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INCIDENTS INVOLVING THE IOPC FUND

BRAER INCIDENT

Note by the Director

1 Introduction

1.1 Since the 44th session, certain developments have taken place as regards various claims arising out of the *Braer* incident. The developments are dealt with in this document.

1.2 At its 44th session, the Executive Committee decided that no further payments of claims should be made, in view of the uncertainty as regards the total amount of the claims. The developments in this regard are also set out in this document.

2 Loss of quotas

2.1 The system for allocating fish quotas in the United Kingdom is operated within the framework of the Common Fisheries Policy of the European Union. The quotas allocated to the United Kingdom are established on a yearly basis by the Council of Ministers of the European Union. The United Kingdom Fisheries Departments are responsible for the management of the United Kingdom's quotas, and the rules for management of the system have been issued by these Departments following consultation with the fishing industry. Fishery Departments are constrained by these rules.

2.2 At its 44th session, the Executive Committee considered a claim submitted by the Shetland Fish Producers Organisation (SFPO) relating to alleged loss of fishing quotas in respect of whitefish (haddock and whiting) and Norway lobster. The discussion was based on a document presented by the Director (document FUND/EXC.44/17, paragraphs 3.4.13-3.4.20).

2.3 The United Kingdom delegation stated that it wished to provide the Director with further information on the quota system.

2.4 Several delegations took the view that the alleged losses incurred by the members of SFPO (viz the cost of purchasing quotas) were as a result of the administrative system for allocating fishery quotas, and that these losses could not be considered as damage caused by contamination.

2.5 The Executive Committee decided that although several delegations considered that the claim was not admissible, the matter would be re-examined after the United Kingdom delegation had provided further information (document FUND/EXC.44/17, paragraph 3.4.20).

2.6 The United Kingdom delegation has presented further information on the legal framework of the operations of the quota management system in the United Kingdom. The presentation of that system set out in paragraphs 2.7-2.9 below has been elaborated in consultation with that delegation.

2.7 Fishery Departments allocate United Kingdom fish quotas amongst various Fish Producer Organisations. In respect of Shetland, this Organisation is Shetland Fish Producers Organisation (SFPO), although the majority of Shetland based vessels are not members of SFPO. Each organisation receives for each calendar year a quota based on the actual catch of its member vessels during the preceding three years ("track record") and manages the catching of the allocated quota among its members. The SFPO quotas for 1995 are therefore based on the actual catches of member vessels during 1992, 1993 and 1994. Each organisation endeavours to ensure that its members catch its allocated quota in full, so that it can maintain its "track record" and thereby maximise its fishing quotas for coming years.

2.8 If it appears that the United Kingdom quota for a particular species is unlikely to be caught in full, Fisheries Departments may consider the reallocation of quotas in favour of any Producer Organisation which appears likely to exhaust its allocation of that species and which may therefore be capable of catching an additional quota allocation. If such a reallocation is made and the additional quota is caught, the Organisation would improve its actual catch record for the year in question, which in its turn would result in that Organisation being allocated an increased quota share for the following year.

2.9 In order to be allowed to fish, United Kingdom fishing vessels need a licence issued by Fisheries Departments. These licences have attached the vessels' "track record" and can be transferred. They can therefore have a considerable market value. By acquiring licences, a Producer Organisation can increase its "track record" of catches for previous years and thereby increase its quota for coming years.

2.10 Fishing for whitefish within the exclusion zone was prohibited during the period 7 January - 24 April 1993. SFPO has stated that as a result, the total catch of whitefish for its members was reduced in 1993. United Kingdom Organisations did not catch their full quota allocations of haddock and whiting in the North Sea in 1993. Although the members of SFPO caught their full quotas of haddock and whiting, SFPO has argued that this was achieved at a later date than would otherwise have been the case, which reduced SFPO's chance of obtaining an additional quota allocation. It has been stated that by almost exhausting its quota well before the end of the year, an Organisation would increase its chance of persuading Fisheries Departments to allocate additional quota to it. SFPO has maintained that in 1993, as a result of the *Braer* incident, it was not able to use fully the possibility of obtaining additional quota, and in order to compensate for this loss, SFPO has purchased licences that have a track record which would attract a quota allocation for a total cost of £720 000.

