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COMPENSATION  
FUND

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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, on the southern coast 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 (Assuranceforeningen 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 existed.

1.4 Severe weather conditions with gale to hurricane force winds and heavy seas continued almost without interruption until 24 January 1993, resulting in the ship breaking up and the cargo and bunkers escaping into the sea. Most 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. 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 spray ashore and this 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 authorities have decided, on the basis of the test results, not 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 salvage 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, was affected. 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.

## **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 were prepared and are distributed on request.

3.1.2 As at 20 September 1993, 1275 claims forms have been issued. 676 claims for compensation have been received. So far, 544 claims have been settled and paid at a total amount of £14 800 752.

3.1.3 At its 34th and 35th session, the Executive Committee considered a number of claims for compensation arising out of the BRAER incident. Some important decisions were taken at these sessions, whereas the Committee postponed its decision on certain claims (document FUND/EXC.35/10, paragraphs 3.4.3 - 3.4.34). The present document deals with these pending claims and with some important questions which have arisen since the 35th session. It also sets out the situation in respect of the types of claims in respect of which the Committee has already taken decisions.

### 3.2 Contamination of Property

3.2.1 So far, 283 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 235 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 £920 265. These claims have been paid by the Skuld Club and by the IOPC Fund.

3.2.2 At present, 48 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 km<sup>2</sup>) of grassland on the southern part of Shetland which is used for sheep grazing. As a result, some 23 000 sheep had to be moved from their normal grazing land and had to be given special feed. On 11 February 1993, approximately 30-35 km<sup>2</sup> were declared fit for grazing. The remaining areas which had been contaminated were declared fit for grazing on 10 September 1993.

3.3.2 At its 34th session the Executive Committee agreed to meet the cost of special feed for sheep, cattle and horses which were prevented from grazing (document FUND/EXC.34/9, paragraph 3.3.14). Feed has been supplied to assist over 200 crofters and farmers. So far £468 777 has been paid in relation to such feed by the Skuld Club and the IOPC Fund. As the contaminated grassland has recovered, the monthly cost of feed has decreased.

3.3.3 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 114 claims for compensation in respect of costs for extra labour and farm machinery, totalling £1 228 820. These claims have been paid by both the Skuld Club and the IOPC Fund.

3.3.4 Although all the land has now been declared no longer contaminated, some areas are still unsuitable for grazing due either to the length of the grass or the abundance of weeds. In addition, due to the disruption of the normal farming routine, some farmers have been unable to grow enough grass for silage making. It is expected that some farmers and crofters will need assistance with feed for their animals during the coming winter months.

### 3.4 Fishing Activities

3.4.1 Fifty-one 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 up to 20 September 1993. The Director has, pursuant to Internal Regulation 8.4.1 and the authority given to him by the Executive Committee (document FUND/EXC.34/9, paragraph 3.3.16), approved these claims for a total amount of £771 737. The claims have been paid by the Skuld Club and the IOPC Fund.

3.4.2 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.

3.4.3 Seven fishermen have presented claims relating to contamination of fishing nets, ropes and lobster pots. These claims have been settled and paid for a total amount of £10 851.

### 3.5 Salmon Farms

3.5.1 A number of claims for large amounts have been submitted by salmon farms located within the exclusion zone imposed by the United Kingdom Government.

#### *1991 Salmon Intake*

3.5.2 As regards the salmon that were stocked as smolt in the spring of 1991 and were half-way through their harvesting period at the time of the incident, the shipowner, the Skuld Club and the IOPC Fund, 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 salmon would depurate quickly or that the zone would be lifted in the near future. It was also recognised that the retention of these salmon in cages for a period of several months to allow depuration would have severely interrupted normal production and would have led to far-reaching losses for the salmon farmers. 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 as soon as possible of the part of the 1991 salmon intake which had not been harvested before the BRAER incident. The remainder of the 1991 intake was thus slaughtered and disposed of during the period March - May 1993 (document FUND/EXC.34/5/Add.1, paragraphs 4.4.6-4.4.9).

