



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND

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Agenda item 3

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## INCIDENTS INVOLVING THE IOPC FUND

### BRAER

#### Note by the Director

#### 1 Introduction

1.1 Since document FUND/EXC.34/5 was issued, major developments have taken place as regards the claims arising out of the BRAER incident.

1.2 Some 100 claims have been submitted as at 1 March 1993. Final settlements have been reached in respect of 27 claims for a total amount of £18 616. Advance payments have been granted to 33 claimants for a total amount of £341 231.

1.3 During the examination of the claims, certain questions of principle have arisen as regards their admissibility which, in the view of the Director, should be submitted to the Executive Committee for consideration. These questions relate, inter alia, to claims from fishermen, salmon farmers, fish processors, the tourist industry and voluntary groups. The Director's analysis of these problems is set out below.

1.4 The system of compensation established by the Civil Liability Convention and the Fund Convention relates to "pollution damage" and "preventive measures" as defined in Articles 1.6 and 1.7 of the Civil Liability Convention which read:

- 1.6 "Pollution damage' means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures."

- 1.7 "Preventive measures' means any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage."

The same definitions are by reference included in the Fund Convention.

1.5 These definitions are implemented into United Kingdom law by Section 1.1 of the Merchant Shipping (Oil Pollution) Act 1971 as regards the Civil Liability Convention and by Section 1.3 of the Merchant Shipping Act 1974 as regards the Fund Convention which read:

Section 1(1) of the Merchant Shipping (Oil Pollution) Act 1971

"Where, as a result of any occurrence taking place while a ship is carrying a cargo of persistent oil in bulk, any persistent oil carried by the ship (whether as part of the cargo or otherwise) is discharged or escapes from the ship, the owner of the ship shall be liable, except as otherwise provided by this Act,--

- (a) for any damage caused in the area of the United Kingdom by contamination resulting from the discharge or escape; and
- (b) for the cost of any measures reasonably taken after the discharge or escape for the purpose of preventing or reducing any such damage in the area of the United Kingdom; and
- (c) for any damage caused in the area of the United Kingdom by any measures so taken."

Section 1(3) of the Merchant Shipping Act 1974

"'pollution damage' means damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever the escape or discharge may occur, and includes the cost of preventive measures and further damage caused by preventive measures."

"'preventive measures' means any reasonable measures taken by any person after the occurrence to prevent or minimise pollution damage."

1.6 The admissibility of the claims will, if no out-of-court settlement can be reached, be decided by the Scottish courts. The courts will base their decisions on the above-mentioned provisions of the Acts. It should be noted that, under the Vienna Convention on the Law of Treaties, account should be taken in the interpretation of treaties of any subsequent agreement between the parties regarding the interpretation or application of the treaty or any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31.3(b) and (c)). Decisions taken by the Assembly and Executive Committee concerning the interpretation of the definitions of "pollution damage" and "preventive measures" could be considered as such agreements on the application and interpretation of the Civil Liability Convention and the Fund Convention. Despite this, it is unlikely that the Scottish courts will look behind the text of the above-mentioned Acts and take into account the international aspects. In any case, the courts will probably take into consideration the general principles of Scottish law concerning the admissibility of various kinds of claims for compensation.

## **2 Director's Authority to Settle Claims**

2.1 The Director's authority to settle claims is governed by the IOPC Fund's Internal Regulations. Under Internal Regulation 8.4.1, the Director may make final settlement of any claim for compensation without the prior approval of the Executive Committee, if he estimates that the total cost to the IOPC

Fund of satisfying all such claims arising out of the relevant incident is not likely to exceed 37.5 million (gold) francs (2.5 million SDR), which corresponds to approximately £2.3 million. The Director may in any case make final settlement of claims from individuals and small businesses up to an aggregate amount of 10 million (gold) francs or 0.67 million SDR (£0.6 million) in respect of each incident. The Executive Committee may authorise the Director to settle claims beyond these limits in respect of a particular incident (Internal Regulation 8.4.2).

