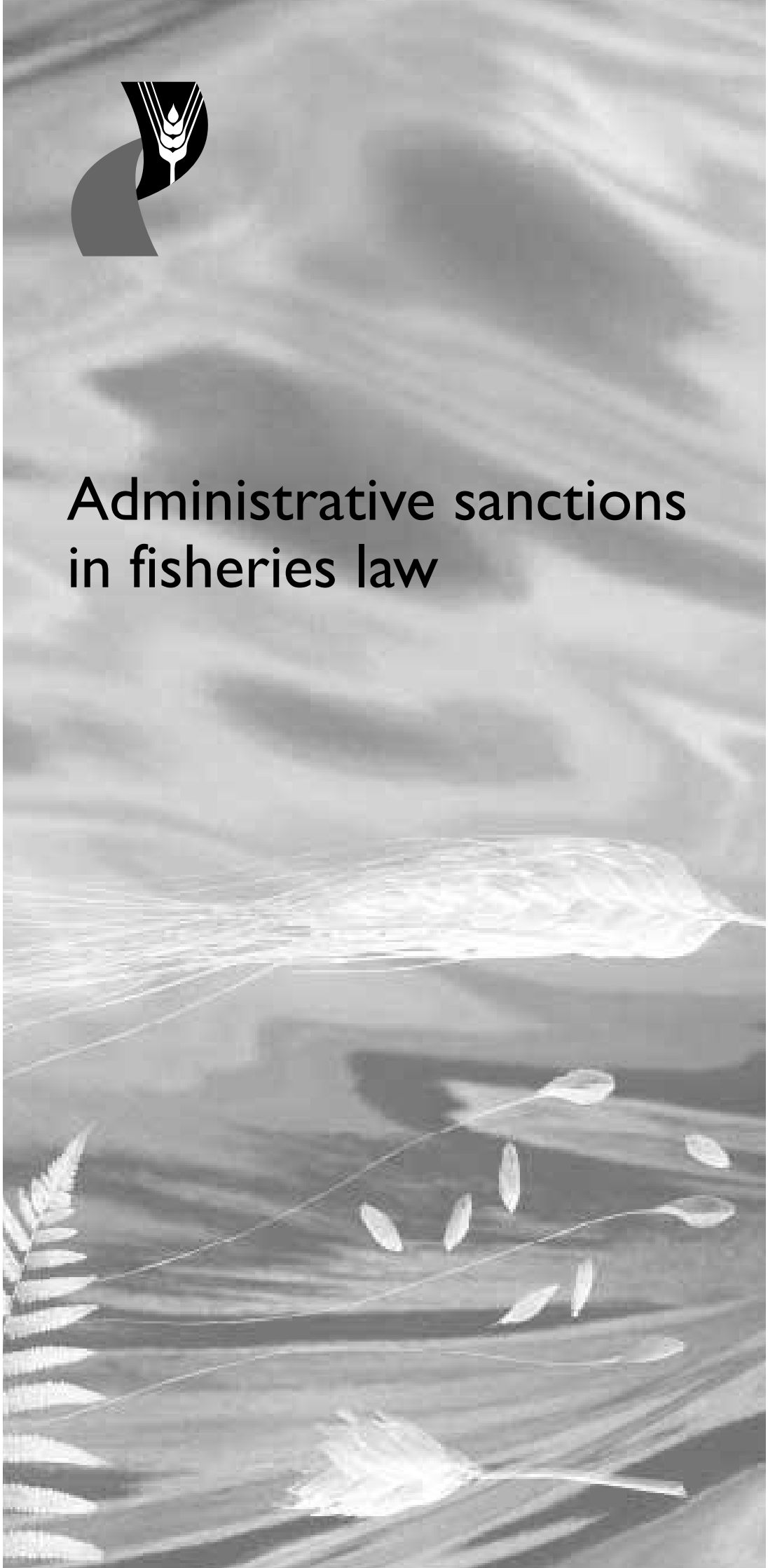

ISSN 1014-6679

FAO LEGISLATIVE STUDY

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Administrative sanctions in fisheries law

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FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS
Rome, 2003

ISBN 92-5-105034-1

PREFACE

This study draws on the contributions of a number of authors from differing legal systems who have brought together a diverse range of materials and sources to bring to life an increasingly important aspect of fisheries law. The immediate inspiration for the timing of this study can be found in two related sources. First, the paper presented by Blaise Kuemlangan on National Legislative Options to Combat IUU Fishing, which was published in the proceedings of the Expert Consultation on Illegal, Unreported and Unregulated Fishing organized by the Government of Australia in cooperation with FAO and held in Sydney in May 2000, which canvassed the possibility of introducing administrative penalties along the lines that had been adopted in the United States. This original idea found its reflection in the International Plan of Action to Prevent Deter and Eliminate Illegal, Unreported and Unregulated Fishing, which was adopted by FAO in 2001. This plan called *inter alia* for States to consider the "*adoption of a civil sanction regime based on an administrative penalty scheme*" (paragraph 21).

Since then, the subject has received further impetus from the European Commission which has suggested to members of the European Union that they should consider the possibility of adopting such a scheme of administrative penalties in their national legislation.

The study is intended to assist States in identifying the kinds of issues they need to take into account when adopting such a scheme. It is expected that it will be especially valuable to developing States seeking to adopt a cost effective means of dealing with IUU fishing, but which nonetheless wish to ensure that basic individual rights of the accused are protected.

Many individuals, to whom we owe our gratitude, contributed in one way or another to coordinating and putting this study together. However, special thanks must go to Blaise Kuemlangan of the Development Law Service who conceptualized and initiated the study, provided the initial background materials and coordinated the work of the authors. Deep appreciation goes also to William Edeson, former FAO Senior Legal Officer who kindly edited the final product.

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INTRODUCTION

It is the duty of coastal States to ensure compliance with their fisheries laws and regulations by any persons or vessels operating within the waters under their sovereignty or jurisdiction and that of flag States to ensure that their flag vessels abide by applicable international conservation and management measures on the high seas. Effective law enforcement is critical if fisheries management objectives are to be achieved. To this end, States are required to establish appropriate measures and procedures to sanction any infringement of their fisheries laws and regulations. Experience shows that laws and regulations are poorly enforced in many parts of the world, thereby undermining the effectiveness of fisheries management. Thus, one may question the efficiency of criminal enforcement systems and wonder if the use of administrative sanctions in fisheries law might constitute a viable enforcement alternative. While the debate on this issue has so far been mainly confined to a few common law States, particularly in the United States of America, it seems that there is a growing interest in the issue. Section 21 of the International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing (IPOA-IUU)[1] provides that States have the responsibilities, *inter alia*, to: "ensure that sanctions for IUU fishing by vessels and, to the greatest extent possible, nationals under its jurisdiction are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing. This may include *the adoption of a civil sanction regime based on an administrative penalty scheme*[2]." In a recent report on the monitoring of the implementation of the common fishery policy[3], the Commission of the European Union observed that "Member States with an administrative sanctioning system in place seem to have reached, on average, results more proportionate to the offences committed."

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1 The IPOA-IUU was adopted by consensus at the twenty-fourth session of the Committee on Fisheries (COFI) on 2 March 2001 and endorsed by the hundred and twentieth session of the FAO Council on 23 June 2001.

2 Emphasis added.

3 See: "Report on the Monitoring of the Implementation of the Common Fisheries Policy", Commission of the European Communities, COM(2001) 526 final, 28 September 2001, page 19.

Furthermore, the preparatory document for the revision of the Common Fisheries Policy[4] emphasizes the need to "explore ways of improving the dissuasiveness of penalties for infringement, including "administrative" penalties such as loss of fishing quota, withdrawal of licences or repayment of financial aid for vessels which infringe fisheries regulations"[5].

What is understood by administrative penalties or sanctions is likely to differ, to some extent, according to whether the legal system in which it is to be applied is of common or civil law tradition[6]. However, in both legal systems, administrative sanctions are characterized by two major features. First, the power to impose such sanctions is vested in an administrative agency (not a judicial body) being part of the executive branch of government or an independent institution. Second, sanctions are imposed outside the judicial process. Hence, for the purpose of this paper, the concept of *administrative sanctions* refers to sanctions imposed by an administrative agency or an

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4 See: "Green Paper on the Future of the Common Fisheries Policy", Commission of the European Communities, COM(2001) 135 final, 20 March 2001.

5 *Ibid*, page 31.

6 In France, which is a country of the civil law tradition, the legal nature of administrative sanctions has, over the years, been debated at length in the doctrine and has been abundantly commented in court decisions both by the State Counsel (highest court of administrative law) and the Constitutional Counsel. No firmly established legal theory has yet been agreed upon. Note that the State Counsel mentioned that "la notion de sanction administrative compte parmi les moins assurées du droit administratif, alors qu'elle conditionne aujourd'hui l'application d'un regime juridique spécifique" (in the study on "les pouvoirs de l'administration dans le domaine des sanctions" documentation française 1995). When applied by an executive agency over its agents, administrative sanctions are widely regarded as disciplinary measures to reprimand a wrongdoing committed by an agent. Imposition of administrative sanctions against the public at large (e.g. for traffic violations) led to the development of a new theory enhancing the similarity of administrative and criminal sanctions and concluding that administrative sanctions that could not be assimilated to a disciplinary measure were of a criminal nature. Courts have invoked two chief legal grounds to justify the imposition of administrative sanctions by an executive agency or an independent institution. First, they have upheld the view of the doctrine that executive agencies have a legitimate right, derived from the notion of hierarchical power, to discipline their agents for any wrongdoing. Second, the power of executive agencies to impose administrative sanctions to any individuals (as opposed to a specified category or categories of individuals) is based on the notion of "prerogative of public power" inherent to the executive function of the administration, particularly to the power to make regulations. By extension, this reasoning applies to independent institutions responsible for a "mission of public service". Note that the concept of "public service" is a central issue of French administrative law.

independent institution for breach of a regulation or rule established by that agency or institution or enacted by parliament without intervention by a court. As a consequence, the regulator is not required to prove a matter to the criminal standard[7] and is not constrained by criminal court procedures. It thus provides for an alternative enforcement mechanism that can be more cost-effective, timely and practical.

Administrative sanctions may take different forms. They can be a warning, a suspension or revocation of an authorization, the loss of a fishing quota, a temporary ineligibility to apply for an authorization, the confiscation of gear, equipment, vessel, or catches, a monetary penalty, the closure of fishing facilities, the exercise of summary powers, or the repayment of financial aid for vessels which infringe fisheries regulations.

Use of administrative sanctions as an alternative enforcement mechanism is not a novel idea as it has long been used in other areas of the law, notably in customs, immigration, finance, trade and traffic violations. In Papua New Guinea, for instance, the Civil Administration Department and the Migration Office of the Department of Foreign Affairs and Trade are entitled to use administrative sanctions under the Aviation Act and the Migration Act respectively. It is also widely used in environmental and natural resources laws (e.g. forestry, water). In France and in most francophone African countries, compounding of offences by the administrative authority responsible for forestry is a standard provision in forestry law. The United States Federal Government makes extensive use of administrative enforcement systems conferring upon administrative agencies the authority to enforce statutes and regulations imposing administrative sanctions for violations. Fisheries as well as other economic sectors subject to federal management follow this model. For example, the Federal Drug Administration is authorized to impose administrative sanctions under the Food, Drug and Cosmetic Act.

The objective of this paper is to review fisheries legislation of countries of both the civil and common law tradition to determine the extent to which administrative enforcement systems are currently used in fisheries law and to assess whether such systems may be regarded as a viable alternative or necessary complement to criminal law enforcement. To this end, this

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[7] In criminal proceedings, it is generally the case that the accused's guilt must be established « beyond a reasonable doubt », which means that facts proven must, by virtue of their probative force, establish guilt.

document identifies and discusses the legal implications that use of administration sanctions may have. Further, it describes the various types of administrative sanctions, presents the advantage of using such a system and identifies the common features of existing systems. Finally, it attempts to provide some guidelines for the introduction of an administrative enforcement system in fisheries law.

1. CONSTITUTIONAL ISSUES RELATED TO THE USE OF ADMINISTRATIVE SANCTIONS

The examples of both the United States and France, which represent countries of common and civil law tradition respectively, have been studied to identify and analyze the principal constitutional issues raised by the use of administrative sanctions by administrative agencies,

1.1 Delegation and separation of powers

The first objection that was raised against the use of administrative sanctions by administrative agencies was that imposition of sanctions by the executive was contrary to the principle of separation of powers. According to this concept, the government is divided into three branches: the legislative, which is empowered to make laws, the executive, which is required to implement the laws, and the judicial, which is charged with interpreting the laws and adjudicating disputes under the laws. Under this constitutional doctrine, one branch is in principle not permitted to encroach on the domain or exercise the powers of another branch. Representative democracies such as the United States and France have given this concept a constitutional value[8]. Contrary to the idea conveyed by this concept, in reality there is no strict division of powers. Even the original wording of both the Constitutions of the United States and France[9] blends the powers among the three branches of government. For instance, the President of the United States takes part in the legislative function by proposing laws and by having a veto power over laws enacted by Congress[10]. Similarly, the French Prime Minister is entitled to participate in the legislative function through the proposition of laws[11]. It is therefore accepted that the principle of separation of powers reflects more a general governmental system than an intractable form of organization. Then, it is the function of the constitutional courts[12] to determine the degree of flexibility that can be allowed in the application of this principle.

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8 Article 16 of the Declaration of the Human and Citizen Rights of 26 August 1789 stipulates that "Toute Société dans laquelle la garantie des Droits n'est pas assurée, ni la separation des Pouvoirs déterminée, n'a point de Constitution (emphasis added)." The constitutional value of these rights has been recognized by the preamble of the French Constitution of 1958.

9 See U.S. Constitution of 1787 and French Constitution of 1958.

10 See Section 7 of the U.S. Constitution.

11 See Article 39 of the French Constitution of 1958.

12 For example, the Supreme Court in the United States and the Constitutional Counsel in France.

Delegation of legislative power

Separation of powers is a basic principle of the U.S. Constitution, but up to 1935, the Supreme Court had never held that Congress had violated this principle by delegating its power to the executive branch. The reasons for legislative delegation are well understood. When adopting a legislative programmeme, Congress cannot foresee all the problems that those administering the programmeme will encounter or the adjustments that will be needed as the programmeme develops. As early as 1825 Chief Justice Marshall, in *Wayman v. Southard*, held that officials administering a general statutory programme must be permitted to "fill up the details" [13]. In other words, he recognized that the executive should be vested with regulatory powers to implement the law. In 1935, against the backdrop of the Great Depression, the Supreme Court, in the *Panama Refining Co. v. Ryan*, 293 U.S. 388, accepted the general delegation of power in the National Industry Recovery Act (Congress to the President and the President to the Secretary of Interior), but struck down the particular delegation as one which was excessive because the Court believed insufficient standards were included in the law to govern those actions entrusted in the President. Shortly after, the *Panama Refining* ruling, the Supreme Court in *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), declared unconstitutional another major feature of the National Industry Recovery Act[14] also on grounds of unconstitutional delegation of legislative power. The following year legislation regulating prices and labor relations in the bituminous coal industry was ruled unconstitutional on the same grounds in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). Since then, no federal delegation of legislative power has been found unconstitutional by the Supreme Court, although in the last decades the delegations have grown increasingly broad.

