

INTERNATIONAL  
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COMPENSATION  
FUND

EXECUTIVE COMMITTEE  
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Agenda item 3

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## INCIDENTS INVOLVING THE IOPC FUND

### BRAER

#### Note by the Director

#### 1 The Incident

1.1 Early in the morning of 5 January 1993, the Liberian tanker BRAER (44 989 GRT), laden with approximately 84 000 tonnes of North Sea crude oil, suffered a total machinery failure south of Sumburgh Head, the southern-most point of the Shetland Islands (United Kingdom). The weather conditions were severe at the time, with 40–50 knot winds and heavy seas. At around 11.00 am the vessel grounded at Garths Ness, and oil began to escape almost immediately thereafter. All crew members were rescued by helicopter before the grounding.

1.2 Experts from the International Tanker Owners Pollution Federation Limited (ITOPF) were engaged by the shipowner and his P & I insurer (Assuranceföreningen Skuld, the Skuld Club) and the IOPC Fund, and one of its experts arrived in Shetland on the afternoon of the day of the incident.

1.3 The United Kingdom Government, in co-operation with the Shetland Islands Council, immediately activated its contingency plans through the Marine Pollution Control Unit (MPCU) of the Department of Transport. A joint response centre was set up at Sumburgh Airport on Shetland. A number of dispersant-spraying aircraft were mobilised. The severe weather conditions prevented any large scale spraying of dispersants and made any recovery operations at sea impossible. Limited spraying of dispersants proved possible for short periods and contributed to the dispersion of surface oil. Local people initially expressed concern about a possible health risk as a result of dispersants being blown inland, but the health authorities confirmed that no such risks resulted.

1.4 Severe weather conditions with gale to hurricane force winds and heavy seas continued practically without interruption until 24 January 1993, resulting in the ship breaking up and the cargo oil and bunker oil escaping into the sea. The major part of the oil was released between 5 and 12 January 1993. An inspection of the wreck carried out by divers on 24 January showed that there was no cargo left on board and that most of the 1 600 tonnes of heavy fuel oil had escaped. A

detailed inspection of the wreck was carried out from 27 to 29 April 1993. This inspection showed that the wreck had disintegrated and that there was no fuel oil or cargo oil in the remains of the ship.

1.5 Due to the heavy seas, most of the spilt oil dispersed naturally close to the grounding site. In spite of the large quantities spilt, very little oil was observed on the surface of the sea, apart from sheens, and the impact on the shoreline was very limited. Strong winds blew oil vapours ashore and the oil affected grassland and houses close to the coast in the south western part of Shetland.

1.6 The coast near the grounding site is rocky and heavily indented with numerous coves, bays and sea lochs. Some oil moved towards the northwest and affected the western coast of Shetland up to some 30 kilometres from the grounding site. Two sheltered sea lochs, one on the east coast and one on the west coast, both important bird habitats, were closed off by booms and sandbags. The severe weather made further defensive booming impossible. It was thus not feasible to take any measures to protect the salmon farms along the west coast, apart from deploying sorbent booms around salmon cages.

1.7 The sea around the Shetland Islands is of great importance for fishing and aquaculture, especially in the form of industrial salmon farming. There are some 55 salmon farms around the Islands.

1.8 On 8 January 1993, the United Kingdom Government imposed a fishing exclusion zone in respect of an area along the west coast of Shetland which was affected by the oil. This zone was extended on 27 January. Some 18 sites for salmon farming are located within that zone. The authorities have been carrying out a programme of analysing the water quality and the effects of the oil on the fish. The results of these analyses have not yet allowed the authorities to lift the general ban on fishing in the zone, but the ban on whitefish was lifted on 23 April 1993.

1.9 At an early stage the shipowner engaged Smit Tak International to save the ship and cargo, but the bad weather prevented any salvage operations. The IOPC Fund monitored the salvage activities through experts from Murray Fenton & Associates.

## **2 Extent of the Pollution Damage**

2.1 As mentioned above, windblown oil spray affected the southern part of Shetland closest to the site of the grounding and contaminated a number of houses. An estimated 40 km<sup>2</sup> of farm land, mainly used for sheep grazing, were affected. As a result, some 23 000 sheep had to be moved from their normal grazing land and had to be given special feed. Some crops were also contaminated.

2.2 The imposition of the exclusion zone prevented salmon farms located in the zone from harvesting their salmon. In addition, some 36 fishermen have been prevented from fishing for whitefish and shellfish in the area. The spill also affected firms involved in packing and processing fish normally caught or farmed in the exclusion zone.

2.3 Considering the quantity of oil that was spilled, the effects on wildlife have been limited. Some 1 600 dead sea birds have been collected and some 250 oiled birds have been cleaned. Three dead seals were recovered, and a further 27 oiled seals have been cleaned and were released by mid March.