3.5.3 On the basis of the authority given to him by the Executive Committee at its 35th session (document FUND/EXC.34/9, paragraph 3.3.17), the Director made final settlement of the claims relating to the slaughter and disposal of the 1991 salmon intake. The total payments in respect of the destruction of the 1991 salmon intake amounted to £7 175 470. Of this amount, £2 730 512 was 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).

#### *1992 Salmon Intake*

3.5.4 At its 34th session, the Executive Committee was informed 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 intake, 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 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).

3.5.5 The Director informed the Committee at its 35th session that discussions concerning the 1992 salmon intake had been held between the United Kingdom Government, the IOPC Fund, the Skuld Club and the salmon farmers concerned, and that the Director had so far not supported the destruction of the 1992 intake, since he had not been convinced of the necessity to take such action. It was noted that, shortly before that session, the United Kingdom authorities had carried out a test programme in respect of the 1992 salmon intake within the exclusion zone and that these results were not yet available. The United Kingdom observer delegation informed the Committee that the preliminary results of these tests were not encouraging.

3.5.6 As for the general question of the right to compensation if salmon or other seafood products were destroyed, the Committee had made a decision of principle in the context of the decision in respect of the AEGEAN SEA incident, namely that the IOPC Fund would be liable to pay compensation only if and to the extent that the destruction of the produce in question was reasonable on the basis of scientific and other evidence available, taking into account, inter alia, whether or not the produce

was contaminated, whether it was likely that the contamination would disappear before the normal harvest time, whether the retention of the produce in the water would prevent further production and whether it was likely that the produce would be marketable at the time of normal harvesting (document FUND/EXC.35/10, paragraph 3.3.11).

3.5.7 In early July 1993, the shipowner, the Skuld Club and the IOPC Fund, in conjunction with their experts, examined the situation in respect of the 1992 salmon intake in the light of the results of tests carried out by the Scottish Office on samples taken from sites inside and outside the exclusion zone at intervals from January up to late May 1993. The results of these tests showed that shortly after the incident hydrocarbon contamination was clearly present at varying levels at all fish farm sites in the zone and organoleptic testing showed that fish at almost all sites were tainted. By late May, analysis of samples showed that hydrocarbon levels were within background values at all but one site out of the total of 14 in the zone, and samples from four sites out of the 14 were clear of taint while the remainder had a low proportion of tainted or "suspect" fish. In view of the test results, it was considered unlikely at that time that the exclusion zone would be lifted in the near future. Nevertheless, in the light of the improvement that had taken place in the situation, the shipowner, the Skuld Club and the IOPC Fund did not think that a total destruction of the 1992 intake was justified, at least not at that stage. It was recognised, however, that a number of farms within the exclusion zone would, in normal circumstances, already be harvesting part of the 1992 intake. It was also recognised that the inability to harvest as normal caused serious financial difficulties to many of the farms within the exclusion zone. The shipowner, the Skuld Club and the IOPC Fund took the position that they were prepared, therefore, to accept for the time being as a reasonable course of action the slaughter and disposal of the proportions of the 1992 intake which would normally be harvested on a month-by-month basis from each individual site.

3.5.8 A detailed offer concerning the calculation of the compensation for fish to be destroyed on a month-by-month basis was made by the Skuld Club and the IOPC Fund on 19 August 1993 after discussions with Shetland Salmon Farmers' Association and the farmers concerned. The Skuld Club and IOPC Fund undertook to review its position in the light of further scientific data as it became available.

3.5.9 The total destruction of the 1992 stock was, however, accepted by the shipowner, the Skuld Club and the IOPC Fund in respect of one farm within the exclusion zone where fish had encountered serious health problems and showed a much higher degree of taint than at other farms in the area. This destruction was carried out on 17 and 18 July 1993. An interim payment of compensation in respect of the salmon thus destroyed was made on 24 August 1993 for an amount of £489 786. Two further payments are to be made in December 1993 and April 1994.