Delegation of judicial power

In the United States, Congress is vested with legislative power through the Constitution, and Congress can delegate this power. However, in the creation of administrative agencies, not only have the agencies been empowered with legislative authority that has been delegated to them by Congress, but the agencies have also been given judicial powers by Congress.

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[13] See the Oxford Companion to the Supreme Court of the United States at p. 619. Oxford University Press (1992).

[14] Industry codes of fair competition.

This raises the question as to whether these judicial powers, which Congress itself does not possess, can be delegated to governmental agencies[15].

In a unanimous decision in 1935 regarding the powers of the Federal Trade Commission, a federal agency, the Supreme Court held, to the extent that the agency exercises any executive function (as distinguished from executive power in the constitutional sense), it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers or as an agency of the legislative or judicial departments of the government. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Without this recognition, the existence of administrative agencies would be unconstitutional, as they exercise many types of powers.

Congress has also determined that administrative agencies can mete out some forms of sanctions. Agencies can impose and enforce administrative fines[16]. In *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909), the Court recognized that it was already commonplace in the early twentieth century for agencies to exercise judicial type powers in imposing appropriate monetary penalties and enforcing such penalties. In upholding the agency's actions, where Congress had authorized penalties by statute, the Court reasoned, enforcement and collection of the penalty was at least as much of an executive as a judicial function. The powers exercised by administrative agencies are typically seen as something less than full judicial authority and are often called quasi-judicial powers.

Congress can determine, through legislation, how to categorize conduct[17] which violates the legislation. For example, Congress can make it a crime, with criminal sanctions, to violate administrative regulations. In that instance, however, adjudicating such violations would not be within the jurisdiction of an administrative agency. There are some recognized limits on the delegation of the judicial function to administrative agencies. Congress may not delegate

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15 See *United States v. Grimaud*, 220 U.S. 506 (1911)

16 Here, fines refer to an amount of money paid as punishment, not just the amount equal to the value of the illegally taken product.

17 Categorizing conduct is a significant, if inexact, matter. How a society collectively thinks about a violation (e.g. is it a moral wrong or a regulatory offence – *malum prohibitum or malum in se*) is often responsible for whether that type of conduct is treated as a crime, a civil offence, an administrative or regulatory violation, some hybrid with qualities of several categories or something else. For a discussion see Berg, Astrid, implementing and Enforcing European Fisheries Law, at pp. 113-114, Kluwer Law International (2000).

to executive officers the power to prescribe a criminal penalty or to define the scope of its application[18]. These powers are left to district court judges appointed under the authority of the Constitution.

In France, it was only in 1989 that the Constitutional Counsel had to determine whether or not the imposition of sanctions by an administrative agency violated the principle of separation of powers recognized by Article 16 of the Declaration of Human and Citizen Rights of 1789[19]. In the *Audiovisual High Counsel* case (Decision 88-248 DC of 17 January 1989), the Constitutional Counsel held that the imposition of sanctions by an administrative agency did not violate the principle of separation of powers provided that such power was exercised by an independent administrative agency and in the framework of an administrative authorization. A few months later, the Constitutional Counsel broadened the scope of the delegation of judicial power to an administrative agency by recognizing that a power of sanction could be vested in any administrative agency exercising prerogatives of public power[20] (Decision 89-260 DC of 28 July 1989 regarding the *Commission des operations de bourse*). However, it set two limits on the delegation of judicial power to administrative agencies. First, administrative agencies are not allowed to inflict any sanction resulting in deprivation of liberty (imprisonment). Second, Parliament is required to provide for sufficient safeguards in the law to ensure that sanctions imposed by an administrative agency do not jeopardize or encroach on the rights and liberties guaranteed by the Constitution.

The Constitution of 1958 clearly delineates the scope of the laws enacted by Parliament and that of the regulations adopted by the executive. To this effect, it contains two separate articles: Article 34 which lists the issues and topics that must be determined by law; and Article 37 which provides that all issues not expressly mentioned in Article 34 are to be dealt with through regulations. According to the provisions of Article 34, offences and related sanctions must be created by law. In French criminal law, offences are divided into three categories according to their degree of seriousness,

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18 See Pres. Comm. on Admin. Management at p. 343, Brownlow ed. (1937).

19 See footnote 9 above.

20 In French law, the term "public power" (*puissance publique*) means all powers vested in the State and other public entities. Here prerogatives of public power refer to the specific powers (normally entrusted in the State) that have been delegated to the "Commission des operations de bourse" for the performance of its duties.

namely, crimes, délits and contraventions[21]. It should be noted that the wording of Article 34 mentions only the first two categories of offences (offences and délits), which are the most serious ones, leaving out contraventions. It has been inferred from the exclusion of contraventions from the scope of Article 34 that contraventions and their sanctions could be prescribed by regulations. Although this interpretation may, from a legal viewpoint, seem to be in conflict with the *nullum crimen nulla poena sine lege* principle (principe de légalité des délits et des peines)[22], it has been widely accepted in practice. Like in the U.S., Parliament is responsible for determining through legislation whether a conduct should qualify as a crime, a délit or a contravention based primarily on how the society as a whole perceives a violation.

1.2 Protection of constitutional rights

Questions have been raised as to whether the use of administrative sanctions converts an otherwise criminal matter into a civil matter. Legal implications are significant because if a sanction is considered criminal, procedural and other legal protection must then be accorded to defendants. In fact, defendants have claimed in the U.S. that making a penalty civil is just an attempt to avoid protections which would otherwise be available to them. Therefore, the important question here is not whether the matter is civil or criminal but whether the persons who are dealt with by law enforcement agencies are accorded their constitutional rights. Protection of constitutional rights was clearly the motive that led the French Constitutional Counsel to restrict the delegation of judicial power to administrative agencies in the Commission des operations de bourse case (see section 1.1.1 above).

Due process

The U.S. Constitution guarantees no deprivation of life, liberty, or property without due process of law[23]. In the administrative law context, these requirements take the form of notice and a hearing. In adjudications where a rule is being enforced against an individual, and the essence is a factual

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21 Contraventions are the less serious criminal offences. They are similar to strict liability offences in common law, meaning that proving intent of the violator is not necessary. The mere establishment of a violation is therefore sufficient to determine liability and for the imposition of a sanction.

22 In substance, this principle means that there is no offence without a law and no sanction without a law.

23 Fifth Amendment of the U.S. Constitution.

dispute, rather than the development of a rule of general application, due process has been interpreted by the Supreme Court to require a hearing, in other words, the right to present evidence and argument (like a trial), rather than written submissions alone. In *Londoner v. Denver*, 210 U.S. 373 (1908), the Court held that due process required that the person charged should have the right to support his allegations by argument, however brief, and, if need be, by proof, however informal, rather than be limited to the right to file a complaint and written objections, as the local procedure provided.

Although most hearings are held before the agency acts, there is no absolute requirement that a hearing be held at any particular time. The Court had decided that the demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective. *Opp. Cotton Mills v. Administrator*, 312 U.S. 126 (1941). This principle has been modified as entitlement programmes have grown in the last few decades, particularly in welfare benefits programmes where the government supplies the recipient the basics of life, such as food and shelter. In these instances, where the government is looking to terminate benefits, the Court has held that the timing of an opportunity for a hearing to contest the termination of benefits must be held before the benefits are cut-off, as the consequences of wrongful termination are so significant. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In true emergency situations, summary seizures by the government have been permitted, with an opportunity to be heard occurring after the fact. These emergencies must be determined to be necessary to secure an important governmental or general public interest; there has been a special need for very prompt action, and a responsible governmental official, working under narrowly drawn statutory authority, has determined it was necessary and justified in a particular instance.

Extension of criminal law principles of constitutional value to administrative sanctions

In France, the Constitutional Counsel held that the *ex post facto* principle[24] (*le principe de non-retroactivité des sanctions pénales*), embedded in Article 8 of the Declaration of Human and Citizen Rights of 1789[25], does not apply only to sanctions imposed by a criminal court but also to all punitive sanctions irrespective of the nature of the authority empowered to inflict such sanctions, thus including administrative agencies (Decision 155 DC of 30 December 1982). Likewise, the principle of proportionality applicable to criminal sanctions (*le principe de proportionnalité des peines*)[26], whereby a criminal sanction should be commensurate to the violation committed, is also applicable to administrative sanctions; this led the Constitutional Counsel to strike down the provision of a law providing for excessive monetary fines (Decision 237 DC of 30 December 1987). In the *Audiovisual High Counsel* case, the Constitutional Counsel went further by proclaiming that all constitutional principles applicable to criminal sanctions had also to apply to administrative sanctions. As a result, in addition to the *ex post facto* and proportionality principles, the *nullum crimen nulla poena sine lege* principle (*le principe de légalité des délits et des peines*) and the principle of compliance with defence rights[27] (le principe du respect des droits de la defense) in criminal proceedings apply to administrative sanctions.

While the Seventh Amendment of the U.S. Constitution guarantees the right of trial by jury "in Suits at common law, where the value in controversy shall exceed twenty dollars", the Supreme Court held in *Atlas Roofing Co. v.*

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24 This principle refers to *ex post facto* law that is a law which aggravates a crime or makes it greater than when it was committed. It is unconstitutional to apply the provisions of such a law to a fact or an act that occurred or was committed prior to the enactment of that law. However, a more lenient law enacted after the commission of an act or the occurrence of a fact can benefit the violator provided that no judgement has been passed.

25 This article reads as follows : « La Loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une Loi établie et promulguée antérieurement au délit, et légalement appliquée. »

26 This principle is mentioned in Article 8 of the Declaration of Human and Citizen Rights of 1789. Note that the Eighth Amendment of the U.S. Constitution requires that sanctions must be commensurate to the violation committed. It states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

27 In French law, the term "defense rights" refers to the prerogatives conferred upon the accused to ensure that he can assure his defence effectively in criminal proceedings.

Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), that it would be wrong to infer from this Amendment that the U.S. Constitution guarantees a right to a jury trial in the U.S. administrative system. The Court reasoned that agency adjudications should not be viewed as a creature of common law but of statutory creation, for which it felt Congress has complete control. If the government was involved in enforcing some statutorily created obligation, then Congress could delegate their adjudication to an administrative agency, making a jury trial incompatible, without violating the Seventh Amendment's requirement that a jury trial is to be preserved in suits at common law.

In a decision in 1982, the French Constitutional Counsel held that no administrative sanction in the form of a monetary penalty can be made cumulatively with a criminal sanction (Decision 82-143 DC of 30 July 1982). This rule, in line with the principle *ne bis in idem*[28], was given a constitutional value. Of interest is the fact that, hitherto, the non-cumulative rule applies only to administrative monetary penalties. There is no guarantee that, in the future, the same rule will apply to other types of administrative sanctions. For instance, the French basic marine fisheries law of 1852 provides that in addition to the criminal sanctions provided for the violation of any provision of articles 6, 7 and 8, the State representative in the region may suspend fishing licences and, in general, all fishing authorizations granted under national or community fisheries law (Article 13).

The principle *ne bis in idem* is a cornerstone of many countries' criminal systems. Its importance has been recognized constitutionally in representative democracies such as the U.S. and India, to name but two. The Fifth Amendment of the U.S. Constitution protects against multiple punishments for the same offence by providing that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb". Likewise, the Indian Constitution of 1997 stipulates that "No person shall be prosecuted and punished for the same offence more than once" (article 20(2)).

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[28] This principle provides that no one can be punished twice for the same action.

2. USE OF ADMINISTRATIVE SANCTIONS IN FISHERIES LAW

2.1 Review of fisheries legislation

Study of selected fisheries legislation reveals that a substantial number of fisheries legislation provides for administrative sanctions and out-of-court settlement[29].

2.1.1 Legislation of European countries

In the European Union (EU), some member States treat violations of fisheries law as criminal offences and deal with them under the criminal law. Examples are Belgium, Finland, Sweden, the Netherlands, Ireland and the United Kingdom. Other member States rely on a system of administrative sanctions as well, in order to supplement their criminal law enforcement mechanisms.

Spain, having the largest commercial fishing fleet in the EU and globally involved in many fisheries, has a sanctioning system in place that predominantly relies on administrative sanctions. Traditionally, the country has a decentralized government with local autonomy. Competence is divided between the central state authorities and Autonomous Communities, which division also applies to the enforcement and control responsibilities in the fisheries sector, too. Recently, in 2001, the Spanish government adopted the *Ley de Pesca Marítima del Estado*[30], which aims to systemize the existing web of legislation. The new law establishes the sanctioning system for marine fishing matters, the enforcement and control of which is retained by the competent bodies of the Ministry of Agriculture, Fisheries and Food. In addition, it establishes the basic principles of the sanctioning system for the Autonomous Communities. The latter have the exclusive competence to

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[29] Sources of information that were used to review fisheries legislation in both common and civil law countries include the two papers commissioned by FAO for the preparation of this document and the research made by the authors on the FAO legislative website (FAOLEX) http://faolex.fao.org/faolex. See: Spreij, M., "Administrative monetary penalties in fisheries law: civil law countries" FAO (2002); and Kuruc, M. "Experiences with the Civil Administrative Sanction Process in Fisheries Enforcement" FAO (2002).

[30] *Ley* No. 3/2001 of 26 March 2001

develop and implement legislation that regulates the fisheries sector and fishery products[31].

The Fisheries Law confirms that any action or infringement under the law is of an administrative nature[32]. Sanctions fall into different categories and range from warnings and fines to confiscation of the vessel. The infringements are categorized into minor, serious and very serious. As to marine fishing matters, special government officials (*Delegados del Gobierno*) who are stationed in the coastal Autonomous Communities impose sanctions for minor infringements (fines ranging from 60 to 300 Euro). The General Director of Fisheries Resources deals with serious infringements (fines ranging from 301 to 60 000 Euro), while very serious infringements are handled by the General Secretary of Fisheries (fines not exceeding 150 000 Euro) or the Minister of Agriculture (fines above 150 000 Euro). Besides fines, the Fisheries Law authorizes the competent authority to impose additional sanctions for both serious and very serious infringements. It includes: making the offender ineligible to fish for a specified period; suspension, withdrawal or non-renewal of a fishing authorization; and seizure of fishing gear or catch or both. The Fisheries Law provides, under certain conditions, for an appeal procedure to the Minister of Agriculture.

