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Agenda item 3

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INCIDENTS INVOLVING THE IOPC FUND

BRAER : JOINT MARKETING CLAIM

Submission by the United Kingdom Observer Delegation

1. Introduction

1.1 At its 34th session the Executive Committee considered a joint claim (the Joint Marketing Claim) submitted by the Shetland Salmon Farmers' Association, the Shetland Fish Processors' Association and the Shetland Fish Producers' Organisation in respect of a proposal for a marketing campaign to counteract the negative impact of the BRAER on Shetland fish and fish products.

1.2 Paragraph 3.3.25 of the Record of Decisions (FUND/EXC.34/9) refers to the statement by the United Kingdom observer delegation that it would submit a paper to the 35th session on the Joint Marketing Claim. This submission indicates the views of the United Kingdom on the Joint Marketing Claim and related matters.

2. Scottish Law

2.1 In FUND/EXC.35/2, paragraph 2.4, the Director sets out the definitions of "pollution damage" and "preventive measures" to be found in Section 1.1 of the Merchant Shipping (Oil Pollution) Act 1971 and Section 1.3 of the Merchant Shipping Act 1974; the United Kingdom legislation implementing, respectively, the 1969 Civil Liability Convention and the 1971 Fund Convention. It should be noted that in that legislation "damage" is defined as including "loss".

2.2 Interpretation of the provisions of this legislation in the case of the Braer will fall to the Scottish Courts. In any such interpretation the Scottish Courts are likely to consider the wording of the provisions in question and may, in addition, have regard to any decisions taken by the IOPC Fund, and in particular the Executive Committee, on their interpretation and application.

2.3 In that connection the Scottish Courts would have regard to the decisions of the IOPC Fund on what constituted "pollution damage", "preventive measures" and "pure economic loss". The Courts would recognise that the IOPC Fund has previously accepted claims relating to "pure economic loss" even though such claims would not necessarily be accepted in many national jurisdictions. In effect the IOPC Fund has established its own jurisprudence

regarding claims for "pure economic loss".

3. Compensation Paid or to be Paid

3.1 Following the Braer the IOPC Fund has paid, or agreed in principle to pay, compensation to :

- (a) salmon farmers within the Exclusion Zone whose fish have suffered damage (FUND/EXC.34/9 paragraph 3.3.17);
- (b) fishermen whose boats, nets, etc suffered damage (paragraph 3.3.16);
- (c) fishermen who suffered economic loss because they were unable to fish within the Exclusion Zone (paragraph 3.3.16), and
- (d) fish processors who suffered economic loss because they were unable to obtain fish from within the Exclusion Zone (paragraphs 3.3.19 to 3.3.21).

3.2 The IOPC Fund has therefore paid, or agreed to pay, compensation in respect of both damage and "pure economic loss" following the Braer.

4 Claims Deferred

4.1 At its 34th session the Executive Committee deferred decision on the Joint Marketing Claim and a claim from a fish processor who had not established that he received fish from within the Exclusion Zone. In deferring the decision on the Joint Marketing Campaign the Committee's Record of Decisions refers both to the view that the drafters of the Civil Liability Convention did not envisage that the actions suggested by the proposers of the Joint Marketing Campaign could be "preventive measures" when they drafted the Convention, and to unspecified concerns about accepting "claims of this kind" (FUND/EXC.39/9, paragraph 3.3.23).

4.2. As regards the fish processor who, at the time, could not establish that he received fish from within the Exclusion Zone the Committee considered that his loss was "a more indirect result of the contamination of a part of the waters around Shetland" and that the claim "presented a borderline case between admissible and non-admissible claims" (FUND/EXC.39/9, paragraph 3.3.22).

4.3 The United Kingdom observer delegation recommends that the Executive Committee should now readdress these claims and in presenting its arguments that these claims should be accepted in principle by the IOPC Fund does so under the following headings

- (i) preventive measures;
- (ii) the effect of the Exclusion Zone;
- (iii) pure economic loss;
- (iv) actions taken in the immediate aftermath of the Braer incident, and
- (v) reasonable measures.

5. Preventive Measures

5.1 The United Kingdom does not defer from the Executive Committee's view, expressed in FUND/EXC.34/9, paragraph 3.3.23,

that costs for the actions proposed in the Joint Marketing Claim should not be considered as falling within the definition of "pollution damage" unless they were to be considered as the costs of "preventive measures".

5.2 The United Kingdom considers that when a claimant has established that he has suffered damage or loss following an oil pollution incident and can establish that he is likely to suffer further damage or loss he can suggest preventive measures to prevent or minimise such prospective damage or loss and that such preventive measures should be considered if they are designed to mitigate further loss or damage so long as :

- (a) the costs of the measures proposed are reasonable;
- (b) the costs of the measures are not disproportionate to the further damage or loss they are intended to mitigate;
- (c) the measures are appropriate and offer a reasonable prospect of success, and
- (d) in the case of any marketing campaign the measures are related to actual, targeted markets.

5.3 The IOPC Fund has already accepted that certain claimants have suffered damage or economic loss. If accepted claimants risk suffering further loss it would appear appropriate to consider whether preventive measures could be taken to mitigate such loss. The fact that the proposed measures may be novel does not preclude their consideration if they meet the conditions outlined above. It would be for the claimant, or claimants, to establish, and the IOPC Fund to agree, the loss likely to be suffered to allow an assessment whether the costs of the proposed measures are reasonable and not disproportionate.

