

LEGAL ASPECTS AND MONITORING CONTROL AND SURVEILLANCE

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INTRODUCTION

Monitoring, control and surveillance is an important key component of fisheries management. In essence MCS is vital for collecting data on biological, economic and social aspects of the fisheries and basic information on the fishers, boats and gear. It influences the decision-making processes or fisheries management planning and plays a critical role for the implementation of fisheries management involving both government and fisher's community and industry.

In a nutshell, the process includes the gathering of information on the basis of which to adopt appropriate rules and the effective implementation (and, if necessary, enforcement) of those rules.

In the mid to late 1970s two considerations figured significantly in FAO's assessment of the need for technical assistance in monitoring control and surveillance (MCS). These considerations were

- (i) The deliberations of the Third United Nations Conference on the Law of the Sea (UNCLOS) and
- (ii) Recognition of the central importance of MCS to effective fisheries conservation and management.

The UNCLOS (1973-1982) led to the adoption of a new international legal regime for the management of the world's oceans, the 1982 **United Nations Convention on the Law of the Sea** (1982 Convention), to which India acceded in 1995.

According to the 1981 FAO Expert Consultation¹¹, the following definitions for monitoring, control and surveillance were adopted. These three inter-related activities were defined as:

- **Monitoring** - the continuous requirement for the measurement of fishing effort characteristics and resource yields.
- **Control** - the regulatory conditions under which the exploitation of the resource may be conducted.
- **Surveillance** - the degree and types of observations required to maintain compliance with the regulatory controls imposed on fishing activities

¹¹ FAO. 1981. FAO. 1981. "Report of an expert consultation on monitoring, control and surveillance systems for fisheries management". FAO Report FAO/GCP/INT/344/NOR.

FAO continues to use these definitions and in many respects they have become international standard terminology. Indeed the combined reference to all three terms has been generally adopted internationally in the past two decades. The point is sometimes made that simpler terminology such as control and enforcement. However, this would not reflect the wider approach taken with respect to fisheries law enforcement. The basic consideration on which such an approach is founded is that effective enforcement does not involve exclusively (nor necessarily) either the use of the latest technical equipment or the use of force, or both. Rather, effective enforcement is subject to the prior realistic consideration of the state of the fish resources (the concept of *monitoring*) and to the adoption of appropriate policy and legislation (the concept of *control*).

FAO acknowledges also that the contents of the definitions are in constant evolution, be it because the nature of MCS functions is changing, be it because of recent developments in fisheries legislation or be it because of changes in international law. A driving force behind the changes in MCS functions is the availability of technologies like VMS combined with the fact that, up to now, conventional MCS measures have not proved to be effective. Changes can be noted, in the light of the recently adopted international fisheries agreements, namely the FAO Compliance Agreement¹² and the UN Fish Stocks Agreement¹³. Indeed, MCS must not be considered exclusively in confined national perspectives.

The FAO Compliance Agreement, elaborated pursuant to the 1982 UN Convention relies on two main elements, namely the concept of flag state responsibility in respect of vessels fishing on the high seas and ensuring the free flow of information on high seas fishing operations. The UN Fish Stocks Agreement is intended to give effect to articles 63 and 64 of the UN Law of the Sea Convention, which deals with straddling fish stocks and highly migratory fish stocks. Both agreements contain several provisions relevant for MCS, e.g. in relation to data collection, in support of VMS, etc.

The same could be said in relation to the Code of Conduct for Responsible Fisheries, adopted by the FAO Conference in October, 1995. Finally "newly" adopted principles such as the precautionary approach lead, undoubtedly also to innovative changes. The introduction of the precautionary approach principles modifies the role of scientific data. It requires that once environmental damage is threatened, action should be taken to control or abate environmental interference even though there may still be scientific uncertainty as to the effects of the activities. It thus represents an important tool for decision making in uncertainty.

A FEW EXPLANATORY WORDS ON THE ATTACHED POWERPOINT PRESENTATION

The pages that follow are copies of a power point presentation, they summarise some core components which one can find in fisheries laws and which are important for the purposes of MCS.

¹² Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (November, 1993)

¹³ The Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, which was adopted by the UN Conference in August, 1995.

Legislation is crucial because there needs to be a legal basis to allow for the effective implementation fisheries management measures as well as for successful implementation of MCS operations. The list of components is not meant to be exhaustive. These core components include:

- The definitions or interpretation section;
- The organisational issues i.e. the powers and responsibilities of all those persons likely to play a role in MCS;
- The consultation and co-operation procedures i.e. consultation with the industry (from owners to traders), co-management structures, co-operation with other States with respect to monitoring, to control and to surveillance;
- The management measures which are reflected amongst others under the respective obligations of the fishers and the authorities;
- The operational aspects: e.g. data collection, boarding, patrols, search and inspection procedures, port/landing site control, fisheries prosecution, evidentiary materials;
- The offences and related sanctions. Obviously, investigation officers ought to be familiar with the elements of each offence. This will allow them to seek elements of evidence for each such element.

