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THE ENFORCEMENT OF INTERNATIONAL FISHERIES AGREEMENTS
ON THE HIGH SEAS: A COMPARATIVE ANALYSIS OF STATE PRACTICE

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Section I. Introduction

A universal demand for improvement in the food production for a growing world population necessitates, inter alia, a more intensive exploration and exploitation of the living resources of the oceans. This higher level of exploitation can be achieved by an increase in effort and by the development of new equipment and techniques for maritime fishing operations. However, at the same time it has become apparent that the wealth of the seas is not unlimited and inexhaustible. In many areas of the high seas the dangers of overfishing have been amply demonstrated. This situation makes effective regulation of maritime fishing operations a matter of increasing urgency.

If the fishing is carried out in the maritime internal or in the territorial waters of a State, regulation can be undertaken by that State alone, since the sovereignty of a coastal State extends to these waters.¹ The establishment by some States of additional zones adjacent to the territorial sea in which these States claim exclusive jurisdiction over fisheries, has enlarged the area in which coastal States by themselves attempt to regulate fishing operations. As far as all other areas of the sea are concerned, the

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¹See, art. 1, para. 1, Convention on the Territorial Sea and the Contiguous Zone, 1958, 516 U.N.T.S. 205.

only way to bring about regulation of fishing operations is by international cooperation. Since the freedom of fishing on the high seas is one of the basic principles of international law,² the management of high seas fishing must be realized with the help of international fisheries agreements.³ One of the legal problems in creating effective administration of high seas fishing by international conventions - the enforcement of these regulations - will be discussed in this study.

Terminology - By "enforcement" will be understood the process by which an arrangement is made effective or, to formulate it differently, the process designed to compel obedience to the rules. In the context of the present study this means the obedience of fishing vessels to international high seas fishing regulations. The terms "inspection" or "supervision" will be used when referring to the critical examination of fishing operations for the purpose of enforcement. Inspection can be carried out in ports, at sea from other vessels and, in exceptional cases, from the air by air patrol of the fishing grounds. Use of the word "control" will be avoided since it can also refer to the management of fisheries.

Enforcement can be assessed according to a number of different criteria, e.g., effectiveness, area, inspection procedure. The present study has been based on a distinction among the agencies responsible for the enforcement of international fisheries agreements. With the help of this criterion the treaty practice of States will be analyzed. The following terminology has been used in this analysis: (1) "national enforcement" - enforcement of an agreement exclusively by the flag State of the fishing vessel in question; (2) "mutual enforcement" - enforcement with regard to a vessel under the flag of a Contracting State by all Contracting Parties; and (3) "international

²See, art. 2, Convention on the High Seas, 1958, 450 U.N.T.S. 111F.

³See, art. 1, para. 2, Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958, 559 U.N.T.S. 285.

enforcement" - enforcement by an international body. These three types will be called "systems of enforcement". Some authors use the term "international inspection" when referring to the second system.⁴ As the distinction among the systems of enforcement has been based on the responsible agency, it is preferred to reserve the term "international" to a system in which an international body is in charge of enforcement.

Area Under Review - The enforcement of international fisheries agreements will be analyzed only as far as it concerns enforcement on the high seas, except those areas in which a coastal State claims exclusive jurisdiction over fisheries. Territorial waters are excluded from this study for two principal reasons. In the first place, many international fisheries conventions are not applicable to those waters.⁵ Enforcement of these agreements in territorial waters is, therefore, a casus non dabilis. Secondly, if an agreement does include territorial waters in its area of applicability, there are two alternatives: (1) the agreement contains a provision to the effect that its enforcement in territorial waters is the exclusive responsi-

⁴See, e.g., J. E. Carroz and A. G. Roche, The International Policing of High Sea Fisheries, VI The Canadian Yearbook of International Law 61 (1968); for other recent publications in this field, see, e.g., D. W. van Lynden, The Convention on Conduct of Fishing Operations in the North Atlantic, London, 1967, XIV Netherlands International Law Review 245 (1967); M. Voelckel, La Convention du 1er juin 1967 sur l'exercice de la pêche en Atlantique Nord, XXIII Annuaire français de droit international 647 (1967). A. J. Aglen, Problems of enforcement of fisheries regulations, Proceedings Second Annual Conference, Law of the Sea Institute, 1967, p. 19; E. C. Surrency, International Inspection in Pelagic Whaling, 13 International and Comparative Law Quarterly 666 (1964).

⁵See, e.g., para. 2, Crab Agreement, 1965, 541 U.N.T.S. 97; art. I, para. 1, Northwest Pacific Convention, 1956, 53 A.J.I.L. 763 (1959); art. I, para. 1, North Pacific Ocean Convention, 1952, 205 U.N.T.S. 65; art. I, para. 1, Northwest Atlantic Convention 1949, 157 U.N.T.S. 157.

bility of the coastal State:⁶ or (2) the agreement is silent in this respect. In the latter case it must be assumed that any attempt of a State to enforce an international fisheries agreement in the territorial waters of another State, without explicit consent of the latter State, constitutes an encroachment on the sovereignty of the Coastal State. It can be concluded that enforcement in territorial waters of fisheries agreements - if the matter arises - has been isolated from the general regime of enforcement applicable on the high seas.

Much more complicated is the question of exclusive fishery zones - zones of the high seas adjacent to the territorial waters in which the coastal State claims exclusive jurisdiction over fisheries. The problem is that most fisheries conventions do not contain provisions with regard to these zones, since the conventions were concluded prior to their establishment. The general approach of the most recent conventions is to place enforcement within the fishery zones exclusively in the hands of the coastal State.⁷ Here again, a separation between enforcement in the exclusive fishery zone and on the high seas is developing in the practice of States. For this reason, enforcement of fisheries agreements in exclusive fishery zones will not be discussed further. A second, more practical, reason for silence on this matter is that such a discussion would require an analysis of the legality of these zones in international law - a subject outside the field of this study. Summarizing the restrictions in the scope of this study, it can be said that one

⁶See, e.g., art. 13, para. 3, North-East Atlantic Convention, 1959, 486 U.N.T.S. 157; art. VI, para. 1, North Pacific Fur Seals Convention, 1957, 314 U.N.T.S. 105; art. II, para. 2, Halibut Preservation Convention, 1953, 222 U.N.T.S. 77.

⁷See, e.g., preamble, Scheme of Joint Enforcement of the North-East Atlantic Fisheries Commission, Annex A to the Report of the Sixth Meeting of the Commission, May, 1968; art. 8, para. 2, Conduct Convention, 1967, 6 I.L.M. 760 (1967); art. IX, para. 3, Atlantic Tuna Convention, 1966, 6 I.L.M. 293 (1967); art. 20, para. 2, Rules for Regulation Fisheries, Annex I to U.K. - Norway Fishery Agreement, 1960, 398 U.N.T.S. 189.

agency of enforcement will not be discussed here, that is, a country acting in its capacity of coastal State.

Agreements and Commissions - As the following sections will be based primarily on the practice of States embodied in international agreements⁸ and in the work of international fisheries commissions, it is necessary to make a few general remarks on these two institutions. Not all fisheries conventions and commissions are of interest from the point of view of enforcement. Generally speaking, fisheries agreements can be divided into three categories: (1) agreements concerning scientific investigations with regard to the living resources of the high seas;⁹ (2) agreements concerning the conservation of living resources;¹⁰ and (3) agreements concerning the conduct of fishing operations.¹¹

Agreements in the first category do not impose rules on fishing operations. Therefore, the problem of enforcement of these conventions with regard to vessels on the high seas does not arise. For this reason they are irrelevant to the present study. Conventions in the second category use a wide range of techniques to realize the objective of conservation. To mention a few possibilities: prohibition of certain types of equipment; restrictions on equipment (e.g., minimum mesh size regulations); prohibition of certain fishing methods: prohibition of the catching of certain species; restrictions on the catch of species (e.g., minimum fish size regulations); closure of

⁸These agreements will be indicated in this study by a slightly abbreviated title.

⁹See, e.g., Mediterranean Fisheries Council Agreement, 1949, as revised 1963, 490 U.N.T.S. 444.

¹⁰See, e.g., North-East Atlantic Convention, 1959, 486 U.N.T.S. 157; North Pacific Ocean Convention, 1952, 205 U.N.T.S. 65; Northwest Atlantic Convention, 1949, 157 U.N.T.S. 157.

¹¹See, e.g., Conduct Convention, 1967, 6 I.L.M. 760 (1967).

certain areas of the high seas with or without time limits; quota systems, etc.¹² These measures are being employed in all possible combinations. Agreements of the third category usually contain provisions regarding the marking of fishing vessels and their equipment, and rules to be observed by these vessels when carrying out fishing operations. The number of conventions in this group is smaller than in the second one, since the need for arrangements on the conduct of vessels has manifested itself only in a limited number of areas. It is clear that the enforcement of these detailed provisions is a complicated problem.

It will be shown that, in an attempt to solve certain aspects of this problem, States have frequently called upon international fisheries commissions. The same limitation as has been mentioned above with regard to agreements applies to these commissions. They must have a function in the regulation of high seas fisheries to be relevant for this study. Commissions, exclusively responsible for scientific research, have no place in a study on enforcement.

¹²For a more detailed survey, see, D. M. Johnston, The International Law of Fisheries, 59 et seq. (Yale University Press, 1965).

Section II. Enforcement in the Treaty Practice of States

Para. 1. National Enforcement

Origin - In some international agreements on fisheries, the enforcement of the provisions with regard to fishing vessels on the high seas is the exclusive responsibility of the flag State of the vessels. This type of enforcement can be accurately characterized as national enforcement. There are two situations in which it arises:

1. The fisheries agreement does not contain provisions regarding its enforcement.
2. The convention explicitly stipulates that the enforcement is the exclusive responsibility of the flag State.