## **3 Claims for Compensation**

### **3.1 General**

3.1.1 On 8 January 1993 the Skuld Club and the IOPC Fund established a joint office in Lerwick (Shetland), known as the BRAER Claims Office, to assist claimants in their presentation of claims and to handle claims which are submitted. Special claim forms for various types of claims have been prepared and distributed on request.

3.1.2 As at 15 May 1993, 1 138 claims forms have been issued. Some 342 claims for compensation have been received. So far, 218 claims have been settled and paid at a total amount of £9 252 280.

3.1.3 The various types of claims submitted are dealt with below.

### 3.2 Contamination of Property

3.2.1 So far, 167 persons have claimed compensation for costs incurred for the cleaning or repainting of their houses and other property (such as fences and sheds) which were contaminated by wind-blown oil emanating from the BRAER. The Director has approved 88 such claims pursuant to Internal Regulation 8.4.1 and the authority given to him by the Executive Committee (document FUND/EXC.34/9, paragraph 3.3.13) for a total amount of £108 017. These claims have been paid by the Skuld Club.

3.2.2 At present, 79 claims within this category are being examined by the IOPC Fund's surveyors.

### 3.3 Contamination of Grassland

3.3.1 The oil spray from the BRAER contaminated a considerable area (some 40-45 square kilometres) of grassland on the southern part of Shetland which is used for sheep grazing. On 11 February 1993, approximately 30-35 square kilometres were declared fit for grazing. The results of recent testing to determine which of the remaining areas can be released for agricultural use are awaited.

3.3.2 About 23 000 sheep which would normally have grazed on the polluted land had to be moved away and provided with feed brought in from the mainland. The lambing season commenced in March 1993. Although most of the affected land could be used again for grazing from 11 February 1993, it was necessary to keep the sheep on a diet of special feed. If the sheep had no longer been given this feed, there would have been a greatly increased risk that the sheep would have aborted their lambs. Extra feed was also provided for some 465 cattle and 100 horses and Shetland ponies.

3.3.3 The shipowner and the Skuld Club, after approval by the Director pursuant to Internal Regulation 8.4.1 and the authority given to him by the Executive Committee (document FUND/EXC.34/5, paragraph 3.3.14), agreed to meet the cost of special feed for sheep, cattle and horses which were prevented from grazing. Feed has been supplied to assist over 200 crofters and farmers. The cost of this feed has been £90 000 per month. So far £353 278 has been paid in relation to such feed. As the major part of the contaminated grassland has recovered, the monthly cost of feed has decreased. It is not possible to assess at this stage when the entire affected area will be usable again for grazing.

3.3.4 Some crofters have needed additional labour in view of the extra work involved in feeding the sheep. As authorised by the Executive Committee, the Director has approved 35 claims for compensation in respect of costs for extra labour and farm machinery, totalling £365 472. These claims have been paid by the Skuld Club.

### 3.4 Fishing Activities

3.4.1 Thirty-six fishermen who normally fish within the exclusion zone have claimed compensation for loss of income as a result of having been prevented from fishing since 5 January 1993.

3.4.2 The Director has, pursuant to Internal Regulation 8.4.1 and the authority given to him by the Executive Committee (document FUND/EXC.34/5, paragraph 3.3.16), approved 36 claims from fishermen for loss of income for a total amount of £398 114, relating to the period from 5 January to 15 May 1993. These claims have been paid by the Skuld Club.

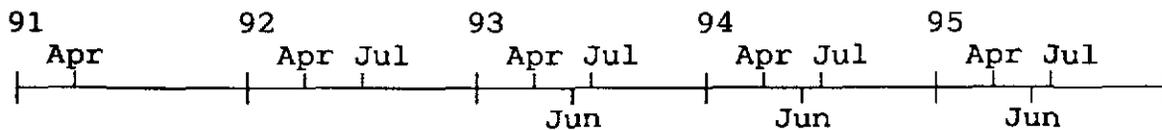
3.4.3 It is expected that further claims will be submitted for loss of income for the remaining period until the fishing ban is lifted for all species.

3.4.4 It has been indicated that some other fishermen will present claims relating to contamination of nets and boats.

3.5 Salmon Farms

3.5.1 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.

3.5.2 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 diagram.



1991 Generation



1992 Generation



1993 Generation



3.5.3 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.

3.5.4 In its consideration of issues relating to salmon farming, the shipowner, 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).

3.5.5 In respect of the salmon farms located within the exclusion zone, agreement was reached in March 1993 between the farms, the Skuld Club and the IOPC Fund that the 1991 intake of salmon should be destroyed, since it was unlikely that the ban on harvesting the salmon would be lifted within the near future (document FUND/EXC.34/5/Add.1, paragraphs 4.4.6 - 4.4.9).