2.11 The catch of Norway lobsters by the members SFPO was, according to the Organisation, significantly lower in 1993 as well as in 1994 and 1995 than it would have been but for the existence of the exclusion zone which is still in force for this species.

2.12 The Norway lobster fishery in the North Sea was subject to sectoral quotas for the first time in 1994, and SFPO was allocated its first Norway lobster quota in 1995. This 1995 quota was based on the actual catches during the years 1992, 1993 and 1994 by registered vessels in membership of SFPO on 1 January 1995. SFPO has maintained that the Shetland Norway lobster fishery was only beginning

to develop in 1993, and that the continued ban on fishing for this species within the exclusion zone has prevented the accumulation of a track record, thereby reducing its sectoral quota for 1995 and future years. SFPO has argued that it would have no alternative but to purchase additional Norway lobster quota from other Producer Organisations or acquire licences with a track record of Norway lobster catches in order to secure a reasonable allocation in future years.

2.13 SFPO has informed the Director that it has requested that Fisheries Departments should, in view of the exceptional circumstances due to the *Braer* oil spill, discount the *Braer* impact on catches and restore quotas to the levels which they would have had but for the *Braer* incident. According to SFPO, Fisheries Departments have not been prepared to do this.

2.14 The United Kingdom delegation has informed the Director that the Rules for the management of the quotas referred to in paragraph 2.1 above do not allow Fisheries Departments to take into account anything but actual catches.

2.15 SFPO has maintained that, in this situation, it has no alternative but to continue to purchase licences that have a track record which would attract a quota allocation. SFPO has stated that the cost of such purchases would be met by the organisation from levies on its members, and that in this way, the members would incur an economic loss as a result of the *Braer* incident. SFPO has argued that the cost of purchasing licences should be compensated by the IOPC Fund.

2.16 The Director maintains the opinion set out in document FUND/EXC.44/5, that the alleged losses incurred by the members of SFPO are a result of the administrative system for allocating fishery quotas. In his view, these losses cannot be considered as damage caused by contamination and a claim for the recovery of these costs would therefore not be admissible.

3 Property damage claims

3.1 Some 290 claims totalling £3.7 million have been submitted for damage to asbestos cement tiles or corrugated sheets that are used as roof coverings for homes and agricultural buildings. The claimants have alleged that the damage, which consists of disintegration of the material, is a result of pollution following the *Braer* incident.

3.2 Following notification of a number of such claims, the Director engaged experts (consulting engineers) to carry out a detailed investigation to determine whether or not oil is capable of affecting these materials in this way.

3.3 All properties which are the subject of claims were inspected by a local surveyor. In June 1995 more than ninety properties were inspected by consulting engineers. It was then decided that representative samples should be taken and analysed for the purpose of determining the extent of the deterioration, if any, that could be due to oil pollution. The analysis of the samples has now been completed. The analysis of the physical characteristics of the materials revealed nothing which was inconsistent with the age of the roofs, their degree of exposure, and the standard of workmanship and maintenance. The physical and microstructural analysis revealed no evidence that oil from the *Braer* had contributed to the deterioration of the materials examined. The chemical analysis and the petrographic examinations revealed no evidence that petroleum hydrocarbons had penetrated the materials or that the materials had suffered any kind of deterioration as a result of contamination by hydrocarbons.

3.4 In view of the results of the experts' investigation, the Director has rejected these claims.

4 Shetland Islands Council

4.1 Shetland Islands Council submitted an interim claim for £1 083 707 in March 1994, and a final claim for an additional £417 737 in June 1994, making a total claim of £1 501 444. The claim covers the costs allegedly incurred by the Council as a result of the incident. The Director offered an interim payment of £295 000 in September 1995. Over a period of time, questions have been put to the Shetland Islands Council in respect of a number of items of the claim.