3.5.10 The Shetland Salmon Farmers' Association has maintained that the entire 1992 stock within the exclusion zone should be destroyed since it does not believe that any part of that stock can be marketed successfully even assuming that at some stage it could be judged fit to enter the human food chain. The Association has expressed the view that the marketing of such fish would have a very damaging effect on the quality reputation of the Shetland industry and it is also concerned about the legal implications for its members if any contaminated fish were to reach the market. On the other hand, one farm within the exclusion zone, which owned 49% of the 1992 smolt within the zone, has taken the view that the exclusion zone should be lifted and has indicated that it would be able to sell its fish.

3.5.11 The United Kingdom Government has expressed its concern regarding the position taken by the IOPC Fund in respect of the 1992 salmon intake and the position that it appears to be taking regarding the future marketability of that salmon intake. The Government's view is that the position taken by the Fund might be seriously flawed, in that it has not addressed the arguments put forward by representatives of the Shetland salmon farming industry and others about marketability. The Government has stated that, in its view, it would be difficult to see justification for any policy other than the total destruction of farmed caged fish which have been shown by clear scientific evidence to have been contaminated following an oil pollution incident. In the Government's view, once caged fish have been contaminated it would be very difficult to guarantee their subsequent condition by any level of sampling and testing. It is the Government's view, therefore, that such fish should not be placed on the market for human consumption.

3.5.12 A new series of tests was carried out on samples taken from sites both inside and outside the exclusion zone in late July 1993. The results of these tests showed a significant improvement both as regards hydrocarbon levels and as regards taint in comparison with the previous test results referred to above, showing that hydrocarbon levels were within background level for samples at all farms and that three out of 13 farm sites had some fish classed as tainted or suspect while the remaining ten were clear. However, on the basis of regular monitoring results on small samples of fish, the United Kingdom Government has taken the view that there are sufficient doubts as to the present state of the contamination to require the retention of the exclusion zone.

3.5.13 After discussions with the United Kingdom Government, and in view of the implications of any decision by the IOPC Fund on this matter, it has been agreed that further expert opinions should be sought on the various questions relating to the 1992 salmon intake. Any developments in this regard will be reported in an addendum to the present document.

3.5.14 All but three farms within the exclusion zone which have 1992 salmon have accepted the terms offered by the IOPC Fund for month-by-month destruction. Discussions are being held with two farmers on the exact terms of the offer. The remaining farmer has informed the Director that he would not start harvesting until 1994.

3.5.15 The month-by-month slaughter of the 1992 salmon intake started in late August 1993 and was carried out by a Norwegian company contracted by the Skuld Club. The fish has been taken to Norway to be processed into protein and fish oil. The cost of the destruction will be paid by the IOPC Fund.

3.5.16 Pursuant to the authorisation given to him by the Executive Committee, the Director has authorised payment of compensation to five farms for the partial slaughter of the 1992 intake carried out in August and September 1993 for a total amount of £1 206 266.

#### *1993 Smolt*

3.5.17 Two claims have been presented by salmon farms inside the zone relating to disruption of normal production through delayed intake of smolt early in the year. One of the farms was due to take in smolt in January 1993, but these were only introduced in March. The other farm was due to receive smolt in February but could not get fish stock insurance cover for some weeks, and minor logistical problems resulted in the fish not being stocked until March. The claimants have maintained that this delay resulted in lost growth. These claims are being examined by the IOPC Fund's experts.

### 3.6 Mussel Farms

3.6.1 A claim for £1 400 has been submitted by a mussel farmer operating within the exclusion zone whose stock had been contaminated. The mussel farmer has maintained that he is suffering economic loss as the exclusion zone is still in force for wild and farmed shellfish and he has been unable to harvest since early January. He has also argued that the retention of market sized mussels at his farm is interfering with his future production. The IOPC Fund has therefore offered to pay compensation to the mussel farmer for the destruction of stock that would have been harvested from January to date. The Fund has also stated that it is prepared to pay compensation for stock destroyed on a month-by-month basis while further scientific data is awaited concerning the condition of the mussels.