2.2 The aggregate of the amounts involved in the BRAER case exceeds the limits of the Director's authority. The Director submits to the Executive Committee for consideration whether the Committee would be prepared to give the Director extended authority to settle claims arising out of the BRAER incident. This question is dealt with in respect of the various groups of claims referred to below.

2.3 The Director's authority to make provisional payments to victims is governed by Internal Regulation 8.6. The Director may, at his discretion, make provisional payments to victims if in his view this is necessary in order to mitigate undue financial hardship to them. The Director shall endeavour to ensure that no person receiving such payment receives more than 60% of the amount which he is likely to receive from the IOPC Fund in the event of the claims being reduced pro rata, ie if the total amount of the established claims were to exceed the maximum amount of compensation available under the Civil Liability Convention and the Fund Convention. The total amount of advance payments made by the Director in respect of a given incident may not exceed 90 million (gold) francs or 6 million SDR (£5.4 million).

### **3 Various Kinds of Damage Relevant In Respect of the BRAER Incident**

3.1 Costs of clean-up operations and of measures taken to prevent or minimise pollution damage ("preventive measures") are to be compensated under the Civil Liability Convention and the Fund Convention, provided these costs are reasonable. Likewise, pollution damage to property should be compensated under the Civil Liability Convention and the Fund Convention.

3.2 Owners or users of property which has been contaminated as a result of an oil spill may suffer loss of earnings, so-called "consequential loss". For instance, a fisherman whose fishing gear has been polluted may lose earnings during the period when he is prevented from fishing, pending the cleaning of the polluted gear or the purchase of new equipment. Most legal systems recognise in principle claims for compensation of this kind, since the claimant has at the same time suffered damage to property. The IOPC Fund has in previous cases accepted claims for loss of earnings in such cases.

3.3 Persons whose property has not been polluted may nevertheless suffer economic loss as a result of oil pollution incidents (so-called "pure economic loss"). If a certain area of the sea is heavily polluted, fishing may be altogether impossible in that area for a certain period of time, which may cause economic loss to fishermen for whom there is no possibility of fishing elsewhere. Hoteliers and restaurateurs whose establishments are located close to a public beach may lose income if tourists do not come to the area because the beach has become polluted. In most jurisdictions there has been a great reluctance to recognise claims in such cases, for fear of the far-reaching consequences that the acceptance of such claims would have. In most countries, a claim for compensation is generally accepted only if it relates to damage to a defined and recognised right (eg a right of property or a right of possession). Damage suffered by someone as a result of the loss of use of the environment due to pollution is normally not considered as damage to an individual's recognised right in this sense.

3.4 Various criteria are applied by national courts to restrict the right to compensation. In some countries the courts apply the tests of foreseeability, remoteness and causation.

3.5 Claims relating to pure economic loss have often been submitted to the IOPC Fund. The Executive Committee has in the past agreed to compensate economic loss suffered by persons who depend directly on earnings from coastal or sea-related activities, even if the person concerned has not suffered any damage to property. In previous cases, the IOPC Fund has accepted claims relating to loss of earnings suffered by fishermen or by hoteliers and restaurateurs at seaside resorts.

3.6 Under United Kingdom jurisprudence, there would not normally be any right to compensation for economic loss unless the claimant has also suffered damage to property or to a right of possession, ie pure economic loss would not be compensated. The United Kingdom courts tend to take a very restrictive attitude to claims for compensation for pure economic loss (cf *Dynamco v Holland*, 1972 SLT p 38; *Esso Petroleum Co Ltd v Hall Russel and Co Ltd*, 1988 SLT p 872).

3.7 In the BRAER case, some claims for compensation for pure economic loss relate to activities which are less directly linked with the pollution than for example fishermen suffering damage of the kind referred to above. The question is what parameters should be applied in deciding which claims for pure economic loss should be admitted or, in other words, where to draw the line between those who should be entitled to compensation for pure economic loss and those who should not be granted such compensation. It should be noted that the definition of "pollution damage" only covers damage by contamination.

