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COMPENSATION OF UNLICENSED FISHERMEN

Note by the Director

Summary:	A study has been carried out by international fisheries consultants of the requirements in a sample of countries in respect of licensing requirements, the enforcement of such requirements, quota restrictions and sanctions for non-observance of such requirements and restrictions.
Action to be taken:	Consider the IOPC Funds' policy in respect of the admissibility of claims by commercial fishermen and subsistence fishermen operating without required licences and by fishermen exceeding established quotas.

1 Previous consideration of this issue by the 1971 Fund

1.1 The question of whether or not unlicensed fishermen should be compensated for economic losses arising out of incidents covered by the 1971 Fund Convention was considered by the 1971 Executive Committee in connection with the *Aegean Sea*, *Braer*, *Sea Empress* and *Nissos Amorgos* incidents.

1.2 In the *Aegean Sea* case (Spain), the Executive Committee considered whether fishermen, shellfish gatherers and operators of mussel rafts should be entitled to compensation only if they held a valid licence. The Committee took the position that, since the question of whether a claimant was entitled to compensation was governed by civil law, the decisive criterion should be whether the claimant had suffered an actual economic loss and that the right to compensation should not depend upon whether or not a licence was held (document FUND/EXC.36/10, paragraph 3.3.3).

1.3 In respect of the *Braer* case (United Kingdom), the Executive Committee noted that in the United Kingdom it was a criminal offence to carry out fishing without a proper licence. The Committee took the view, as regards that incident, that claims for compensation presented by professional fishermen could

be accepted only if the claimant held a licence, since the 1971 Fund should not pay compensation for the loss of proceeds from criminal activities. Some delegations, while agreeing with that position, questioned whether this would not lead to inconsistency in comparison with the position taken by the 1971 Fund in accepting claims from unlicensed fishermen and shellfish gatherers in the context of the *Aegean Sea* incident, since the admissibility of a claim should not, in their view, depend on the categorisation of the offence under national law, for example as a criminal offence or as a breach of administrative law (document FUND/EXC.39/8, paragraphs 3.3.12 and 3.3.13).

1.4 In the light of the Executive Committee's decision in respect of the *Braer* incident, the Director, in connection with the *Sea Empress* incident (United Kingdom), rejected claims by fishermen who did not hold a proper licence.

1.5 When considering the fishery claims arising out of the *Nissos Amorgos* incident (Venezuela) at the Executive Committee's 54th session, a number of delegations questioned whether, in the assessment of the admissibility of claims by unlicensed fishermen, a distinction should be made between administrative and criminal law, ie whether fishing without a licence was a criminal offence or a breach of administrative provisions. A number of delegations took the view that the 1971 Fund should not pay compensation for losses arising out of illegal activities and that this principle should apply whether the activities were a breach of administrative provisions or of criminal law. The point was made that the requirement for fishermen to have a licence was very often established in order to protect fishery resources. It was also pointed out that if, as in Venezuela, illegal catches were subject to confiscation, it would not be correct to compensate for losses of catches which might have been confiscated. A number of delegations also referred to the fact that making distinctions between criminal and administrative law would result in inconsistency in the decisions by the 1971 Fund between different Member States, and they emphasised the need for a uniform application of the Conventions in all Member States. Several delegations considered it necessary to distinguish between commercial fishing and non-commercial (eg subsistence) fishing (document 71FUND/EXC.54/10, paragraph 3.1.31).

1.6 Some delegations considered that the 1971 Fund should in the *Nissos Amorgos* case take the same position as it had done in the *Aegean Sea* case as set out in paragraph 1.2 above. In particular, the Spanish delegation stated that it was essential to maintain the current 1971 Fund policy as it was, and to let unlicensed fishermen receive compensation in cases where the sanction involved was only administrative and the compensation was governed by civil law.

1.7 At its 54th session the Committee decided in respect of the *Nissos Amorgos* case that compensation should not be payable to fishermen who, although required under Venezuelan law to hold a valid licence, did not do so. It was further decided that compensation should be payable to fishermen who were not subject to licence requirements under Venezuelan law, provided that the claimant showed that he had suffered an economic loss as a result of the incident (document 71FUND/EXC.54/10, paragraph 3.1.32).