In the first situation the general rule on jurisdiction over vessels on the high seas, which is laid down in article 6, para. 1, of the Convention on the High Seas of 1958,¹³ is applicable. Article 6, para. 1, provides, inter alia, that ships shall sail under the flag of one State only, and that, save in exceptional cases expressly provided for in international treaties or in the articles of the Convention on the High Seas, ships shall be subject to the exclusive jurisdiction of that State on the high seas. As the fisheries agreements in the first category do not expressly provide for such an exception, it must be assumed that the enforcement of these agreements is the exclusive responsibility of the flag State. Any attempt of another State, also a party to such an agreement, to enforce the provisions of the convention in respect to foreign fishing vessels on the high seas, would constitute a violation of this general principle. However, it should be noted that fisheries conventions without explicit provisions on enforcement, e.g., the Black Sea Fishing Convention of 1959¹⁴ and the Fishing Operations Agreement

¹³450 U.N.T.S. 82.

¹⁴377 U.N.T.S. 203.

of 1964,¹⁵ are a small minority of those agreements which establish a regime for high seas fishing operations.

An example of the second approach to national enforcement is article IV, para. 1, of the Agreement concerning Fisheries of 1965 between Japan and Korea.¹⁶ This article reads: "The right of control (including the right to halt and inspect vessels) and jurisdiction in waters outside the exclusive fishery zone shall be exercised only by the High Contracting Party to which the ship belongs." This provision can be considered as a formulation expressis verbis of the aforementioned general principle of exclusive jurisdiction of the flag State. In a number of other international fisheries conventions similar provisions have been included.¹⁷

Amendments - Some conventions, which provided for exclusive national enforcement when they came into effect, have been amended, or are being amended, in such a way that they no longer belong to this group of conventions. Since these amendments have been made, or are being made, in the framework of international fisheries commissions, they will be reviewed in detail in Section III of this study.¹⁸ Finally, it should be pointed out that even in a system of national enforcement, the flag State sometimes has certain obligations with regard to the way in which it fulfills its responsibility to enforce. In some conventions, for instance, this State has to report to an

¹⁵531 U.N.T.S. 213.

¹⁶4 I.L.M. 1128 (1965).

¹⁷See, e.g., art. IX, Atlantic Tuna Convention, 1966, 6 I.L.M. 293 (1967); art. VIII, Northeast Atlantic Seals Agreement, 1957, 309 U.N.T.S. 269; art. 6, Protection Measures Agreement, 1952, 175 U.N.T.S. 205; art. XII, Northwest Atlantic Convention, 1949, 157 U.N.T.S. 157; art. 11, Meshes Convention, 1946, 231 U.N.T.S. 199.

¹⁸See, p. 21 *infra*.

international fisheries commission. These questions will also be discussed in Section III.¹⁹

Para. 2. Mutual Enforcement

As has been mentioned above, article 6, para. 1, of the Convention on the High Seas of 1958 provides that in exceptional cases, expressly provided for in international treaties, States are entitled to deviate from the general principle of exclusive jurisdiction of the flag State over vessels on the high seas. A great number of international fisheries treaties contain such exceptions. Under these agreements, the parties are entitled to exercise supervision over all fishing vessels on the high seas under the flag of States, which are also parties to the agreement, provided that the vessels are engaged in fishing under the convention, and that supervision is exercised in accordance with the relevant provisions of the convention. The enforcement of such a convention with regard to a certain vessel on the high seas is, in this construction, the responsibility of all States, which are parties to the agreement and not the exclusive responsibility of the flag State. This system can be defined as mutual enforcement.

1882 Convention - Before analyzing recent treaty practice, the famous Convention Internationale pour régler la police de la pêche dans la mer du Nord en dehors des eaux territoriales of 1882 has to be examined.²⁰ This treaty can be considered as the first multilateral convention which incorporated a system of mutual enforcement. An older, bilateral example of such a system is the Regulations for the Guidance of Fishermen, which was concluded by Great Britain and France in 1843.²¹ The latter agreement served as

¹⁹See, p. 21 infra.

²⁰IX Martens Nouveau Recueil, ser. 2, p. 556; english translation: U.N. Legislative Series, Laws and Regulations on the Regime of the High Seas, vol. I, p. 179.

²¹U.N. Legislative Series, Laws and Regulations in the Regime of the High Seas, vol. I, p. 238.

a basis for the 1882 North Sea Fisheries Convention which will be discussed here because of its great importance. In the first part of the treaty, provisions are made for the registration and the marking of fishing vessels and their equipment; the second part gives rules to be observed by vessels in carrying out fishing operations; the third part of the convention deals with its enforcement. The most important provisions in this respect are the articles XXVII and XXVIII.

Article XXVII places the execution of the regulations respecting documents of nationality, the marking and numbering of boats and equipment, and of rules regarding fishing implements which are forbidden, under the exclusive superintendence of the cruisers of the nation of each fishing boat. This article still represents exclusive national enforcement. However, a system of mutual enforcement was introduced in art. XXVIII, which reads: "The cruisers of all the high contracting parties shall be competent to authenticate all infractions of the regulations prescribed by the present convention, other than those referred to in article XXVII, and all offenses relating to fishing operations, whichever may be the nation to which the fishermen guilty of such infractions may belong" (emphasis added). Under this provision commanders of cruisers are empowered to enforce the agreement, not only with regard to vessels of their own nationality, but also with regard to foreign fishing vessels, provided the flag State of these vessels is also a party to the convention.

Articles XXIX to XXXIV elaborate this general principle of mutual enforcement. Under certain conditions, commanders may board and search fishing vessels and, if necessary, may take an offending vessel into a port of the nation to which it belongs. The prosecution of offenses remains in the hands of the flag State.

New Developments - The convention of 1882 was for many years considered a satisfactory arrangement, although in reality the right of commanders to inspect foreign fishing vessels was rarely used. However, Great Britain withdrew from the convention, effective May 15, 1964,²² and asked for a conference to discuss certain fishery problems. The main reason for this withdrawal was that Great Britain wished to establish a larger exclusive fishery zone than the three-mile belt accepted in article II of the 1882 convention. On this request, a conference met in London in 1963 and 1964. It adopted the European Fisheries Convention of 1964,²³ which is primarily concerned with exclusive fishery zones. During the conference a resolution was adopted asking for a second conference to prepare a new convention "on the general lines of the 1882 Convention."²⁴ This second conference met in London during certain periods in 1966 and 1967. It adopted the Convention on Conduct of Fishing Operations in the North Atlantic.²⁵ This convention is now open for ratification. Since the convention of 1882 will be replaced by the Conduct Convention of 1967, the former convention will not be discussed further.

Procedures - A first question in analyzing recent treaty practice is what procedure has been used to establish mutual enforcement. Most agreements provide that the Contracting Parties shall designate a number of "authorized officers", "fishery inspectors" or "observers", whose responsibility it is to supervise the operations of the fishing vessels of all Con-

²²475 U.N.T.S. 364.

²³3 I.L.M. 476 (1964).

²⁴3 I.L.M. 473 (1964).

²⁵London June 1, 1967, 6 I.L.M. 760 (1967), hereinafter referred to as Conduct Convention of 1967.

tracting Parties from special fishery patrol ships.²⁶ Some agreements follow a different approach, for example, the Whaling Convention of 1946.²⁷ Under paragraph 1 (a) of the schedule to this convention, the Contracting Parties are required to maintain on their own factory ships at least two whaling inspectors. The possibility of mutual enforcement was introduced on October 9, 1963 on the basis of a recommendation of the International Whaling Commission. Pursuant to this amendment, national inspectors could be supplemented with "such observers as the member countries engaged in the Antarctic pelagic whaling may arrange to place on each other's factory ships."²⁸ Here, supervision is exercised, not by inspectors on special fishery cruisers, but by an exchange of observers on the fishing vessels.

A second example of a different approach is the Alaska Crab Agreement of 1964 between Japan and the United States.²⁹ The parties to this convention agreed "to provide opportunity for observation."³⁰ However, no provision was made for the appointment of observers. Therefore, it is not clear from the agreement how this "opportunity" is to be used. A similar, vague provision has been inserted in article X, para. 2, of the North Pacific Ocean

²⁶See, e.g., Scheme of Joint Enforcement of the North-East Atlantic Fisheries Commission, Annex A to the Report of the Sixth Meeting of the Commission, May, 1968; art. 9, Conduct Convention, 1967, 6 I.L.M. 760 (1967); para. 3, Crab Agreement, 1965, 541 U.N.T.S. 97; art. 20, para. 1, Rules for Regulation Fisheries, Annex I to U.K.-Norway Fisheries Agreement, 1960, 398 U.N.T.S. 189; art. V, Shrimp Convention, 1958, 358 U.N.T.S. 63; art. VI, North Pacific Fur Seals Convention, 1957, 314 U.N.T.S. 105; art. VII, Northwest Pacific Ocean Convention, 1956, 53 A.J.I.L. 763 (1959); art. II, Halibut Preservation Convention, 1953, 222 U.N.T.S. 77; art. X, para. 1, North Pacific Ocean Convention, 1952, 205 U.N.T.S. 65.

²⁷161 U.N.T.S. 73.

²⁸495 U.N.T.S. 256.

²⁹533 U.N.T.S. 31.

³⁰Id., para. 4.

Convention of 1952 between the United States, Canada and Japan³¹ relating to enforcement of conservation measures in areas, in which one of the Contracting Parties has to abstain from fishing.

The procedure for the designation of authorized officers is laid down in more detail in the national legislation of the Contracting Parties.³² International fisheries conventions usually do not define the terms "authorized officer", "fishery inspector" or "observer". A general requirement is that authorized officers must carry documents of identity and that their vessels must show a special flag or pennant.³³ In modern treaty practice fishery inspectors do not necessarily belong to the navy of the appointing State. The aforementioned North Sea Fisheries Convention of 1882 took a different position. Article XXVI provided that the superintendence of fisheries should be exercised by vessels belonging to the national navies of the parties. An exception was made in Belgium, which had at that time no fleet. The modern approach is illustrated by an amendment to this provision, which was made in 1955.³⁴ Under this additional agreement, naval vessels used for exercising supervision of the fisheries under the 1882 convention might be replaced by other State-owned vessels, commanded by a specially appointed officer, if the necessity to do so should arise. In this connection reference must be made to a questionnaire concerning the implementation of the Whaling Convention, which was sent to all Contracting Parties by the

³¹205 U.N.T.S. 65.