Likewise, **Portugal** applies an administrative sanction system. In 1998, the legal framework governing the fisheries sector was fundamentally amended in order to extend the number of fishery related infringements and to elevate the level of monetary penalties[33]. Besides fines, a wide range of additional sanctions may be imposed, such as confiscation of catches and gear and suspension of licences. However, in case of voluntary payment of the fine, no additional sanctions can be levied. Where infringements are committed in the Portuguese territorial waters, the harbor authorities are competent to issue sanctions. In all other cases, the power to do so lies with the Fisheries Inspectorate (*Inspecção-Geral das Pescas*). The fisheries law sums up the elements to take into consideration when determining the level of the fine, such as the seriousness of the infringement, the economic benefits derived

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31 They are also competent with respect to fishing activities taking place in internal waters, that is in waters on the landward side of the baselines from which the territorial sea is measured (Article 8 of the UN Convention on the Law of the Sea).

32 The Fisheries Law refers to « infracciones administrativas » or administrative infringements (See Chapter I of Title I).

33 See Decree-Law No. 278/87 establishing the Legal Framework Governing Fishing and Mariculture Activities in Portuguese Territorial Waters of 7 July 1987 and Decree-Law No. 383/98 amending Decree-Law No. 278/87 of 27 November 1998.

from it, and the previous record of the offender. Reportedly, decisions of the harbor authorities may be appealed to the Maritime Court (*Tribunal Maritimo de Lisboa*) and decisions of the Fisheries Inspectorate to the general courts (*Tribunais de Comarca*). The procedure in these courts follows the general rules of criminal procedure[34].

Traditionally, **Germany**, being a federal state, has an administrative method of sanctioning fisheries infringements. Offences are listed in the Marine Fisheries Act of 1984, as amended, and a recent Ordinance on fines of 1998, as amended[35]. Sanctions include fines and additional penalties such as the confiscation of catches and gear. Also in Germany, administrative proceedings are regulated by separate legislation[36]. Local administrative courts handle the case if the alleged offender contests having committed the offence or contests the fine.

Reportedly, administrative penalties for minor infringements are applied in **Greece**, where the Hellenic Coast Guard may directly sanction offenders. Fishermen have the right to appeal to the Fisheries Board (under the Ministry of Agriculture), which consists of various representatives from the fisheries sector. Serious cases are brought before the criminal courts.

While **France** relies primarily on criminal offences, the *Decree of 1852 on Marine Fisheries*, as amended[37], provides for administrative sanctions as well. Besides fines, the competent authorities may suspend or withdraw a fishing authorization or impose additional monetary penalties where no genuine economic link can be established between the fishing vessel and France. The amount of the monetary penalty is related to the amount of fish that has been taken by the fishing vessel (per 100 kg). For all other violations, the representative of the State in the Region is authorized to suspend, for a maximum of three months, the rights and prerogatives conferred upon any masters of fishing vessels who have violated the fisheries law as well as the fishing authorizations granted to such fishing vessels.

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34 See also Commission Staff Working Paper, SEC(2001) 1821 of 13 November 2001 on fisheries control in member states.

35 See Marine Fisheries Act of 12 July 1984 and Ordinance on Fines concerning Marine Fisheries of 16 June 1998.

36 Gesetz über Ordnungswidrigkeiten, accessible at www.datenschutz-berlin.de/recht/de/rv/sich_o/owig/.

37 Decree on Marine Fisheries of 9 January 1852 as amended.

A ministerial decree supplemented by a circular provides for the compounding of offences in marine fisheries[38] (this process is known as "transaction" in French). The "transaction" is an out-of-court settlement comparable to compounding of offences in countries of the common law tradition. Initiation of the transactional procedure lies with the government. However, the competent authority varies in relation to the gravity of the violation that has been committed: the more serious the violation, the higher in the hierarchy the authority[39]. Of interest is the fact that no violation is in principle excluded from the scope of the "transaction". However, lawmakers make clear in the circular that by virtue of its nature the transaction is not suited for very serious offences. It is therefore the duty of the competent authority to determine, on a case by case basis, taking into account the circumstances and the gravity of the violation as well as the previous record of the offender, whether a transactional proposal can be made. The transactional proposal is submitted for approval to the public prosecutor within 4 months (when a violation is a contravention) or within 1 year (when a violation is a "délit") after closure of the violation report ("process verbal"). Being an administrative decision, the transactional proposal must contain the reasons warranting it's being initiated. The public prosecutor may approve or disapprove the proposal. In case of disapproval, legal proceedings can be brought against the alleged violator. Once approved by the public prosecutor, a copy of the proposal is served upon the violator who may accept or refuse it within a month from the date of receipt. The transactional proposal must specify the sum of money to be paid by the violator, which cannot be less than one-third of the minimum fine specified in the law, and the period within which it should be paid. Rejection of the proposal or failure to pay in due time by the violator results in the transactional proposal being null and void. Consequently, the matter reverts immediately to the

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[38] See Decree No. 89-554 on Compounding of Offences in Marine Fisheries of 2 August 1989 and a Circular on Compounding of Offences in Marine Fisheries of 2 August 1989.

[39] Article 1 of the Decree No. 89-554 (see note above) provides that the authority competent to initiate a transactional procedure is:

- the local Director of Maritime Affairs for violations punishable by a fine not exceeding the maximum amount prescribed for contravention of the fifth category (such amount is of 1 500 € according to the penal Code 2003);
- the regional Director of Maritime Affairs for violations punishable by a fine not exceeding 3 000 €;
- the Director of Marine Fisheries and Aquaculture for violations punishable by a fine not exceeding 4 500 €; and
- the Minister responsible for marine fisheries for all other violations.

court of competent jurisdiction. By contrast, acceptance of the transaction and payment in full within the established period exclude any subsequent action by the public prosecutor or by the criminal court.

2.1.2 Developments in other European countries

The future enlargement of the EU may influence the developments in other European countries. In 2001, **Malta** (having a mixed system of common and civil law) adopted the *Fisheries Conservation and Management Act*[40]. Under the Act, the Director responsible for fisheries has the power to impose a monetary penalty on the condition that an offence has been committed "in respect of a fishing vessel". The offence should be of a minor nature and the previous conduct of the vessel and the alleged offender concerned must be taken into account. The penalty is imposed by way of a written notice. Within 30 days, the alleged offender can choose to admit the offence, after which he must pay the penalty (amounting to one third of the maximum penalty). This penalty is due as a civil debt enforceable by the competent court of civil jurisdiction. No charge may be laid in respect of the same offence against any person by whom it has been admitted. However, court proceedings will be initiated if the alleged offender does not admit the offence within 30 days.

In case of a second or subsequent conviction under the Act, the person convicted is required, in addition to any other penalties, to forfeit any licence or permit, and any entry in the record of fishing vessels kept under the Act must be cancelled. Furthermore, the person convicted is incapable of holding any fishing licence or permit for a period of three years from the day of the second or subsequent conviction.

Regulations in **Poland**, where a new fisheries law was passed in 1996, are close to the EU regulations. With respect to the authority and the procedures for the imposition and execution of pecuniary penalties, the 1996 fisheries law[41] refers to the provisions in the 1991 *Act concerning the Maritime Zones of the Polish Republic and the Maritime Administration*[42]. According to this Act, the director of the local marine administration imposes fines in the form of

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40 Fisheries Conservation and Management Act of 16 January 2001 (Act No. II of 2001).

41 Fisheries Act of 18 January 1996.

42 Act concerning the Maritime Zones of the Polish Republic and the Maritime Administration of 21 March 1991.

administrative decisions, which may be appealed to the Minister of Transport and Marine Economy. Fines that are not paid on time are subject to "collection in the manner defined in the regulations for enforcement proceedings in the administration".

Of interest is the fisheries legislation in **Albania**[43], which classifies most offences under the law as "administrative contraventions". It specifies that only use of explosive, poisonous substances or electrical energy for fishing purposes is "subject to penal prosecution"[44]. Sanctions include fines and additional penalties ranging from confiscation of catches, gear and vessel to cancellation from the register of fishermen as well as cancellation of licences or authorizations for a period not exceeding 6 months or forever in case of subsequent offences. Review of administrative contraventions is made by the "Commission for the analyses of the violations of law" whose decisions to impose administrative sanctions are taken by majority vote on the basis of a protocol submitted by the fishing inspector. Decisions of the Commission may be appealed to the "tribunal"[45].

In 1997, **Croatia** enacted the *Marine Fisheries Act*[46]. In case of a second or subsequent offence, the Act provides that, in addition to any other penalties, the violator, whether a legal or natural person, must also be punished by "a precautionary measure" ranging from the suspension or revocation of fishing licences to the confiscation of catch, gear, equipment or vessel. Authorized inspectors are entitled to impose an on-the-spot pecuniary penalty of Euros 26.24[47] to any person having violated sport and recreational fishing regulations[48].

Likewise in **Slovenia**, besides prescribed fines, the recently adopted *Marine Fisheries Act*[49] provides that "compulsory protective measures", including the suspension or cancellation of a fishing permit, the temporary or permanent confiscation of a vessel, and the confiscation of catch, gear or equipment, must be automatically applied where certain infringements, specified in the Act, have been committed. It also authorizes the imposition of on-the-spot

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43 Law No. 7908 on Fishery and Aquaculture of 5 April 1995.
44 See Article 39 (B) of Law No. 7908 of 5 April 1995.
45 See Article 44 of Law No. 7908 of 5 April 1995.
46 Marine Fisheries Act No. 46/97 of 22 April 1997.
47 1 HRK = 0.13 €
48 See Article 80 of the Marine Fisheries Act of 1997.
49 Marine Fisheries Act of 12 June 2002.

fines for the violation of certain regulations governing sport and recreation fishing activities by a natural person.

The licensing authority is required to revoke a commercial fishing permit should the holder of the permit fail to inform the Ministry responsible for fisheries of any changes in the vessel's ownership or use, to carry out fishing activities in accordance with the conditions of the permit after having already been penalized twice for such an infringement, to comply with data reporting requirements prescribed in the Act after having already been punished twice for such a failure.

2.1.3 Legislation of African countries

(a) Portuguese speaking countries

In **Mozambique**, the fisheries law[50] distinguishes between "regular" infringements, which are punishable by a fine, and more serious infringements, which can be punished additionally by revocation of the licence and confiscation of catches. The State Secretary for Fisheries establishes and sets the levels of the fines for the infringements specified in the fisheries law and the implementing regulations. In doing so, he must take a number of specific circumstances into account, such as the type of fisheries involved, the technical and economical characteristics of the vessel involved and the estimated economic benefits derived from the infringement. The State Secretary is also the competent authority to impose the fines and other penalties under the law and its regulations, except when the case involves the violent obstruction of fisheries inspectors. Recurring offences can incur twice the amount of the first offence. All penalties may be challenged in the competent provincial court (*tribunal de nível provincial competente*). Appeal must be lodged within 8 days from the notification of the decision of the State Secretary to impose a penalty.

In 2001, the Mozambique government adopted a special decree concerning aquaculture activities. The competence to impose monetary penalties lies with the Ministry of Fisheries. According to the Decree, penalty decisions are first reviewed within the executive hierarchy (*recurso hierárquica*), after which the administrative tribunal (*tribunal administrativo*) will be competent to handle the case.

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[50] Act No. 3/90 approving the Fisheries Act of 26 September 1990.

Similarly, in **Angola** the fisheries law[51] distinguishes between "regular" and more serious infringements, the first being punishable by fines and the latter also by revocation of the licence and confiscation of catches. The levels of the fines for the infringements are established and set by the Council of Ministers. Again, all specific circumstances of the case must be reflected, including the type of fisheries involved, the technical and economical characteristics of the vessel and the estimated economic benefits derived from the infringement. The Ministry of Fisheries has the competence to apply the sanctions defined in the law (except when the case involves the violent obstruction of fisheries inspectors), but only when the offender voluntarily declares to pay the fine (*declarar voluntariamente efectuar o pagamento de multa respective*). Recurring fines can incur twice the amount of the original fines. In the event the alleged offender contests having committed the offence or refuses to pay the penalty, the case must be referred to the competent court (*Tribunal Popular Provincial).*

Also worth mentioning is **Cape Verde**, which - like Mozambique and Angola - inherited its legal system from Portugal. According to its fisheries decree-law of 1987[52], there exists a Member of the Government who is responsible for the fisheries sector. This Member (or a delegated municipal body) is the competent authority to impose administrative fines, while the Regional Tribunals (*Tribunais Regionais*) of Praia and São Vicente are competent to impose additional sanctions. Decisions may be appealed according to the terms of the "general law" (*lei general*).

(b) Spanish speaking countries

The fisheries law of **Equatorial Guinea[53]**, a former Spanish colony, **also** provides for an administrative sanctioning system. Competence to impose administrative fines depends directly on the level of the fine and is divided between the Director General of Fisheries, the Minister of Water, Forestry and Reforestation, and the President of the Republic. The highest category of fines is directly imposed by the courts (*Tribunales de Justicia*). In addition, it is up to the Minister to revoke fisheries licences and confiscate catches, gear, vessels and engines. According to the law, if the offender does not pay the fine, the Director General may initiate administrative proceedings following

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51 Fishing Act No. 20/92 of 14 August 1992.

52 Decree-Law No. 17/87 defining general principles of fisheries policy of 18 March 1987.

53 *Ley de Pesca* No. 2/1987 of 16 February 1987.

the law that is in force. Decisions of the Director General may be appealed before the Minister and decisions of the Minister before the President. Upon exhaustion of the possibilities of administrative appeal, the case can be brought before the courts (*jurisdicción ordinaria*), but only when it concerns serious infringements (depending on the level of the fine), confiscation matters or revocation of licences.

c) Anglophone countries

Of interest are recent provisions in the *Fisheries Proclamation* of **Eritrea**[54] (having a mixed law system), which make "administrative settlement" possible in two situations: an offence has been committed in connection with a foreign fishing vessel or the maximum fine for an offence, which a court may impose, does not exceed a specified amount. The procedure to be followed includes the Minister to cause a written notice to be served on the alleged offender, after which the latter has a reasonable opportunity to comment on the case. Within 60 days, the Minister causes another notice to be served on the alleged offender, which could state the penalty (which may not exceed the maximum fine specified for the offence in the law). The notice could also state that no further proceedings will be taken or that the matter will be brought before the court. In addition to imposing administrative fines, the Minister has the power to cancel any licence or release any vessel or other seized article upon payment of a sum of money not exceeding the value of the vessel or the article. The law determines that any sum of money received under the procedure is dealt with as though it were a fine imposed by the court. Appeal to the decisions of the Minister must be lodged within 30 days before the "court of competent jurisdiction".

