



**Second Intersessional Working Group
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**On-Board Fisheries Observers
Legal Liability and Insurance**

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Introduction

CCMs represented at the TCC3 wished to have information regarding general liability of the observer on board vessels and also wished to know what the observer programmes and vessels responsibility were regarding the liability of the observer on a vessel if something happens to the observer. The question was also raised on who is liable if there is an observer on board and through their actions, they cause the vessel to lose valuable fishing time.

TCC3 delegates sought a legal opinion on this matter. A Canadian-funded expert in Maritime Law, Professor Edgar Gold, provided the information in this paper to WCPFC4 on the issue entitled “On board Fisheries Observer Legal Liability and Insurance”.

WCPFC4 directed that the paper and its implications be discussed at the IWG-ROP2.

**On-Board Fisheries Observers:
Legal Liability and Insurance
A Brief Overview**

By

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**NOTE: Although this overview has been compiled with every care in order to ensure accuracy,
it should not be considered as legal advice and the author cannot be held liable for any errors
or omissions.**

On-Board Fisheries Observers: Legal Liability and Insurance A Brief Overview

Prof. Edgar Gold

Fishery Observers: An Expanding Global System

1. Placing fisheries observers on board large and small fishing vessels operating in territorial waters, Exclusive Economic Zones, and on the High Seas has been practiced by many coastal and island states, and an increasing number of regional fisheries commissions and organizations, for several decades and has today become a well-established practice. The principal purpose of the observer system is to ensure that national and foreign fishing operations comply with national and international regulatory requirements designed to protect fishery resources specifically and the marine environment generally. Such regulatory requirements have been developed under a number of international treaties such as the *United Nations Convention on the Law of the Sea* (UNCLOS) and various global and regional fisheries treaties developed under the UNCLOS umbrella or complementary to UNCLOS. In some cases, larger multi-national fishing companies even invite observers on to their vessels fishing in international waters in order to demonstrate their compliance with international fishing regulations and requirements that are set out under various international treaties. As these international and regional fisheries treaties are well known, they will not be specifically discussed in this paper which will, instead concentrate on liability and insurance aspects related to on-board fisheries observers.

Fishery Observer Legal Liability: The Lack of Reliable Data

2. The on-board fisheries observer system has evolved from its rather haphazard, rudimentary and undefined beginnings into a widely utilized and well-developed system. However, the legal insurance and liability aspects related to on-board observers do not appear to have received the attention they deserve or require. This may be due to the fact that there have been relatively few reported

problems in this area. In addition, as the fisheries observer system has undergone significant global expansion only in the recent past, questions of legal liability may not yet have been considered to be in need of detailed analysis. This can be illustrated by the most recent global meeting that examined the fisheries observer system.

3. The 5th International Fisheries Observer Conference, held in Victoria, BC, Canada in May 2007, attracted over 280 participants from 45 states, including representatives from fish-monitoring programmes, fishing industry groups, end-users of fishery-dependent data collection systems, scientists, managers, lawyers and many others.¹ This meeting illustrated not only the increasing development and formalization of the observer system, but also that it was becoming much more international in its operations. Furthermore, many of the presentations at the conference also indicated that international development problems would be as frequently encountered in the evolution of the observer systems as in other areas. Nevertheless, it is surprising that the largest international gathering examining virtually all aspects of the fishery observer system, did not specifically address on-board observer legal liability and insurance aspects at all. One of the conference workshops discussed 'Observer Safety', but this was more in the context of their general safety on board the vessels upon which operate.² Nevertheless, the conference's proceedings provide an important insight into the current systems of fish-monitoring, as well as valuable guidance to coastal and island states that are evaluating the development and viability of observer systems in their waters in order to protect their fisheries and maximise related economic benefits.

4. In other words, there continues to be very scant research in the specific area of legal liability and risk coverage for on-board fishery observers. The only exception appears to be a US workshop, held in 2001 under the auspices of the US Department of Commerce.³ Although this workshop addressed a number of subjects relevant to the main theme of this overview, the focus was specifically related to US

¹ McVea, T.A. & Kennelly, S.J. Eds. *Proceedings of the 5th International Fishery Observer Conference—15-18 May 2007, Victoria, British Columbia, Canada*. (Cronulla, NSW: NSW Dept. of Primary Industry/Fisheries Centre of Excellence, 2007)

² *Ibid*, at 181

³ Hansford, D.C. & Cornish, V.R., Eds. *Fisheries Observers Insurance, Liability and Labor Workshop—Technical Memorandum*. Organized by the US Dept. of Commerce, National Oceanic and Atmospheric Administration, National Fisheries Service, Office of Science and Technology, National Observer Program (Tampa: MRAG Americas, 2001)

problems which, as is often the case, are very different from those that generally apply internationally, especially in terms of liability and insurance law. This will be addressed again below.

Third-Party (P&I) Liability Insurance in the Maritime Sector

5. Before focussing more sharply on on-board fishery observers, it may be helpful to provide a brief overview of the legal aspects of third-party liability insurance in the maritime sector. A basic understanding of this aspect will be of increasing importance for states, regional fishery organizations, as well as the fishing industry, when the question of legal liability related to fishery observers arises.