³²See, e.g., Canadian Pacific Fur Seals Convention Act, 1957 Can. Stat. c. 31, art. 2; United States' Fur Seal Act of 1968, 16 U.S.C. § 1182 (Supp. III, 1968).

³³See, e.g., para. 3 and 2, Scheme of Joint Enforcement of the North-East Atlantic Fisheries Commission, Annex A to the Report of the Sixth Meeting of the Commission, May, 1968.

³⁴310 U.N.T.S. 145.

International Whaling Commission. From the answers to this questionnaire, it is clear that the whaling observers of most countries are civil employees of the respective departments of fisheries.³⁵

Powers - As has been mentioned above, the general responsibility of fishery inspectors is to observe whether or not the provisions of a fisheries agreement are being carried out by fishery vessels on the high seas. Under a system of mutual enforcement this responsibility refers to the fishing vessels of all Contracting Parties. As far as the authority of inspectors is concerned, a distinction must be made between their powers prior to the establishment of an infraction on the provisions of the convention and their authority after the discovery of such an infraction.

Regarding the first situation, article 9 of the Conduct Convention of 1967³⁶ contains detailed provisions. Paragraph 5 of article 9 stipulates that "if an authorized officer has reason to believe that a vessel of any Contracting Party is not complying with the provisions of the Convention, he may identify the vessel, seek to obtain the necessary information from the vessel and report." Moreover, "if the matter is sufficiently serious, he may order the vessel to stop and, if it is necessary in order to verify the facts of the case, he may board the vessel for enquiry and report."³⁷ Similar provisions have been inserted in other fisheries agreements.³⁸ In

³⁵ See, Appendix VII to the Third Report of the International Whaling Commission, 1951-52.

³⁶ I.L.M. 760 (1967).

³⁷ Id., at 762.

³⁸ See, e.g., Scheme of Joint Enforcement of the North-East Atlantic Fisheries Commission, Annex A to the Report of the Sixth Meeting of the Commission, May, 1968; para. 3, Crab Agreement, 1965, 541 U.N.T.S. 97; art. VII, Northwest Pacific Ocean Convention, 1956, 53 A.J.I.L. 763 (1959); art. X, para. 1 (a), North Pacific Ocean Convention, 1952, 205 U.N.T.S. p. 65.

most systems of mutual enforcement inspectors have, prior to the discovery of an infraction, a power to investigate the conduct of fishing vessels. The details of this general authority differ from arrangement to arrangement.

A number of restrictions are imposed on fishery inspectors when they carry out an investigation. This is already clear from paragraph 5 of article 9 of the Conduct Convention of 1967, mentioned above: the inspector must have a reason to assume that a violation of the convention has occurred, even if he wants only to identify the vessel; he may only seek to obtain only the necessary information; the matter must be serious in order to entitle an inspector to stop a vessel and he may board a vessel only if necessary. Furthermore, paragraph 7 of article 9 of the Conduct Convention of 1967 provides that a fishing vessel may not be ordered to stop while engaged in fishing operations, except in an emergency situation. Paragraph 8, finally, stipulates that "an authorized officer shall not pursue his enquiries further than is necessary ..." and that he always must act "in such a manner that vessels suffer the minimum interference and inconvenience."³⁹ In Annex VI to the agreement, detailed rules for inspection are laid down, especially concerning the documents of identity of inspectors and concerning their reports. From this survey it is clear that in the Conduct Convention of 1967 strong limitations are imposed upon authorized officers in the discharge of their responsibilities.

Other arrangements take a more liberal position with regard to these restrictions. The Scheme of Joint Enforcement, for instance, does not require that the inspector must have a reason to believe that a vessel is not complying with the convention if he wants to board the vessel for investigation.⁴⁰ It is difficult to compare the several provisions because most

³⁹6 I.L.M. 763 (1967).

⁴⁰Para. 4.

agreements are less detailed with regard to the powers of inspectors than the Conduct Convention of 1967 and the Scheme of Joint Enforcement. Generally speaking, most conventions contain two restrictions on the power of an inspector to investigate: (1) that he must have reasonable cause to believe a vessel is violating the convention; and (2) that he must show documents of identity when boarding a vessel.

Concerning the powers of authorized officers after the discovery of an infraction, treaty practice shows a great discrepancy. Some agreements make provision only for a very limited authority, whereas other conventions give extensive powers. An example of the first approach is the Conduct Convention of 1967. As has been mentioned, under this convention authorized officers are required to submit reports on inspections. They do not have extra powers if they discover a violation of the convention during such an inspection. Inspectors can only report an infraction without being empowered to take any further action. Other arrangements take the same position.⁴¹ The Scheme of Joint Enforcement goes somewhat further by providing that a fishery inspector shall affix a mark and may take photographs of nets used in violation of the convention.⁴² It indicates also explicitly where an inspector has to send his report if he discovers an infraction: to his own State, to the competent authorities of the flag State of the offending vessel, and to any inspection vessel of this flag State known to be in the vicinity. Some fisheries agreements provide for more extensive powers after

⁴¹ See, e.g., para. 5, Scheme of Joint Enforcement of the North-East Atlantic Fisheries Commission, Annex A to the Report of the Sixth Meeting of the Commission, May, 1968; para. 3, Crab Agreement, 1965, 541 U.N.T.S. 97; art. 23, Rules for Regulation Fisheries, Annex I to the U.K.-Norway Agreement, 1960, 398 U.N.T.S. 189.

⁴² Para. 11 and 12.

the discovery of an infraction. An example is article X, para. 1 (b) of the North Pacific Ocean Convention of 1952 between the United States, Canada and Japan.⁴³ This article provides, inter alia, that if a person or a fishing vessel is "actually engaged in operations in violation of the provisions of this Convention, or (if) there is reasonable ground to believe was obviously so engaged immediately prior to boarding of such vessel by any such official, the latter may arrest or seize such person or vessel" (emphasis added).⁴⁴ Other agreements contain more or less identical provisions.⁴⁵ It is interesting that this power to arrest and seize appears to be confined to conventions with regard to the Pacific Ocean, whereas arrangements for the Atlantic Ocean are satisfied with the authority to report infractions. In most "Pacific Ocean conventions" it is laid down that in case of an arrest or seizure the State to which the person or vessel in question belongs must be notified, and that the arrested person or the seized vessel must be delivered as promptly as practicable to the authorized officials of his or its State. Only in exceptional cases and under conditions agreed upon by both States involved, may the arrested person or the seized vessel be kept under surveillance in the territory of the State making such arrest or seizure.

Priority Flag State - In concluding the discussion of treaty provisions regarding mutual enforcement, it should be pointed out that even in a system of mutual enforcement the flag State remains the most important agency for the enforcement of the agreement. This is clear from the practice of inspection on the high seas. Under the North Sea Fisheries Convention of 1882,

⁴³205 U.N.T.S. 65.

⁴⁴Id., at 92.

⁴⁵See, e.g., art. V, para. 1, Shrimp Convention, 1958, 358 U.N.T.S. 63; art. VI, para. 2, North Pacific Fur Seals Convention, 1957, 314 U.N.T.S. 105; art. VII, para. 2, Northwest Pacific Ocean Convention, 1956, 53 A.J.I.L. 763 (1959); art. II, para. 1, Halibut Preservation Convention, 1953, 222 U.N.T.S. 77.

for instance, inspection of foreign fishing vessels has been virtually non-existent. This situation has its basis partly in the provisions on enforcement in fisheries convention.

In the first place, many agreements emphasize the role of the flag State. As has been mentioned frequently, article 9 of the Conduct Convention of 1967 creates a system of mutual enforcement. However, the preceding article states explicitly that each Contracting State shall take such measures as may be appropriate to enforce the convention with regard to its vessels and gear.⁴⁶ Thus, the convention first emphasizes national enforcement and then introduces mutual enforcement in a following article. This sequence can also be found in other conventions.⁴⁷

A more substantial argument for the primacy of the flag State in a system of mutual enforcement is that in some agreements inspectors of the flag State have a certain priority over inspectors of the other Contracting Parties. For example, paragraph 12 of article 9 of the Conduct Convention of 1967 reads: "An authorized officer shall not exercise his powers to board a vessel of another Contracting Party if an authorized officer of that Contracting Party is available and in a position to do so himself."⁴⁸ The provision that an arrested person or seized vessel must be delivered as promptly as possible to authorized officers of the State to which he or it belongs, can be considered in the same light.

The third and most important argument for the primacy of the flag State is that all fisheries agreements, which create mutual enforcement, expressly

⁴⁶6 I.L.M. 762 (1967).

⁴⁷See, e.g., art. IX, para. 2, and art. X, North Pacific Ocean Convention, 1952, 205 U.N.T.S. 92.

⁴⁸6 I.L.M. 763 (1967).

reserve to the flag State the right to prosecute an offending vessel and to impose penalties. For instance, article X, para. 1 (c), of the North Pacific Ocean Convention of 1952 provides: "Only the authorities of the Party to which the abovementioned person or fishing vessel belongs may try the offense and impose penalties therefor."⁴⁹ It is interesting that during the tenth meeting of the International Whaling Commission the precise meaning of a similar provision in the Whaling Convention of 1946 was discussed. Article IX, para. 3, of this convention reads: "Prosecution for infractions against or contraventions of this Convention shall be instituted by the Government having jurisdiction over the offense."⁵⁰ New Zealand raised the question whether this provision meant "that a prosecution must be taken whenever an infraction occurred or merely that if a prosecution was instituted it must be taken by the appropriate Government."⁵¹ The Contracting States were invited to send a statement of their position. At the eleventh meeting of the commission, the second interpretation was accepted.⁵²

Many conventions make arrangements to facilitate the prosecution by the flag State or the national State, e.g., that witnesses and evidence under control of any of the Contracting Parties must be delivered as promptly as possible to the party having jurisdiction to try the offense.⁵³ The Scheme of Joint Enforcement and the Conduct Convention of 1967 are also in this respect the most detailed arrangements. They stipulate that no party is obliged to give a report of a foreign authorized officer a higher evidential

⁴⁹205 U.N.T.S. 94.

⁵⁰161 U.N.T.S. 84.

