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Note by Portuguese Commissioners on US note on strengthening and improving the ICNAF Scheme of Joint International Enforcement; Portuguese proposal on the same subject

The two basic arguments for the US proposal are:

- 1) It would facilitate the Flag State's process for disposition of offences if an inspector of the Flag State had an opportunity to view the evidence of the infringement promptly.
- 2) It would facilitate the Flag State's process for disposition of offences to review the facts discovered with the inspector as soon as possible.

Consequently, the first thing to do is to establish once and for all whether those ideas correspond to the facts of the case. In order to corroborate or modify those arguments, the Portuguese Delegation proposes that every delegation present states the position of his country (to be formally reported to the Commission) regarding those two important procedural arguments.

For Portugal, it can be immediately stated without any doubt that both procedures suggested will, in no way, facilitate the process for disposition of alleged offences, although idea No. 2 might possibly be of help in some cases with the proviso that it does not necessitate the presence of any Portuguese inspector or authority on board the inspected vessel.

The evidence of the case has been gathered by the foreign inspector and any other evidence or fact-gathering is not necessary, or no evidence and may, in fact, ~~complicate the case and prolong the process for disposition of the alleged offences.~~

A friendly discussion with the competent national authority over the radio or telephone regarding the alleged infraction and the evidence gathered by the foreign inspector may be helpful only as it may elicit from the Portuguese inspector or authority advice or suggestions on how the foreign inspector may gather further meaningful evidence or dispel some doubts and on how to act in order to deliver his report in the most effective and speedy manner. It is a fact that some reports do not seem to reach the Flag State authorities as quickly as they should and, in some instances, public notice of alleged infractions has taken place before notification of them or their reports have arrived in the hands of the Flag State authorities.

It is to be feared that none of this will improve the efficiency of the system. International control of the fisheries is still a novel idea and it certainly was not borne with the spirit of that famous sign in a London supermarket: "God helps those who help themselves, but we prosecute". Neither do we want the dumb cleverness of one helping one's self, nor do we wish to install the terror of prosecution. A path of understanding, instruction and firmness should be established as the best way to recognition of the rights of all and, in particular, of the special interests of coastal states.

Understanding and persuasion give firmer and more lasting results than repression. The record of the coastal states in this area so far shows most commendably their grasp of this principle.

It pays, therefore, to study carefully the US proposal and see if a compromise solution between the attainment of their legitimate objectives and the practical patent difficulties of distant-water fishermen cannot be reached.

In the first place, it is obvious that the right of the inspector to try and communicate with any inspector of the inspected vessel's Flag State or a corresponding designated authority was already established for each and every apparent infringement. The same applied already to the obligation the master had of sending messages using his radio equipment and operator.

It is plain then that all the text of the US proposal from the beginning up to the word "purpose" is merely a repetition of specific cases already provided for in a general manner in the present regulation 5 (v) of the Scheme of Joint Enforcement (see page 31 of ICNAF Comm.Doc. 75/6). Now, the next sentence in the new proposal was implied in the above-mentioned regulation with only a limit in time, which was expressed as "within a reasonable period of time". It is honestly felt that neither do inspectors have the time to go enjoying the hospitality of fishing vessels for days without the risk of overstaying their welcome nor can the serious business of fishing be reasonably interfered with for more than a "reasonable period of time", without violating regulation 5(i) which nobody has proposed to alter, nor can it be easily modified without altering the whole spirit and structure of the Joint Enforcement Scheme.

It would be difficult to understand that, while coastal states claim that the joint character of the Scheme makes it irregular to unload on them the whole burden of inspection duties, they would at the same time by the keenness of their inspecting fever be led to forget that the enforcement is indeed supposed to be "joint".

Up to here it is concluded that with minor wording differences, the old regulation 5(v) stipulates the same or more than the present US proposal.

It is then with the present sentence which starts "if a Flag State inspector agrees to proceed" that the new proposal departs from the old rule. In effect, previously, after communication, the foreign inspector would wait on board for the national inspector or authority to arrive if the latter would agree for him to wait. In the present proposal, this is not so. No matter what the opinion of the national inspector or authority is, the foreign inspector may remain on board up to 48 hours.