6. Shipowners, vessel operators and ship charterers (and fishing vessels owners, operators and charterers are included in this definition) will usually seek insurance coverage for the many risks that are involved in their sea-going operations. In addition to covering marine-related risks to hull and machinery, cargo on board, as well as a number of other risks, one of the major concerns will be coverage for third-party claims. In fact, no reputable ship operator would today consider sending a vessel to sea without such risk coverage. Third-party claims arise out of injury or damage incurred by others (i.e. third parties) from vessel operations. In the context of this overview, only third-party coverage will be briefly discussed.

7. In shipping law, third-party risk coverage is defined as 'protection and indemnity' (P&I) coverage. In other words, the insurance policy 'protects' the shipowner against claims, and 'indemnifies' the shipowner for claims that have been paid or otherwise satisfied. In most cases, P&I coverage is provided by a unique group of insurers who operate on a non-profit basis and pay claims from funds that are derived from contributions from their shipowner members on a mutual basis.⁴ These mutual underwriting groups are known as 'P&I Clubs'.⁵ Although the majority of the twenty⁶ P&I clubs in operation are based in the United Kingdom, there are several others based in Norway, Sweden, Japan⁷, and the United States. These

⁴ See, for example: Gold, Edgar, *Gard Handbook on P&I Insurance*. 5th Ed. (Arendal: Gard AS, 2002), Part II

⁵ See: Hazelwood, S.J., *P&I Clubs: Law and Practice*. 3rd Ed. (London: Informa, 2000)

⁶ The 13 major P&I clubs are members of the International Group of P&I Clubs, London. See: www.igpandi.org

⁷ The Japan Shipowners' Mutual Protection & Indemnity Association, Tokyo

clubs virtually cover the P&I risks of over 90 per cent of world shipping.⁸ Although the clubs carry a significant risk themselves they cooperate amongst themselves in cases of larger claims through a 'Pooling Agreement' and then reinsure themselves against higher and catastrophic claims.⁹ (See APPENDIX I for fuller details on P&I clubs and their operations)

8. The P&I cover is specifically designed for the various types of vessels operated by the club's members. In the case of fishing vessels the club will require detailed vessel and operational information, including the geographical area of operations, the competency and professionalism of the crew, safety requirements, etc. It is likely that the P&I club will require and receive information on the possibility that fishery observers may be placed on board at this stage. As already indicated, full disclosure on anything that may affect the risk coverage will be essential. In this connection the requirement to disclose all relevant information on the operation of the member's fishing vessels will not differ from other members who may operate tank vessels, container ships, or cruise ships.

9. P&I insurance provides very comprehensive risk coverage for virtually all aspects of maritime operations. This fact is increasingly realized by many coastal states that see this coverage as a vital link in the protection of the marine environment, marine resources and coastal amenities. As a result, the production of evidence of valid P&I cover is now increasingly demanded by states as a condition for vessels being permitted to enter coastal waters and ports, as well as operating in coastal areas. In fact, it can be argued that any coastal state that permits vessels without this vital risk coverage to enter its waters, or operate in its near-shore areas, is not only taking unacceptable risks but is probably in breach of UNCLOS.¹⁰

10. Some type of appropriate P&I coverage is now carried by all vessels with the possible exception of naval and other government-service vessels. Furthermore, the majority of fishing vessels, especially those that carry out international operations, also carry this type of risk coverage. However, it appears that there is a minority of such vessels that are either inadequately covered or have no cover at all. In addition,

⁸ Coverage is technically unlimited, with some exceptions, and may also be subject to Limitation of Liability under maritime law. See, for example: Gold, note 4 above, Part VI; and, Gold, Edgar, Chircop, Aldo & Kindred, Hugh, *Maritime Law*, (Toronto: Irwin Law, 2003) Ch. 18.

⁹ Gold, note 4 above, Ch.5

¹⁰ UNCLOS Art. 192. "States have the obligation to protect and preserve the marine environment."

many smaller, inshore fishing vessels are also frequently uninsured. This minority is increasingly based and operated in less developed regions and/or where coastal state enforcement is either patchy or non-existent. Although it is hoped that fishery observers are not placed on such vessels, it may well be that, in some regions, they are. It is strongly suggested that this is legally unacceptable as such operations are not only placing such personnel at significant risk, but also pose risk to the coastal state in terms of potential damage for which no recourse is available. In other words, it is suggested that in legal terms no state should permit fishing vessels that do not carry adequate third-party risk coverage to operate in waters under its jurisdiction. It follows that fishery observers should not be permitted to be on board such vessels.

P& I Coverage for Fishery Observer Liabilities

11. This section focuses more directly on risk coverage for fishery observers on board the great majority of vessels that carry adequate P&I insurance. The risks that need to be covered are:

- personal injury;
- loss of life;
- loss of equipment and personal effects;
- medical coverage, including medical evacuation if required;
- repatriation costs if required; and
- losses arising from the action, inaction or activity of the observer whilst on board or in the service of the vessel.