3.6.2 A similar claim is expected from an adjacent mussel farm, the only other such farm within the exclusion zone.

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

3.7.1 At its 35th session, the Executive Committee considered claims submitted by salmon farms located outside the exclusion zone imposed by the United Kingdom Government for alleged loss as

a result of a reduction in the sales value of their fish. It also discussed claims submitted by fish processors in respect of losses allegedly suffered as a result of a reduction in sales due to the reduced demand for fish from Shetland caused by the BRAER incident (documents FUND/EXC.35/5/Add.1, paragraph 3, and FUND/EXC.35/5/Add.2, paragraph 5). The Committee took the view that these losses were a more indirect result of contamination than the losses suffered by salmon farms located within the exclusion zone and by fish processors who were deprived of a supply of fish from the zone, since the alleged losses covered by the claims under consideration resulted from the perception of third parties as to the consequences of the BRAER incident on the quality of salmon farmed and fish caught outside the exclusion zone.

3.7.2 After having considered all the aspects of these claims, the Executive Committee took the view that the decisive criteria should not be whether the alleged losses resulted from a suspension of the activities within the exclusion zone or a reduction in the activities outside that zone, but that the criterion for the admissibility of a claim should be whether the loss could be considered as "damage caused by contamination". The Committee considered that it would be necessary to assess in respect of each claim whether the oil escaping from the BRAER actually caused an economic loss to the claimant. It was agreed that it would not necessarily be required that the contamination had affected the fish of the individual claimant. The Committee also agreed that the claimant would have to show that the contamination had affected the area where he carried out his activities and that as a result of this contamination he could not sell his produce or could sell it only at a lower price than if the contamination had not taken place. It was also noted that the further away from the exclusion zone the activities in question were carried out, the more difficult it would be for the claimant to prove the link of causation between the oil spill and the alleged loss (document FUND/EXC.35/10, paragraph 3.4.12).

3.7.3 The Executive Committee authorised the Director to make final settlements of the claims falling within this category which fulfilled the requirements set out in paragraph 3.7.2 above (document FUND/EXC.35/10, paragraph 3.4.13). The authorisation has been used by the Director in his settlement of some of the claims dealt with below.

3.7.4 The Director is examining claims presented by six salmon farms located outside the exclusion zone for alleged loss as a result of a reduction in the sales value of their fish. Further claims are expected from salmon farms outside the zone.

3.7.5 Claims have been presented by two suppliers of salmon smolt on the Scottish mainland. The suppliers have maintained that they have suffered losses as a result of delayed deliveries of smolt into the exclusion zone due to occupancy of cages by the 1991 salmon generation for longer than normal and as result of cancelled orders from farms within the exclusion zone due to alleged uncertainty earlier in the year as to the future of salmon farming in the exclusion zone. These claims are being examined by the IOPC Fund's experts.

### 3.8 Fish Processors' Claims

3.8.1 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 different kinds of activities carried out by the fish processors allegedly affected by the BRAER incident.

3.8.2 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, were 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 these claims in principle. 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).

3.8.3 With regard to the claims presented by the fish processors which were 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 3.3.20).

3.8.4 As stated above, the Executive Committee considered, at its 35th session, claims by fish processors having claimed compensation in respect of losses allegedly suffered as a result of a reduction in sales due to the reduced demand for fish from Shetland caused by the BRAER incident. The Committee took a decision of principle on these claims as set out in paragraph 3.7.1 above.

3.8.5 So far, 18 claims have been received from fish processors in respect of losses suffered during the period January – June 1993. These claims have been examined by the IOPC Fund's experts. To date provisional payments to 13 fish processors have been approved by the Director for a total amount of £1 094 937.