⁵¹Tenth Report of the Commission, 1958-1959, p. 16.

⁵²Eleventh Report of the Commission, 1959-1960, p. 20.

⁵³See, e.g., art. VII, para. 3, Northwest Pacific Ocean Convention, 1956, 53 A.J.I.L. 763 (1959).

value than it would possess in the officer's own country.⁵⁴

Most conventions do not contain provisions on the settlement of infractions by the flag State. Therefore, this State can in principle act at its own discretion. Sometimes it must report to an international fisheries commission. This will be discussed in the next section. An obligation to report to the other Contracting Parties is included only in article VI, para. 6, of the North Pacific Fur Seals Convention of 1957 between Canada, the United States, Japan and the Soviet Union. This provision reads: "Full details of punitive measures applied to offenders against the prohibition shall be communicated to the other Parties not later than three months after application of the penalty."⁵⁵

Para. 3. International Enforcement

Until now no international organization is responsible for the enforcement of a fisheries agreement. An attempt to establish such a system has been made by the International Whaling Commission. As the proposed regulation was not put into effect, it will not be discussed here but in section III.⁵⁶

⁵⁴ Para. 8, Scheme of Joint Enforcement of the North-East Atlantic Fisheries Commission, Annex A to the Report of the Sixth Meeting, May, 1968; art. 9, para. 11, Conduct Convention, 1967, 6 I.L.M. 760 (1967).

⁵⁵ 314 U.N.T.S. 111.

⁵⁶ See, p. 25 infra.

Section III. The Function of International Fisheries Commissions in the Enforcement of Fisheries Agreements.

Para. 1. Functions Not Based on Special Treaty Provisions

This paragraph will examine those aspects of the role of fisheries commissions with regard to the enforcement of fisheries agreements which are not based on special provisions in the convention. A commission has, or can have, a function in enforcement even if an agreement does not make expressis verbis provision for certain responsibilities.

Existence Commission - First, the mere existence of a commission can have an effect on enforcement. The number of infractions of high seas fishing regulations will, as a general rule, decrease if fishermen are of the opinion that these regulations are justifiable and affect fishermen of other nations in the same way and to the same extent. International fisheries commissions can contribute much to this opinion. In some commissions, for instance, the fishing industry has an important voice in the process of formulating the regulations. An example is the International Pacific Halibut Commission. This commission has always discussed proposed regulations with representatives of the halibut industry.⁵⁷ By using such a procedure, regulations are made acceptable, not only to the scientists of the commission, but also to the fishing industry. In such a situation the fishing fleet will be more inclined to comply with the regulations than if these rules were imposed without prior consultation. The result may be a decrease in the number of infractions. There is another reason why fisheries commissions, by the fact of their existence, can have a positive effect on enforcement problems. Most conventions provide that commissions must base recommendations

⁵⁷ See, e.g., Report of the Commission, number 49, 1968, p. 6 and 7.

for regulations, as far as practicable, on the results of scientific investigations.⁵⁸ This requirement may make regulations more acceptable to fishermen because it can be considered a guarantee of the objective character of the limitations imposed upon the fishery. Also, this provision makes it necessary for the commission to collect statistical data, e.g., from the catch records of the masters of fishing vessels. Sometimes staff members of the commission meet the vessels when they return to port and inspect the catch in order to collect scientific information.⁵⁹ In other cases staff members conduct investigations from special research vessels on the fishing grounds.⁶⁰ All these activities refer to scientific research, but may have at the same time an effect on the enforcement of the convention. A captain of a fishing vessel, for example, will be less inclined to catch undersized fish, if he knows in advance that his catch will be inspected in port for scientific reasons. The relation between the collection of scientific information and enforcement was recognized negatively by a Norwegian proposal at the fourth meeting of the North-East Atlantic Fisheries Commission in 1966. Norway urged the commission that the collection of scientific material on mesh sizes be undertaken by scientists and not by enforcement inspectors, in order to avoid the refusal of fishermen to cooperate.⁶¹

⁵⁸ See, e.g., art. 6, para 1 (d), North-East Atlantic Convention, 1959, 486 U.N.T.S. 157; art. VIII, para. 1 (a), Atlantic Tuna Convention, 1966, 6 I.L.M. 293 (1967).

⁵⁹ See, e.g., Annual Report of the Inter-American Tropical Tuna Commission, 1967, p. 52.

⁶⁰ See, e.g., Report of the International Pacific Halibut Commission, number 49, 1968, p. 15.

⁶¹ Report of the Fourth Meeting, May, 1966, p. 8.

Discussions - Apart from this more or less psychological relation between fisheries commissions and enforcement, commissions have broad powers to discuss matters related to the objectives of the convention. Many agreements contain a clause, similar to article IX of the Northwest Atlantic Convention of 1949, which reads: "The Commission may invite the attention of any or all Contracting Governments to any matters which relate to the objectives and purposes of this Convention."⁶² It may be assumed that under this provision the International Commission for the Northwest Atlantic Fisheries has, and has always had, the authority to discuss enforcement problems and "to invite the attention" of the parties thereto.

Even without such a provision, commissions in this category have sometimes discussed enforcement questions. An example can again be found in the International Pacific Halibut Commission. This commission frequently serves in this paragraph as an example because it has no responsibilities under the system of mutual enforcement introduced by the convention. Nevertheless, it has been concerned with enforcement problems on many occasions. In one of its reports the commission notes, for instance, that "with the present effectiveness of enforcement ... the illegally caught poundage is judged to be at nearly the minimum that can be expected of any fishery situation."⁶³ A similar remark was made by the International Pacific Salmon Commission, also a commission without enforcement responsibilities under the convention.⁶⁴

⁶² 157 U.N.T.S. 157; see, also, art. I, para. 2, Tropical Tuna Commission Convention, 1949, 80 U.N.T.S. 3; art. IV, para. f, Northwest Pacific Ocean Convention, 53 A.J.I.L. 763 (1959).

⁶³ Report of the Commission, number 33, 1962, p. 12.

⁶⁴ Annual Report, 1952, p. 21.

In the previous section another example of a discussion on enforcement was given.⁶⁵ There the purpose was to clarify an ambiguous provision in the International Whaling Convention of 1949.

Regulations - Finally, attention is drawn to a third possibility for a fisheries commission to become involved in enforcement, in the absence of special treaty provisions. Some commissions have the authority to make recommendations to the Contracting States for the regulation of high seas fishing operations. This is of interest from the point of view of enforcement, because a commission can incorporate enforcement aspects either in its preparatory discussions or in the recommendation itself. The commission, in doing so, has of course to accept the general provisions on enforcement of the agreement.

Here again the International Pacific Halibut Commission provides an example. The regulations accepted by the parties on the basis of recommendations of this commission include, inter alia, closed seasons for certain areas of the High seas in the Northern Pacific Ocean. At its meeting in February, 1962, the commission decided to recommend a change in the opening and closing hour of the fishing season from 6:00 a.m. to 6:00 p.m. in order "to facilitate air patrol in all areas."⁶⁶ At the same meeting the commission went even further by making concrete proposals on the procedure of inspection. It recommended to the Contracting States that vessels returning from an open area through a closed area should have their equipment sealed by an enforcement officer in Sand Point, Alaska, and that this seal could be broken only by an enforcement officer at the port of sale, prior to un-

⁶⁵See, p. 14 supra.

⁶⁶Report of the Commission, number 33, 1963, p. 10.

loading.⁶⁷ This system reduced the ability of vessels to violate the closed season regulations during their transit through the closed area.

Another example of a commission including enforcement aspects in its recommendations for regulation is the International Commission for the Northwest Atlantic Fisheries. This commission established a special Ad Hoc Committee to study a United States' request for a 10% per annum exemption on the haddock regulation. The committee was instructed to include in its analysis the enforcement problems of such an exemption.⁶⁸

Summarizing this paragraph it may be said that fisheries commissions, even if they have no special responsibilities in this respect under the convention, have been involved frequently in questions of enforcement. The annual reports of most commissions reflect some involvement with regard to enforcement. An exception seems to be the North Pacific Fur Seal Commission, established by the North Pacific Fur Seals Convention of 1957.⁶⁹

Para. 2. The Functions of Fisheries Commissions Within an Existing System of Enforcement.

This paragraph will analyze those provisions in fisheries agreements which give explicit responsibilities to commissions concerning enforcement to the extent that these responsibilities are within the limit of the existing system of enforcement. The authority to amend a system or to make proposals for a new one will not be discussed here, but in the next paragraph.

Reports - It has been mentioned above that the parties to the North Pacific Fur Seals Convention of 1957 must communicate to the other Contracting

⁶⁷ Id., at 10.

⁶⁸ Annual Proceedings, 1955-1956, p. 15.

⁶⁹ 314 U.N.T.S. 105.

Parties⁷⁰ full details of punitive measures applied to offenders. This provision is exceptional. In all other cases where States are required to report on the punishment of offenses, the report must be sent to an international fisheries commission and not to the other parties. This first function of commissions within the framework of an existing system of enforcement can be illustrated by referring to article IX, para. 1, of the Atlantic Tuna Convention of 1966.⁷¹ It provides that the Contracting Parties agree to take all action necessary to ensure the enforcement of the convention and that each party "shall transmit to the Commission, biennially or at such other times as may be required by the Commission, a statement of the action taken by it for these purposes."⁷² Similar provisions have been laid down in a number of other conventions.⁷³ Some of these provisions require States to submit their reports at regular intervals, whereas other agreements stipulate that States must report on any action taken with regard to implementation and enforcement. It may be assumed that this general obligation to report refers especially to information on infractions and their punishment. The terminology of the International Whaling Commission of 1946 limits the scope of reports exclusively to this subject.

⁷⁰ See, p. 20 supra.

⁷¹ 6 I.L.M. 293 (1967).

⁷² Id., at 297.

⁷³ See, e.g., art. 13, para. 2, North-East Atlantic Convention, 1959, 486 U.N.T.S. 157; art. VI, para. 4, Northwest Pacific Ocean Convention, 1956, 53 A.J.I.L. 763 (1959); art. IX, para. 2, and art. X, para. 2, North Pacific Ocean Convention, 1952, 205 U.N.T.S. 65; art. XII, Northwest Atlantic Convention, 1949, 157 U.N.T.S. 157; art. IX, para. 4, Whaling Convention, 1946, 161 U.N.T.S. 73.

