and the Chairman of the Conference signed an Arrangement for the Participation of Fishing Entities. The Arrangement is attached as Annex 10.” See Report of the MHLC 7; supra note 8, p. 2. Notably, at my request in a private negotiation with Chairman Nandan, and agreed by him, Taiwan signed both the Final Act and the ‘Arrangement for the Participation of Fishing Entities’ in the ceremony of signature of the Convention and the Final Act along with all other participating States in an alphabetical order.
requirement of international treaty approval procedure by the Parliament. Combined with paragraph 1 of Annex I to the Convention which reads:

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.

A ‘contractual relationship’ would be established between Taiwan and the Convention through a ‘written instrument’ delivered (or deposited) to the depositary. Such ‘written instrument’ was another ‘substitutive instrument’ for the purpose of or to the effect of an ‘instrument of ratification’. The withdrawal of Taiwan from the Convention would follow a similar procedure and modality in which a ‘written notification’ addressed to the depositary would serve the purpose of withdrawal from the Convention.

This ‘substitutive instruments approach’ to allowing fishing entities to establish their contractual relationship with the relevant multilateral treaties has established itself as an important modality and precedent in international law practice since such an approach has been followed in other similar cases. For example, the revised Inter-American Tropical Tuna Commission (IATTC) constitutive agreement, i.e., the Convention for the Strengthening of the Inter-American Tropical Tuna Commission between the United States of America and the Republic of Costa Rica (also known as the Antigua Convention) adopted on 27 June 2003 at the 70th Meeting of the IATTC at Antigua, Guatemala.

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22 See the full texts of an IATTC ‘Record of Decision’ for the ‘Adoption of the “Antigua Convention”’ and an IATTC Resolution (or the Resolution C-03-02), i.e., ‘Resolution on the Adoption of the Convention for the Strengthening of the Inter-American Tropical Tuna Commission between the United States of America and the Republic of Costa Rica,’ as well as the Antigua Convention on the IATTC official website at <http://www.iattc.org/PDFFiles2/Antigua%20Convention%20-%20Record%20of%20Decision.pdf>, for the Record of Decision, at <http://www.iattc.org/PDFFiles2/Resolutions/C-03-02%20Adoption%20of%20Antigua%20Convention.pdf>, for the Resolution C-03-02, at <http://
the South Pacific Regional Fisheries Management Organisation (SPRFMO) constitutive agreement (or the SPRFMO Convention) which entered into force on 24 August 2012, and the North Pacific Regional Fisheries Management Organization constitutive agreement concluded in March 2011 in Vancouver, Canada. The latter two RFMO agreements deal with the conservation and management of non-highly migratory fisheries species, but all employ similar modalities of 'substitutive instruments' to allow fishing entities to establish their 'contractual relationship' with respective constitutive agreements.

www.iattc.org/PDFFiles2/Antigua_Convention_Jun_2003.pdf>, respectively, accessed 7 January 2013. The texts of the substitutive instruments for Chinese Taipei to sign and to ratify the Convention were pre-determined through an IATTC resolution, namely Resolution C-03-02. Another relevant resolution adopted by the same IATTC meeting in June 2003 was Resolution C-03-09, or Resolution on the Participation of a Fishing Entity in the Antigua Convention, for its texts see at <http://www.iattc.org/PDFFiles2/Resolutions/C-03-09%20Participation%20of%20fishing%20entity.pdf>, accessed 7 January 2013.

For Chinese Taipei's signature with a substitutive instrument to the SPRFMO Convention, the SPRFMO official website once recorded "On 31 January 2011 a representative of Chinese Taipei deposited an instrument for the Participation of Fishing Entities dated 17 January 2011. The Instrument records that Chinese Taipei, as a fishing entity, agrees, subject to a subsequent written confirmation of the fulfillment of its domestic legal requirements, to express its intent to be bound by the regime established by the Convention in accordance with Annex IV of the Convention." A print out hard copy is on file with the author with access date of 24 August 2011. For Chinese Taipei's ratification with a substitutive instrument to the SPRFMO Convention, the SPRFMO official website records "On 24 August 2012 a representative of Chinese Taipei deposited an instrument in accordance with Annex IV paragraph 1 of the Convention. The commitment in this instrument became effective on 23 September 2012. [Annex IV paragraph 1 provides that after the entry into force of this Convention any Fishing Entity whose vessels fish or intend to fish for fishery resources may, by a written instrument delivered to the Depositary, express its firm commitment to abide by the terms of the Convention and comply with any conservation and management measures adopted pursuant to it.]", seen at SPRFMO official website at <http://www.southpacificrfmo.org/status-of-the-convention/>, accessed 7 January 2013.