3.8 The Director is not aware of any court cases in States Parties to the Civil Liability Convention in which the definition of "pollution damage" laid down in the Convention has been interpreted in respect of claims for pure economic loss.

3.9 Many of the issues dealt with in this document in relation to the BRAER incident will also be relevant to claims arising out of the HAVEN incident (document FUND/EXC.34/2). They may also be relevant to claims in respect of the AEGEAN SEA incident (document FUND/EXC.34/4).

3.10 It should be noted that the Assembly has expressed the opinion that a uniform interpretation of the definition of "pollution damage" is essential for the functioning of the regime of compensation established by the Civil Liability Convention and the Fund Convention (document FUND/A.11/20, paragraph 5.5).

## **4 Claims Submitted**

### **4.1 Contamination of Property**

4.1.1 Some 35 persons have so far claimed compensation for costs incurred for cleaning or repainting their houses and other property (such as fences and sheds) which were contaminated by wind blown oil emanating from the BRAER. Twenty-three such claims have been approved by the Director pursuant to Internal Regulation 8.4.1, for a total amount of £15 850, and they have been paid by the Skuld Club. One claim for £225 relates to costs for cleaning a contaminated car. This claim has not yet been settled.

4.1.2 Twelve claims within this category are being examined by the IOPC Fund's surveyors.

4.1.3 The Director proposes that he should be authorised to make final settlements of all claims falling within this category.

### **4.2 Contamination of Grassland**

4.2.1 The oil vapour from the BRAER contaminated a considerable area (some 40-45 square kilometres) of grassland on the southern part of the Shetland, which is used for sheep grazing. On 11 February 1993, approximately 30-35 square kilometres were declared again suitable for grazing.

4.2.2 About 23 000 sheep which would normally have grazed on the polluted land had to be moved away and provided with additional feed brought in from the mainland. The lambing season is due to commence in March 1993. Although some of the polluted land can now be used again for grazing, it is necessary to keep the sheep on a diet of additional feed since, if the sheep were no longer given this feed, there would be a greatly increased risk that the sheep would abort their lambs. Extra feed is also provided for some 465 cattle and 100 horses and Shetland ponies.

4.2.3 The shipowner and the Skuld Club, after approval by the Director pursuant to Internal Regulation 8.4.1, agreed to meet the cost of special feed for sheep, cattle and horses which were prevented from grazing. The estimated cost of this feed is £200 000 per month for January and February 1993. Additional feed has been supplied to assist over 200 crofters and farmers. So far £108 489 has been paid in relation to such feed. The monthly cost will decrease as the effect of the contamination disappears. It is not possible to assess at this stage when the entire affected area will be usable again for grazing.

4.2.4 Some crofters need additional labour in view of the extra work involved in feeding the sheep. The Director has approved one claim for compensation in respect of costs for extra labour and farm machinery, totalling £3 103, and this claim has been paid by the Skuld Club.

4.2.5 The Director proposes that he should be authorised to make final settlement of all claims falling within this category.

4.2.6 One farmer who, shortly before the incident, had engaged an estate agent for the purpose of selling his farm, has stated that as a result of the incident it is not possible to sell the farm at present, at least not at an acceptable price. For this reason, he has offered to sell his farm to the Skuld Club and the IOPC Fund. The Club and the Director have informed this farmer that they cannot buy his farm.

### 4.3 Fishing Activities

4.3.1 Twenty-one fishermen who normally fish within the exclusion zone imposed by the United Kingdom Government have claimed compensation for loss of income as a result of having been prevented from fishing from 5 January 1993.