Finally, some strengths and weaknesses of the Indian State Marine Fishing Regulation Acts are highlighted.

TEXTS OF POWERPOINT PRESENTATION LEGAL ASPECTS RELATING TO MCS

OUTLINE OF PRESENTATION

- Why is legislation important?
- Key legal components for successful MCS
- The specific situation of Indian States: a few words

THE CONCEPT OF MCS: A PROCESS

- Gathering of information
- The effective implementation of the rules
- Adoption of rules

WHY RULES AND BASIC PRINCIPLES

- Fisheries management needs a legal base from which to implement fishing operations
- Basic drafting principles:
- Acceptable, practical and adaptable
- Same rules, different game because of different actors, fishing patterns - flexibility
- Recognised authority to enforce them
- Punishment for violation appropriate and proportional

INTERESTED PARTIES

- Direct participants e.g. fishers
- Those who can affect the rules e.g. governments
- Those who are affected by the rules e.g. local communities

CORE LEGAL COMPONENTS FOR SUCCESSFUL MCS: FISHERIES LEGISLATION

- Section on definitions:
 - (i) e.g. Minister responsible for fisheries,

- (ii) the Fisheries Administrator, fisheries officer etc.;
 - (iii) zones and limits;
 - (iv) fishers, licenses, the act of fishing, fishing vessels
- Organizational considerations: level, role and responsibilities in fisheries management
- Management measures and the fishers
- Consultation with interested parties and liaison:
 - (i) the fishing industry,
 - (ii) other ministries,
 - (iii) police,
 - (iv) port authorities,
 - (v) Ministry of Defense (e.g. Navy, Coast Guard)
- Operational aspects:
 - (i) data collection,
 - (ii) boarding,
 - (iii) patrols,
 - (iv) inspection procedures,
 - (v) port/landing site control,
 - (vi) fisheries prosecution
- The offences and related sanctions

SCALE AND LEVEL OF RESPONSIBILITY : WHO (FROM FISHERS TO AUTHORIZED/INSPECTION/FISHERIES OFFICERS) AND RESPECTIVE RESP/POWERS IN RELATION TO MCS

- National
- Regional/provincial
- Local
- Fisher, fishers cooperative, association

OBLIGATIONS OF FISHERS

- Offences under the law, penalties and the onus of proof
- Registration of fishing activity
- Limited entry fishery

- Concept responsible fisheries management
- Reports: catch report, fishing patterns, timing, position+inspectors reports
- Transshipment issues
- Logbooks requirements
- Marking of fishing vessel/gear

OFFENCES

- Need to define the variety of conduct that is prescribed:
 - (i) assault on fisheries officers;
 - (ii) unauthorized fishing;
 - (iii) unauthorized gear;
 - (iv) breach of terms and conditions, etc.;
- Sanctions may include:
 - (i) forfeiture of illegal gear and fish taken;
 - (ii) fines.
- Investigation officers to be familiar with the elements of each offence to allow him to seek elements of evidence for each such element
- Evidentiary materials: admissible evidence and inadmissible evidence for defining:
 - (i) location (GPS/charts),
 - (ii) time (VMS/GPS)
 - (iii) vessel identification (markings, registration number, colour, size)
 - (iv) vessel activity (gear activity, catch on board, location, charts, logbooks, photographs, videos, witnesses)

THE SPECIFIC SITUATION OF INDIAN STATES: A FEW WORDS

SURPRISING ELEMENTS FROM MCS POINT OF VIEW

- 1978 model - No planning provisions
- Inaccuracies regarding fishing zones: 12 nautical miles or 24 km or 24 nautical miles
- Allocation of institutional responsibilities: Powers of the authorized officers (as per the Marine Fishing Regulations Act);
 - (i) licensing,
 - (ii) registration,

- (iii) inspection,
 - (iv) search,
 - (v) seizure,
 - (vi) reporting to adjudicating officer.
- Contents of returns: fishing zones, consumption of fuel and species, monthly
 - Though major focus on fishing vessels there is no reference to marking of fishing vessels/gear
 - Liaison and consultation with interested parties and between States: one exception; no co-management
 - Investigation based on the report of the authorized officer

A POSITIVE NOTE

- Harmonization same pattern however, similar rules but different games;
- Harmonization is crucial for co-ordinated approaches among states;
- An attempt to place in the legislation a “reverse onus of proof” i.e. the accused is guilty until proven innocent? Is this an excuse for no prosecution or to ease the work of the responsible investigator?