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

3.9.1 Three 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.

3.9.2 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.

3.9.3 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.

3.9.4 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

3.9.5 Details of the action programme were given in paragraphs 3.8.6 - 3.8.8 of document FUND/EXC.35/5.

3.9.6 At its 35th session, the Executive Committee considered a joint claim submitted by the Shetland Salmon Farmers' Association, the Shetland Fish Processors' Association and the Shetland Fish Producers' Organisation for costs relating to activities to be undertaken in order to counteract the negative effect of the BRAER incident on the reputation of Shetland fish products. It took note of a document submitted by the United Kingdom observer delegation (document FUND/EXC.35/6) on this issue.

3.9.7 The Committee agreed that costs for activities of the kind referred to in paragraph 3.9.6 could not be considered as falling within the definition of "pollution damage", unless they were to be considered as costs of "preventive measures". In the Committee's view 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".

3.9.8 Several delegations expressed their concern as to the consequences of accepting claims of this kind. Other delegations maintained, however, that since the IOPC Fund accepted that pure economic loss under certain conditions fell within the definition of "pollution damage", it should also accept costs of measures to prevent or minimise pure economic loss. These delegations emphasised that "preventive measures" were defined as "any reasonable measures taken by any person to prevent or minimise pollution damage" and that this definition did not distinguish between various types of pollution damage. It was stated that in order to qualify for compensation, the measures must have the purpose of preventing or minimising a quantifiable economic loss.

3.9.9 After discussing the problem, the Executive Committee agreed with the latter approach referred to in paragraph 3.9.8 and decided that measures to prevent or minimise pure economic loss should be considered as preventive measures, provided that they fulfilled the following requirements:

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

3.9.10 The Executive Committee also discussed whether the IOPC Fund should accept claims of this type only after the activities had been carried out and the results could be assessed, or whether the Fund should accept to pay for a proposed programme of such activities. It was decided that the IOPC Fund should, in principle, only consider such claims once the activities had been carried out. The Committee noted, however, that the claimant in many cases did not have sufficient economic resources to carry out such activities unless the IOPC Fund made funds available. For this reason, the Committee authorised the Director to make advance payments up to a maximum amount of £1.5 million in respect of activities to be undertaken by the Associations, provided that he was satisfied that the planned activities fulfilled the requirements set out in paragraph 3.9.9 above.

3.9.11 Since the 35th session of the Executive Committee, the Director has, with the assistance of outside experts, examined in great detail the project submitted by the organisations. This examination has been carried out, in respect of each item of the project, against the criteria laid down by the Committee. This examination has not yet been completed.

3.9.12 So far the Director has approved a payment of £40 622 to the Shetland Fish Processors' Association relating to participation at various trade exhibitions and a payment of £3 227 to the Shetland Fish Producers' Organisation for attendance at the East-West Fisheries Conference in St Petersburg (Russia).

3.9.13 As regards the part of the joint marketing claim relating to the Shetland Salmon Farmers' Association, a further complication has arisen. On 10 September 1993, a claim was presented by Shetland Salmon Group Limited relating to a marketing campaign for the same purpose as the campaign covered by the Association's project. The activities planned by the Shetland Salmon Group would cost £200 000.

3.9.14 The Shetland Salmon Group is a sales and marketing confederation of 20 salmon farms on Shetland which are all members of the Shetland Salmon Farmers' Association. The Group is owned on a mutual basis with the profits shared amongst the group members. Two farms within the exclusion zone are members of the Shetland Salmon Group. The Group has an exclusive sales agreement with a company in Aberdeen. It has been stated that, by reducing the number of intermediaries handling the product and by selling to end users, the Group obtains higher prices than would be obtained by selling through agents. The Group has stated that its members are obliged to sell their entire production through the Group to the sales company. In the event that Group members sell their fish through other channels, certain charges and commissions are still payable to the Group and the sales company.