3.5.6 At its 34th session, the Executive Committee agreed with the Director that the claims for compensation presented with regard to the salmon farms located in the exclusion zone in respect of losses incurred as a result of contamination of their salmon were in principle admissible, since such claims related to damage to property. The Committee endorsed the agreements entered into with the salmon farmers relating to the slaughter and disposal of the 1991 intake of salmon, the method of assessment of the damage resulting directly from that slaughter, and the schedule of payments. The Committee authorised the Director to make final settlement of the claims relating to the slaughter and disposal of the 1991 intake of salmon (document FUND/EXC.34/9, paragraph 3.3.17).

3.5.7 The slaughter of the 1991 salmon was carried out during the period 27 March to 23 April 1993 by a Norwegian company under contract with the Skuld Club. The fish was taken to Norway to be processed into protein and fish oil. The disposal costs amounted to Nkr2 280 917 (£218 000), and these costs have been paid by the Club.

3.5.8 On the basis of the authority given to him by the Executive Committee, the Director has made settlements of claims from eight salmon farms in the exclusion zone relating to losses suffered as a result of the destruction of the 1991 intake. These claims have been paid in three instalments during the period 16 March to 24 May 1993, on the terms set out in document FUND/EXC.34/5/Add.1, paragraph 4.4.12. The total payments amount to £7 175 470. Of this amount, £2 730 512 has been paid by the Skuld Club, £1 793 868 by the IOPC Fund and £2 651 090 by the Scottish Office Bridging Fund (see paragraph 4 below).

3.5.9 The Executive Committee also authorised the Director to make final settlements in respect of damage to equipment within the farms located in the exclusion zone (document FUND/EXC.34/9, paragraph 3.3.17). A claim for £260 has been accepted and paid in respect of top-nets damaged by an absorbent boom.

3.5.10 At its 34th session, the Executive Committee noted that the Director intended to submit for consideration at a later session claims for compensation in respect of damage, if any, caused to the 1992 and 1993 salmon intakes, as well as in respect of claims relating to the long term effects, if any of the BRAER incident for the salmon farms. It was also noted that it might be necessary to take a decision in respect of the 1992 intake within the next few months. For this reason, the Committee authorised the Director to take the necessary decisions in this regard, including entering into agreements with the salmon farmers on the method of calculating the compensation in respect of that intake, if appropriate (document FUND/EXC.34/9, paragraph 3.3.18).

3.5.11 So far, no decision has been taken in respect of the 1992 intake. Discussions on this issue are being held between the IOPC Fund, the Skuld Club, the United Kingdom Government and the salmon farms concerned.

### 3.6 Fish Processors' Claims

3.6.1 At its 34th session, the Executive Committee was informed that claims for compensation had been submitted by 14 entities involved in fish processing activities. Five of these entities had presented detailed claims, and these entities represented the different kind of activities carried out by the fish processors allegedly affected by the BRAER incident.

3.6.2 The Executive Committee considered the five above-mentioned claims on the basis of a document presented by the Director (document FUND/EXC.34/5/Add.2, paragraphs 3.1 - 3.33).

3.6.3 The Executive Committee noted that losses allegedly suffered by five fish processors related to pure economic loss which had not been suffered as a direct result of contamination, but as an indirect consequence of the contamination of the water which led to the exclusion zone being imposed by the United Kingdom Government. The Committee recognised that it could be argued that the losses suffered by the fish processors, although caused only indirectly by the contamination, was a foreseeable consequence of a major oil spill in the area. It acknowledged that some claims which had in previous

cases been accepted by the IOPC Fund related also to damage which was only the indirect result of contamination, such as losses suffered by hotels and restaurants at seaside resorts. The Committee took the view that the losses suffered by four fish processors as a result of their having been deprived of a supply of fish from the exclusion zone should be considered as damage caused by contamination. For this reason, the Committee accepted in principle these claims. It authorised the Director to settle these claims as well as claims from other fish processors whose situation as regards the supply of fish was similar to the situation of the above-mentioned four fish processors (document FUND/EXC.34/9, paragraphs 3.3.19 and 3.3.21).

3.6.4 With regard to the claims presented by fish processors which were thus accepted in principle, the Executive Committee instructed the Director to examine in detail each item of the claims in respect of alleged expenses or losses and to establish whether the expenses or losses were caused by contamination in the sense given by the Committee to that expression, whether the amounts claimed were substantiated by sufficient supporting documentation and whether the claimants had taken reasonable steps to minimise the damage. The Committee also instructed the Director to enter into negotiations with the claimants concerned and authorised him to settle these claims to the extent that they fulfilled these criteria. The Director was instructed to refer the claims back to the Committee for consideration, if new questions of principle were to arise. In addition, the Committee authorised the Director to make advance payments to mitigate undue financial hardship on the part of these claimants, in respect of those parts of the claims which he considered acceptable in principle (document FUND/EXC.34/9, paragraph 3.3.19).

