



**INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND**

EXECUTIVE COMMITTEE
35th session
Agenda item 3

FUND/EXC.35/5/Add.1
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INCIDENTS INVOLVING THE IOPC FUND

BRAER

Note by the Director

1 Introduction

Since document FUND/EXC.35/5 was issued, major developments have taken place as regards the claims arising out of the BRAER incident. In particular, further questions of principle have arisen as to the admissibility of claims. These questions are submitted to the Executive Committee for consideration.

2 South Mainland Action Group

2.1 The IOPC Fund has received a letter from the South Mainland Action Group, the text of which is reproduced at the Annex to this document.

2.2 In the letter, the South Mainland Action Group has stated that it has been given the mandate to gather information on behalf of its members on property damage, health matters and economic and environmental damage relating to claims for compensation. The Group has maintained that it is essential that the Shetland population should be compensated for the suffering they have experienced and are continuing to experience as a result of the BRAER incident. The Group has mentioned that its main purpose is to obtain compensation for its members, even if this would necessitate pursuing claims through courts in the United States. In the view of the Group, the IOPC Fund should widen its mandate and make humanitarian payments to each individual in the polluted areas in compensation for, inter alia, exposure to health risks, anxiety and loss of environmental amenities. The Group has emphasised that it would be much cheaper for the IOPC Fund to agree to such payments than if the individuals affected by the spill were forced to take the matter to court. In the view of the Group, the features of the BRAER incident are so unique that it would be extremely unlikely that the IOPC Fund's acceptance to make such payments in this case would create a precedent for future cases.

2.3 In the light of the request made by the South Mainland Action Group for humanitarian payments, the Director would first like to emphasise that the IOPC Fund is permitted to pay compensation only within the framework of the provisions of the Civil Liability Convention and the Fund Convention. The IOPC Fund can therefore pay compensation only to persons who have suffered pollution damage as defined in the Civil Liability Convention, viz damage by contamination. It is therefore not possible for the Fund to "widen its mandate", as requested by the Group.

2.4 The definition of "pollution damage" laid down in the Conventions is limited to "damage caused by contamination". The IOPC Fund Assembly and Executive Committee have constantly stated that compensation under the Conventions can be paid only to persons who have suffered quantifiable economic loss. In the view of the Director, the IOPC Fund cannot make "humanitarian payments" based on general statements as to the kinds of damage suffered. In order to qualify for compensation, each claimant will have to demonstrate that he has suffered a quantifiable economic loss. For this reason, the Director takes the view that the IOPC Fund cannot agree to make any humanitarian payments.

2.5 It goes without saying that any individual claim for compensation would be examined on its own merits. It would appear to the Director, however, that claims relating to exposure to health risks, anxiety and loss of environmental amenities would not fall within the definition of "pollution damage" and could therefore not be accepted.

2.6 It should be noted that the Commission of the European Communities has granted emergency aid in the amount of 700 000 ECU (£560 000) to the victims of the BRAER incident. It is understood that the Shetland Islands Council has distributed this money in the form of lump sum payments to individuals in the affected area of Shetland.

2.7 As regards the reference by the South Mainland Action Group to the possibility of pursuing claims through courts in the United States, the Director would like to state that in his opinion United States courts would not be competent to entertain legal actions against the IOPC Fund.

3 Claims Relating to Activities Outside the Exclusion Zone

3.1 As mentioned in paragraph 3.7 of document FUND/EXC.35/5, a salmon farm located outside the exclusion zone has presented a claim for alleged loss as a result of a reduction in the sales value of its fish. Some fish processors have presented claims in respect of losses relating to fish caught outside the zone.

3.2 A salmon farm located outside the exclusion zone has presented a claim for £95 429 relating to 20% loss of value of its fish. The operator of the farm harvested and sold his fish during February and March 1993. According to the claimant, the BRAER incident resulted in a general depression of the market. The claimant has produced several notes from a major buyer of Shetland salmon, stating that over various periods in February and March the price of Shetland salmon was depressed as a result of the BRAER incident.