How successful were these provisions in practice? The discussion will concentrate on the activities of the International Whaling Commission, of the North-East Atlantic Fisheries Commission and of the International Commission for the Northwest Atlantic Fisheries.

One of the first actions of the International Whaling Commission was the adoption of a standard form, to be completed by the Contracting States when reporting on infractions. The completed form must be submitted to the commission sufficiently in advance of the annual meeting in June/July.⁷⁴ This standard form, as amended at the third meeting of the commission, has been attached to the Second Report of the Commission.⁷⁵ Contracting Parties must supply, inter alia, the following information: (1) the manner in which inspection was carried out in the period, covered by the report; (2) whether any factory ships or whale catchers operated in prohibited areas; (3) the number of whales taken in violation of the convention; (4) each instance where complete utilization of whales taken was not effected; and (5) the number of whales remaining in sea in excess of 33 hours from the time of killing. States received the information necessary for answering these questions from their inspectors on the factory vessels.⁷⁶ The form has been amended from time to time by the commission.⁷⁷ The Whaling Commission has also, when necessary, reminded States of their obligation to supply information.⁷⁸ Thus, the Whaling Commission has laid down and maintained detailed rules to be observed by States when reporting to the commission.

⁷⁴ Eleventh Report of the Commission, 1959-1960, p. 20.

⁷⁵ 1950-1951, p. 13.

⁷⁶ Para. 1 (a), Schedule to the Convention, 161 U.N.T.S. 90.

⁷⁷ See, e.g., Fifth Report of the Commission, 1953-1954, p. 13.

⁷⁸ See, e.g., Third Report of the Commission, 1951-1952, p. 17.

This commission has also used another method to receive information from the Contracting Parties on the enforcement of the convention. At the second meeting it was decided to send a questionnaire to the parties to obtain information on the legislation for the implementation of the convention. Most questions on this questionnaire dealt directly with enforcement. The answers received on the questionnaire were attached to the Third Report⁷⁹ and the Fourth Report of the Commission.⁸⁰ The commission has from time to time requested Governments to submit revisions of their answers in order to keep the available information up to date.⁸¹ These actions are based on a provision in the schedule to the Whaling Convention of 1946, which requires parties to deliver to the commission copies of official laws and regulations relating to whales and whaling.⁸²

The question arises how the International Whaling Commission has handled the information it received from the Governments. According to Rule XVIII of the rules of procedure of the commission it is the responsibility of the Technical Committee of the commission to review the annual reports on infractions submitted by Governments.⁸³ For this purpose the Technical Committee has established each year a special Subcommittee on Infractions. The subcommittee reviews the reports of the Contracting Governments and reports

⁷⁹1951-1952, pp. 29-39.

⁸⁰1952-1953, pp. 28-31.

⁸¹See, e.g., Thirteenth Report of the Commission, 1961-1962, p. 22.

⁸²Para. 15, 161 U.N.T.S. 94.

⁸³Third Report of the Commission, 1951-1952, p. 4.

its findings to the Technical Committee. This committee in its turn reports to the plenary commission. The results of this procedure are being summarized in the annual reports of the Whaling Commission by a brief survey of the discussion at the meetings and by a "Summary of Infractions" appended to the reports.⁸⁴

The outlined procedure is not only a formality. The commission has on occasion expressed concern about an increase in the number of infractions⁸⁵ and has also reminded States of their obligation to maintain adequate inspection.⁸⁶ Illustrative in this connection is an incident involving the "Olympic Challenger", a factory vessel which operated until 1956 under the flag of Panama. At the seventh annual meeting in 1955 it was noted by the commission that no infraction returns had been received from Panama. At the same time Japan and Norway accused the "Olympic Challenger" of having seriously and repeatedly violated the whaling regulations. This matter was discussed extensively by the commission. The representative of Panama stated that the inspectors on board the "Olympic Challenger" were competent and trustworthy. Nevertheless, he had to promise to take up the whole question with the appropriate authorities in Panama and to report to the commission.⁸⁷ This affair lost much of its urgency by the sale of the "Olympic Challenger" to Japan.

⁸⁴ See, e.g., Eighteenth Report of the Commission, 1966-1967, p. 19 and p. 76.

⁸⁵ See, e.g., Seventeenth Report of the Commission, 1965-1966, p. 19 and p. 23.

⁸⁶ See, e.g., Thirteenth Report of the Commission, 1961-1962, p. 22.

⁸⁷ Seventh Report of the Commission, 1955-1956, p. 5 and p. 17.

The approach of the North-East Atlantic Fisheries Commission and of the International Northwest Atlantic Fisheries Commission has much in common with that of the Whaling Commission. The North-East Atlantic Fisheries Commission established an Infractions Committee⁸⁸ at its first meeting in September, 1963. Reports of the Contracting Parties, submitted under article 13, para. 2, of the convention, are reviewed by this committee for report to the plenary commission. On the basis of this report the commission discusses the number and the character of the infractions and the situation with regard to inspection. A summary of these discussions can also be found in the annual reports.⁸⁹ If it considers inspection by a country inadequate, the commission does not hesitate to express its concern. For instance, the Report of the Sixth Meeting in May, 1968, states: "Some countries however still did not carry out inspection at sea and the Commission hoped they would do so in the future."⁹⁰

It is of interest that the parties to the North-East Atlantic Convention of 1959 submit reports to the commission not only concerning inspection on the high seas, but also with regard to inspection in national waters. At its third meeting the commission adopted a resolution to this effect, which said in part: "that Contracting States should, within the limits of their respective jurisdiction, inspect foreign vessels to ascertain whether they are complying with the Commission's recommendations, and shall report to the Flag State and to the Commission the result of the inspection."⁹¹ The commission,

⁸⁸ Report of the First Meeting, September, 1963, p. 1.

⁸⁹ See, e.g., Report of the Sixth Meeting, May, 1968, p. 17.

⁹⁰ Id., p. 17.

⁹¹ Report of the Third Meeting, May, 1965, p. 6.

by adopting this resolution, considerably enlarged the scope of the obligation of States to report.

The International Commission for the Northwest Atlantic Fisheries has collected information on infractions with the help of a "Summary of Infractions", to be completed by the Contracting Parties under article XII of the convention. This information is discussed in a special ad hoc committee, established for the first time in 1958.⁹²

Recommendations - The aforementioned recommendation of the North-East Atlantic Fisheries Commission illustrates a second function of fisheries commissions with regard to enforcement within an existing system: the power to make recommendations. An example of this function is article VII, para. f, of the Agreement concerning Fisheries of 1965 between Japan and Korea.⁹³ Under this provision the Joint Commission may make recommendations concerning the enactment of schemes of equivalent penalties. A similar clause can be found in the North Pacific Ocean Convention of 1952 between Japan, Canada and the United States.⁹⁴ Some conventions contain more extensive powers to make recommendations on enforcement. However, since these powers include the authority to make proposals to change the existing system or to adopt a new one, the discussion of these provisions will be postponed to the next paragraph.

Fisheries commissions, in discussing enforcement problems, have frequently made "requests" or "suggestions" to the parties without adopting

⁹²Annual Proceedings, 1957-1958, p. 12.

⁹³4 I.L.M. 1128 (1965).

⁹⁴Art. III, para. d, 205 U.N.T.S. 86.

formal resolutions. An example is a request of the International Whaling Commission to circulate the reports on infractions to the masters of the expeditions in order to inform them of the statistics of their colleagues.⁹⁵ The International Commission for the Northwest Atlantic Fisheries has, by using this procedure, established a system for the exchange of national enforcement officers.⁹⁶ This informal, but important function of fisheries commissions has been expressly recognized by the Scheme of Joint Enforcement of the North-East Atlantic Fisheries Commission.⁹⁷ Under para. 9 (i) of this scheme the commission may make "suggestions" concerning the coordination of enforcement operations. A commission can also request more extensive powers. This was done by the Northwest Atlantic Fisheries Commission, which at its twelfth annual meeting asked the parties "to give further consideration ... to the possibility" of introducing a provision in the convention empowering the commission to make recommendations on the system of enforcement.⁹⁸

Executive functions - Finally, the question must be asked whether fisheries commissions have executive responsibilities in an existing system of enforcement. Until now, only the North-East Atlantic Fisheries Commission has certain functions in this respect under the Scheme of Joint Enforcement. It is provided, for instance, that Contracting Parties must notify the com-

⁹⁵ Ninth Report of the Commission, 1957-1958, p. 18.

⁹⁶ See, e.g., Annual Proceedings, 1967-1968, p. 21.

⁹⁷ Annex A to the Report of the Sixth Meeting, May, 1968.

⁹⁸ Annual Proceedings, 1961-1962, p. 12.

mission of the names of fishery inspectors and of vessels used for inspection.⁹⁹ The form of the documents for the identity of inspectors and the form of their reports must be approved by the commission.¹⁰⁰ The same provision has been made with regard to the identification mark, which is affixed by inspectors to nets used in contravention of the regulations.¹⁰¹ More important is that the commission must receive a copy of each report by an inspector concerning the inspection of a vessel.¹⁰² The most important provision is laid down in paragraph 9 (i) which requires Contracting Parties to inform the commission by March 1 of each year of their provisional plans for participation in the arrangements of the scheme during the following year. The commission is responsible for coordination. It may discuss these plans and make the "suggestions".

In concluding this paragraph it should be pointed out that not all commissions have made the fullest use of their powers within the limits of a certain system of enforcement. The Contracting Parties to the North Pacific Ocean Convention of 1952 are also required to report to the International North Pacific Fisheries Commission¹⁰³ on action taken for the enforcement of the convention. However, in the annual reports of the commission no reference can be found either to these reports or to any discussion on enforcement problems. It appears that in this respect the commission has not used all its powers. The only information on enforcement found in the annual reports of the International North Pacific Fisheries Commission concerns two

⁹⁹Para. 1 and 2.

¹⁰⁰Para. 3 and 5.

¹⁰¹Para. 11.

