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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 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 machinery failure south of the Shetland Islands (United Kingdom). The weather conditions were severe at the time, with 40–50 knot winds and heavy seas. 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 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 number of dispersant-spraying aircraft were mobilised, although the heavy weather prevented any large scale spraying of dispersants and made any recovery operations at sea impossible.

1.3 The severe weather conditions 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 on 24 January revealed that there was no cargo and virtually no bunkers left on board. A detailed inspection of the wreck was carried out from 27 to 29 April 1993. This inspection showed that the ship had disintegrated and that there was no fuel oil or cargo oil in the remains of the wreck.

1.4 Due to the heavy seas, most of the spilt oil dispersed naturally, and the impact on the shoreline was limited. Strong winds blew oil spray ashore and this oil affected farmland and property close to the coast.

1.5 The coastline 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 heavy weather made further defensive booming impossible, nor was it feasible to take any measures to protect the salmon farms along the west coast, apart from deploying sorbent booms around the salmon cages.

1.6 On 8 January 1993, the United Kingdom Government imposed a fishing exclusion zone covering an area along the west coast of Shetland which was affected by the oil, which prevented the capture, harvest and sale of all fish and shellfish species from within the zone. This zone was extended on 27 January. The ban on whitefish was lifted on 23 April 1993, and the ban on salmon which was placed into cages within the zone in the spring of 1993 was lifted on 8 December 1993. The ban remains in force for shellfish and the 1992 intake of salmon.

2 Braer Claims Office

On 8 January 1993 the shipowner's P & I insurer (Assuranceföreningen Skuld (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.

3 Claims for Compensation

As at 31 January 1994, 909 claims for compensation had been presented. Over 700 claims had been approved, wholly or partly, for a total amount of approximately £22.4 million. Further claims for significant amounts will be submitted.

4 Sale of Farm

4.1 It was reported to the Executive Committee at its 37th session that one of the largest farms on Shetland, which was located on the cliffs below which the BRAER went aground, had been up for sale shortly before the BRAER incident. The farmer maintained that the final selling price might be less than would have been expected had the BRAER incident not occurred.

4.2 The IOPC Fund has been informed that the negotiations for the sale of the farm are now at an advanced stage and that, according to the seller, the proposed purchase price is much less than was expected. A formal claim has been received for the difference between the value of the property in December 1993, as assessed by the claimant (£1 018 000), and the offer made by the prospective purchaser (£613 613), viz £404 387.

4.3 Chartered surveyors appointed by the IOPC Fund are examining the original valuation and the offer in an effort to assess what part of the difference, if any, between the two prices might be attributable to the BRAER incident.

4.4 It should be noted that this farm was the most contaminated property on the island. However, the farmland was declared fit for grazing in September 1993. The farmer has been provided, at the IOPC Fund's expense, with additional equipment, materials, labour and feed for animals to counteract the effects of the wind blown oil spray on the land. Total compensation paid to this farmer as at 31 January 1994 amounts to £347 569. The farmer still faces some difficulties due to overgrazing of some land, giving rise to health problems for his cows and sheep.

4.5 This claim gives rise to a question of principle, ie whether a claim for reduction in the selling price of this property is admissible if and to the extent this reduction was caused by the contamination resulting from the BRAER incident. The Director considers that this question should in principle be answered in the affirmative. It is important to note, however, that there are many other factors which could influence the selling price of the property which are not related to the BRAER incident.

5 Subsistence Fisherman

5.1 A claim has been received from a man who has two small boats which he has been unable to use for fishing while the exclusion zone was maintained. His fishing is not a commercial activity, but allegedly provides the family of four with two meals of fish per week and three cats with food every day. Further, another member of his family collects whelks from the shore which generates a very small income. Fish is also cured by his wife for eating during the winter as the boats are only suitable for fishing during the spring and summer.

5.2 The claim includes £468 for purchase of fish for the family, £100 for loss of income in respect of the collection of whelks and £156 for purchase of cat food. No documentary evidence has been presented to substantiate the amounts claimed.