3.3 A claim for £213 211, relating to the loss of income during the period January - March 1993, has been presented by a company which grades, freezes and packs pelagic fish (herring and mackerel) caught in the waters around Shetland. These fish are normally caught by large vessels which are capable of fishing beyond the exclusion zone. The claim relates mainly to loss resulting from lower sales volumes, allegedly due to reduced demand for fish from Shetland waters as a result of adverse media coverage abroad. In support of the claim the company has cited the cancellation of a substantial order from overseas, the reason given for this cancellation having been stated as a reluctance to buy any Shetland products, although the fish ordered had in fact been caught and frozen before the BRAER incident. The company has also stated that orders had been reduced and that one request had been made that the name of the company be changed by deleting the word "Shetland". In addition, the company has claimed compensation for the costs incurred in respect of extra storage of frozen fish, since it is allegedly under contractual obligations to continue purchasing

fish from its normal suppliers (a group of fishing vessel owners who have a majority share holding in the company), even when demand for fish decreases.

3.4 A fish processing company which normally obtains fish from both inside and outside the area of the exclusion zone has claimed compensation in the amount of £43 188 for the period January – March 1993. The claim is based on alleged reduction in turnover due to the cancellation of orders or the reduction in the quantities being ordered by customers. No supporting documentation has been submitted showing which orders have actually been lost. The claim also includes certain costs relating to the production of new packaging in which the word "Shetland" was omitted, direct mail advertising to regular customers and attendance at extra trade exhibitions.

3.5 A claim for £71 826 has been presented by another fish processor relating to costs for new packaging, since customers had allegedly requested the deletion of the word "Shetland" from the packaging. The claim also includes alleged losses resulting from reduced turnover, but no details have been given in respect of lost orders.

3.6 These four claims give rise to an important question of principle as to the admissibility of claims for compensation. This question is similar to the one discussed by the Executive Committee at its 34th session, viz in respect of a claim by a fish processor who, according to the information then available, did not normally receive any supplies of fish from the area which fell within the exclusion zone. This claim related to an alleged loss which consisted in the cancellation of orders relating to salmon from outside the exclusion zone, suffered as a result of loss of confidence on the part of buyers and consumers in the quality of Shetland salmon in general, including salmon farmed outside the exclusion zone. In respect of that claim the Executive Committee took the view that the loss suffered by the claimant was a more indirect result of contamination of a part of the waters around Shetland than the losses suffered as a result of some other fish processors who were deprived of a supply of fish from the exclusion zone. The Committee considered that this claim represented a borderline case between admissible and non-admissible claims and decided to postpone its decision to its next session (document FUND/EXC.34/9, paragraph 3.3.20).

3.7 In the view of the Director, the four claims dealt with in this section of the present document also represent borderline cases between admissible and non-admissible claims. The question is whether losses resulting from the perception of third parties as to the consequences of an incident on the quality of fish (such as lost orders or lower prices in respect of salmon or other products originating from outside the exclusion zone) should be considered as "damage caused by contamination". In the Director's view it would be for the Executive Committee to consider whether such losses should be considered as falling within the definition of "pollution damage".

4 Salmon Farms

In document FUND/EXC.35/5 it was mentioned that no decision had been taken in respect of the 1992 salmon intake. A test programme was carried out within the exclusion zone during the week commencing 24 May 1993, and the Director will report to the Executive Committee on the results of these tests if available at the time of the Committee's 35th session.

5 Motel

5.1 The owners of a motel on Yell, an island off the north east coast of Shetland, have presented a claim for an amount of £9 825 relating to loss of regular client bookings and cancellations from weekend and holiday visitors. The owners have stated that the BRAER oil spill has so far resulted in cancellation from five tour parties booked for June and July 1993. In addition, the owners have alleged that they expect a reduction in the number of "chance" bookings and family holiday bookings in the summer of 1993. The owners have also maintained that they are facing cash flow difficulties since groups normally pay a deposit in advance of their holidays which is used by the owners to pay outstanding debts.