¹⁰²Para. 5.

¹⁰³Art. IX, para. 2, and art. X, para. 2, 205 U.N.T.S. 92, 94.

reports of the Executive Director with regard to penalties for violations of the convention.¹⁰⁴

Para. 3. The Powers of Fisheries Commissions to Make Recommendations Regarding the System of Enforcement

In this paragraph attention will be given to the authority of international fisheries commissions to make proposals, either for changing the enforcement system adopted by the convention, or for introducing a new system. The powers discussed in the previous paragraph were more restricted since the commission was working within the framework of a given system. Here the commission may propose modification of this framework or may construct a new one.

Treaty provisions - The most distinct provision in this respect has been inserted in the North-East Atlantic Convention of 1959.¹⁰⁵ Article 13, para. 3, of this agreement reads in part: "The Commission may by a two-thirds majority make recommendations for, on the one hand, measures of national control in the territories of the Contracting States and, on the other hand, national and international measures of control on the high seas ..."¹⁰⁶ The Netherlands Government considered this provision so important that in ratifying the convention it made a reservation to the effect that recommendations of the commission for regulation would not be acceptable to it unless a system of enforcement had been proposed by the commission.¹⁰⁷ The Netherlands, together with Belgium, stressed this position again in the commission.¹⁰⁸ Similar provisions can be found in a number of other fish-

¹⁰⁴Annual Report for 1957, p. 3; id., 1959, p. 3.

¹⁰⁵486 U.N.T.S. 157.

¹⁰⁶Id., p. 172.

¹⁰⁷1962 Netherlands Tractatenblad No. 127, p. 2.

¹⁰⁸See, e.g., Report of the Special Meeting, November, 1966, p. 1.

eries agreements.¹⁰⁹

The opposite approach has been followed in article IX, para. 3, of the Atlantic Tuna Convention of 1966,¹¹⁰ which reserves expressis verbis to the Contracting States the right to establish a system of enforcement. The International Commission for the Conservation of Atlantic Tuna has no power in this respect.

The authority of some commissions to make recommendations on the system of enforcement is not based on the original convention but on later amendments. A first example is the International Whaling Convention of 1946.¹¹¹ Under the original convention, the International Whaling Commission had no power to make this kind of proposal. On November 19, 1956, a "Protocol to the International Whaling Convention" was signed in Washington.¹¹² This protocol amended, inter alia, paragraph 1 of article V of the convention in such a way that the commission became empowered to make recommendations on "methods of inspection." The protocol entered into force on May 4, 1959. A similar amendment has been made by the "Protocol to the International Convention for the Northwest Atlantic Fisheries, relating to measures of control," signed on November 29, 1965 in Washington.¹¹³ By this protocol article VIII, para. 5, of the convention was modified by adding a clause under which the International Commission for the Northwest Atlantic Fisheries became

¹⁰⁹ See, e.g., art. VII, para. h, Agreement concerning Fisheries, 4 I.L.M. 1128 (1965); art. IV, para. c, Northeast Atlantic Seals Agreement, 1957, 309 U.N.T.S. 269.

¹¹⁰ 6 I.L.M. 293 (1967).

¹¹¹ 161 U.N.T.S. 73.

¹¹² 338 U.N.T.S. 366.

¹¹³ 5 I.L.M. 719 (1966).

authorized to make on its own initiative proposals for national and international measures of enforcement on the high seas. These amendments were made at the request of the commission.¹¹⁴ At the next meeting in June, 1963, the commission elaborated its request in a detailed proposal for amendment of the convention.¹¹⁵ This protocol to the Northwest Atlantic Convention entered into force on December 19, 1969.

Practicé - Now attention will be focused again on the question how fisheries commissions have used their powers. Here again emphasis will be on the North-East Atlantic Fisheries Commission and on the International Whaling Commission. At its second meeting the North-East Atlantic Fisheries Commission agreed on the need for a system of "international" enforcement.¹¹⁶ It must be pointed out that here a difference in terminology exists between the commission and the present study. Speaking about "international enforcement," the commission had in mind enforcement by all Contracting States with regard to all vessels under the flag of such States. In this study such a system has been called "mutual enforcement." The term, "international enforcement," has been reserved for enforcement by an international body.¹¹⁷ It is interesting to note that the final result of the activities of the commission was called "Scheme of Joint Enforcement" and not "Scheme of International Enforcement" (emphasis added).

¹¹⁴ See, p. 31 supra.

¹¹⁵ Annual Proceedings, 1962-1963, p. 17.

¹¹⁶ Report of the Second Meeting, May, 1964, p. 5.

¹¹⁷ See, p. 2 supra.

At its second meeting the commission also established a special committee to study the problems involved in the introduction of "international enforcement." A first report was received by the commission at the third meeting. The commission discussed it and gave some instructions to the special committee.¹¹⁸ A second report was submitted to the fourth meeting of the commission.¹¹⁹ This second report included a first Draft Scheme of Joint Enforcement and Draft Instructions to Inspectors. After discussing the report, the commission reached the conclusion that it had insufficient time to consider all the matters requiring detailed examination and that a special meeting was necessary. The first special meeting was held in November 1966. A second special meeting convened immediately prior to the regular fifth meeting of the commission. The result of these two special sessions was a Revised Draft Scheme of Joint Enforcement, in which the former Instructions to Inspectors were included.¹²⁰ This Revised Draft Scheme was discussed during the fifth meeting and, after some amendments, it was adopted and formally recommended to the Contracting Parties to become effective on January 1, 1969.¹²¹

At the following meeting in May, 1968, the commission reaffirmed its recommendation, made arrangements regarding the objections lodged by some countries and accepted the fact that the scheme could not become effective until January 1, 1970.¹²² Finally, at the seventh meeting in May, 1969,

¹¹⁸ Report of the Third Meeting, May, 1965, pp. 4-5.

¹¹⁹ Report of the Fourth Meeting, May, 1966, pp. 6-7.

¹²⁰ Report of the Fifth Meeting, May, 1967, p. 79.

¹²¹ Id., pp. 23-26.

¹²² Report of the Sixth Meeting, May, 1968, p. 8.

the commission maintained its position that the scheme should be put into force on January 1, 1970. However, as some countries had difficulties in obtaining the necessary legal powers, the commission agreed that these countries should notify the secretariat of the date at which they would be able to implement the scheme and that operation of the scheme would be suspended with regard to these States until July 1, 1970.¹²³

The scheme was not recommended unanimously. At its sixth meeting the commission made arrangements with regard to the formal objections to the scheme, lodged under article 8 of the convention.¹²⁴ These arrangements were: (1) that between the U.S.S.R. and other Contracting Parties the provisions of the scheme relating to inspection of gear below deck and of catch would be inoperative; (2) idem, Poland, with regard to inspection of gear and catch below deck; and (3) idem, Sweden, regarding gear and catch below deck until January 1, 1972.¹²⁵ The provisions of the scheme are thus not uniformly applicable. In concluding this discussion of the Scheme of Joint Enforcement, it may be pointed out that the International Commission for the Northwest Atlantic Fisheries - since December 19, 1969, competent to make recommendations on enforcement - is considering the idea of making the scheme compatible with its own regulations.¹²⁶

A second example of a commission which has been involved in changing and/or creating a system of enforcement is the International Whaling Com-

¹²³ Report of the Seventh Meeting, May, 1969, pp. 16-18.

¹²⁴ 486 U.N.T.S. 168.

¹²⁵ See, Report of the Sixth Meeting, May, 1968, p. 8.

¹²⁶ Annual Proceedings, 1967-1968, p. 21.

mission. As has been mentioned above, this commission received its authority for this purpose from a special protocol, signed in 1956 and effective in 1959.¹²⁷ The immediate motive for amendment of the convention was a proposal by Norway, introduced at the seventh meeting of the Whaling Commission. Under this proposal the commission would appoint observers to each factory ship engaged in Antarctic pelagic whaling who should not be of the same nationality as the ship on which they would serve. Observers were to receive instructions of the commission and they were to report to that body.¹²⁸ This is a system of international enforcement. The reason for the Norwegian action can perhaps be found in the aforementioned incident with the "Olympic Challenger". At its seventh meeting the commission came to the conclusion that adoption of the proposal would be ultra vires and that amendment of the convention was necessary.¹²⁹ The commission made a request to this effect and as a result, the protocol was signed. Since three countries - Brazil, Mexico and Panama - were slow in ratifying this protocol, the commission was unable to take further action on the Norwegian proposal during the eighth, ninth and tenth meeting.¹³⁰

At the eleventh meeting in 1959 the commission had for the first time the power to recommend changes in the existing system of enforcement and/or to make proposals for a new system. With regard to the first aspect, the commission took immediate action. It recommended an amendment to paragraph

¹²⁷ See, p. 35 supra.

¹²⁸ Seventh Report of the Commission, 1955-1956, p. 12.

¹²⁹ Id., p. 5 and p. 16.

¹³⁰ See, e.g., Tenth Report of the Commission, 1958-1959, p. 6.

1(a) of the schedule to the Whaling Convention in order to remove the need for inspectors on refrigerated ships.¹³¹ As far as the second aspect was concerned, the Norwegian proposal for neutral observers was once again on the agenda. Ironically, decisive action was impossible because Norway - and the Netherlands - had withdrawn from the convention, effective June 20, 1959. Nevertheless, the commission accepted the principle of neutral observers on factory ships and requested the United Kingdom to invite the Governments concerned, including the Netherlands and Norway, for a conference on this subject.¹³² However, the U.S.S.R. declined to take part in such a conference because it considered any arrangement valueless as long as some countries engaged in pelagic whaling remained outside the convention. In the following two meetings the commission reaffirmed its approval of an international inspection scheme and also renewed its request for a meeting. This meeting was not held because the Netherlands had not yet rejoined the convention.¹³³

Finally, at the fourteenth meeting of the commission in 1962, everything was prepared for action on a proposal of 1955. All whaling countries were again represented in the commission, and a proposal for international enforcement was on the agenda. During this meeting the commissioners of the Antarctic pelagic whaling countries met in three sessions and discussed proposals submitted by the Netherlands, the United Kingdom and the Soviet Union. Not all members of the Whaling Commission took part in these sessions, but only the States engaged in Antarctic pelagic whaling operations. It was decided

¹³¹ Eleventh Report of the Commission, 1959-1960, p. 6.