12. The P&I policy treats fishery observers as “a person carried onboard” and the above risks would be covered under the relevant P&I club’s rules. Although there are some minor differences between the various P&I clubs’ rules the following is excerpted from the rules of the Gard P&I Club, the world’s second largest P&I club, based in Arendal, Norway, which has numerous fishing vessels/companies as members:

1. The Association shall cover liability arising out of injury to, or illness or death of, or liability for loss of or damage to the effects of persons carried on board other than crew or passengers provided that:
 - i) in the case of a person other than a close relative of a member of the crew, the Association has approved the presence of such persons on board.¹¹

¹¹ Rule 29. Gard, *Statutes and Rules 2007*. See also: Gold, note 4 above, Ch. 17

In other words, “other persons”, such as fishery observers, are fully covered under a vessel’s P&I policy provided that the relevant club has been notified and approved the presence of such persons on board. The rule is generally broadly interpreted and would easily encapsulate fishery observers. As long as there is liability to and from such a person there is cover. It is a simple, practical matter to this stage. (See also APPENDIX I)

Fishery Observer Liability under Contract

13. Fishery observer liability may become a little more complicated when there is a contract or agreement between the fishing vessel member of the P&I club and the entity that places the observer on the vessel. In many cases, such an agreement or contract will be entered into by a government agency, private corporation, other entity, or even the individual observer. If such an agreement refers to issues of liability, the relevant P&I club must be advised. This is due to the fact that P&I clubs have a specific rule related to terms of external contracts:

The Association shall not cover under a P&I entry liabilities, losses, costs or expenses: a) which would not have arisen but for the terms of the contract or indemnity entered by the Member, or by some other person acting on his behalf, unless the terms have previously been approved by the Association, or cover for such liabilities, losses, costs and expenses has been agreed between the Member and the Association, or the Association decides, in its discretion, that the Member should be reimbursed.¹²

14. This rule is designed to protect the P&I club in the event that the shipowner member may have signed away all rights and defences in the event of a personal injury/death or other claim relating to an on-board observer. In some cases, it may be likely that the relevant government agency may make such broad indemnity a condition for placing the observer on board. In such cases, the shipowner member must inform the responsible P&I club accordingly. However, in many cases, where the member has no choice but to agree to such terms, the P&I club may still provide coverage, even without additional premium payable. This confirms the general policy of P&I clubs to cover their members for all risks to which they may be exposed.

15. Alternatively, there may be cases where on-board fishery observers are covered for certain liabilities and risks, arising out of their employment, by their direct employer. Such an employer may be a government agency, private corporation, or

¹² Rule 55, *ibid.*

contractor acting on behalf of a government agency. In many cases, the individual may actually be a government employee who will be covered for most risks, arising out of the employment, under their employment contract. In such cases, if there is an occurrence that can lead to a claim the person involved is technically not only covered under the vessel's P&I policy, as already described above, but also under the risk coverage of the employment contract. There may, however, be claims that are covered under the vessel's P&I policy, but not under the employment coverage and vice versa. Once again, it will be necessary that clear communications be set up between the fishing vessel owner, the vessel owner's P&I club and the observer's employer, so that there are no problems when claims arise.

16. Although it is unlikely that P&I coverage for fishery observers on board would involve substantial increases in the P&I insurance premium, it may be possible that if the P&I club was informed that the observer is fully covered under external risk coverage, the premium would decrease. In practice this is highly unlikely. For example, If an accident occurs on board and the observer is injured, the costs arising out of such an incident will presumably be settled by the insurer acting on behalf of the employer of the observer. If the employer is a government agency, there may not even be an insurer involved as the claim would be settled out of government funds or other arrangements, such as a Workers Compensation Fund. Nevertheless, regardless of whether a government agency or private insurer is involved, as the accident occurred on board, these entities may seek recovery for the costs of the settlement from the vessel's P&I insurer under the general insurance law principle of subrogation. In other words, unless it can be clearly shown that the accident had no connection whatsoever with the employment on board, the ship and its P&I club will ultimately be held responsible.

Fishery Observer Liability: The 'Mutual' Insurance Cover

17. It is not suggested that employers of fisheries observers should simply leave all questions of liability arising from the on-board employment to the vessel's P&I club. On the contrary! It is always better to be overinsured than underinsured. It is good policy for the employers of observers to provide adequate risk coverage for such employees regardless of whether any other risk coverage is available. In fact this type of cooperative or mutual liability insurance arrangement has been

successfully implemented in many fisheries regions where the fisheries observer system has been implemented.¹³

18. This 'mutual liability insurance system' also provides a good fall-back position; especially in cases where the vessel owner has allowed P&I coverage to lapse or where the P&I club has withdrawn coverage for breach of club rules, such as non-payment of premium. In any case, in its negotiations with the fishing vessel, fishing company or related entity, the coastal or island state that has jurisdiction for permitting access to the fishery, and which wishes to place fishery observers on the vessel(s) involved, may be in the position to pass the various costs involved on to the applicant. Such costs should be clearly calculated and could include the costs for adequate risk coverage provided directly or indirectly by the coastal state's government agency or private contractor for their observer employee.