3.6.5 So far, eight provisional claims have been received from fish processors falling within this category in respect of losses suffered during the period January – April 1993. The claims are at present being examined by the IOPC Fund's experts.

3.6.6 With regard to one fish processor who did not normally receive any supplies from the area of the sea which fell within the exclusion zone, the Committee noted that the alleged loss, which consisted in the cancellation or reduction of orders relating to salmon from outside the exclusion zone, was suffered as a result of a loss of confidence on the part of buyers or consumers in the quality of Shetland salmon in general, including in salmon farmed outside the exclusion zone. The loss suffered by this claimant was therefore, in the view of the Committee, a more indirect result of the contamination of a part of the waters around Shetland. The Executive Committee considered that this claim presented a borderline case between admissible and non-admissible claims. In view of the fact that this matter had been raised at a very late stage, and bearing in mind the importance of the issue, the Executive Committee decided to postpone any decision to its next session (document FUND/EXC.34/9, paragraph 3.3.20).

3.6.7 After further discussions with this latter claimant, it has been established that this fish processor also receives part of its supply from the exclusion zone, and the losses allegedly suffered in respect of that supply would therefore fall within the category covered by the Executive Committee's decision referred to in paragraph 3.6.3 above.

### 3.7 Claims Relating to Activities Outside the Exclusion Zone

The IOPC Fund has recently received a claim in respect of a salmon farm located outside the exclusion zone for alleged loss resulting from a reduction in value of its fish. Some fish processors have presented claims in respect of losses relating to fish caught outside the zone. These claims will be dealt with in an addendum to the present document.

### 3.8 Joint Claim by the Shetland Salmon Farmers' Association, the Shetland Fish Processors' Association and the Shetland Fish Producers' Organisation

3.8.1 The three above-mentioned organisations have submitted a joint claim for costs relating to activities to be undertaken in order to counteract the negative impact of the BRAER incident on the reputation of Shetland fish products.

3.8.2 The organisations representing the various sectors of the fishing industry, viz the Shetland Fish Processors' Association, the Shetland Salmon Farmers' Association and the Shetland Fish Producers' Organisation, have submitted documentation giving general background information on the fishing industry in the Shetland Islands. The information submitted can be summarised as follows.

The fishing industry is of great importance to Shetland's economy. The income produced by this industry is to a great extent retained on Shetland and has a substantial multiplier effect on the local economy. A study undertaken in 1989 indicated that a fall of £12 million in the turnover of the fishing industry would result in a loss of some £33 million to the local economy as a whole.

The fishing industry on Shetland has four sectors, namely fishermen, fish farmers, fish processors and sales and marketing enterprises. The sectors are closely inter-related, and only through the co-operation between them can Shetland fish products be sold worldwide. These four sectors are supported by a number of directly related industries, such as ship repair, ice making, box making, net making and the transport of fish products. There is also a considerable overlap and interdependence between the four sectors. Although the fish products pass through a number of stages often undertaken by different companies, the directors and the owners of these companies are to a large extent the same.

The working population of Shetland is approximately 10 000 persons. In 1991, 1 449 persons were employed in fisheries and a further 1 198 persons in jobs dependent on fisheries.

The value of Shetland seafood production in 1992 is estimated at £83 million. Of this amount, £33 million relates to salmon, £25 million to other fish and £25 million to processing.

The three above-mentioned organisations have, together with the Shetland Islands Council, established Shetland Seafood Quality Control Ltd which is an independent control company entrusted with the task of overseeing the proper application of quality standards in order to maintain and enhance the reputation of Shetland fish products for high quality.

3.8.3 The organisations have stated that they have for many years devoted large resources to promoting Shetland seafood products. Over the last five years, over £3.5 million has been spent by the organisations for that purpose; in 1992, the cost for promotion was about £500 000. In addition, the individual sales companies have spent considerable amounts in promotion costs. The organisations have maintained that the BRAER oil spill destroyed much of the reputation of Shetland seafood for high quality which had been built up and that buyers have reduced purchases of Shetland products.

3.8.4 The organisations have taken measures since the incident to prevent a total collapse of the market by introducing more stringent testing procedures which, in their view, made it possible to persuade most United Kingdom supermarkets to resume purchases, although pre-spill volumes and prices have not been obtained. The organisations have maintained that action is necessary on wider markets to reassure the consumers and the trade buyers of the quality of Shetland fish products. Such a programme will, in the view of these organisations, reduce the losses suffered by the industry, thereby reducing the claims for compensation.