4.3.2 These fishermen have not suffered any damage to property. Their claims relate, therefore, only to pure economic loss as defined in paragraph 3.3 above. In view of the restrictive position of United Kingdom jurisprudence in respect of the admissibility of claims for pure economic loss, it is probable that these claims would not be accepted by United Kingdom courts. The loss suffered by these fishermen resulted, however, from the contamination of the area where they normally carry out their fishing. The IOPC Fund has in a number of previous cases in Japan accepted claims from fishermen relating to loss of income resulting from their being prevented from fishing. In view of this policy, the Director considers that claims from fishermen in the BRAER case for such loss should be accepted.

4.3.3 The Director has, pursuant to Internal Regulation 8.4.1, approved 24 claims from fishermen for loss of income for a total amount of £97 940, relating to the period from 5 January to 22 February 1993. So far, 18 claims totalling £85 968 have been paid by the Skuld Club.

4.3.4 It is expected that further claims will be submitted for loss of income for the remaining period until the fishing ban is lifted.

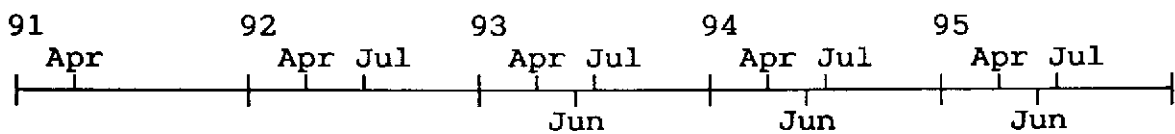
4.3.5 It is possible that some other fishermen will present claims relating to contamination of nets and boats.

4.3.6 The Director submits for consideration by the Executive Committee whether it is prepared to authorise him to make final settlements of all claims falling within this category.

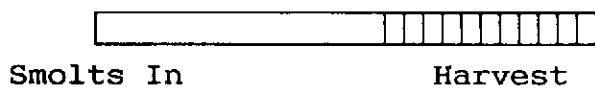
4.4 Salmon Farms

4.4.1 A number of claims for large amounts have been submitted by salmon farms carrying out aquaculture within the exclusion zone imposed by the United Kingdom Government. In order to facilitate the understanding of these claims, a short description of salmon farming is given below.

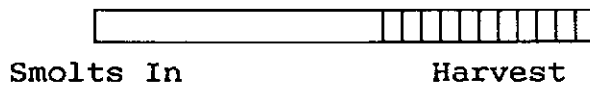
4.4.2 Salmon farming in the waters around Shetland is carried out on an industrial scale. The fish are kept in cages submerged in the water. The cages are generally some 20 metres in diameter and 10-15 metres in depth, although there are many different designs. Each cage contains 5 000-25 000 salmon. The salmon farmer buys juvenile salmon (smolt) which are introduced into the cages at an age of around 15 months, usually in April/May. The fish are fed on a carefully prepared diet. The salmon are grown in the cages for about 15 months, and thereafter the harvest takes place over a period of 12 months. The pattern of harvesting can be illustrated by the following graph.



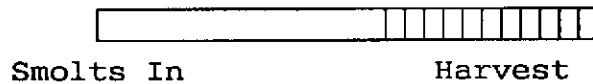
1991 Generation



1992 Generation



1993 Generation



4.4.3 There are some 55 salmon farming businesses around the Shetland Islands, representing an annual harvest value of approximately £35 million. In the exclusion zone imposed by the United Kingdom Government there were 18 sites containing salmon at the time of the BRAER incident, and these sites are run by 11 companies. The value of the annual production within the zone is approximately £11 million. Salmon farming in Shetland waters occupies directly around 600 persons, of whom 100 are linked to the sites in the exclusion zone.

4.4.4 In its consideration of issues relating to salmon farming, the owner, the Skuld Club and the IOPC Fund have been assisted by experts from MacAlister Elliott & Partners Ltd and from the International Tanker Owners Pollution Federation Ltd (ITOPF).