1.8 In the *Sea Prince* case, claims were received from six Village Fishery Associations (VFAs) whose members had been fishing in common fishery grounds without holding valid licences, although such licences were required under the applicable Korean statute. The Executive Committee noted that five of the VFAs were involved in border disputes and were unable to obtain licences while these disputes were pending. Since it was clear that licences would be granted once these disputes were resolved, the Committee decided that the claims of the members of these five VFAs should be considered as admissible in principle. In respect of the sixth VFA, the Committee considered that the lack of a valid licence was due to an oversight by the chief of the VFA. Since it was clear that a licence would have been granted if an application had been made, the Committee also decided that the claims by the members of this VFA should be considered admissible in principle (document 71FUND/EXC.58/15, paragraphs 3.3.14 and 3.3.15).

1.9 In recognition of the importance of the issue of compensating unlicensed fishermen, at its 54th session the Executive Committee instructed the Director to study the question further so that it could re-examine the 1971 Fund's policy in respect of such claims. The Committee drew attention to the need to take into account the differing circumstances in various Member States, especially in developing

countries, whilst at the same time acknowledging the importance of consistency in the 1971 Fund's decisions in respect of claims in various Member States. The Committee noted that *inter alia* the following elements could be considered: the type and severity of sanctions, the type of fishing (eg commercial or subsistence) and the reason for the requirement to have a licence, eg whether to protect fish stocks or for statistical purposes (document 71FUND/EXC.54/10, paragraph 3.1.33).

2 Consultants' study

2.1 Terms of reference

2.1.1 In response to the instructions given by the 1971 Fund Executive Committee, the Director engaged a firm of international fishery consultants to carry out a study of the fisheries of a representative sample of countries in order to address the following issues:

- (a) whether, and to what extent, fishing activities required licences and permits and the extent to which the appropriate legislation was enforced and sanctions against defaulters were applied; and
- (b) regulations in respect of breach of quota restrictions and whether any relevant sanctions were actually enforced.

2.1.2 Nine countries from eight different sub-regions were selected for the purpose of the study to provide a cross-sample of developing and relatively developed countries, different fisheries and fishing methods (from subsistence to large-scale industrial fishing) and different legal systems.

2.1.3 The following issues were addressed in the study:

- (a) the sources of fishery legislation;
- (b) the extent to which fishery activities required licences or permits;
- (c) whether fishery conservation and management measures, such as quotas, closed seasons and closed areas, were in effect;
- (d) the mechanisms for monitoring, control, surveillance and enforcement of fishery laws and regulations;
- (e) sanctions for non-compliance; and
- (f) the extent to which legislation was enforced in practice.

2.2 Consultants' conclusions

2.2.1 The consultants' conclusions on the system of licences, permits and quotas in the countries studied are summarised below.

Licences and permits

2.2.2 With the exception of subsistence fishing in some developing countries, nearly all fishing activities required licences or permits issued by a competent fisheries management authority, usually a public body. The primary purpose of licensing was to provide the competent fisheries management authority with a means of controlling fishing effort in order to conserve and manage a particular fishery.

2.2.3 In many countries the licensing system was not sufficiently developed or enforced to provide an effective fisheries management tool. This led in some cases to the fishermen disregarding the system, since they perceived no value from the licence.

2.2.4 In all the countries studied, the legislation required commercial fishermen to be licensed. For some countries the licences specified the authorised fishing grounds, the type of gear to be used and the species to be caught.

2.2.5 The more highly developed and capital-intensive the fishery, the more likely it was that the fishermen would comply with the licensing regulations.

2.2.6 A considerable problem was to distinguish between commercial and subsistence fisheries. In developing countries in particular there could be a considerable overlap between the two sectors.

2.2.7 Sanctions for fishing without a licence varied from country to country. The sanctions might be severe, ranging from fines to imprisonment or forfeiture of vessel, gear and catch. It appeared that in some of the countries studied the enforcement of the sanctions was ineffective.

Quotas

2.2.8 Quota management systems were designed to protect fish stocks and ensure a sustainable fishery. Only four of the countries studied had any such systems.