The legal system of **Malawi** is based on English common law and customary law. Its recent *Fisheries Conservation and Management Act*[55], which is applicable to its inland fisheries sector, contains an "administrative penalties" procedure that is somewhat similar to the one in Eritrea. Where an offence committed under the Act is of a minor nature and - having regard to the previous conduct of the person or vessel concerned - it is appropriate to impose an administrative penalty, the Director of Fisheries causes a notice to be served on that person. Within 30 days, that person may require in writing that the offence be dealt with by the court, in which case the Director will take no further proceedings. The person may also admit the offence, in which case

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54 Fisheries Proclamation No. 104/1998 of 25 May 1998.

55 Fisheries Conservation and Management Act No. 25 of 13 November 1997.

he can make submissions as to the matters he wishes the Director to take into account in imposing a penalty. If the person does not respond within the period of 30 days, he or she is presumed to have admitted the offence. Where the offence has been admitted, the Director may impose a monetary penalty not exceeding one-half of the maximum penalty to which the person would be liable if he were convicted of the offence by the court. Again, the Director serves a notice stating the particulars of the penalty and the place where it should be paid. Any penalty imposed is recoverable by the government from the person on whom it has been imposed in the same manner as a fine is recoverable on conviction for an offence by a court.

In **Kenya**, the *Fisheries Act*[56], which relies primarily on a criminal enforcement system, also provides for an out-of-court settlement. It authorizes the Director, with the approval of the Minister, to compound an offence for a sum of money not exceeding the maximum fine specified for the offence. The Director may also order the release of any vessel or any other thing seized in connection with the offence on payment of a sum of money not exceeding the estimated value of the vessel and other things. Further, the Act specifies that, should legal proceedings be brought against the offender for the same offence, evidence of compounding of the offence would constitute a good defence. It is in the interest of a licence holder, having breached the law, to accept compounding of the offence as conviction for any offence under the Fisheries Act or any regulation made thereunder automatically leads to the immediate cancellation of the fishing licence. In addition, the convicted person is not eligible to apply for a new fishing licence for a period of two years from the conviction, unless the Director in writing directs otherwise.

The Director is also empowered to revoke or suspend any fishing licence for breach of any regulation or any condition attached to the licence. Decisions of the Director may be appealed within 30 days to the Minister.

Both **Namibia** and **South Africa** treat violations of their recent fisheries laws[57] as criminal offences. The only administrative sanctions that can be imposed under both laws by the Minister responsible for fisheries are the cancellation, suspension or reduction of any fishing right or licence for the failure by the holder of such right or licence to furnish true and complete

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56 Fisheries Act of 1989 (Chapter 378)

57 In Namibia the *Marine Resources Act* was adopted in 2001 and in South Africa the *Marine Living Resources Act* was enacted on 27 May 1998 (Act No. 18 of 1998).

information in the application for that right or licence, to comply with a condition imposed in the right or licence, or to comply with any provision of the law in question. Such administrative sanctions are also applicable to a right or licence holder who has been convicted of an offence under the Act. Both laws contain similar procedures requiring the Permanent Secretary (Namibia) or the Director-General (South Africa) to serve a notice to the alleged offender requesting him or her to show cause in writing, within a period of 21 days, why the right or licence should not be cancelled, suspended or reduced. Upon expiry of the 21-day period, the Permanent Secretary or the Director-General is required to refer the matter, together with any reason furnished by the alleged offender, to the Minister who then decides whether to cancel, suspend or reduce the right or licence or to dismiss the matter.

In the Indian Ocean, the **Seychelles** has enacted the Licences Act[58], which establishes a Licensing Authority responsible for granting, renewing, suspending or revoking any licence that may have been created under the Licences Act or any another Act. Under the fisheries law[59], the Minister responsible for fisheries may require a licence for any kind of fishing activity. Such a licence is granted, suspended or cancelled in accordance with the provisions of the Licences Act. Under this Act, the Licensing Authority may, if it deems it necessary, consult the Seychelles Fisheries Authority to determine whether to order the suspension or cancellation of the fishing licence. Suspension or cancellation of a fishing licence may be ordered in the event that a vessel or any gear in respect of which a licence has been issued has been used, or any activity conducted, in contravention of the Fisheries Act or any condition of the licence. Any decision of the Licensing Authority may be appealed to the Minister (administering the Licences Act) within 15 days from the date of the decision. Furthermore, the Minister is empowered to revoke a licence where the holder of the licence is convicted of an offence under the Licences Act or under any other law which enables on conviction the revocation of the licence.

The fisheries legislation provides for the compounding of offences by the Minister responsible for fisheries who may initiate such a procedure only if the alleged offender admits the commission of the offence and agrees in writing to its being dealt with through compounding. The Minister may then compound the offence by accepting a sum of money not exceeding the

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58 Licences Act of 31 March 1987 as amended (chapter 113)

59 Fisheries Act of 27 August 1986 as amended (Act No. 5 of 1986)

maximum fine specified for the offence in the law and order the release of any vessel or other articles seized in connection of the offence on payment of a sum of money not exceeding the estimated value of the vessel or other articles. Any sum of money received through this procedure must be dealt with as though it were a fine imposed by a court. The law specifies that, should any legal proceedings be brought for the same offence against a person, proof of compounding will be a good defence.

(d) Francophone countries

Francophone countries like Anglophone countries treat violations of the fisheries legislation primarily as criminal offences. Nevertheless, they typically provide for an out-of-court settlement ("transaction"), which is similar in many respects to the compounding of offences provided for in common law countries. In addition, the licensing authority is generally empowered to suspend or cancel a licence for breach of a provision of the fisheries legislation or of the conditions attached to the licence.

The recent fisheries legislation of **Mauritania**[60] authorizes the Minister responsible for fisheries to withdraw or suspend a licence in respect of a fishing vessel where the vessel has been used in contravention of fisheries law and regulations or of any condition governing the use of the licence. He is also entitled to deny temporarily or definitively any master or crew member of the contravening vessel from operating in waters under Mauritanian jurisdiction. Any vessel, together with its gear, nets and catch, which is caught fishing illegally within these waters must be confiscated by order of the Minister. Such a decision is final.

The Minister or any person designated by him may compound any serious or very serious offence as well as any other offence not expressly provided for under the law by accepting a sum of money not less than the minimum specified fine for the offence in the law. Payment must be made within a month as failure to act promptly will result in the compounding procedure being cancelled. In assessing the sum of money to be paid by the offender the Minister is assisted by a "transaction" Commission. In addition to the monetary sanction, the Minister may forfeit to the State any catch, gear or other equipment used in the commission of the violation. Most importantly, once a transaction procedure has been successfully completed, no legal proceedings in respect of the same offence can be brought against the

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60 Fisheries Code of 24 January 2000 (Act No. 2000-025 of 2000)

offender. Finally, the law specifies that payment of the proposed sum of money by the offender implies admission of the offence and therefore should be regarded as a first violation in determining if there occur any repeat offences.

Similarly in **Senegal**, the fisheries law[61] empowers the Minister responsible for marine fisheries, in addition to any other penalty, to suspend or withdraw a licence for breach of any provision of the law. The Minister or his representative[62] is also authorized to compound any offence prescribed in the law and the regulations made thereunder. A consultative commission[63], consisting of 6 members, has been established to assist the Minister in reviewing reported cases and in determining the fine to be imposed on the offender, which must not be less than the specified fine for the offence in the law. The proposal is submitted to the Minister who may approve or disapprove it. In practice, the Minister may modify the amount proposed by the consultative commission. Once the proposal has been approved in writing by the Minister, the offender is required to pay immediately. Failure to do so results in the compounding procedure being cancelled. As in Mauritania, payment of a fine through compounding is regarded as a first offence in determining second or subsequent offences. Successful implementation of a compounding procedure has the effect of preventing any legal proceedings in respect of the same offence from being brought against the offender.

The *Marine Fisheries Code* of **Guinea**[64] contains similar provisions empowering the Minister, or his representative, in addition to any other penalty, to suspend or cancel a fishing licence for a breach of any provision of the law or of the regulations made thereunder as well as any provision of the licence. Suspension of a fishing licence issued in respect of a vessel may vary from 1 to 6 months for a first offence and from 2 to 12 months for a second or subsequent offence. The Minister or his delegate may compound any offence prescribed in the law and the regulations made thereunder by accepting a sum of money not less than the minimum specified fine and not exceeding the maximum specified fine for the offence in the law. Failure by

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61 Marine Fisheries Code of 14 April 1998 (Act No. 98-32 of 1998)

62 The Chief of the regional services of the ministry responsible for marine fisheries is competent to compound offences related to artisanal fishing.

63 See Articles 65 to 67 of the Fisheries Regulations of 10 June 1998 (Decree No. 98-498 of 1998).

64 Marine Fisheries Code of 15 May 1995 (Act No. L/95/13/CTRN of 1995)

the offender to pay within the prescribed period leads to court proceedings. As in both Mauritania and Senegal, the compounding of an offence counts as a first violation for the purpose of determining subsequent offences. After completion of the "transaction" procedure, no legal action can be brought in respect of the same offence against the offender.

The recent fisheries legislation of the **Republic of the Congo**[65] provides for a "transaction" procedure whereby the Minister responsible for marine fisheries or his representative may compound any offence prescribed in the law and the regulations made thereunder. The Minister or his representative, as the case may be, is assisted by a consultative commission in order to determine the fine to be imposed on the offender, which must not be less than the minimum specified fine for the offence in the law. The proposed fine must be paid within two months. In addition, the Minister or his representative may order the confiscation of nets, gear or catch that were seized. No "transaction" procedure can be initiated by the Minister or his representative if a person had already been convicted for a breach of the fisheries law within the same calendar year. As in other francophone countries, successful completion of the "transaction" procedure makes it impossible to bring any legal action in respect of the same offence against the offender.

While the fisheries legislation of **Madagascar**[66] relies primarily on a criminal enforcement system, it also provides for an administrative penalty scheme designed to improve enforcement of regulations governing the shrimp industry. A recent decree[67] establishes a gradual administrative penalty scheme authorizing the fisheries administration to, first, impose monetary penalties for breaches of certain provisions of the fisheries law and regulations and, second, to withdraw a fishing licence. For example, failure by any licence holder to report monthly and yearly catch data within a two-month period results in the licence holder being punished by a pecuniary penalty amounting to 10% of the licence fee. If the person does not comply with reporting requirements within the next 30 days, his licence is automatically withdrawn. A similar scheme is also used to sanction licence holders failing to furnish economic and financial data to the "Observatoire Economique" within the prescribed period. In such instance, a monetary

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65 Marine Fisheries Act of 1 February 2000 (Act No. 2-2000 of 2000)

66 Ordinance No. 93.022 of 4 May 1993 regulating fisheries and aquaculture activities

67 Decree No. 2000-415 of 16 June 2000 on the granting of fishing licences in the shrimp fisheries

penalty amounting to 50% of the licence fees is imposed the first year and in case of a second violation, 20% of the licences are withdrawn.

Like in other francophone countries, the Malagasy fisheries legislation enables the Minister responsible for fisheries and aquaculture to compound any offence prescribed in the law.

2.1.4 Legislation of Asian countries

On the Asian continent, there are some examples of administrative sanctions in fisheries law. In **Viet Nam**, the 1989 Ordinance on the Conservation and Management of Living Aquatic Resources[68] determines that offenders will be fined, depending on the nature of the acts, with administrative or criminal penalties as provided by law. Of additional importance is the 1990 Maritime Code[69], which applies to all sea-going ships that engage in exploiting, exploring and processing maritime resources. These basic legal documents have been implemented by separate government decrees that contain a large number of fisheries and fishery-related violations, and by circulars.

The Vietnamese approach can be illustrated by *Government Decree No 92/1999/ND-CP on sanctions against administrative violations in the maritime field*[70]. The Decree, which implements the 1990 Maritime Code, defines the sanctions for violations in relation with sea-going activities and applies, among others, to fishing vessels. Sanctions can be a warning or pecuniary penalty. Depending on the nature and seriousness of the violation, additional sanctioning forms, such as the confiscation of materials or revoking licences, may be imposed. The Decree empowers a range of persons to impose pecuniary penalties (and additional sanctions), depending on the level, as follows:

- Maritime safety inspector (up to €11[71])
- Regional chief maritime safety inspector (up to € 5,450)
- Maritime port authority director (up to € 5 450 as well)
- Central-level chief maritime safety inspector (up to € 10 900)

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68 Ordinance on the Conservation and Management of Living Aquatic Resources of 25 April 1989.

69 The Maritime Code of Viet Nam was adopted on 30 June 1990.

70 This Decree was adopted on 4 September 1999.

71 One Viet Nam Dong (VND)= .000054 €

- In addition, the Presidents of the various so-called "People Committees" (local executive organs) may also be competent to handle administrative violations of the law.

The Decree contains a large section on sanctioning procedures. For fines up to 20 000 VND, on-the-spot sanctioning decisions are issued. When it concerns higher fines, violations are recorded, after which the competent authority issues a decision within 15 days (and subsequently - within 3 days - sends the decision to the alleged offender). According to the Decree, separate administrative legislation, namely the 1996 Ordinance on Handling of Administrative Violations, regulates these procedures in detail. Any sanctioned organization or individual has the right to complain about sanctioning decisions following the 1998 Law on Complaints and Denunciations. In case of disagreement with the complaint-settling decisions, they have the right to complain further to the immediately superior person or initiate administrative lawsuits in the courts with the required competence. The procedures for lodging and settling complaints and initiating lawsuits have to comply with the Ordinance on the Procedures for Settling Administrative Cases, and - again - the 1996 Ordinance on Handling of Administrative Violations.

Other Asian countries that provide for administrative sanctioning systems in their fisheries law include **Cambodia**. According to the law[72], the district and provincial fishery authorities as well the Department of Fisheries (under the Ministry of Agriculture) have the power to impose administrative fines, each authority up to a certain level. The law provides for administrative appeal against decisions imposing penalties up to the Ministry and, in certain circumstances, access to the court.

In the **Philippines (**formerly ruled by the Spanish and currently having a mixed system of civil and common law), the recently adopted Fisheries Code[73] empowers the Department of Agriculture to impose administrative fines up to a specific level and for specific violations. Illegal fishing by a foreign vessel in the Philippine waters is punishable by an administrative fine ranging from US $50 000 to US $200 000. In addition, the Secretary of the Department is authorized to impose administrative fines up to US $180[74] for a number of minor offences such as failure to comply with minimum safety standards or the construction and operation of fish corrals/traps, fish pens

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72 Fisheries Management and Administration, Fiat-Law No. 33 of 9 March 1987.