19. As already suggested, in the majority of cases in this area that involve claims, the fishery observer claimant will be the employee of a party with whom the fishing vessel owner or fishing company has entered into a contract. Such a contract should deal specifically with the contracting parties' respective responsibilities and liabilities in relation to the injury, illness or death or other claims of such employees. The P&I rules expressly provide that the cover will only apply when and to the extent that the terms of the contract have been approved by the relevant P&I club.¹⁴ It is permissible, under the laws of most jurisdictions, for contracting parties to enter into mutual indemnity agreements that hold each other harmless for the acts of their own employees and for claims arising out of those acts, regardless of which party is at fault.¹⁵ The vessel owner may, for example, be asked to indemnify the fishery observer's employer in respect of claims from their employees in return for such employer not passing on the costs of insurance cover to the vessel owner. Cover will only be available for liability incurred by a member under the terms of an indemnity (including an indemnity contained in a more general contract), where the terms of the

¹³ This includes Australia, Canada, the European Union states, parts of the Caribbean region, South Africa, the United States (only to some extent, as will be briefly discussed below). In some of these regions the Regional Fisheries Management Organizations (RFMOs) are also directly involved in this development. However, the situation off the coasts of Africa, South America, and parts of Asia and the Pacific Ocean region is less clear.

¹⁴ Gard Rule 30. See note 11 above

¹⁵ However, in the United States any agreement providing for indemnity may be unenforceable. See: Gold, note 4 above, at 303

indemnity have been approved by the relevant P&I club. Approval may not be given for certain indemnities.¹⁶

Liability Claims arising from the Fault of the Fishery Observer

20. An additional question that may arise relates to the division of liability claims where the fishing vessel owner (and always the relevant P&I club) has incurred costs that have arisen from the action or inaction of the fishery observer. This may involve insubordination, failure to cooperate with the ship's crew, malicious damage, criminal action (such as drug use, excessive alcohol consumption, smuggling etc.). In some cases the vessel may be held or delayed. In other cases, the vessel may have to call at or return to port unexpectedly. Although it has been suggested that this type of expenditure or loss would not be covered under the P&I policy, this is not correct. The standard P&I policy will cover the costs arising out of this type of occurrence or incident as it would not be treated differently from similar claims that might arise from non-fishing vessel operations.¹⁷

21. In other words, this type of potential claim is fully covered under the P&I policy that makes no distinction in terms of coverage between ships' crews and "other persons", such as fishery observers,¹⁸ in terms of covering the shipowner member for this type of risk.¹⁹ If significant costs are involved from such coverage, the P&I club may attempt to take action against the observer's employer for cost recovery. However, it is more likely that such expenditures will affect the P&I premium when the policy is renewed.

22. It is obvious that these considerations are all aspects that should form part of the initial agreement between the vessel owner or fishing company and the observer's employer. (See APPENDIX II for some points that may be considered in agreements negotiated between fishing vessels and observer providers). Such an agreement should also indicate whether the fishery observer is subject to ship's

¹⁶ This reflects the provisions of the P&I Pooling Agreement. Guidance should be sought from the relevant P&I Club as to which types of indemnity are acceptable.

¹⁷ Gard Rule 29 applies. See note 11 above.

¹⁸ However, it has to be assumed that the fishery observer, from whom such claim originates, is a well-trained professional and otherwise capable of carrying out the observer duties for which he or she was engaged.

¹⁹ "Other persons" are frequently carried on vessels and, in addition to fishery observers, may include travelling repair and maintenance personnel, supercargoes, pilots, coastguard inspectors, surveyors, relatives of crew members, and even refugees and stowaways.

disciplinary action or not. It is suggested that fishery observers should be subject to such discipline in terms of compliance with on-board safety and related rules. In some cases, the observer may actually be 'signed on' or engaged as a supernumerary crew member, although this might affect the observer's required independence. If the agreement states that such individuals are engaged as crew members, or are only partially subject, or not subject to such disciplinary requirements, the P&I club should be informed, as it may ultimately affect the vessel's P&I coverage.

Fishery Observer Liability under National Legislation

23. A further legal consideration that has to be taken into account is that there is likely to be liability related to fishery observers that is governed by the common or statutory law of the relevant coastal or island state.²⁰ The applicable state may include:

- the state where the incident occurred;
- the state where the person came on board;
- the place of domicile of the vessel owner;
- the place of business of the fishing company; or,
- the flag state of the vessel.

In many states there is an obligation on the shipowner to ensure that the ship complies with international and national safety requirements for persons carried on board (together with their personal effects), with resulting liability when the owner is negligent in failing to comply with such obligations. The applicable rules of law may also place an obligation on the person carried on board to exercise ordinary care for his or her own safety and to adhere to the instructions regarding precautions given by the master. The expected standard of care will depend on the presumed knowledge and experience of the person. If such legislation is applicable it would also need to be conveyed to the vessel owner or fishing company during the negotiations that lead to the agreement that ultimately places fishery observers on board.