Does the new proposal make sense? No, it does not. How can it be logical that the opinion of a foreign inspector should prevail upon the opinion of a national inspector or authority?

Please notice that the differendum would not be between coastal state authorities and distant-water authorities, but between a vessel Flag State authorities and authorities foreign to the vessel. Is there in modern law of the sea any tendency to defend such a rank heresy?

With all due respect, it is hard to think that such a theory will find much to be commended. Also, looking at the whole new proposed action by foreign inspectors under a practical point of view, the truth remains that this inspector could stay on board for days, if the vessel's radio would be out of order, and then another 48 hours, for good measure, after the national authority, prodded by a master understandably in bad humour and out of patience, would have requested him to leave. Is this really the way to create the right atmosphere for a good effective Joint Enforcement Scheme? Or even for the preservation not of evidence but of foreign inspectors?

Thus, here the Portuguese Delegation stands fair and square behind the old regulation 5(v) as the only logical, practical and possible one.

This brings us finally to the crux of the matter of the new proposal - while communication is not established the vessel does not fish and after that, until the national inspector arrives, only if the foreign inspector allows so. In the first place, is it not plainly absurd to admit that after the vessel had remained stopped waiting for communications, the foreign inspector would allow her to fish in the same conditions after those communications had been established? How does the nature and importance of the alleged infraction depend on the establishment, or not, of communications? When in the Scheme was it given to a foreign inspector such an authority over the master of the vessel?

As a result of all the considerations made, the Portuguese Delegation would suggest the following wording for a new paragraph 5(v):

Where an apparent infringement of the regulations is observed, the inspector may, with a view to facilitating flag state action on the apparent infringement, immediately attempt to communicate with any inspector of the inspected vessel's flag state known to be in the vicinity or with the authority of the inspected vessel's flag state, designated in accordance with paragraph 1 above. The master of the inspected vessel shall arrange for messages to be sent and received by using his radio equipment and operator for this purpose. If the inspector is unable to communicate with an inspector or designated authority of the flag state, he may remain aboard the inspected vessel a reasonable period of time at the end of which he shall complete the inspection, leave the inspected vessel, and communicate as soon as possible with an inspector or designated authority of the flag state. However, if he succeeds in establishing communications while on board the inspected vessel and providing the flag state inspector or designated authority of the flag state agrees, the inspector may remain aboard the inspected vessel to facilitate preservation of the evidence of the apparent infringement until boarding of the vessel by a competent authority of the flag state, or during a period of time as determined and communicated to the master of the vessel by that authority. While the inspector remains on board, the inspected vessel may continue to fish, provided that when the inspector has pointed out to the master that he believes that an apparent infringement of the regulation pertaining to:

- A. Fishing in a closed area or with gear prohibited in a specific area;
 - B. Fishing in an "Others" quota without prior notification to the IGMNF Secretariat, or after the allowable catch for that stock or species has been taken;
 - C. Fishing for stocks or species in an area after the Contracting Government having jurisdiction over the inspected vessel has notified the Executive Secretary that its allowable catch for those stocks or species has been taken;
 - D. Failure to possess proper flag state registration documents for the area where the vessel is found fishing;
- is still being committed during that fishing, and this warning is stated on the corresponding report or on an additional report to the former, the flag state will punish the master and/or other responsible entities, if convicted

on the first report, for a second offence due to the continuation of fishing relative to the infringement established by the same first report."

If this proposal is acceptable, a small alteration to the form of the report will be necessary.

Withdrawal of ICNAF Registration

This regulation as proposed in Comm.Doc. 76/I/2 Revised adds nothing to the Scheme, since its effect depends entirely on national legislation.

The Commission's role is to pass international legislation, that is then reflected in the national legislations of Member Countries, not to confer international status of the national legislations of some Contracting Parties.

It is obvious that, even without the proposed rule, the inspector of the flag state of the inspected vessel may (in fact, may even be obliged to by the national legislation) withdraw temporarily, or not, the vessel's authorization to fish.

Over-Quota Adjustment

This matter is not within the terms of reference of STACTIC, and consequently, is not part of the substance of this paper.

