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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 Kinloch Damph Ltd

1.1 At its 39th session, the Committee examined a claim for £195 011 received from Kinloch Damph Ltd, a company supplying smolt from its installation on mainland Scotland. It was noted that, according to the claimant, a quantity of this smolt was to be reared on its behalf 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 destroyed. It was also noted that the claimant had maintained that he subsequently sold these smolt at a reduced price to another farm within the exclusion zone where cages were available. The Committee took note of the statement by the claimant that he had suffered loss of profit through not being able to implement the rearing contract.

1.2 The Executive Committee took the view that the claim presented by Kinloch Damph did not fulfil the criteria laid down by the Committee in that the claimant's activities did not form an integral part of the economy of the area affected by the contamination. The Committee decided to reject this claim (document FUND/EXC.39/8, paragraph 3.3.20).

1.3 The claimant has indicated that it wishes its claim to be reconsidered, but it is not yet ready to submit further information in support of its claim.

1.4 The Director proposes that if new information is presented by the claimant, this claim should be reconsidered at the next session of the Executive Committee.

2 Etrick Trout Company Ltd

2.1 At its 39th session, the Committee also examined a claim for £2 004 867 presented by a company farming salmon within the exclusion zone (Shetland Sea Farms Ltd). It was noted that this claimant had stated that it had been planning to place smolt in the cages in January and March 1993, that it was contracted to buy smolt at a predetermined price and that it fulfilled the contract but, due to the contamination of the farm, disposed of the fish elsewhere at a loss, and that the claimant also had suffered loss of profit through not growing these fish.

2.2 It was noted that the Shetland Sea Farms Ltd was supplied with smolt by a smolt producing company on mainland Scotland, that both these companies were members of a group of aquaculture companies with a common majority share holding, and that the company to which the smolt were eventually sold at 50% of the purchase price and which had reared and sold the fish also belonged to the same group. It was noted that the group was controlled by a single individual who was a director of all the companies within the group.

2.3 The Executive Committee considered that, in view of the close link between the three companies involved, it had not been shown that the group of companies had suffered any economic loss in relation to the smolt in question. For this reason, the Executive Committee decided to reject the claim presented by Shetland Sea Farms Ltd (document FUND/EXC.39/8, paragraph 3.2.23).

2.4 Following the 39th session of the Executive Committee, Etrick Trout Company Ltd, the parent company in the group, has submitted further documentation alleging that the group of companies as a whole suffered a loss as a result of the incident amounting to £1 513 020.

2.5 The following information regarding the companies belonging to the Etrick Trout Company Ltd is of interest in this context:

Etrick Trout Company Ltd	Trout farming in mainland Scotland. Company has 8 000 shares, 7 999 of which are held by one individual.
Shetland Sea Farms Ltd	Salmon farming within exclusion zone. 100% of the shares owned by Etrick Trout Company Ltd.
Orkney Sea Farms Ltd	Salmon farming in Orkney. 100% of the shares owned by Etrick Trout Company Ltd.
Summer Isles Salmon Ltd	Salmon farming on the west coast of Scotland. 100% of the shares owned by Etrick Trout Company Ltd.
Terregles Salmon Company Ltd	Salmon smolt production in mainland Scotland. At the time of the BRAER incident, 85% of the shares were owned by Etrick Trout Company Ltd whose shareholding has increased since.
Scottish Supplies Ltd	Salmon trading, Scotland. 76% of the shares owned by Etrick Trout Company Ltd.

2.6 As is the case in respect of all sea farm sites, the companies referred to in paragraph 2.5 have leases from the Crown Estates that give them exclusive use of certain defined areas of coastal water for farming salmon. The companies therefore do not own the sea-bed as such, but the leases can be bought and sold, subject to Crown approval. The companies own the equipment that is installed on their respective sea-water sites.

2.7 Shetland Sea Farms Ltd which operates a number of sites within the exclusion zone had a written agreement with Terregles Salmon Company Ltd to buy 200 000 smolts in January 1993 and 400 000 in March 1993. It has been alleged that the intakes of smolts into Shetland Sea Farms Ltd's sites could not take place in January and March 1993 as allegedly planned as a result of the BRAER incident. The claimant has stated that there was only a very limited period during which the smolt could be transferred to sea water. According to the claimant, the majority of the smolt scheduled to go to Shetland Sea Farms Ltd were eventually transferred to Summer Isles Salmon Ltd, and the remainder either died or were given away.