²⁰ Some states may have very strict requirements in this area. See, for example, the US *Death on the High Seas Act* (DOHSA) 1994,

24. These national statutory obligations are almost universal today as they basically implement and incorporate into national law the international obligations that have been set out under UNCLOS or under the numerous maritime safety treaties developed by the International Maritime Organization (IMO), and maritime labour conventions completed under the auspices of the International Labour Organization (ILO). Nevertheless, it is always necessary to check if such national requirements are in place.²¹ Regrettably many less developed states have not completed the required national implementing legislation, despite the fact that they may have accepted the relevant international treaties.

25. There may also be additional complications in certain coastal states, using the fisheries observer system, that have complex federal-state legal systems, and where the jurisdiction over fisheries matters may not be entirely clear. The best example in this category is the United States, where jurisdictional responsibility for fisheries observer liability is split unevenly between federal and state government levels.²² As a result, insurance coverage for fisheries observers under US jurisdiction has been termed as a “quagmire of risk management considerations because of the nature and location of working environments in which they operate.”²³ Although it is not possible or appropriate to provide details of the fishery observer liability under US law here, it should be noted that at least eight federal statutes may be involved.²⁴

Fishery Observer Liability in the Pacific Ocean Region

26. As already indicated above, many coastal and island states administer their national and international marine resource systems on a unilateral basis. This will involve regulating their fisheries responsibilities and include, as required, the placing of fisheries observers on board national and foreign vessels. Increasingly, however, states have agreed to hand all or some of this jurisdiction and commensurate responsibilities over to regional international fisheries commissions that have been

²¹ This may not be a major problem in the South Pacific region where the development of national maritime legislation has been given high priority by the Legal Office of the South Pacific Commission. Nevertheless, it is suggested that the Legal Office of the Forum Fisheries Agency ensure that legislation is in place and has been implemented

²² This may also cause difficulties in the administration of fishery observer programmes in US territories in the Caribbean and South Pacific, although federal jurisdiction may prevail. This has to be ascertained.

²³ Vincent Gullette of American Equity Underwriters. Fisheries Observers Insurance, Liability and Labor Workshop, note 3 above, at 15

²⁴ *Ibid*, at 16

created through treaties developed under UNCLOS auspices, as well as under the jurisdiction of the Fisheries Division of the Food and Agriculture Organization (FAO). One of the more recent of these treaties is the *Western and Central Pacific Ocean Fish Stocks Convention* (WCPOFS Convention) that covers one of the largest ocean regions in the world. This treaty also envisages the placing of fisheries observers on board as required and sets out a framework for a regional observer programme.²⁵

27. As can be expected, this framework concentrates specifically on the general purpose of the observer programme and provides guidance on how such a programme should be set up and administered. However, nothing specific is stated about observer liability, apart from the requirement that observers should “be trained and certified in accordance with uniform procedures to be approved by the Western and Central Pacific Fisheries Commission.”²⁶ This Commission is also requested to develop further procedures and guidelines for the operation of the regional observer programme, including defining “the rights and responsibilities of observers in the performance of their duties.”²⁷ Finally, the Commission is also requested to “determine the manner in which the costs of the observer programme would be defrayed.”²⁸

28. In response, the Commission has developed a *Draft Conservation and Management Measure for the Regional Observer Programme*²⁹ containing specific ‘Guidelines on the Rights and Responsibilities of Observers’,³⁰ and ‘Guidelines on the Rights and Responsibilities of Vessel Operators, Captain and Crew’.³¹ Although these guidelines provide a very comprehensive framework for the regional observer programme generally, in terms of observer liability the provisions so far drafted, appear to be inconsistent as well as inadequate, especially when compared to how fisheries observer programmes are operated in other Regional Fishery Management Organizations and Commissions. Furthermore, inconsistencies are also apparent in terms of the established general principles of legal liability in the maritime sector as outlined above. In other words, the Commission Draft does not take into

²⁵ WCPOFS Convention, Art.28

²⁶ Ibid, Art. 28 (6)(c)

²⁷ Ibid, Art. 28 (7)(c)

²⁸ Ibid, Art. 28 (8)

²⁹ Doc. WCPFC-TCC3-2007/32 of 29 September 2007

³⁰ Ibid, Annex A

³¹ Ibid, Annex B

consideration the commercial third party liability insurance coverage that is utilized and available in the maritime sector generally.

29. The shortcomings in the Commission Draft can easily be rectified. For example, Appendix A could indicate that observers must be provided with full liability coverage by their employer, regardless of whether this is the Commission itself, a government agency or private contractor. This appears to be included under Sections 8 and 9 of the Draft, but is not at all clear. It is suggested that a clear statement on this be included in the body of the Draft or in Appendix A. It is not necessary to address questions of costs at this stage. Appendix B attempts to provide for observer insurance cover in non-specific language under Section 2(k). It appears that such coverage is to be solely the responsibility of the vessel operator. It also specifies that coverage only applies whilst the observer is “on board”. This means that there would be no coverage for such individuals when proceeding to or from the vessel. This has to be clarified.

