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Agenda item 3

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INCIDENTS INVOLVING THE 1971 FUND

SEA EMPRESS

Note by the Director

1 Introduction

The Director submits the claims referred to in paragraphs 2 and 3 below to the Executive Committee for consideration of their admissibility.

2 Claim by shellfish merchants

2.1 Two shellfish merchants (husband and wife) have submitted a claim relating to their operations in the collection and processing of cockles and mussels in the area affected by the spill. This claim has given rise to two questions of principle which are submitted to the Executive Committee for consideration, ie whether losses allegedly suffered by the claimants as a result of not being able to sell to a regular customer and losses incurred as a result of a new customer not paying for produce delivered to him are admissible for compensation.

2.2 The claimants have presented the following information on these two issues:

2.2.1 The claimants have a long-term relationship with a French customer which purchased quantities of cockles at regular intervals. During the time of the ban on the collection of cockles, the claimants were prevented from selling to all of their customers. During this period the French customer repeatedly asked when they would again be in a position to supply him. The last such occasion was on 2 July 1996, the day before the ban was lifted. Immediately after the lifting of the ban on 3 July the claimants informed the French customer that they were now able to resume deliveries of cockles. The French customer then stated that he had already agreed to buy cockles from an Irish supplier and that he could not resume purchases from the claimants until 1 September 1996. The claimants have maintained that, as a result, they had suffered a loss of £67 340 through

not being able to make sales to their usual customer in France for the period 3 July - 31 August 1996.

2.2.2 In order to reduce their losses as a result of being unable to sell cockles to the customer in France, the claimants made serious attempts to find alternative markets. This proved very difficult, but they contacted a British businessman operating in Spain who agreed to accept 10 tonnes of cockles on a trial basis. However, the buyer in Spain did not pay for the quantities received. It emerged later that he was in serious financial difficulties and had proved unreliable also in business dealings with other suppliers. The claimants have still not been paid.

2.3 In respect of the admissibility of the item of the claim which relates to the losses allegedly suffered by the claimants by not being able to sell to the French customer, the Director makes the following observations.

2.4 From the date when the ban on cockles was lifted, the claimants were in a position to resume delivery to their regular French customer. In the meanwhile, however, in order to ensure delivery of cockles, the French customer had agreed to buy from an Irish merchant and, according to the claimants, this agreement had to be honoured until 1 September 1996. The losses allegedly suffered during the two month period were caused by the decision of the French customer to purchase his cockles elsewhere. It is not known from where, if at all, this buyer obtained his supply of cockles for the 18 weeks of the harvesting ban during which time he could not be supplied by the claimants.

2.5 The claimants could not have known that the harvesting ban would be lifted the day after the French customer allegedly agreed to buy cockles from the Irish supplier. Two months after the lifting of the ban (ie on 1 September 1996) the French customer resumed his business relationship with the claimants. It should be noted that this part of the claim relates to loss of sales after the ban on the collection of cockles was lifted.

2.6 The important question of principle is, therefore, whether a claimant's loss as a result of a regular customer not purchasing after a fishing ban is lifted gives a right to compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention, ie whether this loss should be considered as damage caused by contamination. If a claim of this type were to be considered admissible in principle, the further question is how to determine the length of the period for which compensation is payable. In this case, the claim relates to a period of only two months. It is possible, however, that in future cases claimants will maintain that a customer has been lost for a longer period of time, or even forever, as a result of the oil spill and the ensuing fishing ban.

2.7 It could be maintained that the situation in which the claimants found themselves in the case under consideration, ie that a customer, as a result of the ban on harvesting cockles, had protected himself by agreeing to buy from another supplier for a short period of time, is a foreseeable consequence of a major oil spill and that the losses resulting therefrom should qualify for compensation. On the other hand, it could be maintained that the claimants' losses were not a direct result of the contamination and the ensuing fishing ban, but were due to a commercial decision by a third party to protect his business for a period of time, until he could be sure that the claimants would be able to resume normal deliveries, and that for this reason there is not a sufficient degree of proximity between the loss and the contamination. The Director supports the latter approach and takes the view that, for this reason, this part of the claim should be rejected.

2.8 If the Committee were to consider that this part of the claim is admissible in principle, however, the question arises whether the claimants have taken reasonable steps to mitigate their loss. The claimants have maintained that they made efforts to mitigate their loss by trying to find new buyers. It has been established, however, that after the lifting of the harvesting ban, the claimants purchased larger quantities of cockles from the gatherers than before the ban, at higher than the prevailing price. The claimants have maintained that this was done in order to re-establish a loyal group of gatherers. It should be noted, however, that the claimants did not at that time have customers to whom the increased quantities could be sold. Apart from the sale of 10 tonnes to a new customer in Spain, the cockles

purchased by the claimants were sold to a shellfish processor at a reduced price (including some cockles sold at cost price).