5.3 The Director submits to the Executive Committee for consideration whether the claimant, who is not a commercial fisherman, is entitled to compensation for the cost of buying food for the family and cats as a result of his being unable to fish and for loss of income from the collection of whelks.

5.4 In the Director's view, the losses allegedly suffered by this claimant should be considered as damage caused by contamination and should, therefore, be admissible in principle. The claimant would obviously have to prove that he in fact suffered these losses and substantiate their quantum.

6 Salmon Farms

1991 Salmon Intake

6.1 Final settlement has been made relating to the slaughter and disposal of the 1991 salmon intake inside the exclusive zone, resulting in payments totalling £7 175 470.

1992 Salmon Intake

6.2 The Executive Committee had, at its 35th session, taken the view that in respect of the 1992 salmon intake within the exclusive zone, the IOPC Fund would be liable to pay compensation only if and to the extent that the destruction of the produce was reasonable on the basis of scientific and other evidence available, taking into account, inter alia, whether or not the produce in question was contaminated, whether it was likely that the contamination would disappear before the normal harvest time, whether 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 3.4.6).

6.3 During spring and summer 1993, the IOPC Fund had taken the position that a total destruction of the 1992 intake within the exclusion zone was not justified, in the light of the improvement of the levels of hydrocarbon and taint found in the fish. The IOPC Fund had recognised that a number of farmers within the exclusion zone would, in normal circumstances, have started harvesting the 1992 salmon intake in August 1993 and that the inability to harvest as normal had caused serious financial difficulties to many of the farmers within the exclusion zone. The Fund had therefore accepted as a reasonable course of action the slaughter and disposal of the proportion of the 1992 intake which would normally be harvested on a month-by-month basis from each individual site, subject to review of the Fund's position in the light of further scientific data as it became available. In addition, the total destruction was accepted in respect of one salmon farm where the fish had experienced serious health problems and showed a much higher degree of taint than other farms in the area. Compensation totalling £5 229 483 has been paid relating to the destruction of the 1992 intake, so far.

6.4 At the 36th session of the Executive Committee, the Director expressed the view that any destruction of produce should be based on a thorough examination of all aspects of the case. It was, in his opinion, important that in any such case an exhaustive sampling programme, using internationally accepted techniques, was carried out at regular intervals. The Director stated that he had considered

the main factors involved – scientific and technical aspects, the timing of a possible sale and the marketing consequences of such a sale – against the criteria laid down by the Executive Committee. He mentioned that, although he would have preferred to have had the results of a more exhaustive sampling programme, he recognised that there existed a serious time constraint, in view of the fact that the main marketing season for salmon was before Christmas. He took the view that, at this stage, it would not be an unreasonable course of action for the salmon farmers concerned to slaughter the 1992 intake and that, if this was done, the IOPC Fund should pay compensation for the destroyed fish. The Executive Committee agreed with the Director's analysis as well as with his conclusion (document FUND/EXC.36/10, paragraphs 3.4.9 and 3.4.11).

6.5 Negotiations have been held between the IOPC Fund and the salmon farmers concerning the conditions for outright slaughter of the remaining 1992 intake within the exclusion zone. Agreement on these conditions was been reached in December 1993 and January 1994 with all salmon farms within the exclusion zone except two. Due to bad weather, it has not yet been possible to carry out the destruction, except in respect of one farm whose 1992 intake was destroyed in December 1993.

6.6 Under the agreement, a salmon farmer could elect that a specific quantity would be considered as harvested at the time of destruction or at a later date. To the extent that the salmon farmer chooses the second option, he should declare before the end of a given month the quantity he wishes to be considered as being harvested in that particular month. Compensation will be paid for each quantity which is to be considered as being harvested on the basis of the price he would have obtained had he been able to sell the salmon during the month in question. There are certain provisions included in the agreements so as to ensure that the declared harvest schedules and quantities will be as close as possible to the harvesting pattern which the farmer concerned would have followed had the BRAER incident not occurred.