30. However, given the overview of third-party P&I coverage for fishing vessels as outlined above and in Appendix I, it should be specified quite clearly that the observer would benefit under such coverage. Nevertheless, as also discussed above, it should further be specified that observer liability coverage would also be the responsibility of the observer’s employer, in order to ensure that cover would be available regardless of P&I cover. In fact, it is suggested that the Commission should go even further and require the submission of an acceptable P&I policy as part of the access agreement and as a condition prior to placing observers on board vessels that are licensed to operate within the region’s jurisdiction.

31. It may also be of value for the Draft to specifically address the question of liability insurance costs for fisheries observers. It is clear that such costs are likely to only consist of a minor percentage of the overall observer costs. Nevertheless, they need to be quantified so that there is clarity during the access negotiations. At that stage the vessel owner or fishing company would be able to present additional P&I coverage costs (if any) and the Commission, government agency, or private contractor would supply information on the additional insurance costs involved in covering the observer employee. Whether the latter costs should or could be passed on to the vessel operator or fishing company would, obviously, depend entirely on the overall access negotiation.

32. As already indicated above, if providing access to vessels that are uninsured or that carry inadequate liability insurance is unacceptable, it follows that placing observers on such vessels may well be irresponsible. In either case the Commission generally, and the relevant coastal or island states specifically, would expose themselves to various unforeseen liabilities. Instead, the Commission must make specific efforts, either directly, or with international development assistance, that the region's marine living resources are adequately protected through a widely accepted regional observer system, staffed with well-trained, professional fisheries observers covered by comprehensive legal liability protection. Such protection might best be achieved if the various parties involved in regional fisheries protection systems enter into contractual arrangements that contain mutual liability insurance provisions contributed to by both parties.

APPENDIX I

Protection and Indemnity (P&I) Clubs: Third Party Insurance in the Maritime Sector

1. Originally P&I clubs were established as unincorporated associations with their members having the dual role of insurers and insureds. This led to some problems, especially when litigation was involved. In response, P&I clubs were incorporated so that they now have a legal structure separate from their members. As a result, they are able to enter into separate contracts of insurance with such members. A P&I club is required to have a corporate structure, which includes documents, such as Statutes and Rules, that represent and regulate the contract of insurance between the club and the member. As insurers, P&I clubs issue general insurance provisions covering the basic principles related to risks covered, claims settlement procedures, and the payment of premiums. P&I clubs do not normally operate with traditional insurance contracts. Instead their insurance provisions are set out in the club's Rules, with the specific terms and conditions applicable to each member, set out in the "Certificate of Entry".
2. Many P&I clubs have also established wholly owned subsidiaries and some branch offices in other states. Such branches provide not only useful local contact with members and insurance brokers, but also serve as claims representatives. In addition to such branch offices, P&I clubs also appoint correspondents in all the major ports of the world. Such correspondents assist the clubs and their members with claims that arise locally. This contributes to the extreme efficiency in the handling and settling of most P&I claims.
3. A member of a mutual, not-for-profit club is both an insurer and an insured. The club members have reciprocal rights and obligations and are dependent on their fellow members for the success of the club. As an insurer, the member is obliged to pay sufficient premiums and, when required, sufficient additional premium "calls" to enable the club to discharge all claims. Accordingly, each member shares in the risks of the others and, as a result, has a direct interest in who is admitted to membership and how the other members conduct their business.³² As an insured, the member has a right to be indemnified by the club for certain liabilities and losses that the member incurs in direct connection with the operation of an entered ship.
4. One of the defining characteristics of a mutual club is its non-profit nature. It is not run for profit but for the benefit of its members, who are both the owners of the capital and the customers of the club, -- or as already indicated above, the insurers and the insureds. The income of the club, which is principally provided by the members by way of annual premiums and additional premium calls, is only required to be sufficient to meet the liabilities of the club and for the establishment of adequate reserves. There is no element of profit for external capital providers. In other words, mutual insurance means, in practice, insurance at cost.

³² The member's claims record is assessed at the end of each policy year. If there were significant claims this may result in an increased premium, although past 'good' claims performance will always be taken into account. If the claims record shows losses that may be attributed to consistent problems in the member's operations, this may also affect subsequent premium and, in extreme cases, the member may be expelled from the club.

5. Most P&I clubs treat the insurance of risks by balancing the club's assets and liabilities on an annual basis. The members entered in each policy year pay calls to discharge the liabilities incurred in that policy year, and it is contrary to the spirit of mutuality that the members entered in one year should pay liabilities incurred in another. It is, however, inevitable that this may occasionally occur, such as when clubs create reserves from assets of one year to pay claims in another, in an endeavour to equalise calls and to provide for catastrophic claims.

6. This mutuality of interest amongst the members is manifested in the way the directors or managers of the club are expected to conduct the day-to-day business of the club. The rules of the mutual clubs will usually confer on the directors or managers a large degree of discretion. Such discretion enables the directors or managers of the club to protect the mutual interests of the shipowner members as a whole in conducting the business of the club. In most cases the club's Executive Committee has the discretion to extend the club cover, as appropriate, on a case-by-case basis to liabilities that may otherwise not be covered under the club's Rules. This is known as the "Omnibus Provision." Furthermore, under the standard terms of the "Defence Cover," the club has a discretionary right to reject a claim, in whole or in part, for a variety of reasons, that are set out in the club's Rules.