2.9 The Director takes the view that after the harvesting ban was lifted, and in the knowledge that a major customer would not be buying from them for two months, it was not reasonable for the claimants to buy larger quantities of cockles than they required to satisfy the orders they had at the time, paying higher than the prevailing price to the gatherers. While the claimants have maintained that there were good commercial reasons for their action, the Director considers that any loss resulting from this action cannot be attributed to the *Sea Empress* incident.

2.10 The second item of the claim referred to above relates to losses incurred as a result of the customer in Spain not paying for the cockles delivered to him. The Executive Committee may recall that it considered a similar issue at its 40th session in the context of the *Braer* incident. The relevant paragraphs of the Record of Decisions (document FUND/EXC.40/10, paragraphs 3.5.34 and 3.5.35) read as follows:

> The Executive Committee was informed that a fish processing company on Shetland had indicated its intention to claim compensation for loss of income as a result of failed attempts to mitigate a loss. It was noted that the company normally sold large quantities of smoked salmon to France, the market for which collapsed in early 1993. It was also noted that the company had maintained that this collapse was due to the BRAER incident, although research carried out by the IOPC Fund's experts showed that there were other significant factors that had caused the reduced demand for smoked salmon in France at that time. The Committee took note of the fact that the company had found buyers in another European country but that they had failed to pay for the smoked salmon supplied.
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> The Executive Committee considered that the loss allegedly suffered by this potential claimant could not be considered as damage caused by contamination but was a result of normal business risks. For this reason, the Committee rejected the claim.

2.11 On the basis of the Executive Committee's decision in the *Braer* case, the Director takes the view that the loss allegedly suffered by the claimants in the *Sea Empress* case due to the non-payment for the cockles delivered to the customer in Spain cannot be considered as damage caused by contamination, but was a result of normal business risks. In his view, therefore, this part of the claim should be rejected.

3 Claim by a fish transporter

3.1 A claim for £71 912 has been presented by the owner of a haulage company which operates 11 vehicles for general transport throughout the United Kingdom from its base in Narberth, 10 kilometres from Saundersfoot in the area affected by the oil spill. The claim relates only to loss of business suffered as a result of the claimant not being able to use one of the company's vehicles which had been specifically purchased for the collection of whelks from Saundersfoot and their transportation to a fish processor in Newquay some 60 km from Narberth. The vehicle is equipped with a heavy crane to lift bags of whelks from the fishing boats directly onto the vehicle. According to the claimant the specialised vehicle could not be used in other areas of the claimant's business activities. He has stated that the vehicle in question was virtually unused during the period of the fishing ban. He has maintained that the only businesses that need vehicles with a crane of this type are building contractors and scrap metal dealers and that they usually have their own vehicles.

3.2 It is recalled that a similar claim was considered by the Executive Committee at its 37th session in the context of the *Braer* incident. The relevant paragraphs of the Record of Decisions read as follows (document FUND/EXC.37/3, paragraphs 4.2.14 - 4.2.16):

> The Executive Committee considered a claim by a haulage company based on Shetland which transported salmon from three farms located within the exclusion zone. It was noted that the company maintained that as a result of the imposition of the exclusion zone

and the destruction of the 1991 salmon intake, its vehicles had not been fully loaded on the outward journey from Shetland. The Committee also took note of the fact that the company, which made wooden pallets on which goods were transported, maintained that there had been a reduction in the number of pallets required.

The Executive Committee decided that the losses allegedly suffered by this claimant as a result of a reduction in the demand for transport services could not be considered as "damage caused by contamination" and that this part of the claim should therefore be rejected.

As regards the part of the claim relating to losses allegedly suffered as a result of a reduction in the number of pallets required, the Executive Committee instructed the Director to examine whether the losses allegedly suffered could be considered as "damage caused by contamination" on the basis that this reduction was due to the destruction of the 1991 salmon intake or the imposition of the exclusion zone which had prevented the harvest of the 1992 salmon intake. The Committee authorised the Director to settle this part of the claim, if and to the extent that this question were to be answered in the affirmative.

3.3 The Director makes the following assessment as to the admissibility of the claim presented by the haulage company in Narberth. The claimant conducted his activity in the area affected by the spill. In the Director's view, the claimant's business was an integral part of the economic activity of the affected area. As regards the vehicle covered by the claim, the claimant was dependent on the affected resource, since the vehicle was specialised for the use of transporting whelks from the fishermen to a particular fish processor. Both the whelk fishermen and the fish processor have received compensation for losses resulting from the fishing ban. Notwithstanding the Executive Committee's decision referred to in paragraph 3.2 above, the Director considers that the loss suffered by the claimant should be considered as damage caused by contamination and that therefore the claim is admissible in principle.

4 Action to be taken by the Executive Committee

The Executive Committee is invited:

(a) to take note of the information contained in this document; and

(b) to give the Director such instructions as it may deem appropriate in respect of the admissibility of:

(i) the claim by two shellfish merchants (paragraph 2 above); and

(ii) the claim by a fish transporter (paragraph 3 above).