4.4.5 The IOPC Fund has in a number of incidents in Japan paid compensation to fish farms in respect of losses resulting from pollution of their fish. It should be noted that, since fish in fish farms have an owner, damage to such fish should not be considered as pure economic loss but as damage to property. For these reasons, the Director has taken the view that the losses suffered by the salmon farms as a result of the contamination of their salmon fall, in principle, within the definition of "pollution damage" laid down in the Conventions as interpreted by the Executive Committee. He has therefore agreed to the advance payments referred to below.

4.4.6 The harvest of the 1991 salmon intake started in August 1992, and about half of the salmon farmed within the exclusion zone had been harvested before the BRAER incident.

4.4.7 Discussions were held between the Shetland Salmon Farmers' Association (which represents nine of the eleven salmon farming companies located within the exclusion zone), on the one side, and the shipowner, the Skuld Club and the Director, on the other, as to the course of action to be taken by the farmers in order to minimise their losses and speed up the procedure for obtaining compensation. The owner, the Skuld Club and the Director, upon the advice of their experts, assessed the results of the analysis of hydrocarbons in salmon within the exclusion zone and took into account the fact that it was unlikely that the ban on harvesting salmon within that zone would be lifted within the near future. In view of this situation, on 5 February 1993 the shipowner, the Skuld Club and the Director informed the salmon farmers operating within the zone that they considered the reasonable course of action to be to slaughter and dispose of the remainder of the 1991 intake of salmon as soon as possible. They stated that the question of what action to be taken, if any, in respect of the 1992 intake of salmon would have to be addressed at a later stage, in the light of developments. Finally, in view of the steady improvement of the water quality within the zone and the proposed destruction of the 1991 intake of salmon, the owner, the Skuld Club and the Director informed the salmon farmers that they would consider it unreasonable not to stock the 1993 intake of smolt into the farms located within the exclusion zone.

4.4.8 In taking the position referred to in paragraph 4.4.7 the owner, the Skuld Club and the IOPC Fund, after consultation with their experts, took account of the fact that the losses which would have resulted if the 1991 intake were not slaughtered would most likely have been considerably greater than the loss resulting from the immediate slaughter of that intake. There were several reasons for this position. If the 1991 intake were not slaughtered, considerably fewer 1993 smolt than normal could be introduced in the water because of lack of cage space, which would result in a substantial reduction in production. Had the 1991 intake been sold after the ban on harvesting salmon in the zone was lifted, the prices would probably have been lower than normal. It was also considered that there would have been a risk that a number of salmon farms would have become insolvent as a result of not being able to sell the 1991 intake. Keeping the 1991 intake in the water for a longer period than normal would also have resulted in greater losses, due to disease caused by the overlap of generations at farm sites.

4.4.9 The salmon farmers belonging to the Association agreed with this position as regards the 1991 intake. Discussions were then held as to the financial consequences of slaughtering and disposing of the 1991 intake and the level of compensation which the farmers could expect. After detailed discussions with their technical experts in respect of salmon farming, the shipowner, the Skuld Club and the Director proposed that the fish should be assessed according to one of two alternative methods, one simplified one and one more complicated. The salmon farmers considered these two proposals and all but one of the members of the Association opted for assessment according to the simplified formula; the remaining member has not yet taken any position in this regard.

4.4.10 Under the agreed simplified formula for compensation, the salmon would be removed from the cages and weighed in bulk by the most practical means available. The weight recorded would be increased by 10%. The value of the fish would then be calculated by multiplying the modified weight by £3 750 per tonne. This formula was chosen in order to reflect the higher value which might have been realised if harvesting in normal circumstances had taken place later.

4.4.11 After discussions concerning the detailed arrangements, it is expected that formal agreement as to the destruction and disposal of the 1991 intake and as to the method of assessing compensation will be reached at the beginning of March 1993.