5.2 As mentioned in the document relating to the HAVEN incident (document FUND/EXC.35/3, paragraph 3.2.8), the IOPC Fund accepted in the TANIO case claims for loss of income suffered by hotels at seaside resorts. The Director has proposed that claims for loss of income suffered by hotels on the Italian Riviera resulting from the HAVEN incident should in principle be accepted, subject to certain conditions. As regards the HAVEN case, the Director has maintained that each claim should be considered on its merits, and the decisive criterion should be whether there is a link of causation between the damage and the contamination (document FUND/EXC.35/3, paragraphs 3.2.11–3.2.18).

5.3 The Director takes the view that the same criteria should be applied to claims from the tourist industry in Shetland. Each claim should be considered on its own merits. The claimant would have to show that there is a link of causation between the alleged loss of income and the contamination resulting from the BRAER incident. It should be noted that there is a difference between the tourist industry on the Italian Riviera affected by the HAVEN incident and that on Shetland. Tourists go to the Italian Riviera mainly for beach holidays, whereas visitors to Shetland do not go there to swim but to enjoy other activities such as walking or bird watching. If, however, the contamination caused by the BRAER had the effect of reducing the number of visitors to Shetland, then in the view of the Director the individual operators within the Shetland tourist industry suffering quantifiable economic loss would in principle be entitled to compensation. In the BRAER case, however, the impact of oil on beaches and other areas of interest to tourists was confined to a limited part of the Shetland Islands and was, except in respect of some grazing land, of short duration. Any damage to the tourist industry may therefore result to a large extent from misleading media reports on the consequences of the BRAER incident.

5.4 It goes without saying that each claimant would have to prove the quantum of his loss, for example by a comparison between the profits during 1991 and 1992, and the profits during 1993. It would therefore be difficult to establish the amount of any loss until the end of the 1993 tourist season.

5.5 As regards the cash flow problems allegedly encountered by the owners of the motel, reference is made to the considerations set out in paragraph 6 below.

6 Cash Flow Problems

6.1 Some claimants have alleged that the BRAER incident has caused serious cash flow problems which threaten the survival of their businesses. They have therefore requested that the IOPC Fund should provide the necessary funds to solve their cash flow problems. It is likely that some salmon farms within the exclusion zone will soon face cash flow difficulties since they are unable to harvest and sell the 1992 salmon intake. Some farms would start harvesting in June 1993, whereas others would normally start harvesting in July or August.

6.2 One salmon farm located within the exclusion zone which had harvested its entire 1991 intake of salmon before the incident, has maintained that, as a result of the BRAER incident, it was impossible for the claimant to obtain necessary credit or overdraft facilities from its bank in order to continue the cultivation of its 1992 intake, since the bank's confidence in the salmon within the zone as security had diminished. The claimant has also stated that it was unable to obtain insurance for the 1993 smolt. According to the claimant, it was likely that the farm would have to go into liquidation unless assistance to solve the cash flow problem was provided.

6.3 In the view of the Director, the fact that banks are unwilling to give loans or extend overdrafts to businesses affected by the BRAER incident does not in itself constitute grounds for compensation under the Civil Liability Convention and the Fund Convention. If the salmon farm referred to above continues its normal activities up to the time of harvesting and sells the harvested fish at normal prices, the claimant will not have suffered any economic loss. In the event that the IOPC Fund had made advance payments to this claimant to ease his cash flow problems, the Fund would have made payments to a claimant who, in fact, had not suffered any economic loss and was not entitled to compensation.

6.4 In the Director's view, the notion of "pollution damage" would not cover cash flow problems of the kind dealt with above.

6.5 It should be noted that, in the Director's view, increased costs for financing overdrafts or other loans necessitated by the BRAER incident would in principle form the basis of a valid claim for compensation.

7 Assessment of Quantum of Economic Loss

7.1 In respect of economic loss suffered by hoteliers, restaurateurs, shopkeepers and fishermen, the IOPC Fund has in previous cases based its assessment of the quantum of the losses on the actual economic results of the individual claimant for comparable periods in the years prior to the relevant incident, normally the two preceding years. The assessment has been based on the results of the two preceding years, subject to adjustments in view of the particular circumstances relating to the individual claims.