7. A mutual risk will normally be regarded as a risk that is commonly borne by shipowners. In fact, it is to insure these types of risks that forms the basis for the establishment of P&I clubs. Directors and managers bear this in mind when exercising their discretion, and, therefore, generally favour accepting claims that arise from what are considered to be mutual risks. On the other hand, claims arising from risks that are particular only to the business of the member bringing such claims, or which are otherwise not normal shipowners' risks, will be rejected. It is for this reason that cover for certain specialised operations is either excluded or would attract additional premium payment. For example, an additional voyage premium may be levied for certain types of fishing operations, i.e. winter voyages in the North Atlantic or in ice-infested regions.

8. The discretion in the decision-making process by the club's directors is only subject to judicial review when it is alleged that such directors have exceeded their authority or failed to apply the rules of natural justice. A court will normally assume that the directors have acted in good faith and the onus of proving otherwise, which is not easily discharged, is on the party bringing the allegations.

9. Entry of a ship by an owner, operator or charterer will automatically result in club membership. If the entry is arranged by more than one such entity on a joint basis, they will be classified as "Joint Members". A shipowner is the individual or company (whether incorporated or not) who has legal title to the ship. The shipowner may be a part owner, with only title to part of a ship, or sharing such title with another co-owner.³³ Any type of charterer (whether bareboat, demise, time or voyage charterer) can arrange an entry and become a member. However, time or voyage charterers cannot be joint members and are entered on a fixed premium basis.³⁴ Such members are entitled to all the benefits of club membership, including the right to vote. A member who owns more than one ship is entitled to enter one or more with more than one P&I club.

³³ For registration purposes ships are often divided into shares and different persons can own such shares or they can be jointly owned by a number of individuals.

³⁴ This type of arrangement is often used in the case of fishing vessels.

10. As the applicable club is only liable for claims during the period of entry, the member will continue to be liable for premiums on a pro-rata basis in cases where the insurance is terminated or ceases. As already indicated, the terms and conditions of the contract between the member and the club is evidenced by the Certificate of Entry and are subject to the club's Statutes and Rules and, where applicable, further special conditions.

11. Members have no direct liability for insurance claims and other obligations, although mutual members are required to provide their club with sufficient funds to enable it to discharge claims obligations. In other words, any claimant must take action against the club, and not its members. If the relevant club is unable to satisfy such claims, the claimant has no course of action against the individual members.³⁵ Alternatively, where there is a surplus on the closing of a policy year, this may be repaid to members who were entered in that year.

12. In addition to the basic principles of general insurance law, there are four factors that are of particular importance with respect to the structure of the P&I cover:

- i.) The cover is always developed as a direct response to shipowners' need for liability insurance. Thus, only those liabilities and losses that are identified in P&I club rules are covered. In other words, P&I club cover is a "named risk" insurance.
- ii.) There must always be a link to an insured ship. Liabilities and losses incurred by a shipowner without any connection to an insured ship fall outside P&I club cover.
- iii.) The cover is unlimited save for the theoretical limit introduced on "Overspill Claims".³⁶ However, the owner is always required to make use of the right to limit liability under any applicable rule of law.³⁷
- iv.) The P&I cover is an indemnity insurance, which means that the P&I club is only obliged to indemnify the assured member when the latter has discharged the quantified liability to third party claimants.

13. 'Named risk' insurance means that only the categories of liabilities and losses set out in the rules of the individual club fall within the cover. These categories are continually reviewed and amended by the clubs in response to changing market conditions. The principal types of liabilities and losses now covered are:

- i.) Liability arising from carriage of cargo.
- ii.) Pollution liability.
- iii.) Liability for death of or injury to crew members, passengers and others,³⁸ on board ships.
- iv.) Damage to fixed and floating objects and to other property.
- v.) Such part of the liability for collision damage that is not covered under the ship's hull policy.
- vi.) The excess liability arising out of a collision, including that which is in excess of the limit of the hull policy.
- vii.) Wreck removal.

³⁵ This is most unlikely. All operating P&I clubs have significant financial resources and reserves to meet their obligations.

³⁶ Gold, note 4 above, at 118

³⁷ Ibid, Part VII on Limitation of Liability.

³⁸ This would include on-board fisheries observers

14. The term “liabilities, losses, costs and expenses” is generally used in P&I club rules to describe the individual category of liabilities and losses falling within the cover. In other words, the use of this expression represents in itself a restriction in the cover. Firstly, the word “liabilities” defines legal liabilities. For example, P&I clubs do not cover voluntary or *ex gratia* payments, made by a club member to third parties for the member’s own commercial reasons, in the absence of any legal liability. Legal liabilities can arise by means of a contract entered into by the member, in tort, or under other statutory obligation. Neither jurisdiction nor the law under which liability arises are material. Under local laws a member’s liability may be dependent upon a member’s negligence (such as the case of a collision) or it may be a strict or absolute liability, created by statute and imposed without any negligence on the part of the member (such as the case of damage to fixed or floating objects). Liabilities, losses, costs and expenses that would not have arisen, but for the terms of a contract of indemnity entered into by, or on behalf, of the member are not covered, unless the terms have been approved by the club prior to the liability that has been incurred. Similarly, the club provides no cover for liabilities resulting from terms of contract prohibited by the club, or arising where a member has omitted to use contractual terms required.