4.4.12 Under the proposed agreements, a first advance payment of 50% of the value of fish calculated at £3 750 per tonne would be made within seven working days of the salmon farm concerned giving certain written undertakings. The weight used for the purpose of this advance payment would be established on the basis of farm stock records or the weight used for the insured value, in either case increased by 10%. A second advance, equal to 50% of the first advance, would be made within seven working days of the fish being removed from the cages. Should the weight established on the removal of the fish differ from the weight used as a basis for calculation of the first advance payment, the second advance payment would be adjusted, so that the aggregate amount of the two advance

payments would represent 75% of the value calculated on the basis of the established weight increased by 10% at £3 750 per tonne. These advance payments would be made by the Skuld Club or the Scottish Office Bridging Fund.

4.4.13 In the proposed agreements, the Director would undertake to submit the agreements concerning compensation in respect of the losses suffered as a direct result of the slaughter and disposal of the 1991 intake of salmon for consideration by the Executive Committee at its 34th session with his recommendation that they be approved. In the letters setting out the terms of the agreements, it was emphasised that it was for the Committee to decide on the admissibility of these claims. Subject to the approval of the Committee, the balance of the payment relating to the value of the slaughtered salmon would be effected within 21 days of the Executive Committee's meeting or within 21 days of the removal of the fish from the cages, whichever was the latest.

4.4.14 In the text of the proposed agreements it is stated that the total amount of compensation available in respect of the BRAER incident under the applicable United Kingdom legislation and the Civil Liability Convention and the Fund Convention is 60 million Special Drawing Rights (approximately £54.5 million). It is pointed out that, in the unlikely event that this amount were to be insufficient to satisfy in full all claims arising out of this incident, all claims would have to be reduced proportionally. The text of the agreements states that for the purpose of the calculation of such a proportional reduction, the claim relating to the slaughter and disposal of the 1991 intake of salmon and any further claims made by the same salmon farm would be treated as one single claim.

4.4.15 The agreements regarding slaughter and disposal of the 1991 salmon intake would not prevent the salmon farms from making further claims in respect of other loss or damage, such as damage to equipment, additional costs and loss of growth of their salmon. In addition, further claims may be submitted in respect of the 1992 or 1993 salmon intakes.

4.4.16 The Skuld Club has made arrangements for the disposal of the fish being carried out by a Norwegian company. Once removed from the water, the fish would be weighed and slaughtered and thereafter taken to Norway where it would be processed into protein concentrate and fish oil. No substances resulting from the processing would enter the human food chain. It is expected that the disposal will start on 10 March and that the last disposal of the 1991 intake will be completed within three weeks. The Skuld Club has agreed to pay the cost of the disposal and claim these costs against the shipowner's limitation fund.

4.4.17 It is important to note that several of the salmon farms were facing serious financial difficulties as a result of the BRAER incident, in particular in the form of cash flow problems. In addition, many of them faced difficulties due to the fact that their banks refused to extend their credit facilities, since the banks felt that there was great uncertainty concerning the value of the fish as security against loans. For this reason, the Director considered it crucial that advance payments were made so as to alleviate the financial hardship of the farms.

4.4.18 Advance payments based on proven losses and additional expenses incurred as a result of the incident have therefore been made in order to mitigate financial hardship. One farm applied for advance hardship payment on 22 January 1993, and the Skuld Club, after receiving the Director's approval, made an advance payment of £150 000 on 28 January 1993. Further advance payments, totalling £129 476, have been approved by the Director and the Skuld Club in respect of six other salmon farms.

4.4.19 The Executive Committee is invited to consider the admissibility of claims for compensation presented by the salmon farms located in the exclusion zone. Should the Committee agree with the Director's opinion that these claims are in principle admissible, the Committee may wish to consider whether it would authorise the Director to make final settlement of the claims relating to the slaughter and disposal of the 1991 intake of salmon. The Committee may also wish to authorise him to make final settlements in respect of damage to the equipment within these farms and in respect of any other loss suffered as a result of the slaughter of the 1991 intake.



4.4.20 The Director intends to submit for consideration by the Executive Committee at a later session claims for compensation in respect of damage caused to the 1992 and 1993 salmon intake, if any, as well as in respect of any claims relating to the long term effects of the BRAER incident for the salmon farms.