3.8.5 The cost of the proposed action programme has been estimated by the organisations as follows:

Relaunch of Shetland salmon	£2 213 756
Relaunch of Shetland fish	£ 339 297
Relaunch of Shetland processed fish	£ 422 000
	£2 975 053

3.8.6 As regards the salmon industry, the proposed action plan would include, inter alia:

- press campaigns in the United Kingdom;
- invitations to journalists, key buyers and top chefs in the United Kingdom to visit Shetland;
- participation at exhibitions;
- international press campaign;
- invitations to foreign journalists and key foreign buyers to visit Shetland;
- renewal of videos and literature on Shetland salmon to stress increased quality control;
- co-ordination of campaign by a specialist public relations and marketing company.

3.8.7 With respect to the fish producers (other than the salmon industry), the proposed action plan would include, inter alia:

- production of a video;
- production of a brochure;
- participation in exhibitions;
- advertising;
- invitation to journalists and key buyers from the United Kingdom and abroad to visit Shetland.

3.8.8 Concerning the fish processing industry, the proposed action plan would include, inter alia:

- trade press advertising;
- participation in exhibitions;
- production of a video.

3.8.9 At its 34th session, the Executive Committee held a preliminary discussion of this claim which had been presented only a few days before the session. The discussions were held on the basis of a document elaborated by the Director (document FUND/EXC.34/5/Add.2, paragraphs 4.10 - 4.14).

3.8.10 The question of principle involved is whether costs for activities of the kind envisaged by the organisations would fall within the definitions of "pollution damage" or "preventive measures". The Executive Committee agreed with the Director's view that such costs could not be considered as falling within the definition of "pollution damage", unless they were to be considered as costs of "preventive measures", which are defined as "... any reasonable measures taken by any person after an incident has occurred to prevent or minimise pollution damage". The Committee felt that it was likely that the drafters of the Civil Liability Convention did not foresee that activities of the kind envisaged by these three organisations should fall within the definition of "preventive measures". Several delegations expressed their concern as to the consequences of accepting claims of this kind (document FUND/EXC.34/9, paragraph 3.3.23).

3.8.11 In view of the importance of the issue which had not been raised until the opening of the 34th session, the Committee decided to postpone its decision on this claim to its 35th session. It was noted that, pending this decision, no advance payments could be made by the IOPC Fund in respect of this claim (document FUND/EXC.34/9, paragraph 3.3.24).

3.8.12 At the 34th session of the Executive Committee, the United Kingdom delegation indicated that it would be submitting a paper on this matter to the 35th session. This paper is reproduced as document FUND/EXC.35/6.

3.8.13 Since the Executive Committee's 34th session, no further information on the activities covered by the claim has been received from the organisations. They have, however, requested that funds be made available for carrying out a pilot project in Japan for the purpose of reestablishing the quality image of Shetland Seafood products in Japan and eliminating any misconceptions concerning the extent of the damage caused to fish stocks as a result of the BRAER incident. The project includes visits to Shetland by nine representatives of leading Japanese fish trading houses and by journalists from Japanese trade press. The Director informed the organisations that, in view of the decision of the Executive Committee referred to in paragraph 3.8.11 above, the IOPC Fund could not entertain this

request. The Skuld Club has however made available £50 000 as an ex gratia payment to finance this project. The Director has been informed that these activities are at present being carried out.

3.8.14 As stated by the Director in document FUND/EXC.34/5/Add.2, the BRAER incident and the ensuing negative publicity have caused damage to the reputation of Shetland fish products. Some reduction in sales has already taken place, and if no action were to be taken it might take a long time before the reputation and sales were restored to pre-incident levels. The Director accepts that activities of the kind included in the plan would contribute to re-establishing Shetland fish products in the international and domestic markets by restoring the reputation of these products for high quality. Such activities could therefore result in a reduction in losses suffered by salmon farmers, fishermen and fish processors, thereby reducing the claims against the shipowner, the Skuld Club and the IOPC Fund. Obviously the positive effects of the proposed activities depend on a great number of imponderable factors. The Director also accepts that any activities of this kind should be carried out as soon as possible in order to have maximum impact.

3.8.15 Recognising the usefulness of the activities envisaged by the organisations, the Director considers that the question of whether the costs of these activities are admissible under the system of compensation established by the Civil Liability Convention and the Fund Convention should be decided by an interpretation of the definition of "preventive measures". As stated by the Executive Committee, it is likely that the drafters of the Civil Liability Convention did not foresee that activities of the kind envisaged by the organisations should fall within the definition of "preventive measures". Against that background, an interpretation of the wording of the definition would result in claims of this kind being considered as falling outside the definition.

3.8.16 The Executive Committee may nevertheless wish to consider whether a more extensive interpretation of this definition would be justified in order to take into account the special geographic and economic situation on Shetland as well as the social and economic consequences of any decision. It goes without saying that the Committee's decision on this issue will have far-reaching consequences.

3.8.17 It should be noted that the activities of the kind proposed by the organisations may have useful effects not only for products from the area covered by the exclusion zone once the zone is lifted, but also for products from outside that area.