The North Pacific Fisheries Commission official website indicates that "At the Tenth Multilateral Meeting held from 27 February to 4 March 2011 in Vancouver, Canada, the participants concluded substantive negotiations of the English text of the long-term agreement, entitled the "Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean". Seen at <http://nwpbfonomad.jp/>, accessed 7 January 2013. Due to the poor management of the official website, the details of the relevant instruments could not be found.
Concluding Remarks

The MHLC negotiation process was challenging for all the participating delegations, especially Taiwan. In the MHLC process, Taiwan was fighting an uphill battle in breaking the glass ceiling of international non-recognition that had led to legal difficulties of creating a contractual relationship between Taiwan and the constitutive agreement, and seeking an equal treatment in terms of both rights and obligations enshrined in the constitutive agreement and the organizational status in the intergovernmental body to be established by such agreement as well. The MHLC process was also challenging to the Chairman since he was performing a dual role during this process. He was both a career diplomat who sought compromises on issues and a law of the sea expert who had his own personal devotion and conviction of creating an inclusive and equitable regime to accommodate all the parties that had real interests in the fisheries in the region.25

Chairman Nandan functioned as an intermediary between Taiwan and China during the period when there was no direct dialogue between them. He was also personally involved in the negotiations and dialogue within and between the FFC countries and the distant-water fishing nations. Due to such a difficult role, he received tremendous pressure from almost every side and once even suffered a personal insult.

Taiwan may not be satisfied with the final outcomes of the MHLC negotiation process since many issues could not be subject to open legal debates, thus reasonableness might yield to political maneuvering. In addition, too many 'constructive ambiguities' were left in the Convention texts due to political compromises at the time, which left us with difficulties after the Commission came into operation. Examples include:

1. The Convention provides that the election of the chairman and vice-chairman of the Commission shall be from among the Contracting Parties. This wording has the effect of excluding any representative from a fishing entity that is a member of the Commission but not a Contracting Party to be elected as the chairman or the vice-chairman of the Commission.

2. The qualification for nomination and election as chairman of subsidiary bodies of the Commission is left silent in the Convention. There is an understanding that this was due to political compromises and not

25 See the ‘Opening Remarks by the Chairman’ as Annex 2 to the MHLC 4 Report, pp. 8–9, at p. 8. Supra note 13.
necessarily a legal barrier to Taiwan in the future work of the Commission. However, the practice so far seems to deprive representatives from a fishing entity member from contributing his or her expertise and experience to such subsidiary bodies by serving as chairperson for such subsidiary bodies.

(3) The determination of the location of the headquarters of the Commission and the appointment of the Executive Director of the Commission are the exclusive rights of Contracting Parties, although these two rights are executed only once in the life of the Commission or every four years. While Taiwan nationals are allowed to be recruited as staff members of the Secretariat of the Commission,\(^2\) and Taiwan is more often than not one of the leading financial contributors to the budget of the Commission, there is no avenue for Taiwan to have a say in the selection and appointment of the chief executive officer of the Secretariat, or the executive director in this case.

(4) The inconsistency in Article 9 paragraph 6 presents the privileges and immunities enjoyed by the Commission and its officers “in the territory of a Contracting Party” and “shall be determined by agreement between the Commission and the member concerned”, while to allow such privileges and immunities is by its nature a concession to a member of the Commission to the Commission and its officers rather than a right enjoyed by a member of the Commission.

(5) The right to invite other States and regional economic integration organizations to accede to this Convention is reserved for the Contracting Parties alone which evidently diminishes the political status of fishing entities as a ‘subject of international fisheries law’.\(^2\)

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26 Article 16 paragraph 2 provides that “… due regard shall be paid to the importance of recruiting the staff on an equitable basis between the members of the Commission with a view to ensuring a broad-based Secretariat”, thus, Taiwan nationals have the opportunity to be recruited as staff members of the Secretariat.

27 Interestingly, a regional economic integration organization (REIO) itself is a ‘non-State actor’ that used to suffer from a similar non-recognition difficulty as fishing entities as a subject of international law, however, in recent decade, it has become common practice to accept REIO as a subject of international law that could become a Contracting Party to various multilateral, intergovernmental treaties. See N.-T.A. Hu, supra note 6 at pp. 150–151. Some international law scholars and practitioners hold confirmed views that fishing entities are subject of international law. See: Hasjim Djalal, an experienced Indonesian diplomat who played an important role in shaping the WCPFC Convention, indicated that “For those regional organizations in which Taiwan participates fully, with all rights and obligations, Taiwan acts as a subject under international law, having rights, obligations,
(6) Ideally, the rights and duties of all members of the Commission should be designed and written into the constitutive agreement in such a way that fully correspond to the functions of the Commission. However, to a fishing entity member of the Commission certain inequities exist in the provisions of the Convention, *inter alia* Part V Duties of the Flag States and Part VI Compliance and Enforcement.28