73 Fisheries Code of 1998 (Act No. 8550 of 1998).

74 One PHP = 0.018 US$

and fish cages. Besides, the Fisheries Code authorizes the Department to issue so-called Fishery Administration Orders for the conservation, management and sustainable development of fisheries and aquatic resources. Some of these Orders, for example concerning prohibited fishing gear, or the catch, purchase and export of specific species such as whale sharks and manta rays, empower the Director of Fisheries and Aquatic Resources to impose administrative fines up to 5 000 Pesos[75].

The fisheries law of **China[76],** being the world's top fish producer and one of the largest fish exporting nations, contains provisions on administrative penalties, too. The law, which was amended in 2000, sets out a number of violations to be sanctioned with fines, revocation of licences, confiscation of catches and gear, etc. According to the law, the various administrative fisheries departments and authorities are responsible for imposing the penalties, including "on the spot" decisions.

The fisheries law of **Malaysia**[77] authorizes the Director-General to cancel or suspend any fishing licence for such period as he deems fit where there has been a breach of any provision of the Act or any of the conditions of the licence. Decision by the Director-General may be appealed to the Minister within 30 days from the cancellation or suspension. After hearing the appeal, the Minister by order may allow or disallow the cancellation or suspension of the licence. His order is final.

The Fisheries Act contains provisions on compounding of offences. It provides that any fisheries officer may compound any offence (except those expressly specified under sections 8a, 11.3, 15.1 and 16) under the Act for a sum not less than 500 ringgit (except for any offence under section 43.1 not less than 100 ringitt) and not exceeding the maximum fine for that offence, provided that it is a first, second or third offence only.

Similarly in **Sri Lanka**, the fisheries law[78] empowers the Director or the Licensing Officer, as the case may be, to cancel a licence in the event that the

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75 See for example Fisheries Administrative Orders (FAO) 155 (Series of 1986), 164 (Series of 1987), 188 (Series of 1993) and 193 (Series of 1998), accessible at www.bwf.org/bk/laws. For FAO 193 (Series of 1998) see www.flmnh.ufl.edu/fish/Sharks/InNews/WhaleShark.htm

76 Fisheries Law of the People's Republic of China of 20 January 1986, as amended in 2000.

77 Fisheries Act 1985 (Act No. 317 of 1985)

78 Fisheries and Aquatic Resources Act of 11 January 1996 (Act No. 2 of 1996).

licence holder has contravened any of the provisions of the Act or any regulations made thereunder or any terms and conditions of the licence or has been convicted of an offence under the Act. A decision by the Director or the Licensing Officer is subject to an appeal, in writing, to the Secretary of the Ministry within 30 days from receipt of the decision. Decision to approve or disapprove the cancellation of the licence by the Secretary is final and conclusive.

Any offence, except one under section 27 (use or attempt to use or be in possession of any poisonous, explosive or stupefying substances or other noxious or harmful material or substance), may, in the case of a first offender, be compounded by the Director for a sum of money equal to not less than one fifth of the maximum fine that can be imposed for such offence. Compounding of an offence is subject to the approval of the Minister. It must be notified in writing to the Magistrate's court where a proceeding is pending where it will have the effect of an acquittal.

2.1.5 Legislation in Latin American countries

Administrative penalty systems appear in a number of Latin American countries, many of which have a civil law tradition. The fisheries legislation of **Ecuador**[79] divides sanctioning power between local fisheries inspectors and the Director General of Fisheries, the first being responsible for dealing with acts of deceit (*defraudación*), the latter for all other violations of the law. Local fisheries inspectors have to issue a decision within 48 hours, the Director General within a maximum of 16 days. Decisions of the local fisheries inspectors may be appealed within 3 days before the Director General and decisions of the latter within 3 days before the Tribunal of Appeal (*Tribunal de Apelación*). According to the law, the Tribunal consists of four government representatives: the Sub-secretary of Fisheries Resources accompanied by delegates (lawyers) of the Ministries of External Relations, Defence and Natural Resources. Sanctions include fines, the level of which depends on the gravity of the violation as well as other circumstances. In case of repeated offences, fines will be doubled, while resistance to inspection or capture of the vessel will lead to a 1/3 higher fine (without prejudice to the application of the Criminal Law (*Código Penal*)). In case of non-timely payment of the fine, property and possessions may be seized

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[79] *Decreto Supremo* No. 178, *Ley de Pesca y Desarollo Pesquero* of 12 February 1974, as amended

according to the procedures as defined in the Code of Civil Procedure (*Código de Procedimiento Civil*).

In **Argentina**, fishing activities were traditionally regulated by a scattered set of laws, decrees, regulations and resolutions. In 1998, a new comprehensive fisheries law was adopted (and substantially amended in 2001)[80]. The authority that applies the law (*autoridad de applicación*) and takes sanctioning decisions is the Secretary of Fisheries (or by delegation the Sub-secretary of Fisheries and Aquaculture or any other future entity). Provincial jurisdictions, however, apply the law when it concerns violations within 12 miles from the coastline. Depending on the circumstances of the case, a variety of administrative sanctions can be imposed (without prejudice to criminal sanctions where applicable), such as warnings, fines, suspension from the fisheries register and the confiscation of catches and gear. The procedure provides for a notice to be served upon the alleged offender, who - within 10 days - can deny or admit to have committed the infringement (in which case the applicable sanction could be reduced by 50% or 75%). Within 5 days from the initial decision to impose a penalty, the alleged offender may request the *autoridad de applicación* to reconsider its decision, after which a final decision is taken within 20 days. Subsequently, appeal may be lodged within 5 days from the final decision before the National Chamber of Appeal in Federal Administrative and Contentious Matters (*Cámara Nacional de Apelaciones en lo Contencioso Administrativo de la Capital Federal*). As in Ecuador, also in Argentina non-timely payment of the fine leads to application of the Code of Civil and Commercial Procedure (*Código Procesal Civil y Comercial*).

In **Peru**, the fisheries law[81] expressly stipulates that violations shall be dealt with administratively (without prejudice to actions under civil or criminal law). Sanctions include fines, the level of which is set by ministerial resolution. They are imposed by the Commission of Sanctions of the Ministry of Fisheries or by Regional Commissions, depending on their competence. The Commission of Sanctions consists of various government officials. Under exceptional circumstances, the Commission may invite a representative of the private fisheries sector. Before imposing any sanctions, the Commissions consider a number of circumstances, such as the nature of the infringement, the intention of the offender, damages caused to natural

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[80] In Argentina, the basic fisheries legislation is the *Ley de Pesca* of 6 January 1998 (*Ley* No. 24.922 of 1998) as amended by the *Ley de Pesca* of 18 September 2001 *sobre Procedimiento de sanccion de infracciones a la Ley* No. 24.922 (*Ley* No. 25.470).

[81] *Ley General de Pesca* of 21 December 1992 (*Decreto Ley* No. 25.977 of 1992)

resources and the environment, the economic benefits obtained and repetition of the offence. Decisions of the Regional Commissions may be appealed to the Commission of Sanctions. Decisions of the latter may be appealed to the Vice-Minister of Fisheries.

In 2001, Peru adopted a special law to regulate aquaculture activities[82]. Offences under the aquaculture law are sanctioned administratively (without prejudice to actions under civil or criminal law). Sanctions include fines, the level of which depends on the damage to the hydro-biological resources and the illegally obtained benefits. According to the law, the competent body (*órgano competente*) within the Ministry of Fisheries imposes the sanctions. A regulation, also adopted in 2001, further implements the law.

According to the fisheries legislation of **Colombia**[83], the National Institute of Fisheries and Aquaculture (INPA) imposes sanctions, which range from warnings and fines to revocation of licences and confiscation of catches and gear. The level of the fine is related to the average, daily minimum wage and depends on the seriousness of the offence and other relevant circumstances. Of interest is that the law expressly distinguishes between inland fisheries (with fines ranging from one to 1 000 days of minimum wage) and marine fisheries (from 1 to 100 000 days of minimum wage). Appeal to the decisions of INPA is possible within the terms of the Code of Administrative Disputes (*Código Contencioso Administrativo*).

Of particular interest is the regulatory framework adopted by **Chile**, being amongst the world's leading fishing and fish exporting economies. The 1989 General Law on Fisheries and Aquaculture (revised and consolidated in 1991) contains a large section on violations, sanctions and procedures[84]. Knowledge of the lawsuits for violation of the law corresponds to the judges of the civil court (*jueces civiles)* with jurisdiction over the communes where the violations were committed or initiated. Special jurisdiction rules exist for violations committed and initiated in the territorial sea or in the exclusive economic zone and for violations committed by foreign fishing vessels. Officers of the National Fishery Service that become aware of violations of

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82 *Ley de promocion y desarollo de la acuicultura* of 25 May 2001 (*Ley* No. 27.460 of 2001)

83 In Columbia, the basic fisheries legislation is the *Ley General de Pesca* of 15 January 1990 (*Ley* No. 13 of 1990) as supplemented by the Decreto of 4 October 1991 (Decreto No. 2.256 of 1991).

84 *Ley General de Pesca y Acuicultura* of 22 December 1989, as amended (*Ley* No. 18.892 of 1989)

the law denounce them to the court and in addition notify the accused to appear in court. The law contains detailed rules on the court proceedings, including rules on hearing, evidence, judgment and payment of the fine. An appeal is lodged before the Court of Appeals (*Corte de Apelaciones*) within 10 days from the notification of the decision in the first instance. The law contains detailed rules on the appeal procedure as well.

The federal fisheries law of **Mexico** establishes several types of administrative sanctions including warnings, suspension and revocation of permits, imposition of fines, confiscation of catches and gear and closure of fishing facilities[85]. The Secretary of Fisheries imposes the sanctions (without prejudice to any criminal sanctions where applicable). Fines are assessed depending on the type and severity of the violation and the economic situation of the offender, and can range from 20 to 20 000 times the minimum wage of the Federal District. Recurring fines can incur twice the amount of the original fines. Decisions (*resoluciones*) of the Secretary may be reviewed through the procedure set forth in the fisheries law. A request thereto must be filed to the Secretary within 15 days. Upon review of the request, the Secretary may confirm, modify or cancel the contested resolution. Pending review, execution of the contested resolution must be held up. In case of final decisions (*resoluciones definitivas*), the appeal procedure established in the Federal Law of Administrative Proceedings (*Ley Federal de Procedimiento Administrativo*) must be applied or the matter referred to competent judicial institutions (the administrative courts).

In **El Salvador**, the fisheries law[86] also establishes an administrative sanctioning system. Again, infringements are divided into minor, serious and very serious and fines depend on the gravity of the violation and the economic situation of the offender. Repetition of an infringement leads to the fine being doubled. The General Director of Fishery Resources (under the Ministry of Agriculture and Farming) imposes the fines (without prejudice to any action under the criminal law where applicable). The law provides for the possibility of a hearing. The Director may grant the alleged offender an additional period of 8 days to prepare his defence, after which the Director takes a definitive decision within 3 days. Decisions of the Director may be appealed before the Ministry within 3 days from the

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85 *Ley de Pesca* of 23 June 1992 and Reglamento de la *Ley de Pesca* of 17 July 1992

86 *Ley General de las actividades pesqueras* of 14 September 1981 as amended (*Decreto Ley* No. 799 of 1981)

notification of the initial decision. The Civil Procedures Law (*Código de Procedimientos Civiles*) is applicable to the procedure in the appeal.

Finally, the 1996 fisheries decree of **Cuba** contains an administrative penalty system[87]. The power to impose monetary penalties lies with inspectors authorised by the Ministry of Industrial Fishing and the Ministry of Internal Affairs. Appeal to their decisions can be lodged within 3 days to the provincial fisheries authority (*autoridad pesquera provincial*), which renders a final decision within 15 days. No further administrative or judicial appeal is possible. In addition, of importance is a recent Decree on infringements concerning the tenure and operation of boats, including fishing vessels[88]. Here the Port Authorities impose fines for a number of minor and serious infringements. Appeal is possible within 5 days from the notification of their decision before the National Chief of Port Authorities. Again, no further administrative or judicial appeal is possible.

2.1.6 Legislation in North America

In the **United States of America**, two statutes provide the general underpinning for the extensive administrative sanction system of enforcement utilized by the National Oceanic and Atmospheric Administration (NOAA)[89]. One portion is supplied by the *Magnuson-Stevens Fishery Conservation and Management Act*[90] (the Magnuson Act), the other by the *Administrative Procedure Act*[91] (APA), which is a general law applicable to all federal administrative action. While the APA provides the general procedural authority guiding NOAA's process for assessing sanctions, the Magnuson Act provides the specific substantive law to be applied in particular action. In sum, the APA and the Magnuson Act have constant interplay in the fisheries context.

The APA takes the approach of having a single law apply to all federal agencies. Prior to the APA, typically, an agency's enabling legislation gave some mention of specific, or more often, vague formulations of how

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87 *Reglamento de pesca* of 28 May 1996 (*Decreto Ley* No. 164 of 1996)

88 *Reglamento de las infracciones sobre la tenencia y operacion de embarcaciones* of 19 July 1999 (*Decreto Ley* No. 194 of 1999)

89 NOAA is responsible for enforcing the Magnuson-Stevens Fisheries Conservation and Management Act, prosecuting violations, assessing sanctions and collecting fines.

90 The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 et seq., was enacted in 1976.

91 The Administrative Procedure Act, 5 U.S.C. 551 et seq., was enacted in 1946.

authority was to be exercised. Just as common was no mention at all in enabling legislation of how administrative power was to be used. The APA was therefore an attempt to impose some controls and consistency on the growing role of federal agencies and the administrative process. It defines the basic administrative powers (rule making[92], adjudication[93], and licensing), sets out the procedures to be followed in exercising these powers and provides for judicial review of exercise of administrative powers. Sanctions that may be imposed by an agency include "the whole or a part of an agency –

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;
(B) withholding of relief;
(C) imposition of penalty or fine;
(D) destruction, taking, seizure, or withholding of property;
(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;
(F) requirement, revocation, or suspension of a licence; or
(G) taking other compulsory or restrictive action."[94]

The APA sets out the details of a check and balance mechanism for the exercise of the agency's powers, including the public's right to information, protection of individuals whose records are maintained by an agency, the right of the individual to a civil claim if the agency does not comply with the requirements of the APA in respect of the individuals protection and the right of review of agency action. Review of exercise of administrative powers is not restricted to decisions made or actions taken by the agency. It also applies to rule making. If the Act governing or regulating a specific matter provides for detailed procedures for the use of administrative penalties, the APA need not be used.

The APA requires the proponent of a rule or order to carry the burden of proof. In administrative adjudications, typically, NOAA is seeking an order from the administrative law judge that: 1) a law or regulation was violated; 2) the respondent is liable and; 3) imposes a sanction. Unless a specific statute changes the burden of proof (as it does at times for affirmative defences or rebuttable presumptions), the APA always places the burden of proof on the government. In addition, in the administrative context, the standard of proof

92 5 U.S.C. 553
93 5 U.S.C. 554
94 5 U.S.C. 551 (10)

is the civil standard of *preponderance of the evidence* (as opposed to *beyond a reasonable doubt* in criminal matters).