#### 4.5 Shetland Salmons Farmers' Association and Shetland Fishermen's Association

4.5.1 The Shetland Salmon Farmers' Association has claimed compensation for extra costs incurred as a result of the BRAER incident and has requested an advance hardship payment. The claim, which totals £142 552, relates to costs incurred for measures taken to reassure major buyers and the media that the quality of salmon farmed outside the exclusion zone was not affected by the BRAER incident and that no salmon farmed inside the exclusion zone would reach the market whilst the harvesting ban remained. The Association considered that these measures would prevent loss of confidence in Shetland salmon, which in the Association's view would reduce the ultimate losses suffered by its members. The Association has also claimed reimbursement for the cost of giving technical advice to its members to help them minimise the damage to their farms. In addition, the Association has claimed compensation for salaries paid to its own staff who diverted considerable resources in order to deal with the incident, in particular providing information to mass media and existing buyers. The claim covers also the cost of a programme of sampling the salmon. Finally, compensation is claimed for extra costs relating to telephone, telefax and rental of extra office premises.

4.5.2 The Shetland Fishermen's Association has submitted a similar claim for £30 460 relating to the cost of measures taken to protect the interests of those of their members who normally fish whitefish and shellfish within the exclusion zone.

4.5.3 The Director is at present examining these claims.

#### 4.6 Fish Processors and Companies Involved in Sales and Marketing of Fish

4.6.1 The Director has been informed that claims will be submitted by firms processing fish which normally are caught within the exclusion zone. These firms are grading, processing and packing salmon and other fish products. He has also been notified that some firms engaged in sales, marketing and distribution of fish products will submit claims. It is understood that the claims will relate to loss of income and additional costs resulting from the BRAER incident.

4.6.2 The Director will revert to this matter when more information has been submitted in respect of these potential claims

#### 4.7 Tourist Industry

4.7.1 Shetland Islands Tourism, a local association, has informed the Director that it intends to submit a claim for compensation for extra costs incurred as a result of the BRAER incident. It is understood that the claim will relate to extra costs incurred as a result of its office being kept open during evenings and weekends, and as a result of hiring extra staff to answer questions from tour operators and the press. The claim will also relate to reimbursement of the cost of additional work carried out by its public relations consultants. It has also been stated that the claim will cover the cost of a planned media campaign, including a series of television advertisements in North-East England.

4.7.2 Several hotel owners and other businesses in the tourist industry have indicated their intention to submit claims. However, it is unlikely that any claims will be submitted until after the summer tourist season is over. It remains to be seen whether or not these businesses will actually suffer a reduction in income as a result of the BRAER incident.

#### 4.8 Voluntary Groups

4.8.1 Claims for compensation have been presented by three voluntary groups involved in the protection of wildlife.

4.8.2 The Scottish Society for the Prevention of Cruelty to Animals has claimed £52 805 in compensation for costs incurred in connection with the treatment of oiled birds. The Sea Mammal Research Centre has claimed £3 000 relating to studies of seals affected by oil. The Hillswick Wildlife Centre has submitted a claim for £49 000 in respect of costs relating to the cleaning of seals and otters.

4.8.3 The Director takes the view that costs incurred by voluntary groups to clean birds and other animals are in principle admissible as costs of preventive measures. In his view, the admissibility should be subject to the conditions that the operations were carried out in a responsible manner, that they were useful for mitigating the impact on birds and other animals and were carried out efficiently, and that the costs were reasonable. For this reason, he proposes that the Executive Committee authorises him to make final settlement of claims of this kind which fulfil these conditions.

#### 4.9 Claims by Public Authorities

4.9.1 The United Kingdom Government will submit a claim for compensation in respect of costs incurred for clean-up operations at sea and on shore, and for monitoring the operations carried out for the purpose of saving the ship and the cargo.