7.2 In the BRAER case, some claimants, in particular some fish processors, have argued that the compensation should be assessed not on the actual results of previous years but on the budgeted result for 1993. For example, one fish processor has produced figures showing that his turnover doubled from 1991 to 1992. The claimant has stated that he had in his budget predicted another doubling of the turnover during 1993 in comparison with 1992, and has argued that compensation should be assessed on the budgeted figures.

7.3 In the view of the Director, the IOPC Fund should maintain its policy of using as a basis for the assessment of compensation the actual results of the individual claimant for appropriate periods during the years preceding the incident. The IOPC Fund should be prepared to take into account particular circumstances in the individual case which might show that it would be inappropriate to base the assessment strictly on the figures of previous years. For example, if a hotel had built an extension shortly before the incident, thereby increasing its capacity to receive guests, this should be taken into account, provided that it was likely that more guests would in fact have used the hotel than in previous years.

8 Action to be Taken by the Executive Committee

The Executive Committee is invited to:

- (a) take note of the information contained in this document; and
- (b) give the Director such instructions as it may deem appropriate in respect of:
 - (i) the request by the South Mainland Action Group (paragraph 2);
 - (ii) claims relating to activities outside the exclusion zone (paragraph 3);
 - (iii) claim submitted in respect of a motel (paragraph 5);
 - (iv) requests for assistance to overcome cash flow problems (paragraph 6); and
 - (v) assessment of the quantum of economic loss (paragraph 7).

ANNEXText of a letter dated 16 May 1993 received from
the South Mainland Action Group

Dear Sir

Please place this letter before members of the convention for consideration at their next meeting.

The South Mainland Action Group was formed in Shetland during the first few days of the *Braer* disaster with a mandate to gather information for its members on property damage, health matters, economic and environmental damage, with regard to compensation claims. Recently the group conducted a house-to-house survey in the polluted South Mainland of Shetland to ascertain how the disaster is affecting the population as a whole. The survey revealed three points on which there was almost 100 per cent unanimity among the hundreds of people questioned:

- 1) Extreme concern and worry over the long-term effects of the oil spill on our health and environment.
- 2) The possibly unlawful use of unlicensed and untested dispersants and the refusal of the authorities to release details of the chemical content of these.
- 3) The need for a one-off, no-strings-attached, humanitarian payment to each individual in the polluted area in compensation for exposure to health risks, anxiety, upset, loss of environmental amenities etc caused by this disaster.

We are now of the unanimous opinion that it is essential that the population should be compensated for the suffering they have experienced and are continuing to experience. The IOPCF is in a position to show that it has the welfare of a small community at heart and it would be advantageous to the organisation to be able to eventually leave Shetland with good public relations rather than a residue of mistrust, anger and disillusionment.

The procurement of a settlement is the prime object of the group, even if this means pursuing a claim through the American courts – something which would be bound to attract adverse public opinion worldwide for our opponents. We feel that the IOPCF is in a position on this occasion to widen its mandate to make such a one-off humanitarian payment and enter into negotiations with our group. The EC made a small, but much appreciated gesture in this direction with its humanitarian payment. Such a settlement would obviously have to be bigger than the EC payout but it would be a cheaper, more sensible option than forcing people who are quite blameless in this whole incident into a legal confrontation with the insurers.

We therefore submit this request to the 56 members of the IOPCF and urge them give it their sympathetic consideration. The unique, traumatic feature of the *Braer* disaster – the spread far inland of oil spray aerosol in the high winds – is extremely unlikely to happen in any subsequent tanker disasters. Therefore, the granting of a humanitarian payment in these circumstances would not create a precedent the IOPCF might regret in future years.

Yours faithfully, for the
South Mainland Action Group (*Braer*)

T Redfern
(Chairman)

A Duncan
(Committee member East)

J Johnston
(Secretary)

M Pickbourne
(Committee member West)