4.2 The examination carried out of the various items of this claim has resulted in the Director accepting items totalling £385 062. Questions seeking further information have been submitted to the Council relating to claims totalling £200 388. The Director has informed the Council that items totalling £908 206 are not admissible.

4.3 Of the non-admissible items, three groups are of particular interest, namely those relating to environmental impact studies, mass media and legal fees.

4.4 The Council has claimed compensation in the amount of £401 819 for the costs associated with commissioning impact assessment studies in respect of various aspects of the Shetland economy following the *Braer* incident. Separate studies were undertaken to consider the impact of the incident on the seafood industry, tourism, transport, the environment and agriculture. Copies of the reports of these studies were made available to the IOPC Fund in March 1994.

4.5 In the Director's view, the reports were of a fairly general nature, and did not include a level of detail which would support a particular claim. The reports relied to a great extent on information that was available from other sources, and due to the timing of their publication did little to contribute to clarification of the issues relating to compensation. For these reasons the Director considers that these studies did not contribute to the submission of admissible claims for compensation and that therefore the claim for the costs associated with such studies should be rejected.

4.6 The Council had included in its claim the costs for handling representatives of the mass media and for receiving cabinet ministers and other important persons who visited Shetland in connection with the *Braer* incident. The Director has taken the view that these costs cannot be considered as damage caused by contamination and that they are therefore not admissible.

4.7 The Council has claimed compensation for legal fees totalling £179 377 paid to three law firms, one in the United States and two in the United Kingdom. The advice given by the American firm related to the possibility of taking legal action in the United States, jurisdictional and congressional rules and practices, the United States Oil Pollution Act 1990, other United States legislation and other matters. The work carried out by this firm was not relevant for the purpose of presenting claims under the Civil Liability Convention and the Fund Convention. For this reason the Director has rejected this part of the claim. One of the United Kingdom law firm (whose fees totalled £110 349) carried out work which related mostly to matters other than the preparation and presentation of claims under the Civil Liability Convention and the Fund Convention as implemented in United Kingdom law by the Merchant Shipping Acts 1971 and 1974. For example, a large amount of work was carried out in connection with Lord Donaldson's inquiry, environmental impact studies, criminal liability of the master, the Marine Accident Investigation Branch (MAIB) inquiry, the shipowner's right of limitation, the possibility of taking legal action in the United States, attendance at Congressional hearings in the United States by the Chief Executive of the Shetland Islands Council, and preparation of press releases. Another United Kingdom law firm (whose fees totalled £42 849) focused its work on the question of wreck removal, the MAIB enquiry and the cause of the incident, and was requested to prepare a report on potential heads of damage and prospects of recoverability. The firm gave advice on damages under Scottish law, identifying sources of compensation. Advice was also given in respect of the Vienna Convention on the Law of Treaties and the cause of the incident. A report was prepared on the condition of the ship and the possibility of breaking the shipowner's right to limit liability. In the Director's view, the advice given by these firms for the most part did not relate to subjects which might form the basis of admissible claims against the IOPC Fund and that the fees relating to these subjects are

therefore not admissible. The Director has offered a contribution to the fees of these firms in the amounts of £11 000 and £4 000, respectively.

4.8 On 24 October 1995, a meeting was held between the Director and the Chief Executive of Shetland Islands Council. At that meeting the Director explained the IOPC Fund's position on the three issues dealt with in paragraphs 4.4-4.6 above. He also mentioned that the IOPC Fund would shortly set out in writing questions for further clarifications on a number of issues. It was agreed that these issues would be discussed between representatives of the Shetland Islands Council and the IOPC Fund at a meeting to be held on Shetland on 5 December 1995. Letters containing these questions were sent to the Shetland Islands Council on 16 November 1995.

4.9 On 30 November 1995, the Chief Executive of the Shetland Islands Council informed the Director that, since the IOPC Fund did not appreciate its clear legal obligation to the Council arising out of the *Braer* incident and, furthermore, was not prepared to proceed in a consistent manner when determining whether to accept or reject claims, he was not left with any alternative but to seek a legal solution. Accordingly, the Chief Executive informed the Director that there would be no further correspondence and that the meeting scheduled for the following week was cancelled.