2.8 The claimant has alleged that overall effects of these events were to cause losses through:

- (a) mortalities at a hatchery operated by Terregles Salmon Company Ltd on mainland Scotland due to the smolts being held for longer than planned;
- (b) donation of some surplus smolts to a river authority;
- (c) higher than normal mortalities due to overcrowding at Summer Isles Salmon Ltd's farm on the west coast of Scotland;
- (d) loss of production as the fish had to be harvested earlier than normal due to overcrowding at Summer Isles Salmon Ltd;
- (e) higher unit production costs at Summer Isles Salmon Ltd compared to Shetland Sea Farms Ltd; and
- (f) loss of profit on reduced production arising from (a), (b), (c) and (d) above.

2.9 The Director has made a further assessment of the situation with the assistance of experts. With respect to the alleged losses arising as a result of the planned intake of smolt in January 1993 not taking place at Shetland Sea Farms Ltd's site within the exclusion zone, the Director is of the opinion that it would not have been prudent to introduce salmon smolts at this time at that site due to elevated hydrocarbon concentrations in the water column. With respect to the planned March 1993 intake, the IOPC Fund and the Skuld Club wrote to the Shetland Salmon Farmers Association on 5 February 1993 informing them that it would be unreasonable not to stock 1993 salmon smolts as normal from that point on, and a copy of this letter was sent to Shetland Sea Farms Ltd. The same point was made in a letter dated 4 March 1993 to all salmon farmers within the zone. The claimant has alleged that as a result of the destruction arrangements for the 1991 generation salmon not having been implemented at Shetland Sea Farms Ltd's sites until late April 1993, there was insufficient cage space available at these sites in which to place the planned intake of smolt in March 1993. Given the lack of practical alternatives, the Director accepts that losses relating to the planned March intake are a result of the incident to the extent that the destruction of 1991 fish interfered with the planned stocking schedule.

2.10 In view of the complexity of the legal and factual situation, the Director intends to investigate the various aspects of this claim further before submitting a proposal to the Executive Committee.

3 Wadbister Salmon Ltd

3.1 Wadbister Salmon Ltd operates salmon farm sites on the east coast of the Shetland mainland, outside the exclusion zone. The company has submitted a claim for £1 332 034 relating to loss of profit allegedly suffered as a result of not introducing salmon smolt into its farm in 1993 as planned, due to the BRAER incident.

3.2 The company has maintained that it was in the process of expanding its salmon-rearing facilities at the time of the incident. According to the company, an order had to be placed for new equipment in January 1993 for completion of the expansion work by the end of March 1993 in order to comply with the terms and conditions of various grants made to the company and to ensure that space was available for their smolt intake in April/May. The company has alleged that the uncertainty within the Shetland salmon industry in the aftermath of the BRAER incident and the depression in prices of salmon being sold from outside the exclusion zone led to a loss of confidence on the company's part and to the decision not to confirm orders for the equipment needed. According to the company, this led to the company not rearing any 1993 smolt.

3.3 The Director takes the view that the alleged losses cannot be considered as caused by contamination, but by the claimant's decision not to order the equipment as planned. For this reason, the Director proposes that this claim should be rejected.

4 Shetland Marine Salmon Fisheries Ltd

4.1 Shetland Marine Salmon Fisheries Ltd which has submitted a claim for £25 473 operates a salmon farm outside the exclusion zone. The company has alleged that it delayed the harvest of its 1991 stock from the period of January-March 1993 to the period of May-July 1993, due to depressed prices as a result of the BRAER incident. According to the company, it had to purchase new cages in order to take in its 1993 smolt as normal in April/May. The company has claimed compensation for the costs incurred for this purchase and for additional costs associated with holding the fish for longer than planned.

4.2 The Director is of the opinion that the alleged damage cannot be considered as caused by contamination but by the claimant's decision to delay the harvest, and that the claim should be rejected. It should be noted that the cost of the purchase of the new cages was many times higher than the likely losses due to price depression at the time of normal harvest.

5 McConnell Salmon Ltd

5.1 McConnell Salmon Ltd is involved in salmon farming in western Scotland. In 1992, the company transferred salmon smolt to be reared under contract at a farm located just outside the exclusion zone in Shetland and operated by a Shetland based company (Hoganess Salmon Ltd). McConnell Salmon Ltd has submitted a claim for £5 380 relating to costs for the mobilisation of personnel and equipment from western Scotland to Shetland, to be available for preventive measures if the oil were to threaten the site where its fish were being reared.