2.2.9 While licences were required for most types of fishing activity worldwide, quotas were far less common due to the practical problems of enforcement, particularly in fisheries that were either multi-species and/or targeted by large numbers of fishermen whose activities were on a small scale.

2.2.10 Sanctions for fishing in excess of the applicable quotas appeared to be limited to fines and suspension, reduction or cancellation of quotas.

2.2.11 Where fishery quotas were effectively controlled, they would be helpful in establishing whether any economic loss had been caused by pollution damage and, if so, the quantum of such loss.

2.3 Consultants' recommendations

2.3.1 As a general rule, those exceeding quotas or engaging in unlicensed commercial fishing should not, in the consultants' view, be compensated for pollution damage. While it is not feasible to expect the IOPC Funds to enforce national fishery legislation, the study emphasises the need to scrutinise claims with care. The consultants make the point that this might be difficult where national enforcement is poor, catch records are scarce or the status of the resource is uncertain.

2.3.2 The consultants consider that some flexibility within the general policy might be appropriate in the case of subsistence fishing in developing countries, since the strict application of national legislation in the aftermath of an oil spill might cause real economic hardship. However, in the consultants' view, the Funds should examine claims carefully to ensure that they genuinely relate to subsistence fishing.

2.3.3 It is recommended by the consultants that some guidelines should be developed, focusing on the economic status of subsistence fishermen acting outside the applicable national legislation. The consultants recognise that developing such guidelines would not be easy. Factors which, in the consultants' view, might be taken into account include an individual's income relative to the per capita GDP of the State, economic safety nets and food security. The consultants mention that existing data on the economics of small scale fisheries could be used as a basis for developing policy guidelines. They consider that any guidelines should also take into account the actual degree of enforcement of national legislation and the type of offence committed by a non-licensed fisherman.

3 Director's consideration

3.1 Whether a breach of licensing requirements is subject to criminal or administrative sanctions depends to a large extent on the legislative tradition of the country concerned. The Director takes the view that the question of whether a fisherman operating without a required licence or exceeding quotas is entitled to compensation should not depend on whether his act is a criminal offence or a breach of administrative provisions. Such a distinction would result in inconsistency in the decisions by the IOPC Funds between different Member States.

3.2 The Director agrees with the consultants that the IOPC Funds should maintain their policy not to pay compensation for alleged loss of catches which exceed quotas laid down by the competent authorities.

3.3 The Director takes the view that the IOPC Funds should also maintain their policy not to accept claims from commercial fishermen who carry out their activities in breach of licensing requirements laid down in or based on national legislation.

3.4 However, the Director believes that the IOPC Funds should exercise a certain flexibility in respect of claims by commercial fishermen operating without a required licence if there are valid reasons for a licence not having been obtained. This was the position taken by the 1971 Fund Executive Committee in the *Sea Prince* case (paragraph 1.8 above). It is recognised that it may be difficult to determine whether such valid reasons exist, but this would have to be decided on a case by case basis.

3.5 With regard to so-called subsistence fishing, ie fishing carried out by individual fishermen mainly for the purpose of providing food for their families, the Director believes that a review of the IOPC Funds' policy would be appropriate. It should be noted that in some developing countries subsistence fishing is not subject to licensing requirements. In some countries licences may be required, but in reality this requirement is not enforced. If compensation were refused to subsistence fishermen operating without a required licence, this would mean that the most vulnerable people would be without compensation if an oil spill affected their livelihood. It would be necessary, however, to consider how to define subsistence fishing.

3.6 The Director agrees with the consultants that it would be useful to develop guidelines in respect of the admissibility of claims relating to subsistence fishing. He proposes to explore further this issue in consultation with the Funds' experts and the Food and Agriculture Organization (FAO). In a study of this issue it would be important, in his view, to establish how to distinguish between commercial and subsistence fishing.

4 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to consider the information contained in this document;
 - (b) to consider the position in respect of admissibility of:
 - (i) claims for alleged loss of catches which exceed the quotas laid down by the competent authorities;
 - (ii) claims from commercial fishermen in breach of applicable licensing requirements; and
 - (iii) claims from persons who carry out subsistence fishing; and
 - (c) to decide whether guidelines for determining the admissibility of claims arising from subsistence fishing should be developed.
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