7 Activities to Counteract the Negative Effect of the BRAER Incident on the Reputation of Shetland Fish Products

7.1 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. The Committee took the view that costs for activities of the kind covered by this claim 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". After discussing the issue, the Executive Committee decided that measures to prevent or minimise pure economic loss should be considered as preventive measures, provided that they fulfilled the following requirements (document FUND/EXC.35/10, paragraphs 3.4.15 and 3.4.19):

- (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.

7.2 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, and

cautioned that the Fund should not take the role of the claimant's banker. 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 7.1 above (document FUND/EXC.35/10, paragraph 3.4.20).

7.3 At its 37th session, the Executive Committee took the view that the IOPC Fund should take a restrictive view towards claims of this type. In particular, the Committee reiterated its concerns as regards the IOPC Fund's considering such claims before the activities have been carried out, and cautioned that the Fund should not take on the role of the claimant's bankers (document FUND/EXC.37/3, paragraph 4.2.8).

7.4 The joint marketing claim has been considered by the Director against the criteria set out in paragraph 7.1 above. In the Director's view, it is very unlikely that the industries concerned will suffer further damage resulting from the BRAER incident. For this reason, he considers that the proposed activities do not fulfil these criteria. The Director has therefore not approved any general marketing activities. He has, however, accepted that the IOPC Fund should pay the cost of certain marketing activities planned by some individual fish processing companies in respect of targeted markets for a total amount of some £17 000.

7.5 In the light of the above-mentioned criteria, the Director has accepted part of a claim relating to measures taken by the Shetland Salmon Farmers' Association during the months immediately following the incident to limit the damage to the reputation of Shetland salmon caused by the incident, for an amount of £218 301. The Director has approved certain further claims for specific marketing activities which had been carried out by the three associations for a total amount of £60 016.

8 Tourism

8.1 Shetland Islands Tourism, an organisation of tourism related businesses, has submitted a proposal for a marketing campaign to counteract the negative effect of the BRAER incident on tourism. It has been stated that over the last ten years, tourism on Shetland has increased by 11% per annum and that this growth is attributed to aggressive marketing on the part of Shetland Islands Tourism. It has been maintained that, while the reduction in the number of tourists to the island during 1993 has been partly offset by the number of business visitors generated by the BRAER incident, the underlying number of tourists has declined. Shetland Islands Tourism has estimated a loss of tourist revenue of approximately £2.1 million for 1993. The claimant has asserted that, due to the declining number of tourists and reduced number of BRAER related visitors, it is expected that the tourist industry will suffer a loss in the region of £3.8 million during 1994. According to the claimant, future losses for the next five years in the event that no marketing is carried out are estimated in the amount of £24.6 million. Shetland Islands Tourism has proposed to carry out a marketing campaign over the next five years for a total cost of £3 395 800 which, in the claimant's view, would reduce the estimated loss by £20 million.

8.2 The claim submitted by Shetland Island Tourism was discussed by the Executive Committee at its 37th session. As regards the question of principle raised by this claim, reference is made to paragraphs 7.1 and 7.2 above. The Committee instructed the Director to examine this claim on the basis of the criteria set out in paragraph 7.1 above and authorised him to approve this claim in respect of the activities, once they had been carried out, which fulfilled the criteria. In addition, the Committee authorised the Director to approve activities which were intended to mitigate damage during the 1994 tourist season and which fulfilled these criteria, and to make advance payments in respect of the cost of such activities. The Committee decided that the total amount of advance payments in respect of all activities relating to measures to prevent or minimise pure economic loss to be carried out in respect of the BRAER incident should fall within the maximum amount of £1.5 million referred to in paragraph 7.2 above (document FUND/EXC.37/5, paragraph 4.2.9).

8.3 The IOPC Fund and the Skuld Club have engaged a consultant specialised in tourism to make an assessment of whether or not the Shetland Island tourist industry had suffered economic losses during 1993 as a result of the incident, and whether it is likely that further losses will be sustained in the future if special marketing activities are not carried out. The consultant has made a preliminary study of the issues involved. However, in order to assess the extent of the loss that may be attributable to the BRAER incident, if any, the consultant proposed to carry out a detailed survey of the Shetland tourist industry. It transpired, however, that the Shetland Islands Council had already commissioned such a study. To avoid a duplication of effort, a copy of the study prepared on behalf of the Shetland Islands Council was requested from Shetland Islands Tourism by the IOPC Fund. To date the IOPC Fund has not received a reply to this request.