5 Total amount of the claims

5.1 At its 44th session, the Executive Committee noted that so far a total of £45.9 million had been paid in compensation, out of which the IOPC Fund had paid £41.1 million and the Skuld Club £4.8 million. It was also noted that the maximum amount available under the Civil Liability Convention and the Fund Convention, 60 million SDR, would correspond to £57 114 000, calculated on the basis of the rate of exchange prevailing on 12 October 1995.

5.2 The Executive Committee noted the Director's estimate that the private claimants, whose claims had been considered admissible in principle, would total some £3 million, that the Skuld Club had presented a claim for some £1.8 million for reimbursement of the payment made to a salvage company under LOF 90, that Shetland Islands Council had presented a claim for £1.5 million and the United Kingdom Government a claim for some £4 million. It was recognised that there were a number of claims which had been rejected by the Executive Committee but in respect of which the claimants had not agreed with that decision, and that there were also a number of outstanding claims for significant amounts in respect of which no decision had been taken as to their admissibility. It was noted that the United Kingdom Government intended to pursue its claim. It was recalled, however, that at the Committee's 34th session, the United Kingdom delegation had stated that the United Kingdom Government would not compete with other claimants for the purpose of obtaining compensation (document FUND/EXC.34/9, paragraph 3.3.29).

5.3 The Director drew the attention of the Committee to the fact that he had been advised shortly before the 44th session that a number of claimants (in addition to Landcatch Ltd) intended to bring legal action against the shipowner, the Skuld Club and the IOPC Fund, claiming compensation for significant amounts, an amount of some £25 million having been mentioned. He stated that he did not have any information of the types of claims involved, nor of their legal basis.

5.4 The Director stated that he still believed that the total amount of the established claims would stay below the maximum amount available under the Civil Liability Convention and the Fund Convention, ie 60 million SDR. He mentioned, however, that if the courts were to accept as admissible the claims for substantial amounts which had not been considered as admissible in principle by the IOPC Fund, the total amount of the established claims might exceed that limit. The Director drew attention to the fact that the IOPC Fund would in that case find itself being subject to two conflicting obligations under the Fund Convention, namely that under Article 4.5 to ensure that all claimants were treated equally and that under Article 4.4 that the compensation under the Civil Liability Convention and the Fund Convention should not exceed 60 million SDR. For this reason, he requested the Committee to instruct him on the action to take in this situation.

5.5 A number of delegations expressed their serious concern that this situation had arisen. They recognised, however, that it was often very difficult for the IOPC Fund to establish with certainty whether the total amount of the established claims would exceed the limit of 60 million SDR. It was also recognised that in the *Braer* case the situation was unclear, and that it was by no means sure that the total amount of the established claims would exceed that limit. However, in view of the uncertainty, a number of delegates expressed the view that the IOPC Fund should suspend any further payments until the situation had been clarified.

5.6 The Executive Committee decided to instruct the Director to continue the negotiations concerning the outstanding claims for the purpose of arriving at agreements on the quantum of the losses sustained. At the same time, the Committee instructed the Director to suspend any further payments until the matter had been re-examined by the Committee at its 46th session, to be held in December 1995. Since then claims totalling £982 877 have been approved but not paid. The Director was also instructed to make this decision known in an appropriate way to the affected community in Shetland. He was finally instructed to study the legal and practical problems that would arise if, in a given case, a number of claims had been paid in full and the total amount of the established claims were to exceed the limit of 60 million SDR (document FUND/EXC.44/17, paragraph 3.4.45).