¹³² Id., p. 7.

¹³³ Thirteenth Report of the Commission, 1961-1962, p. 9.

by these Antarctic pelagic whaling countries to continue the deliberations at a separate conference of the five States concerned. The commission itself under these circumstances took no further action.¹³⁴

The separate conference met from April 29 to May 5, 1963, in Moscow. The discussions were resumed prior to and during the fifteenth meeting of the Commission.¹³⁵ On October 28, 1963, the "Agreement concerning an International Observer Scheme for Factory Ships engaged in pelagic whaling in the Antarctic" was signed in London by Japan, the Netherlands, Norway, the U.S.S.R. and the United Kingdom.¹³⁶ It should be realized that this was a separate agreement and not a recommendation of the Whaling Commission. Not all whaling countries were parties to the agreement, but only those States which operated factory ships in the Antarctic. Therefore, the additional convention deals exclusively with the enforcement of the whaling regulations regarding factory vessels and is not concerned with land stations.

From this procedure it is clear that the role of the International Whaling Commission concerning the Whaling Observer Scheme has been more limited than the role of the North-East Atlantic Fisheries Commission with regard to the Scheme of Joint Enforcement. The latter is a recommendation of the commission and not an independent agreement. The Whaling Commission was actively involved in the process of formulating the Whaling Observer Scheme as a center for discussions, but it did not make a formal recommendation. Therefore, it may be said that the Whaling Commission has not fully used its powers, under the protocol of 1956, to recommend a new system of enforcement. Because it is a separate agreement, and because it is very interesting in its legal approach,

¹³⁴ Fourteenth Report of the Commission, 1962-1963, pp. 19-20.

¹³⁵ Fifteenth Report of the Commission, 1963-1964, p. 20.

¹³⁶ I.L.M. 107 (1964).

the Whaling Observer Scheme will be discussed in a separate paragraph, in which attention will also be paid to subsequent developments in the Whaling Commission.

Para. 5. The International Observer Scheme for Factory Ships Engaged in Pelagic Whaling in the Antarctic

The Scheme - The Whaling Observer Scheme is the only attempt found in the practice of States to establish a system of international enforcement. Unfortunately, this attempt failed to materialize, since the scheme has never entered into force. It will be discussed here, not because of its importance in practice, but because of its unique approach to the problem of enforcement.

Article 1 of the Whaling Observer Scheme provides that "Observers shall be appointed by the International Whaling Commission to expeditions engaged in pelagic whaling in the Antarctic under the flags of member countries. These observers shall be responsible to the Commission ..." Each Party to the scheme nominates to the commission a number of observers which is at most equal to the number of foreign expeditions and at least equal to the number of expeditions under its own flag. From this nomination the commission appoints one observer to each expedition in such a way that the number of observers of each nationality is equal to the number of factory ships of that country. The remaining observers are appointed to such expeditions as the nominating Government requires, provided that not more than one observer of the same nationality serves on any expedition. The requirement that observers shall have a different nationality than the vessel on which they serve, was not explicitly formulated.

Article 2 deals with the rights and functions of observers. As a general rule, it is provided in paragraph 2 that "An observer shall be enabled to observe freely the operations of the expedition to which he is appointed,

so that he may verify the observance of the provisions of the Convention and the Schedule in regard to the taking of whales and their rational utilization." All reports, records and other data, required to be made or kept by the Whaling Convention, must be made available to inspectors who are entitled to all necessary explanations. The master of the expedition has a general obligation to supply observers with all information necessary for the discharge of the observers' functions. However, observers do not have administrative powers with regard to the activities of the expedition, and they have no authority to interfere in any way with those activities. Observers may neither seek nor receive instructions from other sources than the commission. They are required to draw up reports of any infraction. These reports are to be submitted to the master of the expedition for information and comment. With this comment, reports are transmitted to the secretariat of the commission. This procedure must be carried out on an emergency basis if the infraction is serious and not due to excusable error. The remainder of the articles of the Whaling Observer Scheme deals with finance, language, entry into force and duration.

Developments - From this summary it is clear that the Whaling Observer Scheme incorporates a truly international enforcement system. Observers are appointed and instructed by, and they are responsible and report to, an international body: the International Whaling Commission. If this scheme were realized, an international fisheries commission would have been in charge of the enforcement of an international fisheries convention. The International Whaling Commission cannot be blamed for the fact that the scheme was never put into operation. At its fifteenth meeting the commission immediately adopted a resolution designed to let the commission play its part in implementing the scheme. It resolved that "The operation of the observer arrangements shall be the responsibility of a committee consisting

of the Commissioners for the member countries engaged in the Antarctic pelagic whaling."¹³⁷ In the same resolution the commission amended paragraph 1 (a) of the schedule to the convention, by providing that, apart from the existing national observers, such additional observers could be placed on factory ships "as the member countries engaged in the Antarctic pelagic whaling may arrange ..."¹³⁸ Thus the Whaling Commission immediately made the necessary arrangements. Moreover, the States concerned reached agreement on the implementation of the Whaling Observer Scheme.¹³⁹ Prior to the sixteenth meeting of the commission the outlook regarding the implementation of the scheme was good.

Unfortunately, while Japan, the Netherlands, Norway and the United Kingdom formally accepted these implementation rules, the Soviet Union refused to do so without prior revision of the 1962 Quota Agreement under which each of the Antarctic pelagic whaling countries was assigned a certain percentage of the total permitted catch.¹⁴⁰ Since the Soviet Union maintained its position, implementation of the scheme was completely blocked. At the end of the 1965-1966 season the Agreement concerning an Observer Scheme expired without being brought into operation. A resolution, adopted by the Whaling Commission and urging the active pelagic whaling countries to put the scheme into effect, could not prevent this result.¹⁴¹

The International Whaling Commission took up the matter again at its eighteenth meeting in 1966. It decided to set up a special working group

¹³⁷ Fifteenth Report of the Commission, 1963-1964, p. 21.

¹³⁸ Id., p. 21.

¹³⁹ Sixteenth Report of the Commission, 1964-1965, p. 8.

¹⁴⁰ 486 U.N.T.S. 263.

¹⁴¹ Seventeenth Report of the Commission, 1965-1966, p. 21.

to discuss the details of a new observer scheme with regard to all whaling operations, both pelagic and from land stations.¹⁴² Land stations were included on the basis of a British suggestion during the previous meeting.¹⁴³ A first report of the working group was received by the commission at its nineteenth meeting in 1967.¹⁴⁴ The commission accepted this report and invited the countries concerned to establish regional enforcement schemes along the lines of the report of the working group.¹⁴⁵ In this approach five separate agreements would be concluded: (1) for Antarctic pelagic whaling expeditions between Japan, Norway and the U.S.S.R.; (2) for pelagic whaling in the North Pacific between Japan and the U.S.S.R.; (3) for land stations in the North Pacific between Canada, Japan and the United States; (4) for land stations in the southern hemisphere between Australia, South Africa and the United Kingdom; and (5) for the North Atlantic between Canada, Denmark, Iceland and Norway. This procedure makes it clear that the International Whaling Commission is still reluctant to introduce an enforcement system by using its power to make recommendations to the Contracting Parties on methods of inspection.

¹⁴² Eighteenth Report of the Commission, 1966-1967, p. 17.

¹⁴³ Seventeenth Report of the Commission, 1965-1966, p. 22.

¹⁴⁴ Nineteenth Report of the Commission, 1967-1968, pp. 20-22.

¹⁴⁵ Id., p. 15.

Section IV. Final considerations

The problem of enforcing international agreements, in which rules are laid down governing human activities in areas beyond the range of State sovereignty, is limited neither to fishing operations nor to the high seas. An example of a provision for the enforcement of rules concerning activities on the high seas, other than fishing, is article X of the Convention for the Protection of Submarine Cables of 1884.¹⁴⁶ Under article X officers of vessels of war may prepare reports on alleged infractions of the provision of the convention by a vessel other than a warship, "whatever may be the nationality of the inculpatated vessel." This solution to enforcement is close to the one found in systems of mutual enforcement. A similar approach was followed in respect to the enforcement of treaty provisions in Antarctica, which, like the high seas, is another area not subject to State sovereignty. In order to ensure observance to the Antarctic Treaty of 1959,¹⁴⁷ article VII provides that each Contracting Party designates a number of observers who have complete freedom of access at any time to any or all areas of Antarctica.

New forms of human activities on the high seas are rapidly developing. These new activities will require new regulations. The regime applicable to deep-sea mining operations, for instance, is being discussed all over the world. These new regulations will need provisions for their enforcement. The Legal Committee of the Intergovernmental Maritime Consultative Organization, for example, agreed recently that it was necessary to study the question of enforcement of international agreements for the prevention of oil pollution of the sea.¹⁴⁸ It can be concluded that the answers to problems

¹⁴⁶XI Martens Nouveau Recueil, ser. 2, p. 281.

¹⁴⁷402 U.N.T.S. 71.

¹⁴⁸I.M.C.O. Document L.E.G./III/W.P. 22, June 14, 1968, p. 3.

of enforcement, which were found in international fisheries agreements have importance not only for the regulation of high seas fishing operations but also for a great number of related fields.

Criteria - It is submitted that, in general, a system of enforcement may be judged according to two fundamental criteria: (1) whether or not it is effective, and (2) whether or not it applies in a non-discriminatory way. With regard to fisheries agreements, these two standards mean that it should be very difficult for any fishing vessel to violate the applicable regulations without punishment, and that it should not be easier for violating vessels of one nationality to escape detection than for vessels of another nationality. There is a relation between the two criteria because a form of discrimination exists if vessels of a different nationality are subject to different levels of effectiveness in enforcement.