3.8.18 In the event that the Executive Committee were to decide that costs for activities of the kind envisaged by the organisations are, in principle, to be considered as costs of "preventive measures" and thus admissible under the Conventions, the Committee may wish to instruct the Director to examine the action plan in detail, with the assistance of experts in the marketing of fish products. In that event, the Director proposes that he should be authorised to settle this claim and to grant advance payments in respect of activities which, in his view, are justified and cannot reasonably be postponed until after the completion of such an examination.

### 3.9 Claims by the Shetland Salmon Farmers' Association for Damage Limitation Measures

3.9.1 The Shetland Salmon Farmers' Association has submitted a claim for £47 713 relating to measures taken in January 1993, ie the period immediately following the BRAER incident, to limit the damage caused by the incident to the reputation of Shetland Salmon. The amount claimed covers, inter alia, the fees paid to a consultancy firm to assist the association in media management and damage limitation. It includes costs for various activities relating to contacts with the mass media as well as costs for contacts with major buyers to persuade them not to stop buying Shetland salmon or to resume buying Shetland salmon. At the invitation of the Association, representatives of some major buyers visited Shetland, as did chefs of some leading United Kingdom restaurants, and the cost of these visits is included in the claim. In fact, some major buyers who had decided after the incident to stop buying Shetland sea products resumed their purchase. In addition, the Association has claimed £10 861 for extra harvest testing and scientific monitoring. The Association has maintained that extra harvest testing was necessary to convince major buyers and the wholesale fish trade that no contaminated salmon reached the market.

3.9.2 A further claim has recently been received from the Association. Part of that claim, in the amount of £65 589, relates to damage limitation activities. This claim covers costs incurred during February and March 1993, mainly consultancy fees for monitoring press and television coverage of the incident and for conducting a telephone survey in respect of Shetland Salmon products. The claim also includes costs for a special promotion activity, where chefs from some leading United Kingdom restaurants who had been invited to Shetland prepared special salmon dishes for invited guests at a function in Shetland.

3.9.3 As for the damage limitation activities covered by this claim, it could be argued that these activities are of the same kind as those covered by the joint application by the three associations referred to in paragraph 3.8 above. The decision taken by the Executive Committee on that application would then be of direct relevance also for the claims by the Shetland Salmon Farmers' Association. It could be considered, however, in the view of the Director, that there is a difference between the measures taken immediately after the spill to inform the press and public of the real damage and to counteract exaggerated mass media reports, *on the one hand*, and measures of a general promotional character taken later, *on the other*. The harvest testing and scientific monitoring undertaken immediately after the spill could also be considered as part of such immediate damage limitation. In the view of the Director, the activities carried out were generally reasonable in the circumstances. It may appear that the activities carried out during February and March did not have the same character of immediate damage limitation as those which took place in January.

3.9.4 The Director submits to the Executive Committee for consideration whether the activities covered by the claims presented by the Shetland Salmon Farmers' Association could be considered as falling within the definition of "preventive measures". If the Executive Committee were to answer this question in the affirmative, the Committee may wish to instruct the Director to examine in detail the various items of the claims and to authorise him to approve those items which he considers reasonable in the circumstances.

### 3.10 Fishing Equipment Repair Facility

3.10.1 A claim for compensation has been submitted by a company established in October 1992 which repairs equipment used in the fishing industry, such as trawl nets, gear and lobster pots. So far compensation has been claimed for the period 5 January - 28 February 1993 in the amount of £8 919. The company was allegedly formed in response to a demand for these services. According to the company, it had already prior to the BRAER incident established good relations with several prospective regular customers, mainly fishermen operating in the waters falling within the exclusion zone. The turnover of the company during the period October to December 1992 has been indicated at £300 per week.

3.10.2 The claim relates to loss of income due to the suspension of the fishing activities within the exclusion zone which, in particular, prevented small shellfish boats from fishing. The loss allegedly suffered by this claimant is not a direct result of the contamination caused by the BRAER incident but is the result of certain fishermen having been prevented from fishing in the exclusion zone. For this reason, it could be questioned whether the loss can be considered as "damage caused by contamination". It would be for the Executive Committee to take a decision on the interpretation of the definition of "pollution damage" in this respect. In the Director's view, it could be argued, however, that the loss allegedly suffered by this claimant are similar to those suffered by the fish processing plants and that this claim should therefore be admitted in principle.

### 3.11 Diver

3.11.1 A diver who carries out on-site underwater maintenance work on the nets and cages of salmon farms, including farms located within the exclusion zone, has presented a claim for compensation for £1 600. The claim relates to loss of income during the period 5 January to 31 March 1993 as a result of the cages not being cleared of fish and therefore not available for maintenance work.

3.11.2 As the 1991 intake of salmon was destroyed, there was no harvest in respect of that intake. The diver was therefore deprived of the maintenance work which he normally would have carried out in the exclusion zone which resulted in loss of income. In the view of the Director, this loss should be considered as caused by contamination, and the claim should therefore in principle be admitted.