3.9.15 The Shetland Salmon Group has maintained that the activities planned by the three above-mentioned organisations do not take into account the interests of the Group's members. In addition, the Group has stated that neither the Group nor its members had been consulted by the Shetland Salmon Farmers' Association on the project presented by the latter to the IOPC Fund.

3.9.16 The Director has informed the Shetland Salmon Farmers' Association and the Shetland Salmon Group that the IOPC Fund would not be able to make any payments to cover costs of any marketing campaign to either body until the two bodies had agreed on a co-ordination of their planned activities.

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

3.10.1 The Shetland Salmon Farmers' Association submitted claims totalling £291 791 relating to measures taken during the period 5 January – 30 June 1993 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. Costs for promoting press and television coverage of the incident were also included, as were the costs for a special promotion activity where chefs from some leading United Kingdom restaurants were invited to prepare salmon dishes for invited representatives of the seafood press and other media at a special function on Shetland. The claim 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. In fact, some major buyers who had decided after the incident to stop buying Shetland sea products resumed purchasing them. The costs for extra harvest testing and scientific monitoring are also included in the claim. 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.

3.10.2 The Director examined these claims, with the assistance of experts, in the light of the criteria for admissibility laid down by the Executive Committee in respect of measures to prevent and minimise pure economic loss, as set out in paragraph 3.9.9 above. The Director came to the conclusion that most of the measures taken during the period covered by these claims fulfilled these criteria. He took the view that there was a significant risk that oil pollution caused by the BRAER incident would have caused considerable economic loss to the Shetland salmon farming industry unless measures had been taken at an early stage to counteract the negative effects of the incident for that industry. In his view the measures taken were, with some exceptions, reasonable in the circumstances and were generally not disproportionate to the threatening damage. An assessment of the results of these measures shows, in the Director's opinion, that they probably were largely successful, although it is impossible to predict what the situation would have been had these measures not been undertaken. These measures were also directed at actual targeted markets.

3.10.3 Some of the activities covered by the claims did not, in the view of the Director, fulfil the criteria laid down by the Executive Committee (mainly some promotional events), and these parts of the claims were not accepted. In addition, the Director considered that the fees charged by the above-mentioned consultancy firm were excessive, and this item was therefore only accepted for a reduced amount. Some costs which were not supported by documents were not accepted.

3.10.4 The total amount accepted in respect of the damage limitation activities carried out during the period January – June 1993 was £218 301.

### 3.11 Fishing Equipment Repair Facility, Diver, Collector of Offal, Ice Maker and Box Maker

3.11.1 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, fishing 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 within the exclusion zone. The turnover of the company during the period October to December 1992 has been indicated at £300 per week. The claim relates to loss of income due to the suspension of fishing activities within the exclusion zone which, in particular, prevented small shellfish boats from fishing.

3.11.2 A self-employed 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.

3.11.3 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 self-employed person who collects and disposes of offal from one of the fish processing plants on Shetland. The plant, which processes fish from 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.

3.11.4 An operator of an ice factory has submitted a claim in the amount of £22 805 for loss of income due to a reduction in the sales of ice following the reduced sales of farmed salmon and white fish as a result of the imposition of the exclusion zone. This company is the major supplier of ice on Shetland for use on fishing boats and by fish packers. All salmon farms within the exclusion zone buy ice from this company, with the exception of one salmon farm which has its own processing plant and ice making facility.

3.11.5 A claim for compensation in the amount of £126 075 has been submitted by a company which manufactures the polystyrene boxes in which fresh salmon is transported from Shetland. This company is the only local source of supply of polystyrene boxes. The company has claimed compensation for loss of income in respect of boxes not sold following the destruction of the 1991 salmon intake. The company has maintained that it is unable to compete in any other market (ie the United Kingdom mainland or continental Europe) as it produces a relatively small quantity of boxes, at relatively high production costs. Additionally it has argued that transport costs to any market outside Shetland would make the prices of the boxes uncompetitive.