By creating two separate sections, the Magnuson Act clearly distinguishes criminal offences from civil penalties. While most prohibited activities[95] are punishable by civil administrative sanctions[96], the Act provides for a few criminal offences[97], e.g. to resist a lawful arrest, and illegal fishing by a foreign vessel. The amount of a civil penalty must not exceed $120 000 for each violation[98], provided that each day of a continuing violation constitutes a separate offence. Although $120 000 is the statutory maximum, by having multiple counts in a single charging document for violations committed over a period of time, the total sanction amount can climb very high. It is not uncommon for violators to admit liability for the violation but to contest the amount of the sanction. A hearing in front of the administrative law judge can be requested to litigate liability, the amount of the sanction, or both. The administrative law judge has the power to depart from the agency's suggestion and to impose the amount of sanction he chooses. Any person who is found to have committed an act prohibited under section 1857 of the Magnuson Act may request a hearing. In practice, not many cases go to a hearing and in fact most cases are settled with all parties executing a written agreement containing the terms of settlement.

In addition to monetary sanctions, the Magnuson Act specifically provides for sanctions concerning the permit itself[99]. These sanctions can be imposed for cause or for unpaid sanctions. In imposing a sanction with respect to the permit itself, the Secretary is required to take into account the gravity of the prohibited acts for which the sanction is imposed and, with respect to the violator, the degree of culpability and any history of prior offences. Sanctions concerning the permit for cause or for unpaid penalties are very effective. The permit represents the authority to fish, and if taken away, even temporarily, then the ability to fish is lost. Lost fishing time is often more costly than any outright monetary sanction.

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95 16 U.S.C. 1857

96 16 U.S.C. 1858

97 16 U.S.C. 1859

98 This amount is adjusted periodically for inflation. The Federal Civil Penalties Adjustment Act of 1990, Public Law No. 101-410, as amended by the Debt Collection Improvement Act of 1996, Public Law No. 104-134, raised the maximum amount of monetary sanction across the spectrum of federal law.

99 16 U.S.C. 1858(g)

As in most fisheries legislation, the Magnuson Act authorizes seizure and forfeiture of vessels, cargo, stores, furniture, appurtenances and fish or the fair market value thereof[100].

The Magnuson Act authorizes maritime liens for unpaid civil administrative sanctions, but in practice that mechanism has not proved successful for NOAA, so this authority is rarely used.

In **Canada**, the administrative system which had developed relied on the following brief and general grant of authority. This authority is found in section 7 of the *Fisheries Act* which provides the Minister of Fisheries and Oceans the authority in his "absolute discretion" to issue or authorize the issue of fishing licences. In applying his authority, the Minister had included licensing conditions which had allowed for sanctions to be imposed.

When this "absolute discretion" authority, which had been used as a basis for administrative sanctions, was challenged in *Matthews v. Canada (Attorney General)*,[101] the Minister argued that this sanctioning authority was contained within the grant of absolute discretion given him by the legislation. He argued that it would at least indirectly help attain the Act's goals of managing, conserving, and protecting fish. The Court concluded otherwise and determined that the connection to the Act's objectives was too "indirect and remote to be seen as properly within the purview of the clear mandate given to the Minister." The Court invalidated the use of administrative sanctions which had been in use by the Ministry saying, "If the Minister wishes to impose a penalty against a person who has reportedly violated the Act, the Regulations[102], or the terms of his or her licences, Parliament, by providing the penal provisions of the Act, has directed how that purpose is to be met, by prosecution under the Act."

Not only did the Act provide for penal sanctions as a way to deal with violations but the courts were also concerned about procedural safeguards at the administrative level. The court determined that administrative sanctions

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100 16 U.S.C. 1860(a)

101 1997, 1 FC 206, aff'd 242 NR 181, leave to appeal to the Supreme Court of Canada refused (2000) 255 NR398.

102 While the Matthews case involved a violation of a licence condition, another case, *Kelly v. Canada (Attorney General)*, involved a violation of regulations where the Minister imposed sanctions, also based on his "absolute discretion" in section 7 of the Fisheries Act. Again the federal court invalidated this as a basis for the Minister's use of sanctions citing the same reasoning as the *Matthews* case.

were foreclosed by the structure of the Act. The provision (in the Act) does not specifically authorize the Governor in Council, to provide by sanction or penalty a punishment for violation of the terms of a licence. Since that matter is specifically dealt with by Parliament under the Act, and is not specifically included in the regulatory authority vested in the Governor in Council or the Minister, it is implicitly excluded from the regulatory powers delegated under the Act. It is implicit that Parliament did not intend that penal powers are to be exercised by the Minister. So the Minister could not, therefore, exercise authority for the purpose of imposing penalties or sanctions for past licence violations as had been done in the *Matthews* case[103].

This view was affirmed by the Appellate Court. Given the Canadian decision, it might be concluded that a clear, affirmative basis of legislative authority for utilizing a scheme of administrative sanctions is preferable.

2.1.7 Legislation in New Zealand and the South Pacific

All of **New Zealand**'s commercial fisheries are managed under a quota management system. The majority of violations, and virtually all serious violations of New Zealand's fisheries laws, are handled with traditional criminal prosecutions,[104] however, administrative sanctions are used for some purposes. The use of administrative penalties applies only in respect of minor offences and where it would be appropriate to impose an administrative penalty in light of the previous conduct of the vessel and the accused person. The *New Zealand Fisheries Act 1996*[105] actually expands the use of administrative sanctions for minor violations. The Minister has power to impose administrative sanctions as part of the punishment in serious cases. (Some of this power, specifically the power to decide what happens to property once forfeited, has been transferred to the courts under the provisions of the Fisheries Act 1996. The Minister had been able to extract

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[103] Section 83 of the Fisheries Act provides, "Except as otherwise provided in this Act, all penalties and forfeitures under this Act or any of the regulations are recoverable and enforceable by summary proceedings taken under the provisions of the *Criminal Code* relating to summary convictions."

[104] With potentially high monetary fines (upped to $500 000 in the new law) and vessel, gear, quota and catch forfeitures as well as the possibility of 5 years imprisonment for the most serious types of fraud offences.

[105] New Zealand had been in transition for several years between the Fisheries Act 1983 with a focus on fisheries sustainability to the Fisheries Act 1996 with its focus on an ecosystem based approach to fisheries management. Stuart, S., Infringement Follow Up and Sanction Scheme, International Conference on MCS, Brussels 2000.

additional monetary penalties if he was going to release the forfeited property.) In addition to this sort of administrative sanction authority, minor violations are also capable of being dealt with by administrative sanctions.

The Fisheries Act 1996 enlarges the powers of the Minister of Fisheries by granting wider powers of enforcement. The 1996 Act became fully effective on 1 October 2001. The Act now allows an infringement fee to be imposed on violators by the Minister of Fisheries. The infringement notices containing the fees can be written by a Fisheries Officer on the spot, although some infringement notices will be issued once all of the relevant information has been checked and considered. These fees are for recreational violations and can range up to € 393[106] for a single violation. The amount of the fee for a particular violation is specified by regulation.

In **Papua New Guinea** (PNG) there is a systematic programme of administrative penalties for fisheries violations. In PNG, the Constitution provides a basis for administrative law. Article 59 of the Constitution, entitled "Principles of Natural Justice", provides, "Subject to this Constitution and to any statute, the principles of natural justice are the rules of the underlying law known by that name developed for control of judicial and administrative proceedings." Article 60 goes on to provide "Particular attention shall be given to the development of a system of principles of natural and of Administrative law ..."

The *Fisheries Management Act of 1998*, entrusts the management and development of fisheries in PNG to a National Fisheries Authority, comprised of the National Fisheries Board and the Authority, under the overall policy direction of the Minister. Administrative proceedings are provided for in the 1998 fisheries law which requires the establishment of a Summary Administrative Panel to make determinations in Summary Administrative Proceedings. The panel is to have representatives (who are compensated for their participation): the Managing Director and one each from the legal profession and the fishing industry. The Panel is to seek such evidence, advice and information that it considers necessary, and it is not governed by the strict rules of evidence. Initiation of Summary Administrative Proceedings against a violator can occur only after consultation and consent from the Public Prosecutor. Timeliness is required, the decision to initiate Summary Administrative Proceedings shall be made within 48 hours of the issuance of a notice of violation and a hearing for a

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106 One NZD = 0.52 US$

Summary Administrative Proceeding shall be set within 48 hours of the decision to proceed administratively. Where there is a decision to handle the matter in Summary Administrative Proceedings, the person whom the notice of violation is served on shall be given notice of the hearing and shall have the right to appear, be heard, and produce evidence to counsel retained at his or her own expense. The alleged offender may admit to the violation in writing and a Summary Administrative Proceeding may be used. If a person denies a violation, Summary Administrative Proceedings may still be used, provided that the Public Prosecutor concurs. If the Public Prosecutor does not concur, the matter shall be referred for prosecution.

Subject to the conditions listed above, and that the Summary Administrative Panel has determined that the person has violated the Act, the Managing Director may impose administrative penalties. These penalties may include a fine in an amount not exceeding the maximum provided under the Fisheries Act (the amount is to be determined by the Panel), and the fair market value of any fish caught illegally. In addition, until the penalty is paid, the violator may not engage in fishing or carry out any other activity in fishing waters. The violator also shall be deemed to have consented to any seizure which took place in accordance with the law. After notification of the penalty amount, the person has three days to pay in full or the matter shall revert to a court of competent jurisdiction. The Panel may order that any item used or involved in respect of the violation be seized or confiscated but shall not impose a term of imprisonment or order forfeiture. The Panel's decision is final and binding.

In the **Marshall Islands**, violations of the *Marine Resources Act 1997*[107] are dealt with either by traditional criminal prosecutions or by civil or administrative penalties. Civil penalties can be imposed where the Attorney General determines in writing that no criminal proceedings have been or will be instituted for the same contravention. The Act provides that the amount of a civil penalty must not exceed the maximum amount of the fine prescribed in the Act and specifies that in assessing the amount of the civil penalty to be inflicted, the Court must have due regard to the gravity of the prohibited act or acts committed and, with respect to violators, the degree of culpability and any history of previous offences.

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[107] The Marshall Islands Marine Resources Act was enacted on 3 August 1997.

The Director of the Fisheries Authority (the Director)[108] may initiate an administrative procedure against any natural or legal person having contravened any provision of the Marine Resources Act. Decision to proceed administratively for any violation is subject to prior approval of the Attorney General and must be made within 48 hours of the issuance of a notice of violation by the Director or the person designated by him. The Marine Resources Act provides for two types of adjudication proceedings depending on whether or not the alleged violator admits in writing to the violation. If the alleged violator admits to the violation, this matter is handled through summary administrative proceedings. In the contrary, the violation must be determined in an adjudicatory administrative procedure, provided that the Attorney General consents to it. In the event that the Attorney General denies consent, the matter must immediately revert to a court of competent jurisdiction. If there is a decision to handle the matter in an adjudicatory administrative procedure, the Director is required to set an adjudicatory administrative hearing for the violation within 48 hours of that decision. In summary administrative proceedings, the Director disposes of the violation by accepting an administrative penalty, the amount of which must not exceed the fine or penalty specified in the Act, plus the fair market value of any fish caught illegally. Pending full payment of the administrative penalty, the violator must not engage in any fishing or related activities in the Marshall Islands waters. Failure to pay the administrative penalty in full within three days of notification of such penalty assessment has the effect of rendering the summary administrative proceeding null and void and results in the matter being immediately reverted to a court of competent jurisdiction. On payment of the administrative penalty in full, the Director may order the release of any article seized under the Act or the proceeds of sale of such article. Any decision taken or order given by the Director in summary administrative proceedings is final and binding. The Director does not have the authority to impose a term of imprisonment. Timely payment of an administrative penalty[109] resulting from summary administrative proceedings must be notified in writing, under the signature of all parties, to the Court.

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[108] In the Marshall Islands, this authority is known as the Marshall Islands Marine Resources Authority.

[109] Note that section 103(6) stipulates that "Summary Administrative Proceedings for any violation shall … be satisfied upon payment of one half of the maximum fine set for such violation …" (emphasis added).

In addition to monetary penalty, the Marine Resources Act provides for licence sanctions. As in the U.S., licence sanctions (revocation, suspension, or imposition of additional conditions on or restrictions on licence use) may be imposed for cause or for unpaid sanctions.

Finally, it is interesting to note that, although the Marshall Islands has enacted an *Administrative Procedures Act* (equivalent to the American APA described above), the provisions of this Act do not apply to the Marine Resources Act due to the fact the latter contains detailed procedural rules.

2.2 Main features characterizing administrative sanctions

The survey of selected fisheries legislation throughout the world reveals that most countries have adopted provisions concerning the application of administrative sanctions in order to deal with fisheries infringements. Generally, the basic fisheries law specifies the acts and omissions that constitute offences, infringements or violations and usually includes the related penalties. For monetary penalties, lawmakers may empower the executive authority to set the levels of fine through regulations so as to make it easier and swifter to adjust such levels to inflation (e.g. in Spain[110]) or may link the levels of fine to a neutral economic parameter (e.g. minimum wage of the Federal District in Mexico). In addition, the law may contain provisions of a procedural nature, for example rules on notices, hearing, evidence, appeal etc. While fisheries legislation of some countries such as Malta or the Marshall Islands provide ample details on procedural rules, others, particularly in francophone Africa, have adopted limited provisions of a procedural nature. These rules, however, may be further regulated through administrative legislation applicable across the spectrum of legislation such as in the U.S. and Mexico. Moreover, to prevent protracted judicial proceedings, a growing number of countries the world over (with the exception of Latin America) have enacted fisheries legislation providing for out-of-court settlement mechanisms, generally referred to by lawmakers as compounding of offences or transaction.

2.2.1 Executive authority

The main distinguishing feature of an administrative sanction as opposed to criminal and civil law enforcement is that (at least in the first instance) the

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[110] In Spain, the *Ley de Pesca* 2001 authorizes the Government to adjust fines by Royal Decree.

decision to impose an administrative sanction is under the control of an administrative authority instead of a court. Often, the executive authority is the Minister responsible for fisheries or the chief executive officer in the fisheries administration (Director or Secretary), but further delegation is sometimes possible. Subject to certain conditions, some fisheries laws directly empower other government (enforcement) officers to impose administrative fines, for example local fisheries inspectors (e.g. Croatia and Slovenia) or harbor authorities (e.g. Cuba). Competence may be divided among a hierarchy of executive authorities depending on the level of the fine, such as in Equatorial Guinea, Spain or Viet Nam. Competence may also be divided between federal or state authorities on the one hand and provinces or communities on the other hand, like in Argentina or Spain. Some jurisdictions have established special commissions to assist the executive authority in assessing penalties (or establishing out-of-court settlements), for example in Albania, Peru, Mauritania and Senegal.