8.4 In view of the fact that the study prepared on behalf of the Shetland Island Council has not yet been made available to the IOPC Fund, the Director has not been able to assess whether and, if so, to what extent the marketing activities proposed by Shetland Island Tourism fulfil the criteria set out in paragraph 7.1 above. The Director has not been able, therefore, to make any advance payments in respect of such activities.

8.5 So far, the IOPC Fund has made payments to Shetland Island Tourism totalling £66 295 for certain activities carried out shortly after the incident to limit the damage to the Shetland tourist industry.

9 Claims for Economic Loss by Fish Processors

9.1 A number of claims have been received from businesses (in particular fish processors) on Shetland for loss of profit caused by cancelled or reduced sales orders from specific customers as a result of the incident. The claims documents have been examined by the IOPC Fund's experts. It has been established that in some cases, despite the loss of specific business, the business as a whole has increased when compared with the same period in 1992 or the months immediately prior to the incident.

9.2 The loss adjusters acting on behalf of some fish processors have argued that compensation should be paid in respect of reduced or cancelled orders from specific customers until this specific business is regained, independent of the development of the claimant's business as a whole.

9.3 The Director has taken the view that, the criteria should be whether the claimant's business as a whole had suffered losses as a result of the BRAER incident. In the Director's view, the claimant is not entitled to compensation unless the result of his business as a whole has deteriorated because of the incident.

9.4 The Director submits to the Executive Committee for consideration the criteria to be applied for the assessment of loss in the situations set out in paragraphs 9.1 and 9.2.

10 Loss of Income suffered by Fish Producers due to Reduction in Prices

Whitefish

10.1 Whitefish producers on Shetland have maintained that following the BRAER incident there was a loss of confidence on the part of whitefish buyers which caused a drop in the first sale price and a reduced demand. They have indicated that they intend to claim compensation for the losses incurred as a result thereof. The claimants have stated that, in their view, the quantum of the losses should be assessed by comparing the average monthly prices of fish sold at market on Shetland with the corresponding prices paid at Aberdeen and Peterhead in Scotland. Statistical models have been developed by the claimants to predict for each species what the price should have been had the incident not occurred.

10.2 The technical experts appointed by the IOPC Fund have taken the view that the method used by the claimants was in principle reasonable, except that the method does not identify the "BRAER effect" as distinct from all other prevailing market influences. The IOPC Fund's experts have used identical data to that used by the claimants but applied different assumptions to the same statistical model in order to take account of other market influencing factors. The analysis of the price information for the period up to October 1993 has been completed for the five most important species, in terms of quantities landed, out of the eight species under consideration. The analysis shows that for the period studied, prices of whitefish on Shetland fluctuated both above and below those predicted by the statistical model. There was a general trend of depressed prices relative to those predicted over the period February - June 1993, whereafter the situation improved. There were also very marked differences between species, one (cod) showing no apparent price depression at all. The analysis shows that by October 1993 whitefish prices were well within the normal for all species except one (haddock), for which it was not so clear that total price recovery had taken place.

10.3 It is expected that discussions will take place between the IOPC Fund and the claimants in the near future with a view to agreeing the quantum and duration of price depression for whitefish attributable to the BRAER incident.

Salmon

10.4 Shetland Salmon Farmers' Association has maintained that the price of Shetland farmed salmon sold from outside the exclusive zone, both on the domestic and export market, is still depressed as a result of the incident. A number of claims have been presented by salmon farmers operating outside the exclusion zone for losses resulting from such price depression.

10.5 The data provided by the Association has been analysed by the IOPC Fund's experts. In the light of the results of this analysis, the Director accepts that there was a fall in the relative price of Shetland salmon during the months immediately following the incident, but the period for which such price fall was due to the BRAER incident and the magnitude of such fall has not yet been agreed. In any event, the Director has taken the view that it is very unlikely that there is any remaining price reduction caused by the BRAER incident. The quantum and duration of the price depression are being analysed by the IOPC Fund's experts.