5.7 At the Executive Committee's 44th session, the Director stated that in many major cases, it is difficult to establish at an early stage whether the total amount of the established claims would ultimately exceed 60 million SDR. He indicated that, if it were to be required that, before any payments were made in full to claimants, there would have to be absolute certainty that this limit would not be exceeded, it would be impossible to pay any claims in full, or even to pay a high percentage of any agreed amounts, until the periods of three and six years laid down in Article 6 of the Fund Convention had expired and all claims brought before the courts had been decided by final judgement. He considered that if such certainty were required, the IOPC Fund would not be able to pursue its present policy, of ensuring the prompt payment of compensation to victims. The Director mentioned that in every case, he examined, together with the Fund's experts, the likely level of the established claims, but could not be sure that his estimate of the total figure was correct.

5.8 Since the Committee's 44th session, the Director has tried to get more information in respect of the outstanding claims, in particular as regards the claimants who may consider taking legal action against the IOPC Fund. Unfortunately, it has not been possible to get any precise information in this regard.

5.9 It will be recalled that in September 1995 a smolt producer (Landcatch Ltd), whose claim had been rejected by the Executive Committee, had initiated proceedings against the IOPC Fund claiming compensation for a total of £1 961 347 (document FUND/EXC.44/5, paragraph 3.17.4).

5.10 The United Kingdom Government has initiated legal action claiming compensation for a total amount of £3.5 million.

5.11 In view of the position taken by Shetland Islands Council referred to in paragraph 4.9 above, it is likely that the Council will take legal action. The Council's claim has been indicated to total £1 501 444.

5.12 A firm of Aberdeen solicitors have informed the IOPC Fund that it is representing 55 salmon farmers and fish processors who intend to take legal action against the shipowner and the *Skuld Club* and to notify the IOPC Fund of these actions. This firm also mentioned that it had been instructed in general terms in respect of various fishing interests (including shellfish, whitefish and pelagic fishermen) and that it did not yet have a definite list of those clients who intended to take legal action. No indication was given of the amount of the claims.

5.13 A firm of Glasgow solicitors have informed the IOPC Fund that it will commence legal action on behalf of a salmon farmer who so far has received payments of compensation totalling £2 782 601. No indication has been given of the amount to be claimed in the legal proceedings.

5.14 It is possible that the persons whose claims relating to damage to asbestos roofs have been rejected (cf paragraph 3 above), or some of them, will take legal action.

5.15 It cannot be ruled out that legal action will be taken in respect of personal injury (cf document FUND/EXC.44/5, paragraph 3.14).

5.16 The Director is not able to make any reasonable estimate of the total amount which may be claimed in the legal actions referred to in paragraphs 5.2-5.15 above.

5.17 In view of the remaining uncertainty as regards the outstanding claims, the Director proposes that the suspension of payments should be maintained. The Director hopes that the situation will be clearer at the Committee's 47th session, to be held in February 1996, since further claims against the IOPC Fund will be time-barred on or shortly after 5 January 1996 (cf document FUND/EXC.44/17, paragraphs 3.15.1-3.15.6).

5.18 As for the instruction given by the Executive Committee at its 46th session that the Director should study the legal and practical problems which would arise if, in a given case, a number of claims had been paid in full and the total amount of the established claims were to exceed the limit of 60 million SDR, the Director would like to make the following observations.

5.19 As the Director mentioned at the Committee's 46th session, in the situation referred to in paragraph 6.10 the IOPC Fund would find itself being subject to conflicting obligations pursuant to the Fund Convention: under Article 4.5 the IOPC Fund should ensure that all claimants are treated equally, whereas under Article 4.4 the compensation under the Civil Liability Convention and the Fund Convention should not exceed 60 million SDR. The Director cannot see how both these obligations can be fulfilled in this situation. He considers that it would, in any event, not be possible to reclaim any amounts from those claimants who had already been paid in full.

6 Action to be taken by the Executive Committee

The Executive Committee is invited to:

- (a) take note of the information contained in this document;
 - (b) give the Director such instructions as it may deem appropriate in respect of the claims arising out of this incident dealt with above; in particular in respect of the claim relating to loss of quotas (paragraph 2 above); and
 - (c) give the Director instructions in respect of the payment of claims (paragraph 6 above).
-