Discretion

Practically all administrative sanction systems seem to allow for some element of discretion by the executive authority and may require the authority to interpret legal or factual points in applying administrative sanctions. Most commonly found circumstances for consideration in the various fisheries laws are the following:

- gravity, seriousness or nature of the infringement;
- intention or fault of the offender (except for strict liability violations);
- previous conduct/record of the offender (repetition of an offence generally leads to the imposition of a higher sanction; typically higher fines and other sanctions such as suspension or revocation of fishing authorization or non-eligibility for the offender to hold a licence for a specified period are imposed)
- economic situation or capacity of the offender (solvency);
- estimated economic benefits derived from the infringement;
- type of fish or fisheries involved;
- (technical and economical) characteristics of the vessel; and
- damage caused to the fishery resource.

Inclusion of such language in a fisheries law is primarily designed to ensure consistency and fairness in the administrative decision-making process. In

the U.S., for example, NOAA has developed a sanction schedule used as guidance for its agency prosecutors in assessing sanctions in individual cases so as to avoid that the level of sanctions proposed by the agency's prosecutor be dependent on which prosecutor happens to be assigned to the case or the particular geographical location where the violation occurred. The sanction schedules are developed locally for those fisheries managed at the regional level. All schedules must undergo a review and approval process at the headquarters office before they can be formally adopted and used as part of the sanction schedule. Existing schedules are regularly evaluated to assess whether they maintain their effectiveness. The process is a dynamic one and changes can be made easily and quickly to respond to emergency situations. The sanction schedule is an internal policy document, not a rule, and therefore is not required to be published in the Federal Register. Factors in a schedule that are considered in setting a particular sanction or the range of the penalty include the seriousness of the type of offence, relationship of the violation to the fishery resource, frequency of violation, and history of the fishery. Aggravating and mitigating factors are also identified in the schedules and are taken into account. These factors entail the biological impact of the violation, impact on the viability of the regulatory scheme, extraordinary cooperation or lack thereof, attempted concealment of the violation, evasion, and the respondents' prior record of convictions. Separate schedules are established for most levels of violations. In addition to setting a specific dollar amount or range for types of violations, the schedules usually list any other sanctions likely to be imposed for particular violations, for instance, seizure of catch or vessel (or both), permit sanction (suspension or revocation), etc. Repetition of violations incurs the harshest sanctions.

Broad provisions enabling the licensing authority, being the Minister, the Secretary or the Director, to suspend or revoke a fishing authorization (typically where a person has contravened any provision of the Fisheries Act or any regulations made thereunder or any terms and conditions attached to the authorization or has been convicted under the fisheries law) are commonly found in fisheries legislation, for example in Sri Lanka and Mauritania. Unlike the U.S., few countries have established sanction schedules (or other safeguards[111]) to ensure consistency and fairness in

[111] Besides fines, the Spanish law specifies any other sanctions, including suspension or revocation of fishing authorization, that can be imposed for particular violations. The Malagasy fisheries regulations governing the shrimp fisheries determine the circumstances whereby a fisheries licence must be automatically withdrawn by the administration.

assessing and imposing administrative sanctions. No, or insufficient, safeguard restricting or limiting the discretionary power of the executive authority may lead at times to arbitrariness, particularly in countries where the rule of law is not yet established and where corruption is widespread.

Review or appeal of decisions by executive authority

All fisheries laws include the possibility of review of or appeal from the decision of the executive authority to impose an administrative sanction. Appeal may be limited to a reconsideration of the initial decision by a higher executive authority. This process is frequently used in countries of common law tradition such as in Sri Lanka, Malaysia and South Africa, to review administrative sanction decisions directly affecting the right to fish (suspension or revocation of a fishing authorization, non-eligibility of holding a fishing licence for a specified period). In Mexico, the fisheries law establishes an internal review procedure requiring the Secretary to review his own decision provided that the request to do so is made by the aggrieved person within 15 days of notification of the decision. If the Secretary confirms his initial decision, then the appeal procedure set forth under the *Ley Federal de Procedimiento Administrativo* can be initiated or the matter can be referred to an administrative tribunal.

In many countries, the decision is appealed before an external body, which can be a criminal court or an administrative or civil tribunal. In France, an administrative sanction imposed under article 13 of the fisheries law[112] can be appealed before an administrative tribunal. Review by an administrative tribunal is generally limited to determine whether a decision taken by an executive authority should be invalidated for breach of procedural rules or for lack of authority. Article 13, however, specifies that in instances provided for therein, the administrative judge is allowed to review all legal and factual points and may substitute his judgment for that of the executive decision (as opposed to simply invalidating the decision)[113].

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[112] Article 13 of the Decree of 9 January 1852 provides for the suspension of rights and prerogatives of masters of fishing vessels and of fishing licences issued in respect of such vessels where a violation of the prohibited acts provided for under articles 6, 7 and 8 has been committed.

[113] In French administrative law this procedure is known as "recours de pleine jurisdiction" as opposed to "recours pour excès de pouvoir".

2.2.2 Types of administrative sanctions

Administrative sanctions may take different forms. The survey of selected fisheries legislation shows that the most commonly used are the imposition of a monetary penalty, a suspension or revocation of a fishing authorization, a temporary ineligibility to hold a fishing authorization and the confiscation of catch, gear, equipment or vessel. To guarantee people's rights, deprivation of liberty (imposition of a term of imprisonment) is excluded from the scope of administrative sanctions and can only be imposed by a criminal court. Apart from administrative monetary penalties and authorization sanctions, which can be imposed by the executive authority as an immediate result of a breach of law or regulations, other types of administrative sanctions are generally subordinated to the main sanction generally imposed by the court[114]. With regards to suspension or revocation of a fishing licence or permit, two approaches are used. One authorizes the executive authority to suspend or revoke a fishing authorization any time a provision of the fisheries law or regulations has been contravened or a condition of the authorization has been breached regardless of the seriousness of the violation that has been committed. The other provides that such sanction can only be imposed where the holder of the authorization has been convicted of certain types of violation under the fisheries law (generally related to the gravity of the violation or where the offence has been repeated, e.g. U.S. and Spain).

Other types of administrative sanctions that were found include the loss of a fishing quota, the repayment of financial aid for vessels or maritime liens.

2.2.3 Rules of procedure

The main purpose of rules of a procedural nature incorporated in fisheries legislation is to guarantee constitutional rights or other similar basic legal rights. In countries relying primarily on a criminal enforcement system, few rules of procedure are found in fisheries legislation as criminal procedural rules apply, e.g. francophone African countries. In countries providing for administrative penalty schemes, one may opt for one of two approaches by either laying out detailed rules of procedure in specialized legislation or by applying procedural rules set forth in administrative procedure legislation,

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[114] These subsidiary-type sanctions are referred to as "sanctiones accesorias" in Spanish and "sanctions accessoires" in French.

which is applicable across the spectrum of legislation, e.g. US, Mexico and Spain.

With the objective of protecting an individual's rights, particularly due process and defence rights[115], common procedures found in most fisheries legislation include: notice, hearing or written statement, and the right to appeal the administrative decision within a specified period. Once a violation has been committed, a notice is served upon the offender to inform her or him of the facts, the date and nature of the offence, the location and the assessed sanction. Notices are served prior to imposing a penalty so as to afford the accused a reasonable opportunity to express their comments on the case. It can be done through a hearing or written statement. The decision of the executive authority may be appealed within a specified period to a higher authority or to civil or administrative courts.

In the U.S., notices take different forms according to the seriousness of the violation that has been committed. At the lowest level, it is a verbal warning provided by a law enforcement officer to a suspected offender at the time the violation is detected. It does not carry any future consequences, is not tracked in NOAA's enforcement database and does not follow formal rules or guidelines to control its use. A fix-it notice is used for very low-level, technical violations that do not impact directly the fishery or marine resources. It is a written notice given by a law enforcement officer at the scene of detection of the violation, if possible. The violator is required to fix or correct the violation within a specified period of time, typically 30, 60 or 90 days. Due to the low-level of the violation and the shortage of staff, NOAA does not check for compliance after the expiration of the fix-it time period. However, if the offender is found to be in non-compliance a second time and the time period to fix the violation has expired, there can be no credible claim of ignorance or mistake and the violator is unlikely to get off so easily. A written warning is the next step up and while it does not carry any monetary sanction, it is an appealable charge and may be counted as a prior conviction for the purpose of increasing the amount of monetary sanction for a subsequent offence. To deal with low-level violations, NOAA, a decade ago, introduced a new process, known as summary settlement. Its purpose is to provide an early offer to settle a case for a specified amount of money before it is referred to the agency's prosecutor. For the most serious type of violation, a notice of violation and assessment (NOVA) is used. The

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[115] Depending on the country considered, those rights may or may not have a constitutional status.

NOVA is an official charge that is served on the violator and combines the allegation of the violation, cites the statute or the regulations violated, and briefly explains the legal procedure available to the accused and specifies the assessed sanction. Once a violator receives a NOVA, he or she may take one of four options: 1) do nothing, in which case the NOVA ultimately becomes final by operation of law and the full amount of the assessed sanction may be collected by NOAA; 2) ask for the charges to be modified on the basis of information he supplies; 3) request a hearing in front of an administrative law judge to contest the allegations made by the agency. A hearing is not automatically scheduled, it must be requested, unless parties are charged jointly and severally, in which case only one respondent needs to request a hearing. The other party's rights will be adjudicated whether they are present to participate in a hearing or not; or 4) admit the violation and pay the full amount of the assessed sanction.

In France, any administrative decision affecting an individual's right must contain the reasons therefor and can be appealed to an administrative tribunal. As already mentioned in this paper, the scope of the administrative judicial review depends on the authority conferred upon the administrative judge by a statutory law. He may be authorized to either substitute his judgement to the executive authority's decision or his ruling may be limited to determine whether the executive authority complied with procedural rules in making its decision or had the required authority to make such a decision. Under article 13 of the Decree of 1852, the State representative in the Region, in addition to any other penalties, is authorized to suspend for a maximum period of three months the rights and privileges of masters of fishing vessels or fishing authorizations in respect of fishing vessels having violated any provisions of articles 6, 7, or 8 of the Decree of 1852. Decisions under article 13 are taken after consultation with a disciplinary counsel. A notice is served on the accused who may respond in writing within two months of notification. The decision may be appealed to the administrative tribunal, which, for decisions taken under article 13, is expressly authorized to substitute its judgment for the executive authority's decision. Under article 13-1 of the Decree of 1852, the executive authority may, in addition to any penal sanctions, impose a monetary penalty or suspend or withdraw a fishing authorization. An infringement notice providing for the factual basis of the allegation and explaining the procedure available is served on the accused. He may, within two months of notification, present his defence in writing and request a hearing in front of the executive authority. The decision is appealable to the administrative tribunal, which, in this case, is only competent to review the legality of the decision.

2.2.4 Out-of-court settlement

In many of the countries reviewed for the purpose of this study, it appears that out-of-court settlement is one of the processes used by executive authorities to enforce fisheries laws and regulations. The primary purpose for settling out of court is to avoid judicial action (protracted and costly judicial proceedings) and the moral stigma attached to it (criminal record)[116]. This process also allows the fisheries authority to tailor the sanction to a particular case (better than could be done by a court). Advantages of out-of-court settlement include swifter decision and greater effectiveness which in turn have the effect of strengthening the authority of the enforcement officers.

In countries of the civil law tradition, France and those francophone African countries, which have inherited the French legal system, have adopted specific provisions providing for a transactional procedure. They present the following common elements:

- the power to propose a transaction lies with the executive authority, usually the Minister or the person designated by him. In France and Morocco[117], however, the competent authority varies in relation to the seriousness of the violation committed as reflected in the level of the fine. In Senegal, the Minister or his representative is competent to settle any violation under the fisheries law except those concerning artisanal fisheries. More recently adopted fisheries laws often provide for the establishment of consultative commissions to assist the settling authority. Examples of such commissions can be found in Mauritania, Senegal, Republic of the Congo, Cameroon and Guinea. In Senegal, the consultative commission, after hearing the offender, proposes a monetary sanction to the Minister, who may approve or disapprove it. If he disapproves the proposal made by the commission, he may change it without having to consult again with the commission or having to disclose the reasons underlying his decision.

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116 Although it does not result in the violator having a criminal record, out-of-court settlement counts as a first offence for the purpose of determining repeat of offences in several francophone African countries such as Mauritania, Senegal or Guinea.

117 See Dahir portant loi n° 1-73-255 du 23 novembre 1973 formant réglement sur la pêche maritime tel que modifié et complété.

- Two approaches have been taken for initiating a transactional procedure. In countries such as Senegal, Republic of the Congo and Guinea, a transaction can be proposed to deal with any type of violations, regardless of their seriousness. In other countries, restrictions apply particularly with respect to very serious offences and repetition of offences. In Mauritania, for example, no transactional procedure can be proposed for violations concerning violence against, or interference with any action of, an enforcement officer, or destruction or concealment of evidence of a violation. In addition, there cannot be any transaction in case of repeat of offences. Similar provisions have been adopted in Madagascar, except that violations concerning the destruction or concealment of any evidence of a violation can be dealt with through transaction. In France, a transaction is viewed as a measure of leniency towards the offender and therefore is not suitable for very serious offences. However, the law does not expressly exclude any violation from the scope of the transaction and leave it up to the executive authority, taking into account the local context and the previous conduct of the offender, to determine whether or not to initiate a transactional procedure. In case of repetition of offences, a transaction should not be an option. However, an exception to the rule can be made, should such action, in view of the local context, be warranted. Lastly, in Senegal and Guinea, no transaction can be proposed if legal action seeking compensatory damages has been brought against the offender.

- In recent legislation, a transaction can only take place prior to judgment, in other words prior to any judicial proceedings or during such proceedings. This is a departure from earlier legislation which allowed initiation of transactional procedure at any time, including after judgment. In this regard, the Moroccan fisheries legislation of 1973, still in force, provides for transaction before and after judgment. This law is under review and such provision is likely to be modified soon.

- Generally, the administrative monetary penalty to be paid should not be less than the minimum specified fine for the offence, e.g. Republic of the Congo, Senegal, Morocco and Mauritania. Other provisions specifying that the administrative monetary penalty should not exceed the maximum specified fine can also be found in fisheries laws of other countries such as Guinea and Madagascar.

France takes a more lenient approach and makes a transactional procedure more attractive as the sum of money to be paid may not be less than one third of the minimum specified fine for the offence. An element of flexibility has been built in the law as the competent authority may augment the lower level of money to be paid in relation to the seriousness of the violation.