3.11.6 In the view of the Director, the losses suffered by the five claimants dealt with in paragraphs 3.11.1 – 3.11.5 above should be considered as caused by contamination, for the reasons given by the Executive Committee when it accepted in principle, at its 35th session, claims arising out of the AEGEAN SEA incident by persons who were considered as carrying out activities which were an integral part of the fishing activities in the polluted area (document FUND/EXC.35/10, paragraphs 3.3.17 and 3.3.18). The five claims under consideration should therefore, in the Director's opinion, be accepted in principle.

### 3.12 Employees Put on Part-time Work or Made Redundant and Employees Kept in Employment

3.12.1 At its 35th session, the Executive Committee considered claims relating to loss of income submitted by employees on Shetland who had suffered a reduction in working hours or who had been made redundant from fish processing plants which receive most of their supply from salmon farms located within the exclusion zone. As regards these claims, the Executive Committee referred to its decision in respect of similar claims arising out of the AEGEAN SEA incident (document FUND/EXC.35/10, paragraph 3.3.23) that losses suffered by employees as a result of having been made redundant could not be considered as "damage caused by contamination" and therefore did not fall within the definition of "pollution damage", and that such claims should therefore be rejected (document FUND/EXC.35/10, paragraph 3.4.24). The claimants concerned have been informed of the Committee's decision.

3.12.2 Some claimants falling within this category have expressed their disappointment at the decision of the Executive Committee and have asked that the Committee review its decision. The Director submits this request to the Executive Committee for consideration.

3.12.3 It should be noted that some employers within the salmon farming industry, namely some salmon farms and fish processing plants, have maintained their workforce, although there has been insufficient work to keep the employees fully occupied or no work at all. The reason given is that, since the exclusion zone might be lifted in respect of the 1992 salmon intake, it was necessary to maintain the workforce. It has been pointed out that if the employees were made redundant, the employers would have to make redundancy payments in accordance with United Kingdom legislation. It has also been stated that the employees would incur costs for re-employment once the exclusion

zone was lifted, and that there was a risk that the workers who had been made redundant would in the meantime have found other jobs.

3.12.4 The Director has so far taken the view that the position taken by these employers is reasonable as long as there is uncertainty in respect of the 1992 salmon intake. If, however, the 1992 salmon intake were to be slaughtered in its entirety in the near future, the situation might be considered differently. In that situation, there would be no work in respect of harvesting salmon from inside the exclusion zone until the 1993 intake is ready for harvest in the summer of 1994. The question arises as to what position the IOPC Fund should take in respect of the salaries of employees of salmon farms and processing factories who are retained although they do not have any work until the commencement of the harvest of the 1993 salmon intake. The Executive Committee is invited to give the Director instructions as to the IOPC Fund's position, should this situation arise.

### 3.13 Tourist Industry

3.13.1 Shetland Islands Tourism, a local association, has submitted a claim for compensation for costs incurred as a result of the BRAER incident in the amount of £64 219. The claim relates 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, in order to mitigate potential damage to Shetland tourism. The Director approved this claim in the amount of £45 942. The amount was paid by the IOPC Fund on 12 August 1993.

3.13.2 Shetland Islands Tourism has indicated that it intends to submit a claim for the cost of a marketing campaign to counteract the alleged negative effect of the BRAER incident on the Shetland tourist industry. It has stated that promotional activities need to be carried out in the very near future in order to mitigate the decline in tourism before the 1994 season begins.

3.13.3 So far, three claims have been received from small businesses operating within the tourist industry claiming compensation for loss of income as a result of a reduction in tourism due to the BRAER incident. These claims are being examined by the Braer Claims Office. It is likely that a large number of similar claims will be presented later this year.

