



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
39th session
Agenda item 3

FUND/EXC.39/4
25 April 1994

Original: ENGLISH

INCIDENTS INVOLVING THE IOPC FUND

BRAER

Note by the Director

1 The Incident

1.1 In the morning of 5 January 1993, during a period of heavy weather, 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 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 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.

1.3 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. The heavy weather made defensive booming impractical, 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.

1.4 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.

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

3.1 As at 20 April 1994, 1 060 claims for compensation had been presented. Some 900 claims had been approved, wholly or partly, for a total amount of approximately £26.4 million.

3.2 The present document contains information on the claims and groups of claims in respect of which there have been significant developments since the Executive Committee's 39th session. As for other claims, reference is made to document FUND/EXC.38/5.

4 Sale of Farm

4.1 The Executive Committee was informed that the owner of one of the largest farms on Shetland, which was located on the cliffs below which the BRAER went aground, had shortly before the BRAER incident taken steps to put the farm up for sale, that the negotiations for the sale of the farm were at an advanced stage and that, according to the seller, the proposed purchase price was less than would have been expected had the BRAER incident not occurred. It was noted that a claim had been made for the difference between the value of the property in December 1992, as assessed by the claimant, and the offer made by the prospective purchaser. It was also noted that this farm was the most contaminated property on the island, that the farmland had nevertheless been declared fit for grazing in September 1993 and that the farmer had been provided, at the IOPC Fund's expense, with equipment, materials and labour, as well as feed for livestock, in order to overcome the effects of the wind-blown oil spray on the land. The Committee was informed that the Director had requested opinions on the matter from a chartered surveyor and from the District Valuer (a chartered surveyor appointed by the United Kingdom Commission of Inland Revenue to be the primary provider of advice and assessments on property values to Government and other public bodies).

4.2 The Executive Committee took the view that the claimant would in principle be entitled to compensation if and to the extent that the property had suffered an on-going loss of value as a result of the BRAER incident. The Committee emphasised, however, that there were many other factors which could have influenced the selling price of the property which were not related to the incident.

4.3 The Executive Committee instructed the Director to obtain an opinion from the District Valuer and the chartered surveyor on the question as to whether the BRAER incident had caused any on-going diminution in the value of the property. In addition the Director was instructed to examine these opinions and submit the claim to the Committee for consideration at its 39th session.

4.4 The Executive Committee took the view that if operating difficulties of the farm resulting from the incident remained, the cost of overcoming these difficulties would in principle qualify for compensation.

4.5 The District Valuer has expressed the view that there is no visible indication to suggest that any form of permanent damage has occurred but that the farm may be tainted with the stigma of impurity, however unjustified. The chartered surveyor has stated that there should be no adverse effects in the profitability of the farm but that there may be a minimal depreciation of a psychological nature.

4.6 In the light of the opinions of the District Valuer and the chartered surveyor, the Director has taken the view that the farmer is not entitled to compensation for any on-going diminution of value. However, in the light of the position taken by the Executive Committee referred to in paragraph 4.4

above, the Director considers that the claimant is entitled to compensation for the reduction in price resulting from the costs of overcoming the remaining operating difficulties.

4.7 Discussions with the claimant are still in process.

5 Salmon Farms

1992 Salmon Intake

5.1 The Executive Committee was informed, at its 38th session, that agreements had been reached for the outright slaughter of the 1992 salmon intake with all but two of the salmon farms within the exclusion zone. The conditions of these agreements are outlined in paragraph 6.6 of document FUND/EXC.38/5. The agreement has subsequently been approved by the two remaining salmon farms within the zone.

5.2 The disposal of the 1992 salmon intake within the exclusion zone was completed on 24 March 1994. So far, payments of compensation have been made in respect of the destroyed quantities for a total amount of £7 195 250.

5.3 In accordance with the agreements, payments are outstanding in respect of those quantities of the 1992 salmon intake which are considered to be harvested at a later date. It is estimated that these payments will be in the region of £5 million.

6 Tourism

6.1 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.