### 3.12 Collector of Offal

3.12.1 A claim for loss of income for the period 5 January - 5 April 1993 in the amount of £1 004 has been submitted by a person who collects and disposes of offal from one of the fish processing plants on Shetland. This plant, which processes fish from only two farms in the exclusion zone has not operated since the harvesting ban was imposed. The claimant has allegedly suffered loss of income due to not having been able to collect and sell offal from this processing plant, since the 1991 salmon intake was slaughtered and disposed of elsewhere.

3.12.2 The loss allegedly suffered by the claimant is not a direct result of the contamination caused by the BRAER incident but is the result of the closure of the fish processing plant. For this reason, it could be questioned whether the loss can be considered as "damage caused by contamination". It would be for the Executive Committee to take a decision on the interpretation of the definition of "pollution damage" in this respect. The Director considers, however, that there are reasons to treat this claimant in the same way as shopkeepers, restaurateurs and hoteliers who were granted compensation in the TANIO case.

### 3.13 Employees Put on Part-time Work or Made Redundant

3.13.1 A worker who is employed by a fish processor (Shetland Seafoods Ltd) has claimed compensation for loss of income, for an amount of £70 per week from 8 February 1993, due to the fact that her working week has been reduced from 40 hours to 20 hours. This company receives the major part of its supply of salmon from three farms located within the exclusion zone. The employer has, in a written notice, stated that the reduction of this employee's work time is a result of the BRAER incident.

3.13.2 This claim relates to damage which is not a direct result of the contamination caused by the BRAER incident but an indirect result of contamination of the water, which in turn resulted in reduction of supply of fish to the fish processor. Also in respect of this claim it can be questioned whether the loss can be considered as caused by contamination.

3.13.3 The question of principle is whether losses suffered by persons employed in sea-related activities as a result of their being made redundant or put on part-time work in connection with an oil spill fall within the definition of "pollution damage". A major oil spill can have serious consequences for such persons, from both a personal and an economic view. The acceptance of claims of this kind would, however, have far reaching consequences. If such claims were accepted in principle, the question would be for how long a time compensation would be payable, for example in a situation where the employer ceased trading as a result of the incident. It could be maintained that compensation under the Conventions should be limited to the entity carrying out the sea related activities affected by the oil spill and that its employees would not be entitled to compensation. On the other hand, it could be argued that the losses suffered by such employees are a foreseeable consequence of a major oil spill. The Executive Committee is invited to take a decision on the interpretation of the definition of "pollution damage" on this point.

3.13.4 It should be noted that another fish processing plant on Shetland which has also suffered from a reduction in the supply of raw material as the result of the fishing ban has continued to pay wages to its staff at the normal rate. This plant has included the cost of retaining staff during "idle" times as part of its claim for compensation.

3.13.5 The Director assumes that a large number of claims may be presented by employees who have been made redundant or who have had their working week reduced as a result of the incident. A salmon farm in the exclusion zone has laid off three employees, allegedly because of reduction in work as a result of the farms not being able to introduce new smolt after the destruction of the 1991 salmon intake. The farm has indicated that it could neither finance the insertion of new smolt, nor obtain insurance cover. The IOPC Fund has been informed that these employees will submit claims for compensation. The salmon farm in question has confirmed that, should the work load of the farm increase in the near future, these persons would be re-employed.

3.13.6 A fish processing plant has indicated that it can no longer afford to pay its staff, due to the lack of work resulting from the reduction of the supply of fish from the exclusion zone. The company has suggested that it will soon be obliged to make its employees redundant. It would be for the Executive Committee to take a decision on whether such costs would fall within the definition of "pollution damage".

### 3.14 Transport Companies

P & O Scottish Ferries Ltd, which operates a ferry service between Shetland and Aberdeen, has claimed compensation for loss of income resulting from the effects of the BRAER incident on the transport of salmon and other fish products on its ferries. A haulage firm (Intercity Transport) has presented a similar claim. The claim documents do not give any details of the claims. The Director has invited the claimants to submit supporting documentation, but so far no such documentation has been received. For this reason, the Director considers it premature to take any decision in respect of these claims.

### 3.15 Voluntary Groups

3.15.1 Claims for compensation have been presented by voluntary groups involved in the protection of wildlife. At its 34th session, the Executive Committee considered that the costs incurred to clean birds and other animals were in principle admissible as costs of preventive measures. It was noted that these groups had carried out important and useful tasks in the context of the incident. The Executive Committee authorised the Director to make final settlement of claims of this kind, subject to the condition that the operations were carried out in a responsible manner, that they were useful in mitigating the impact on birds and other animals, that they were carried out efficiently, and that the costs were reasonable (document FUND/EXC.34/9, paragraph 3.3.28).