and legal personality and capacity. It can also be presumed 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." See H. Djalal, *The Emergence of the Concept of Fishing Entities: A Note,' 37 Ocean Development & International Law, No. 2 (April–June), Special Issue on The Concept of Fishing Entities in International Law: A Decade of Practice, 2006, 117–121, at 120; Martin Tsamenyi, an international law professor and once serving as legal adviser to the WCPFC, concluded that: "Although this development does not necessarily imply that fishing entities are states, the conclusion is inescapable that such entities are new subjects of international law in so far as international fisheries management is concerned." And, this conclusion is based on his analysis that: "The analysis above has shown that there is now a new subject of international law in the form of the fishing entity. The legal basis of this is the U.N. Fish Stocks Agreement and the subsequent instruments designed to give effect to the U.N. Fish Stocks Agreement. Analysis of the relevant international fisheries instruments from both the normative and the functional necessity tests demonstrates that the fishing entity has been accorded international fisheries rights and obligations analogous to those accorded to states. The international legal personality of fishing entities is confirmed by their recognition in international fisheries instruments and the creation of obligations for such entities." See M. Tsamenyi, *The Legal Substance and Status of Fishing Entities in International Law: A Note,' 37 Ocean Development & International Law, No. 2 (April–June), Special Issue on The Concept of Fishing Entities in International Law: A Decade of Practice, 2006, 123–131, at 123 and 130. The present author holds the view that: "It can be concluded that 'fishing entities' are a subject of international law, at least in the field of international fisheries law...a fishing entity should be understood as being an entity possessing full autonomy in the conduct of its external fisheries relations and of all matters provided for in relevant international law. This is the effective outcome in the WCPFC Convention, the Antigua Convention, and the ISC Guidelines". See N.-T.A. Hu, *supra* note 6 at p. 175.

28 For instance, Article 24(1) of the Convention provides that: "Each member of the Commission shall take such measures as may be necessary to ensure that:... (b) fishing vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of any Contracting Party." It seems to imply that "unauthorized fishing" conducted by fishing vessels of a Contracting Party member of the Commission could occur within areas under the national jurisdiction of a fishing entity member of the Commission since a fishing entity member is not a Contracting Party. Furthermore, while Article 26(3) of the Convention provides that: "Each member of the Commission shall ensure that fishing vessels flying its flag accept boarding by duly authorized inspectors..." and paragraph 1
(7) Taiwan as a fishing entity could only deposit its 'written instrument' as a substitutive instrument for the purpose of or to the effect of an 'instrument of ratification' only after the entry into force of the Convention.  

(8) The organizational status as a member of the Commission for fishing entities is not unequivocally defined in the main texts of the Convention.

of the same Article stipulates that: "... 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", this Article is silent on whether all members of the Commission have the same obligation of accepting high sea boarding and inspection and the same right of sending their public vessels to undertake this task. This silence is intentional due to the sensitivity of the issue of high seas boarding and inspection. Unfortunately, this silence has led to a differentiated treatment between Contracting Party members and fishing entity members in the 'Western and Central Pacific Fisheries Commission Boarding and Inspection Procedures' adopted pursuant to Article 26 of the Convention in 2006 by the 3rd Session of the WCPFC. Paragraph 5 of the Procedures reads: "Each Contracting Party may, subject to the provisions of these procedures, carry out boarding and inspection on the high seas of fishing vessels engaged in or reported to have engaged in a fishery regulated pursuant to the Convention." Paragraph 6 provides that "Unless otherwise decided by the Commission, these procedures shall also apply in their entirety as between a Contracting Party and a Fishing Entity, subject to a notification to that effect to the Commission from the Contracting Party concerned." However, following Article 26(3) of the Convention almost verbatim, paragraph 7 of the Procedures provides that: "Each Member of the Commission shall ensure that vessels flying its flag accept boarding and inspection by authorized inspectors in accordance with these procedures". These paragraphs imply that a fishing entity member of the Commission has the treaty obligation to accept high sea boarding and inspection by duly authorized inspection vessels and inspectors from other Contracting Party member but not necessarily has the same right of having its own duly authorized inspection vessels and inspectors to undertake the same boarding and inspection activities vis-à-vis fishing vessels of other Contracting Party members, unless "a notification to that effect to the Commission from the Contracting Party concerned".

This procedural discrimination was rectified in the IATTC Antigua Convention but was later reversed to the WCPFC model in the more recent South Pacific and North Pacific RFMOs' Conventions.

The IATTC Antigua Convention makes this issue clear by having Article 1 paragraph 7 explain: "'Members of the Commission' means the Parties and any fishing entity which has expressed in accordance with the provisions of Article XXVIII of this Convention its formal commitment to abide by the terms of this Convention and comply with any conservation and management measures adopted pursuant thereto."
Nevertheless, the two-tier structure of the Commission (namely the Contracting Parties to the Convention and members of the Commission), the generally equal arrangement for all members of the Commission in the work of the Commission, and the creation of substitutive instruments approach so as to allow a fishing entity member of the Commission to establish its legally-bound contractual relationship with the Convention all contributed to the final agreement of this Convention. This created a model and precedent of international law practice to be followed. I have to give credit to Ambassador Nandan for his leadership as the Chairman of the MHLC and this will always be remembered as Ambassador Nandan’s legacy in the development of international law. It is not an overstatement to say that Ambassador Nandan is the Father of the WCPFC Convention.