6. Effect of the Exclusion Zone

6.1 The Exclusion Zone established around part of the Mainland of Shetland originally prevented the harvesting and sale of any fish from within its area. The Exclusion Zone has now been lifted in respect of fish other than farmed salmon and shell fish. It is submitted that as farmed salmon and shell fish from within the Exclusion Zone cannot be harvested or sold while the Zone is in place it is impossible to determine at present what loss could be suffered if salmon or shell fish or salmon or shell fish products from within the area now covered by the Exclusion Zone are eventually placed on the market.

6.2 The United Kingdom considers that it is therefore probably premature to consider measures of the type suggested in the Joint Marketing Campaign in respect of those who are unable to market their fish or fish products because of the restrictions placed on them by the Exclusion Zone. The appropriate time to consider such measures will be when the claimants affected by the Exclusion Zone are in a position to return to the market. In this connection the United Kingdom notes that none of the compensation paid to date in respect of those affected by the Exclusion Zone seeks to cover the costs and possible losses that might occur when the claimants seek to reenter the market.

7. Pure Economic Loss

7.1 Salmon farmers, fishermen, fish processors and others engaged in the Shetland fishing industry but who are not subject to the restrictions of the Exclusion Zone have experienced market resistance to their products since the Braer. This resistance has been reflected in the relatively lower prices paid for farmed salmon and salmon products from Shetland and lower prices for wild fish landed on Shetland including increased amounts of wild fish being withdrawn from market under EC intervention rules.

7.2 Extensive media coverage of the kind experienced after the Braer is now an inevitable and foreseeable consequence of any major oil pollution incident. Genuine concern about the effects of the incident on the quality of Shetland fish products may have been further fuelled by exaggerated press reports in the immediate aftermath of the incident. However the consequences for those on Shetland who experienced, and in many cases continue to experience, lower prices for their fish and fish products are very real and arise as a direct consequence of the Braer. Without the Braer these losses would not have been suffered. The United Kingdom considers the suggestion that in some way the losses were the result of "media pollution" and not a consequence of the Braer is disingenuous and unreasonable.

7.3 The United Kingdom has considered the previous practice of the IOPC Fund as regards claims involving "pure economic loss" and, in particular, the decisions made by the IOPC Fund following the Tanio. The United Kingdom notes that no geographical limit was drawn in previous instances when "pure economic loss" claims were accepted. The United Kingdom does not accept that in the case of the Braer linkage to the Exclusion Zone is a reasonable or appropriate determinant as to whether, or not, pure economic loss meriting compensation by the IOPC Fund has occurred. Instead the United Kingdom would recommend to the Executive Committee that the IOPC Fund should compensate those in the Shetland fishing industry who can demonstrate that they have suffered loss following the Braer. This position repeats the view the United Kingdom expressed at the Committee's 34th session. In that connection the United Kingdom does not defer from the Executive Committee's decision recorded in FUND/EXC.34/9, paragraph 3.3.27, regarding a claim submitted by a London-based fish trader.

7.4 The United Kingdom further recommends that the Executive Committee instructs the Director to consider whether the cumulative level of future loss likely to be suffered by those on Shetland who have fish or fish products available to market indicates that measures of the kind suggested in the Joint Marketing campaign would be appropriate having regard to the criteria outlined in paragraph 5.2 (above). The United Kingdom has not addressed the question whether the costs of the proposed Joint Marketing Campaign are appropriate. It is considered that this can be left to negotiations between the Director and the claimants.

8. Actions Taken Immediately After the Incident

8.1 In the immediate aftermath of the Braer incident a number of large supermarket chains in the United Kingdom indicated that they would not accept further supplies of Shetland salmon. To address these concerns the Shetland Salmon Farmers' Association invited representatives of the supermarket chains concerned to visit Shetland to examine the measures that were being taken to safeguard and ensure the quality of Shetland salmon. In addition the national and international press who were on Shetland following the Braer were also briefed on the measures that were being taken to ensure the quality of Shetland fish and fish products. These measures were discussed with the Director of the IOPC Fund in the days following the incident. The steps taken were effective in that all the supermarket chains subsequently lifted their bans on Shetland salmon.

8.2 The United Kingdom considers that these actions were appropriate in light of the uncertainties in the immediate aftermath of the incident. The United Kingdom recommends that the Executive Committee should accept that the claims submitted in respect of these actions should be honoured. The United Kingdom also considers that the success of the actions taken demonstrates the effectiveness of carefully targeted marketing measures.

9. Reasonable Measures

9.1 The United Kingdom considers on examination of the proposals in the Joint Marketing Campaign and in the light of the effectiveness of the actions referred to in paragraph 8.1 (above) that carefully directed marketing measures can constitute reasonable and effective preventive measures.

9.2 In that connection the United Kingdom welcomes the "without prejudice" decision of the Skuld P and I Club to provide £50,000 to fund a pilot marketing campaign for Shetland fish products on the Japanese market. The United Kingdom trusts that the results of this pilot exercise will further demonstrate the effectiveness of such marketing measures.