4.9.2 The Shetland Islands Council will also present a claim in respect of costs in connection with the incident.

### 5 Other Issues

#### 5.1 Basis of Claims

5.1.1 A number of persons have requested advance hardship payments on the basis of documents in which it was stated that they did not submit formal claims and that in particular the documents should not be considered as constituting claims under the Civil Liability Convention and the Fund Convention. The purpose of this construction was, as the IOPC Fund has been informed, to preserve the possibility for these claimants of taking legal action in States not Parties to the Civil Liability Convention and the Fund Convention.

5.1.2 The Director informed the solicitors representing these claimants that the IOPC Fund could not entertain any claims except on the basis of the Civil Liability Convention and the Fund Convention as implemented into the United Kingdom law by the Merchant Shipping (Oil Pollution) Act 1971 and the Merchant Shipping Act 1974. He stated that the IOPC Fund could only pay compensation in respect of the claims made on the basis on the Fund Convention, and that no payments could be made unless the claimants accepted that these payments were made under the Conventions.

5.1.3 The position thus taken by the Director has been criticised by certain solicitors. For this reason, the Director submits this matter to the Executive Committee for consideration.

#### 5.2 BRAER Legal Group

5.2.1 A number of solicitors have formed a group (the BRAER Legal Group) to protect the interests of victims of the BRAER incident. They requested that the IOPC Fund and the Skuld Club should make funds available to finance the work of this Group and to cover the fees of a United States lawyer for studying the possibilities of taking legal action in the United States. The Director and the Club rejected the request for financial assistance. In the Director's view, the solicitors will have to charge their clients for the work carried out. He also considers that the question of whether and to what extent legal costs are to be reimbursed will have to be decided on the basis of the merits of individual claims.

5.2.2 The BRAER Legal Group has asked that Director to submit its request to the Executive Committee for consideration. For this reason, the Executive Committee is invited to consider whether the IOPC Fund should grant financial assistance to the Group.

5.2.3 The Director does not support the request made by the BRAER Legal Group. The reasons for his position are set out in paragraph 5.2.1 above.

## **6 Director's Assessment of the Claims Situation**

6.1 The Director considers that it is too early to make any assessment of the total amount of the established claims. It should be noted that the amount will depend on a number of factors, in particular the decisions of principle taken by the Executive Committee on the various issues dealt with in this document. Of great importance also is whether the 1992 and 1993 salmon intakes will suffer damage. The Director believes that the total amount of the established claims for pollution damage as defined in the Civil Liability Convention and Fund Convention will stay well within the limit laid down in the Fund Convention, viz 60 million SDR (£54.5 million).

6.2 The Director has nevertheless made the Skuld Club and the Scottish Office aware of the fact that, to the extent that they pay claims or make advance payments to claimants, they would not be able to exercise their right of subrogation in full in the event that the total amount of the established claims arising out of this incident were to exceed 60 million SDR.

## **7 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) take note of the Director's decisions on settlement of claims and on requests for advance payments in respect of:
    - (i) contamination of property (paragraph 4.1 above);
    - (ii) contamination of grassland (paragraph 4.2 above);
    - (iii) fishing activities (paragraph 4.3 above); and
    - (iv) salmon farms (paragraph 4.4 above);
  - (c) give the Director such instructions as it considers appropriate in respect of claims submitted by:
    - (i) contamination of property (paragraph 4.1.3 above);
    - (ii) contamination of grassland (paragraph 4.2.5 above);
    - (iii) fishing activities (paragraph 4.3.6 above);
    - (iv) salmon farms (paragraph 4.4.19 above); and
    - (v) voluntary groups (paragraph 4.8 above);
  - (d) give the Director such instructions as it deems appropriate as regards claims which do not refer to the Civil Liability Convention and the Fund Convention as implemented into United Kingdom law (paragraphs 5.1.1–5.1.3 above); and
  - (e) decide whether the IOPC Fund should give financial assistance to the BRAER Legal Group (paragraphs 5.2.1–5.2.3 above).
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