3.13.4 The owner of a motel on Yell, an island north east of Shetland, has presented a claim for an amount of £9 825 relating to loss of regular client bookings and cancellations from weekend and holiday visitors. The owner has stated that the BRAER oil spill has so far resulted in cancellations from five tour parties booked for June and July 1993. In addition, the owner alleged that he expected a reduction in the number of "chance" bookings and family holiday bookings in the summer of 1993. The owner also maintained that he was 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.

3.13.5 At its 35th session, the Executive Committee decided in the context of the HAVEN incident that claims for loss of income suffered by hotels on the Italian Riviera should in principle be accepted, subject to certain conditions. The Committee stated that each claim should be considered on its own merits and that the decisive criteria should be whether there was a link of causation between the loss or damage and the contamination resulting from the incident (document FUND/EXC.35/10, paragraph 3.2.4).

3.13.6 The claim presented by the owner of the above-mentioned motel has been examined in the light of the decision of principle taken by the Executive Committee in the context of the HAVEN incident. The Director has come to the conclusion that the alleged losses fulfil in principle the criteria laid down by the Executive Committee. In order to mitigate serious financial hardship to this claimant, the Director made a provisional payment of £5 000 to this claimant in July 1993, pursuant to Internal Regulation 8.6.

3.13.7 The Executive Committee is invited to consider the position which the IOPC Fund should take in respect of claims relating to the Shetland tourist industry.

### 3.14 Personal Injury Claims

Claims have been received from three individuals who have maintained that their health has suffered as a result of the BRAER incident. The Director is studying the question as to whether and, if so, to what extent the Civil Liability Convention and the Fund Convention apply to personal injury.

### 3.15 Public Authorities

3.15.1 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 (document FUND/EXC.34/9, paragraph 3.3.29). No claim has so far been received from the United Kingdom Government.

3.15.2 The Shetland Islands Council has informed the Director that it will soon present a claim for compensation in respect of the costs incurred by the Council following the BRAER incident.

3.15.3 A claim has been submitted by the Shetland Islands Council in the amount of £23 320 in respect of cleaning a number of houses owned by the Council. This claim is at present being examined.

3.15.4 Two claims have been received for £52 443 from the Civil Aviation Authority relating to the cleaning of the terminal buildings at Sumburgh airport, which had been contaminated by wind-blown oil. These claims, which were accepted by the Director in their entirety, were paid by the IOPC Fund in May and June 1993.

## 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.

4.3 Since the 35th session of the Executive Committee, the Scottish Office Bridging Fund has not been called upon to make any payments. It cannot be ruled out, however, that the Scottish Office Bridging Fund may be called upon to do so in the future.

## 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 The report on the United Kingdom Government's investigation into the cause of the incident is expected to be available in early 1994. It is not known when the results of the Liberian investigation will be available.

5.3 A former Master of the Rolls of the English Court of Appeal (one of the most senior posts in the English 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.

5.4 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 such an invitation to give evidence (document FUND/EXC.34/9, paragraph 3.3.6). At the invitation of Lord Donaldson, the Director gave such evidence on 10 June 1993.

## **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) mussel farms (paragraph 3.6);
    - (v) activities outside the exclusion zone (paragraph 3.7);
    - (vi) fish processors (paragraph 3.8);
    - (vii) joint marketing claim (paragraph 3.9);
    - (viii) damage limitation measures (paragraph 3.10)
    - (ix) tourist industry (paragraph 3.13);
    - (x) personal injury claims (paragraph 3.14); and
    - (xi) public authorities (paragraph 3.15)
  - (c) give the Director such instructions as it may deem appropriate in respect of the handling of claims arising out of this incident, in particular claims relating to:
    - (i) salmon farms (paragraph 3.5);
    - (ii) fishing equipment repair facility, diver, collector of offal, ice maker and box maker (paragraph 3.11);
    - (iii) employees put on part-time work or made redundant and employees kept in employment (paragraph 3.12); and
    - (iv) tourist industry (paragraph 3.13)
-