3.15.2 Claims have been received from 13 voluntary groups for a total amount of £185 588. The Director has so far approved four claims for such groups for a total amount of £72 513.

### 3.16 Public Authorities

3.16.1 At the 34th session of the Executive Committee, the United Kingdom delegation informed the Committee that the United Kingdom Government would submit a claim for compensation in respect of costs incurred for clean-up operations at sea and on shore, for monitoring the operations carried out for the purpose of salvaging the ship and the cargo, and for the cost of carrying out tests on water and fish to establish the level of hydrocarbon. The delegation stated that it was premature to indicate the amount of the Government's claim for clean-up and salvage monitoring with any degree of accuracy but that it would probably be in the region of £2 million. In addition, the United Kingdom delegation stated that the United Kingdom Government would not compete with other claimants for the purpose of obtaining compensation. This delegation mentioned that the Shetland Islands Council would also present a claim in respect of costs in connection with the incident (document FUND/EXC.34/9, paragraph 3.3.29).

3.16.2 No claims have so far been received from the United Kingdom Government nor from the Shetland Islands Council.

3.16.3 A claim has been received for £36 673 from the Civil Aviation Authority relating to the cleaning of the terminal building at Sumburgh airport, which was used as the headquarters for the Joint Response Centre. This claim has been accepted in its entirety. An additional claim in respect of cleaning other buildings in the airport is expected.

### 3.17 Tourist Industry

3.17.1 Shetland Islands Tourism, a local association, has informed the Director that it intends to submit a claim for compensation for 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 the cost of additional work carried out by its public relations consultants. It has been stated that the claim will cover the cost of a planned media campaign, including a series of television advertisements in north east England.

3.17.2 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 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.

3.17.3 In the view of the Director, it would be premature for the Executive Committee to take any decision in respect of claims of this type at this stage.

## 4 Scottish Office Bridging Fund

4.1 The United Kingdom Government has, through the Scottish Office, set up a Bridging Fund to facilitate rapid payments. This Bridging Fund may, if liquid funds available to the Skuld Club and the IOPC Fund are insufficient to ensure rapid payments, make advance payments to claimants whose claims are considered by the Skuld Club and the IOPC Fund to be admissible in principle under the Civil Liability Convention and the Fund Convention. So far, payments have been made from the Bridging Fund for a total amount of £2 651 090 relating to claims in respect of salmon farms.

4.2 The procedure for use of the Bridging Fund was discussed at an early stage between the United Kingdom Government and the IOPC Fund.

## 5 Investigations Into the Cause of the Incident

5.1 The United Kingdom Government is carrying out an investigation into the cause of the incident. A similar investigation is being carried out by the Liberian authorities. The IOPC Fund will be following these investigations through its Scottish lawyer and such technical experts as may be necessary.

5.2 A former Master of the Rolls of the United Kingdom Court of Appeal (one of the most senior posts in the United Kingdom judicial system), Lord Donaldson, has been commissioned by the United Kingdom Government to hold an enquiry into whether any further measures are appropriate and feasible to protect the United Kingdom coastline from pollution from merchant shipping. Lord Donaldson is required to give due consideration to the international and economic implications of any new measures. He has requested written evidence and will be requesting oral evidence.

5.3 At the 34th session of the Executive Committee, the United Kingdom delegation informed the Committee that Lord Donaldson might invite the Director to give evidence as regards the functioning of the compensation system established by the Civil Liability Convention and the Fund Convention.

The Executive Committee agreed that the Director should accept any such an invitation to give evidence (document FUND/EXC.34/9, paragraph 3.3.6). So far no such invitation has been received.

**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) take note of the situation as regards claims relating to:
    - (i) contamination of property (paragraph 3.2);
    - (ii) contamination of grassland (paragraph 3.3);
    - (iii) fishing activities (paragraph 3.4);
    - (iv) transport companies (paragraph 3.14);
    - (v) voluntary groups (paragraph 3.15);
    - (vi) public authorities (paragraph 3.16);
    - (vii) tourist industry (paragraph 3.17); and
  - (c) give the Director such instructions as it may deem appropriate in respect of the claims relating to:
    - (i) salmon farms (paragraph 3.5);
    - (ii) fish processors' (paragraph 3.6);
    - (iii) activities outside the exclusion zone (paragraph 3.7);
    - (iv) joint claim submitted by Shetland Salmon Farmers' Association, Shetland Fish Processors' Association and Shetland Fish Producers' Organisation, (paragraph 3.8);
    - (v) Shetland Salmon Farmers' Association for damage limitation measures (paragraph 3.9);
    - (vi) fishing equipment repair facility (paragraph 3.10);
    - (vii) diver (paragraph 3.11);
    - (viii) collector of offal (paragraph 3.12); and
    - (ix) employees put on part-time work or made redundant (paragraph 3.13).
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