15. The expression “losses, costs and expenses” cover not only losses arising out of a member’s liability to a third party, but also losses, costs and expenses suffered by the member directly, where the club rules permit the member to recover such losses from the club. Examples include:

- i.) Diversion expenses.
- ii.) Expenses incurred in dealing with stowaways and refugees.
- iii.) Costs and expenses of wreck removal.
- iv.) Irrecoverable general average expenditure.
- v.) The cost of measures taken to avert or minimise loss.
- vi.) Disinfection and quarantine expenses.

Some of these expenses may only be recoverable if incurred with the prior approval of the relevant P&I club.

16. The liabilities, losses, costs and expenses must be incurred either by the member directly or by servants, agents or independent contractors³⁹ for whose acts or omissions the member is held vicariously liable. For example, the member may have a direct liability to a third party for loss or damage caused by the acts or omissions of the member’s employees, on the basis that an employer is vicariously liable for acts of member’s employees that are performed in the course of their employment. Where a servant, agent or independent contractor of a member incurs a direct liability to a third party in the course of his employment, the member may be obliged to indemnify such an entity for that liability. This obligation may arise under a specific term of the contract between the member and the servant, agent or independent contractor, or under general law. Whilst the club does not insure the servant, agent or independent contractor directly and will not reimburse directly for liabilities incurred by such entities, the club will cover the member for the indemnity payment for which the member is liable. This cover is dependent upon the liability that is incurred by the servant, agent or independent contractor, being one that would have been covered by the club if the member had incurred it directly. In other words, the member must directly incur the liability. Accordingly, the club will not cover *in rem* claims against the ship,

³⁹ A Fishery Observer may be any of these. Such an individual would be the ‘servant’ if a member of the vessel’s crew; or an agent if employed by an observer provider; or an independent contractor in the unlikely case where the observer is self employed.

incurred by someone other than the member, e.g. a previous owner or a bareboat/demise charterer who is not entered with the club.

17. P&I clubs do not require that a competent court or arbitration tribunal shall first have determined any liability incurred by a member to a third-party claimant. In the event of a claim, it is sufficient that the club, after its own investigation, is satisfied that the member is under a liability, or likely to be under a liability, to the claimant in order for there to be cover. Frequently, especially in the case of cargo and personal injury claims, although there may be some doubt as to whether the member even has any liability to the claimant, the likelihood arises that the claim could be settled quickly on a compromise basis. In such cases the club will cover the member's agreed compromise liability, providing it has approved the settlement.

APPENDIX II

Fishery Observer Liability: Points for Consideration in Agreements between Fishing Vessels and Observer Providers

Mandatory/Required Terms:

Observer Provider must provide evidence:

- That Observers are professionally qualified for the intended task
- That Observers are physically capable to carry out the intended task
- That Observers are to be compensated directly for their work by the Provider
- That Observers have been fully briefed for the intended task
- To whom the Observers are responsible and report to
- What national laws may be applicable of affect observer liability

Fishing Vessel/Operator/Charterer must provide evidence:

- That the fishing vessel/operator/company/charterer has a valid 'Certificate of Entry' issued by a P&I club, which is a member of the International Group of P&I Clubs
- That the P&I policy covers "other persons" on board, such as Fisheries Observers for all liabilities normally covered under such a policy
- That full details of such P&I coverage will be disclosed to the Observer Provider
- That the relevant P&I club has been informed that fisheries observers will be carried on board and has agreed to such carriage
- That the P&I policy will be in effect throughout the period the Observers are on board
- That the Observers carried on board will be provided with a safe environment commensurate with the expected fisheries operations
- What national/flag state laws may be applicable and affect observer liability

Negotiable Terms:

- The Observer Provider assumes full health and safety insurance responsibilities for its observers on terms and costs to be disclosed
- The Observer Provider assumes partial health and safety insurance for its observers to complement any existing P&I policy. Terms and costs to be disclosed
- The Observer Provider assumes full/ partial/no disciplinary responsibility for its observers. This would include accepting responsibilities for claims arising from disciplinary breaches.
- The Observer Provider assumes responsibility for any claims that might arise whilst its observers are in transit to and from the fishing vessel.
- The Fishing Vessel assumes full responsibility for any Fisheries Observer Liability under the P&I Policy. Terms and costs to be disclosed.

- The Fishing Vessel absorbs any additional P&I costs involved in the carriage of Observers on board, or whilst in transit to and from the vessel. Terms and costs to be disclosed.
- The Fishing Vessel agrees that the Observers will be/will be partially/will not be subject to the ship's disciplinary regulations. Costs and terms to be disclosed.

The above list is not exhaustive and will depend to a significant extent on the overall access negotiations between the Fisheries Commission, Coastal or Island state and the access/licensing applicant.