Comparing systems of national enforcement with systems of mutual enforcement on the basis of effectiveness and non-discrimination, it must be concluded that mutual enforcement is preferable. In a system of national enforcement, intensity of inspection with regard to vessels of a certain State depends completely on the effort of that State. Some countries inspect vessels at sea, whereas other Governments limit their activities to inspection in port. The result may be discrimination between fishermen of different nationalities. A system of mutual enforcement, on the other hand, directs the inspection effort of a State to all fishing vessels which must observe the regulation. Thus, a system of mutual enforcement contributes to the elimination of discrimination. This cannot be said of national enforcement. Moreover, the combined inspection efforts of all countries in a system of mutual enforcement are more effective than the combined efforts of all countries in a system of national enforcement. Patrol vessels and inspectors can be used more efficiently if they may inspect all vessels in

a certain area. By pooling the inspection resources, the intensity of inspection per unit of effort increases. Therefore, a more effective system of enforcement can be created with the same resources and the same effort. This preference for mutual enforcement is reflected by the practice of States, since the number of agreements which expressly provide for national enforcement is very small.¹⁴⁹

The choice between mutual enforcement and international enforcement is more difficult. The problem is that practical experience with the latter system is lacking. Generally speaking, international enforcement is a more complicated system than mutual enforcement. It presupposes the existence of an international body and the willingness of States to transfer authority in the field of enforcement to this body. Even if these conditions are met, a delicate balance must be found between the powers of States and the powers of the international fisheries commission. For instance, an international enforcement system in which a fisheries commission also has the power to prosecute offenders is extremely difficult to imagine. Thus, the establishment of a system of international enforcement is more complicated than that of a mutual enforcement system.

Does international enforcement have advantages with regard to effectiveness and non-discrimination which make it worth the extra effort? As far as effectiveness is concerned, there is no reason why international enforcement should be inherently a better system than mutual enforcement. The most important argument in favor of international enforcement is that it further minimizes the dangers of discrimination. It will apply in the same way to all fishing vessels. In a particular fishing situation where there is a serious risk of discrimination, this argument may be decisive. However, it

¹⁴⁹ See, p. 8 supra.

appears that for most types of fisheries mutual enforcement can be quite adequate in this respect, especially if fisheries commissions use their powers to prevent discrimination.

Suggestions - If, generally speaking, a system of mutual enforcement is a satisfactory arrangement, how can such a system be introduced, how can it be made as effective as possible and how can discrimination be avoided?

As far as the first point is concerned, it is clear from the analysis in section III that an international fisheries commission can make an important contribution. The formulation and implementation of the Scheme of Joint Enforcement has been a difficult and time-consuming process, but it is doubtful whether such an arrangement would have been introduced without the action of the North-East Atlantic Fisheries Commission. Although the role of the International Whaling Commission with regard to the Whaling Observer Scheme has been more limited, it nevertheless made important contributions. Moreover, an international enforcement system presupposes an international body, viz., the Whaling Commission. A third example is the scheme for enforcement which is being developed by the International Commission for the Northwest Atlantic Fisheries. It may be concluded that it is desirable to give a fisheries commission the power to make proposals with regard to the establishment of a system of enforcement.

If the agreement itself outlines a system of enforcement, a provision to that effect is also useful. The detailed character of the rules of the Scheme of Joint Enforcement shows that it is hardly possible to include all aspects in the convention. The commission can work out the details. This procedure has the advantage that a commission can first formulate its regulations and then adapt the provisions on enforcement, as closely as possible, to these regulations and their problems in practice.

It is desirable that the power of the commission to make recommendations concerning the system of enforcement is included in the original convention.

Experience with the International Whaling Convention of 1946 and with the International Convention for the Northwest Atlantic Fisheries of 1949 indicates that subsequent amendment of the convention is a difficult procedure.

The effectiveness of a system of mutual enforcement depends on many factors. Some of these factors are legal; others have nothing to do with legal considerations. As far as the latter category is concerned, the technical characteristics of each type of fishery are important elements with regard to the effectiveness of the enforcement of regulations applicable to that fishery. For instance, the introduction in some types of fishing operations of mothership vessels makes effective enforcement of regulations with regard to a minimum size of fish difficult since the catch is processed as soon as possible. Exchange of observers on the mothership vessels might be a solution for this problem. It may be said that fishing operations are a difficult object of effective enforcement, since they are carried out by rapidly moving objects in extensive areas of the sea. Inspection of fixed installations is definitely easier.

A first legal factor which influences effectiveness of enforcement is that some types of regulations can be enforced more easily than others. If the only limitation imposed upon the fishery is an annual catch quota, enforcement can be realized by inspection in port and by preventing the departure of vessels once the limit has been reached. On the other hand, the enforcement of provisions which prohibit fishing vessels from using certain equipment must be carried out by inspection at sea. Therefore, aspects of enforcement must be included in the formulation of regulations for maritime fishing operations. It is useless to draft rules which cannot be enforced.

A second group of legal factors influencing effectiveness are, of course, the provisions on enforcement of the agreement under consideration.

In this connection a few remarks must be made concerning mutual enforcement. It is remarkable that no agreement adopts standards for the intensity of inspection. States must appoint inspectors, but nowhere has provision been made for a minimum number of inspectors to be appointed or to be maintained at sea or in port. It is difficult to find a way to measure intensity of inspection. The term refers not only to the number of inspectors but also to the size of the fishing fleet under the flag of the appointing State. Nevertheless, it is possible to formulate a standard, e.g., the inspection hours/fishing hours ratio of each country. The North-East Atlantic Fisheries Commission discussed this problem and decided to employ the number of registered fishing vessels in a country as a basis for evaluating the inspection effort of that country.¹⁵⁰ Discussing the intensity of inspection, however, is something else than formally agreeing upon a minimum level of intensity.

A second remark concerns the powers of inspectors before the discovery of an infraction. Most agreements require inspectors to have a reason to assume that a vessel has violated the convention in order to entitle him to board this vessel. It is accepted that fishermen must have protection against vexatious inspection. A provision that inspectors must act in such a way that vessels suffer a minimum of inconvenience is desirable, especially if the vessels are actually engaged in fishing operations. However, the aforementioned clause protects fishermen not only against unreasonable, but also against reasonable inspection. The provision prevents an inspector from inspecting all vessels in a certain area. Therefore, it adversely affects the efficiency of inspection operations. It may be impossible to assume that an infraction has occurred simply by looking at a fishing vessel

¹⁵⁰ See, e.g., Report of the Sixth Meeting, May, 1968, p. 17.

from a distance. For the discovery of some types of infractions, e.g., violations of minimum mesh size regulations, inspection on the spot is necessary.

A third remark concerns the powers of inspectors after the discovery of an infraction. State practice takes an extreme position: either the inspector may seize vessels and arrest persons or he may only draw up a report. A more realistic approach would be to empower inspectors to seize those objects necessary for establishing the offense in court. Such a provision, combined with the presently adopted system of reports and with provisions on the evidential value of reports of foreign officers, would be a satisfactory arrangement in a system of mutual enforcement.

A final observation concerns the coordination of different systems of enforcement. It is confusing if a fishing vessel is subject at the same time to different systems of enforcement. Such a situation exists, for example, in the North Atlantic Ocean. Vessels fishing in this area are subject: (1) to enforcement under article 9 of the Conduct Convention of 1967 with regard to the way in which they carry out fishing operations, and (2) to the Scheme of Joint Enforcement with regard to the minimum mesh and fish size regulations of the North-East Atlantic Fisheries Commission. It has been discussed that there are differences between these two systems of enforcement. This situation creates practical problems, and should have been avoided by a more careful coordination.

What can fisheries commissions do with regard to these problems? It has been advocated that commissions be empowered to formulate enforcement arrangements. Therefore, if a commission makes recommendations on the regulation of fisheries, it should include the aspect of enforcement. In formulating enforcement schemes, the commission should make arrangements regarding the intensity of inspection and with regard to the powers of inspectors to

seize those pieces of equipment necessary as evidence of the offense. The Commission should omit the requirement that an inspector must have reason to assume that an infraction has occurred when boarding a vessel.

It is even more important that the commission is involved not only in creating the legal framework of enforcement, but also in the practical aspects of inspection. Commissions have not hesitated to remind States of their obligations with regard to enforcement. This aspect of the activities of commissions becomes even more important if specific rules are laid down regarding the intensity of inspection. A provision that States have to report on their enforcement activities is in this respect a necessity. A commission should make decisions with regard to form and content of these reports.

Perhaps the most important power which should be given to commissions in this respect is the authority to make recommendations on the coordination of the enforcement effort of all countries in a system of mutual enforcement. Only an international body can make the necessary arrangements in this respect. Mutual enforcement is more effective than national enforcement because it makes possible the pooling of resources available for inspection. This advantage will fail to materialize if coordination of the activities of each State cannot be achieved.

An active role of a fisheries commission with respect to effectiveness is also a guarantee against discrimination. If a commission makes recommendations on the coordination and the intensity of inspection, one of the results will be a more equal level of inspection with regard to fishermen of all nationalities. Moreover, there are some special steps which a commission can take in order to prevent discrimination. One important action concerns the harmonization of national approaches to enforcement. Fisheries commissions realize that here a problem exists. The exchange of inspectors by the International Commission for the Northwest Atlantic Fisheries, is one

attempt to solve the problem. Recommendation of schemes of equivalent penalties cover another aspect of the question. It would be advisable if commissions had in this respect more extensive powers. Another improvement from the point of view of non-discrimination can be made in the system of enforcement reports by the States - members of the commission. It would be useful if a copy of the report of each individual inspection would be sent to the commission by the inspecting State. The master of the inspected vessel should be entitled to attach his comment to the report. If such a provision were combined with the annual reports on enforcement by Contracting Parties, the commission would be in a position to analyze all aspects of the enforcement procedure: inspection, discovery of an infraction, the character of the violation, and punitive measures. Under such a system it would be possible for a commission to discover differences in the treatment of fishermen which are based on nationality. A provision under which fishermen with complaints concerning discrimination would have direct access to the commission, should be given serious consideration.

In the Introduction to this study it was said that effective regulation of high seas fishing operations by international agreement is a matter of increasing urgency. The same remark might be made with regard to the creation of effective, non-discriminatory systems of enforcement. It is hoped that States are willing to abandon for this purpose old traditional concepts before the forces of necessity compel them to do so.

Kingston, R.I. - May 26, 1970