- The executive authority is usually empowered to take additional measures, such as the confiscation of catches, gear and any other equipment used in the commission of the offence. In Madagascar, the Minister may also order the withdrawal of the fishing licence held by the offender.

- Failure to pay within the prescribed period results in the transactional procedure being null and void, in which case the matter should revert immediately to the court of competent jurisdiction (e.g. Congo, Guinea, Mauritania, Madagascar, France).

- Payment of the transactional fine implies admission of having committed the offence. As a consequence, some fisheries laws, such as in Guinea, Senegal, Mauritania and Madagascar, provide that such payment counts as a first violation with respect to repetition of offences.

- Timely payment of the transactional fine excludes the matter further being dealt with afterwards by the court.

It is noteworthy to mention that the French law is the only one to subject the transactional proposal to the approval of the public prosecutor. Indeed, no legislation of francophone African countries studied in this paper provide for similar mechanisms. Lack of appropriate safeguards to ensure consistency, transparency and fairness in decision-making may lead to arbitrary decisions. This is particularly true in some African countries where lack of trust in the judicial system has resulted in the transactional procedure replacing judicial proceedings.

The provisions establishing a transactional procedure are comparable with the provisions on "the compounding of offences" that can be found in fisheries legislation of countries with common law tradition, such as Kenya, Seychelles, Sri Lanka and Malaysia. Similarly, the executive authority, generally the Minister or the Director of Fisheries, is vested with the power

to compound an offence by accepting a sum of money from the offender if it is believed that an offence has been committed. The amount of fine that can be imposed is set in relation to the level of fine specified in the law. It may not exceed the maximum fine specified for the offence, such as in Seychelles and Kenya, whereas it may not be less than one fifth of the maximum specified fine for the offence in Sri Lanka. Malaysia combines the two approaches by setting a minimum and maximum amount of fine. In both Seychelles and Kenya, two prerequisites must be met prior to compounding an offence. The offender must admit having committed the offence and must agree in writing to its being dealt with through compounding. While any offence may be compounded in both Seychelles and Kenya, exclusions are provided for under both the fisheries legislation of Malaysia and Sri Lanka. In Sri Lanka, it is further required that the Magistrate's Court be notified of any compounding of an offence under the fisheries legislation. Unlike a transaction which precludes further judicial proceedings, the compounding of an offence has a lesser effect as it is considered a good defence in both Seychelles and Kenya, provided that evidence of compounding can be shown. The Malaysian fisheries law is silent on this issue, which suggests that legal action can be taken. In Sri Lanka, however, the compounding of an offence has the effect of an acquittal.

In the U.S., NOAA's regulations and policies authorize settlement by mutual agreement of the parties at any stage in the proceedings, even after a hearing has been held or an initial decision rendered by the Administrative Law Judge. Eventually, more than 90% of NOAA's cases settle. When parties settle, rather than litigate a case, NOAA can agree to settlement conditions well beyond those specifically authorized by statute. NOAA tries to fashion a sanction that is meaningful and tailored to a particular case. Often creative solutions are driven by a lack of money on the part of the offender but can also occur because monetary relief is not seen as the most meaningful. Sometimes, education or other methods are seen as far more effective. NOAA has used a variety of conditions in its settlements, including such things as:

- public service videos, advertisements in newspapers or trade publications taken out by violators where the violator explains to his peers what he has done wrong and tries to help them benefit from his mistakes;
- community service in a task related to the violation;
- installation and use of vessel monitoring systems where it is not otherwise required;

- sale of vessels; and
- permanent surrender of permit.

Besides systems of compromise settlements, other enforcement measures are used to avoid criminal prosecution. They include summary administrative proceedings and infringement notices. Examples of the former can be found in the fisheries laws of Papua New Guinea and the Marshall Islands and examples of the latter in the fisheries laws of Malta and Argentina (see review of the fisheries laws of these countries above). These enforcement systems, which require admission of the violation by the offender, present similar features to those characterizing the transactional procedure and compounding of offences. Such systems may apply to any types of offences (e.g. the Marshall Islands or Papua New Guinea), or to certain types of offences only (e.g. minor offences in Malta). As in a transactional procedure and compounding of offences, failure by the offender to pay the administrative penalty within the prescribed period can result in court proceedings.

2.2.5 Why use administrative sanctions?

The debate on the use of administrative sanctions in fisheries law in jurisdiction other than the U.S. is limited. However, as mentioned above, the issue has been raised in recent European Commission reports and communications. In 2001, the European Commission issued a Communication to the Council of Ministers and the European Parliament concluding that: "For constitutional or historical reasons some Member States apply an administrative procedure, and others a criminal one. Even if the choice of procedure belongs to the Member State as a prerogative of sovereignty, experience in other economic fields has shown that the most effective procedure is not necessarily the one, which imposes criminal sanctions. Some reflection on this issue is therefore required[118]." Recognizing that the level of compliance with European fisheries regulations is not adequate to achieve the goals of the EU common fisheries policy and noting that administrative enforcement systems may prove more effective than traditional criminal ones, the EU Commission encourages Member States to seek new solutions, using administrative sanctions, for improving enforcement in fisheries law.

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[118] European Commission, Communication from the Commission to the Council and the European Parliament, COM(2001) 650 final, 12 December 2001.

One obvious argument for the use of administrative sanctions is to avoid the lengthy process that characterizes establishment of liability before imposing sanctions in criminal proceedings. In addition, use of administrative sanctions is a less expensive way of enforcing requirements as the cost of judicial proceedings is often prohibitive.

One of the main criticisms for the use of criminal sanctions in fisheries laws is that the economic losses to the country arising from illegal fishing activities are unaccounted for. Criminal sanctions are indeed not profit and revenue driven. Therefore, it can be argued that by involving persons (fisheries enforcement officers) who know the industry in adjudication, as is done in the U.S., more realistic and appropriate penalties are likely to be imposed on the offender. This point is particularly important in developing countries where the judiciary may not have the necessary resources (lack of financial means, shortage of judges) and adequate knowledge (especially in countries where fisheries is not a governmental priority) to prosecute fisheries cases.

Another argument for the use of administrative sanctions is that, in a criminal proceeding, there is no opportunity for settlement. In some countries of the common law tradition, the only form of settlement may be plea bargaining where the prosecutor could opt to prosecute the offender for a lesser offence or seek a lesser penalty if the defendant agrees to plead guilty. Such argument is even more potent in certain countries of civil law tradition, such as France, where plea bargaining is a foreign concept and therefore there exists no possibility to settle in a criminal proceeding.

Avoiding the moral stigma that is attached to criminal sanctions and thus the consequences that the existence of a criminal record may have on the offender's life was an argument put forward for the use of the transaction in France. In other countries such as in the United Kingdom, this argument was dismissed as it was argued that the systematic use of criminal sanctions has become so common that the moral stigma that it carries has lost its deterrent effect. A similar view was expressed in Papua New Guinea[119].

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[119] See Kuemlangan, B., A Discussion Paper on Administrative Penalties as Alternative Sanction for Natural Resources Law Enforcement in Papua New Guinea, (FAO) unpublished paper. The author mentions that "the moral stigma issue may even have less effect if the fact that former criminals are carrying normal business is any indication".

3. STEPS TO FOLLOW FOR THE INTRODUCTION OF ADMINISTRATIVE SANCTIONS IN FISHERIES LAW

The purpose of this chapter is to provide lawmakers with some general guidelines for the drafting of legal provisions enabling the use of administrative sanctions in fisheries law. It attempts to identify the issues that need to be addressed and briefly discusses the various options that can be chosen from.

3.1 Scope

Determining the scope of application of administrative sanctions is the first question to be answered by lawmakers. Can they be imposed on any kind of offences (ranging from minor to very serious) or only to certain types of offences (e.g. minor offences)? Is there any exception to a rule of general application (e.g. violence against an enforcement fisheries officer is generally treated as a criminal violation regardless of the type of enforcement system that has been chosen)? Clear-cut language precisely specifying the offences or types of offences to which administrative sanctions can be imposed must be inserted in the law so as to avoid any problem of interpretation at the implementation stage.

3.2 Executive authority

As already mentioned above, the main distinguishing feature of an administrative sanction is that, at least in the first instance, the decision to impose an administrative sanction lies with an executive authority instead of a court. Therefore, the law must determine the nature of the executive authority in which such power is vested (whether it is the Minister, the Director, or any other authority) and specify whether, and subject to which conditions, it can be delegated. The nature of the executive authority may vary in relation to the types of violations or the level of fines, or to the State's structure (e.g. in some federal states, there could be power-sharing arrangements).

3.3 Types

The various types of administrative sanctions that can be inflicted by the executive authority must be defined in the law. They can take different forms, *inter alia*, monetary penalty, suspension or revocation of a fishing

authorization, loss of fishing quota, and confiscation of catches, gear, equipment and vessel. In addition to the different forms of administrative sanctions that can be imposed, the law may also determine the conditions or triggering factors that will enable the executive authority to inflict specific types of sanctions. For example, the law may list the various types of violations that may be punished by suspension or revocation of fishing authorization. The purpose of including such provisions in the law is two-fold: first, it is designed to have a deterrent effect on potential offenders who, by knowing what is at stake if they willingly decide to infringe the law, may conclude that it is not worth taking the risk; and, second, it allows lawmakers to grade sanctions in relation to the seriousness of the violation and by the same token to limit the executive authority's discretionary power. Guidelines may also be drawn up to assist the executive authority in determining the level of sanction to be imposed (see section 3.5 below).

3.4 Processes

It is crucial that the law provides for the different processes (e.g. transaction, compounding of offences, infringement notice, summary administrative proceedings) that are to be used to impose administrative sanctions and spells out the rules of procedure governing every step in the process (notice, hearing, written statement, decision, rules of evidence, time frame, appeal, judicial review). Devising clear and comprehensive rules of procedure is critical to guarantee any person's constitutional rights and to ensure consistency, transparency and fairness in the decision-making process leading to the imposition of administrative sanctions. Whether such rules are to be laid out in the fisheries legislation or in a separate piece of legislation dealing specifically with administrative rules of procedure (e.g. APA in the U.S.) is of little importance. What matters is that such rules exist and are sufficiently detailed and precise to achieve their goal. In francophone African countries, rules of procedure governing transactions found in fisheries legislation (which are usually not supplemented by subsidiary legislation) are often too sketchy. As a result, the transactional procedure often lacks of transparency and may at times lead to the taking of arbitrary decisions. This example shows that it is critical that lawmakers be very careful in drafting provisions of a procedural nature and that they ensure that appropriate safeguards are built in the law. Issues to be addressed include:

- discretionary power: the question here is to determine whether the discretionary power enjoyed by the executive authority should be restricted to the purpose of imposing administrative sanctions. For

example, should the Minister be allowed to dismiss the proposal of an administrative sanction made by a consultative commission or panel by substituting his own decision without referring the matter back to that commission and without explaining the reasons of his decision?

- reasons underlying a decision taken by an executive authority: what is to be specified here is under which circumstances or conditions or for which types of decision should an executive authority be required to state the reasons of his decision. In France, for instance, any administrative decision resulting in the denial or the restriction of a natural or legal person's right (e.g. suspension or revocation of a fishing authorization) must contain the reasons that decision.. This requirement is designed to protect the rights of natural and legal persons against arbitrary or unjustified decision by an executive authority.
- approval by an external body: what is to be determined here is whether the decision to initiate administrative proceedings should be left to the full discretion of the executive authority or be subject to the approval of the public prosecutor or Attorney General as is already done in several countries, including France, the Marshall Islands and Papua New Guinea. Such a measure enables the department responsible for justice to exercise some control over the use of judicial power by the executive.

3.5 Assessment of administrative sanctions

To achieve consistency and fairness in the process of meting out administrative sanctions, it is important that guidelines designed to assist the executive authority in assessing the administrative sanction to be imposed be devised. These guidelines should, on the one hand, help the executive authority determine the level of fines to be inflicted and, on the other, list the kind of additional measures that can be imposed in relation to the type of the violation that has been committed (e.g. sanction schedule used by NOAA in the U.S., guidelines provided for the use of transaction in France). Guidelines should be flexible and adaptive instruments so as to enable the executive authority to fashion the administrative sanction to a particular case and to respond to emergency situations. They should therefore be taken in a form that allows easy and swift modification. Mitigating and aggravating factors or circumstances to be considered to determine the level of sanction to be inflicted may also be spelled out in the guidelines (impact of the violation on the fishery resources, previous conduct of violators etc.).

3.6 Appeal/judicial review

Any person who is aggrieved by a decision taken by an executive authority should be able to contest the decision before a court of competent jurisdiction or appeal it to a higher administrative authority. Where an internal administrative appeal procedure has been provided for under the law, relevant provisions should at least designate the authority to whom the appeal should be lodged, set the time frame within which action can be taken, provide for a hearing or an exchange of written statements, specify the kind of measure that the executive authority may take and determine whether such decision is final or can be further appealed. Judicial review of an executive authority's decision is subject to applicable rules of procedure before the court of competent jurisdiction.

CONCLUSION

The prime purpose of this study has been to examine the use of administrative systems for dealing with fisheries offences, drawing examples from a diverse range of countries and from different legal systems. The study was itself undertaken against the background of the call in the IPOA-IUU for States to consider the "*adoption of a civil sanction regime based on an administrative penalty scheme*"[120] which has made the study especially timely.

Most countries have established dual enforcement systems, utilizing criminal and civil administrative systems to deal with the many types of fisheries violations. Even countries which traditionally rely primarily on a criminal enforcement system will often complement this system by providing for the use of administrative penalties to sanction certain types of fisheries violations. Some countries, in particular the U.S., have made extensive use of administrative enforcement in fisheries. This system has proved effective and flexible. The U.S. example shows that a system of administrative enforcement may be a viable alternative to a criminal enforcement system in fisheries.

A second purpose has been to provide countries considering the introduction of such systems with a starting point in their enquiry and to alert them to the range of issues that they need to take into account. In the EU, a new trend pointing in the direction of an extended use of administrative sanctions in fisheries may be emerging as the Commission of the European Union in a recent Communication is recommending that its members to give serious thought to this issue.

As can be seen from the study there are many different ways of establishing a scheme of administrative sanctions. They can thus be fashioned in many ways to achieve the intended objectives, and they deserve serious consideration as a means of extending the effectiveness of governmental law enforcement programmemes. The value of such schemes can range from providing an alternative mechanism to the more cumbersome criminal procedures found in most countries.

Additionally, such schemes can provide an alternative approach altogether for countries which might lack the resources to tackle IUU fishing through more traditional judicial methods. For such countries, provided that the basic

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[120] Paragraph 21

safeguards governing the rights of individuals are incorporated into the system, going down the path of an administrative penalty scheme could well prove to be both economically and legally cost effective. In addition, they can provide a speedy means of dealing with IUU fishing, with only limited administrative resources required for its administration.