10.6 An interim payment of £38 500 has been made to one salmon farm outside the exclusion zone for losses due to price depression in early 1993.

11 Fish Feed Manufacturer

11.1 A fish feed manufacturer in Denmark has submitted a claim in the amount of £139 691 for loss of profit during 1993 due to reduced sales of fish feed to a salmon farm located within the exclusion zone. It has been alleged that there was a contract between the manufacturer and the salmon farm, under which the farm would on a monthly basis buy certain quantities of salmon feed from the manufacturer. It has been maintained that the salmon farm did not require as much feed as it would normally have done due to earlier than normal removal of the 1991 stock, and the long periods of reduced feeding of the 1991 and 1992 stocks. The claimant has calculated his loss of profit on the basis of the difference between the quantities specified in the contract and those actually bought by the salmon farm.

11.2 In the view of the Director, the claimant's alleged loss is a result of the buyer not fulfilling his contractual obligations and can not be considered as damage caused by contamination. The Director proposes, therefore, that this claim should be rejected.

12 Smolt Suppliers

12.1 Claims have been submitted by three companies alleging that they have suffered losses as a result of the BRAER incident interrupting the normal stocking of salmon smolt in Shetland waters.

12.2 One such claim for £473 513 has been presented by a company which is farming salmon within the exclusion zone. This company has stated that it was planning to place smolt in its cages in January and March 1993. The claimant has maintained that he was contracted to buy smolt at a pre-determined price and fulfilled that contract but, due to contamination of the farm, disposed of the fish elsewhere at a loss. This company has also alleged that it suffered loss of profit through not growing these fish.

12.3 Another claim for £195 011 has been received from a supplier of smolt from its installation on mainland Scotland. The claimant has maintained that a quantity of smolt was going to be reared under contract by a salmon farmer within the exclusion zone and that smolt could not be introduced in March 1993 in the cages allocated as planned, since these cages were still occupied by the 1991 intake of salmon which had not yet been removed. The claimant has stated that he sold these smolt at a reduced price to another farm within the exclusion zone where cages were available. The claimant has also alleged that he suffered loss of profit through not being able to implement the rearing contract.

12.4 A third claim for £2.2 million has been submitted by a smolt supplier on mainland Scotland who has maintained that a general loss of confidence in the salmon farming industry in Shetland in the months following the BRAER incident led to a reduction or cancellation of orders for sales of smolt as well as to a reduction in prices. This claimant has also claimed compensation for losses suffered as a result of having kept considerable quantities of smolt under a contract rearing arrangement until a buyer could be found. This claim includes increased production costs, increased financing costs and loss of good will.

12.5 The claimant referred to in paragraph 12.4 has indicated that further documentation in support of his claim will be submitted in the near future, and has requested that the IOPC Fund should not take any decision on his claim until this documentation has been presented.

12.6 The Director proposes that the Executive Committee should postpone its decision on these claims to its 39th session.

13 Investigations into the Cause of the Incident

13.1 The United Kingdom Government has carried out an investigation into the cause of the incident through the Marine Accident Investigation Branch of the Department of Transport. A similar investigation has been carried out on behalf of the Government of Liberia through the Commissioner of Maritime Affairs.

13.2 The reports of these investigations were published on 20 January 1994. The Director will examine these reports with the assistance of the IOPC Fund's Scottish lawyer and such technical experts as may be appropriate.

14 Action to be Taken by the Executive Committee

The Executive Committee is invited to:

- (a) take note of the information contained in the present document; and
- (b) give the Director such instructions as it may deem appropriate in respect of claims arising out of this incident, in particular claims relating to:

- (i) price reduction in connection with sale of farm (paragraph 4);
 - (ii) costs incurred by subsistence fisherman for food for his family and cats and for loss of income from the collection of whelks (paragraph 5);
 - (iii) losses suffered by fish processors (paragraph 9); and
 - (iv) losses suffered by fish feed manufacturer (paragraph 11).
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