6.2 The claim submitted by Shetland Islands Tourism was discussed by the Executive Committee at its 37th session. The Committee instructed the Director to examine this claim on the basis of the criteria laid down by the Committee (cf document FUND/EXC.35/10, paragraph 3.4.19) 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 a maximum amount of £1.5 million (document FUND/EXC.37/3, paragraph 4.2.9).

6.3 The IOPC Fund and the Skuld Club have engaged a consultant specialised in tourism to make an assessment of whether or not the Shetland Islands 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. 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. A copy of the report on the study commissioned by Shetland Islands Council was made available to the IOPC Fund in late March 1994. A preliminary examination of the report by the IOPC Fund's consultant raised a number of questions which have been referred to Shetland Islands Tourism. The consultant is at present carrying out a detailed examination of the report and the answers to the questions.

6.4 At its 38th session, the Director informed the Executive Committee that he had not been able to assess whether and, if so, to what extent the marketing activities proposed by Shetland Islands Tourism fulfilled the criteria referred to in paragraph 6.2 above, since the study prepared on behalf of the Shetland Islands Council had not yet been made available, and that he had therefore not been able to make any advance payments. The Committee endorsed the Director's position in respect of the proposed marketing activities (document FUND/EXC.38/5, paragraph 3.4.10).

7 Loss of Income Suffered by Fish Producers Due to Reduction in Prices

Whitefish

7.1 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.

7.2 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.

7.3 The IOPC Fund's experts will have completed their study of these issues during May 1994. 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

7.4 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.

7.5 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 and it is expected that they will have completed their work in early May 1994. Discussions will then be held with the claimants.

7.6 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.

8 Smolt Suppliers

8.1 At its 38th session, the Executive Committee noted that claims had been submitted by three companies alleging that they had suffered losses as a result of the BRAER incident interrupting the normal stocking of salmon smolt in Shetland waters. It was also noted that one of the claimants had requested that the Committee should not take any decision at that session, so as to enable the claimant to present further documentation in support of his claim. The Executive Committee decided to postpone its decision on these claims to its 39th session.

8.2 These claims will be dealt with in an addendum to the present document.

9 Fishermen Not Holding a Licence

9.1 At its 36th session, in connection with its examination of claims arising out of the AEGEAN SEA incident, the Executive Committee was informed that claims for compensation had been received from a number of individual fishermen, shellfish gatherers and operators of mussel rafts in Spain who appeared to carry out their activities without holding a valid licence for this purpose. It should be noted that a person carrying out such activities in Spain is breaking the administrative law but does not commit a criminal offence.

9.2 The Executive Committee considered whether the claimants referred to in paragraph 9.1 would be entitled to compensation only if they held a valid licence. The Committee took the position that - since the question of whether a claimant was entitled to compensation was governed by civil law - the decisive criteria should be whether the claimant had suffered an actual economic loss and that the right of compensation should not depend upon whether or not a licence was held (document FUND/EXC.36/10, paragraphs 3.3.2 and 3.3.3).

9.3 In the context of the BRAER incident, a similar question has arisen. In order to be able to enforce the fishing quotas set by the European Community, the United Kingdom Government has introduced a requirement for all vessels fishing for profit to be licensed. Fishing without a proper licence is a criminal offence under United Kingdom law.

9.4 In view of the fact that fishing for profit without a proper licence is a criminal offence under United Kingdom law, the Director has taken the view that, as regards the BRAER incident, claims for compensation presented by professional fishermen can be accepted only if the claimant holds a proper licence, since in his view the IOPC Fund should not pay compensation for loss of proceeds of criminal activities.

10 Shetland Islands Council

Shetland Islands Council has submitted an interim claim in the amount of £1 083 000 in March 1994. It is expected that the final version of the claim will be presented in the near future.

11 Impact Assessment Studies

11.1 Following the incident, the Shetland Islands Council commissioned experts to undertake studies of the impact of the incident on various aspects of Shetland life, including agriculture, the environment, the seafood industries, tourism and transport.

11.2 The reports of these investigations were submitted to the IOPC Fund in March 1994. The cost of these studies, which has been included in the Shetland Islands Council claim, amounts to £292 000.

11.3 The reports are being studied by the IOPC Fund Secretariat with the assistance of various experts.

12 Investigations into the Cause of the Incident

12.1 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.

12.2 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.

13 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.
-