5.2 Following the incident, Hoganess Salmon Ltd which was responsible for rearing McConnell Salmon Ltd's fish undertook various preventive measures to protect the farm from damage by oil contamination. Since this farm is situated just outside the exclusion zone and low levels of oil were detected close to the sites, the IOPC Fund took the view that the preventive measures taken were reasonable and £6 474 was paid to that company in compensation in respect of these measures.

5.3 The Director considers that under contractual arrangements of this type, the well-being of the fish is the primary responsibility of the company providing the rearing service. As such, this company (Hoganess Salmon Ltd) took reasonable measures to prevent damage and was compensated. Although McConnell Salmon Ltd was the owner of the fish, the costs for its mobilisation of personnel and equipment cannot, in the Director's view, be considered as damage caused by contamination. In addition, the mobilisation by McConnell Salmon Ltd of equipment and personnel was at least partly duplicating the efforts of Hoganess Salmon Ltd. For these reasons, the Director proposes that this claim should be rejected.

6 Fishermen operating in Burra Haaf

6.1 The owners of four white fish catching vessels which normally fish in an area west of the Island of Burra, known as the Burra Haaf, which is located within the exclusion zone have notified the IOPC Fund of their intention to submit claims for loss of income due to reduced catches of white fish from this area. Although the exclusion zone in respect of white fish was lifted in April 1993, the owners of these vessels have alleged that there is a scarcity of fish in this traditional fishing ground as well as traces of oil on bottom-set fishing gear.

6.2 As mentioned in paragraph 9.3 of document FUND/EXC.40/6, the Director has commissioned a sediment sampling programme in certain areas around Shetland. In view of the possibility of claims being presented by the fishermen referred to in paragraph 6.1 above, the survey of marine sediments was extended to examine this relatively small Burra Haaf area. The analysis of the samples is not yet completed.

6.3 The Director will examine these claims when received against the usual criteria for admissibility.

7 Wholesale Butcher

7.1 A claim for £392 509 has been submitted by a wholesale butcher whose slaughterhouse is located in the southern part of Shetland. In October 1992, the butcher entered into an agreement to supply lamb to a customer in the Faroe Islands during 1993 and in subsequent years. Following the BRAER incident and subsequent adverse publicity, in August 1993 the customer cancelled his order for 320 tonnes of lamb that would have been supplied during September 1993. It is not known whether this customer will buy any lamb from the claimant in 1994 or later years.

7.2 The claimant has stated that the Faroe Islands have traditionally been supplied with lamb from Iceland, although recent changes in subsidies in Iceland and taxes in Faroe caused a substantial increase in the price of Icelandic lamb. The butcher has maintained that the Shetland Islands was considered to be a suitable alternative source of supply for two reasons other than the price. He has declared that, firstly, the normally pollution free environment of Shetland would meet the strict environmental health requirements and regulations of the Faroe Islands and secondly, the meat of sheep grazed in a coastal area acquires a special flavour because of the quantity of salt consumed and this is to the taste of consumers of lamb on the Faroe Islands.

7.3 The butcher, who did not own any sheep at the time of the incident, has maintained that the sheep which he would have bought from local farmers on Shetland were undoubtedly contaminated by oil spray, but that no contamination was found in the meat. He has pointed out that his slaughterhouse was contaminated. He has stated that on the day after the incident he was ordered by an official of the Scottish Office Agriculture and Fisheries Department not to slaughter any animals from the surrounding area until further notice. It should be noted that this restriction was lifted on 11 February 1993.

7.4 The Director is of the view that the order from the Faroe Islands was cancelled in August 1993 as a result of adverse media coverage and not because the lamb had been found to have been contaminated. He considers, therefore, that the losses allegedly suffered by the claimant cannot be considered as damage by contamination. For this reason, he proposes that the claim should be rejected.

8 Farming Claim

8.1 A claim for compensation for £13 500 has been submitted by a farmer for a contribution towards the purchase of equipment to sort, wash, dry and bag potatoes. The farm in question is located in the southern part of Shetland, very close to the site of the grounding of the BRAER, which is the only area where the soil is suitable for the cultivation of vegetables. As a result of the incident

this farm was contaminated and the 1992/93 crop of vegetables still in the ground was condemned by the Scottish Office Agriculture and Fisheries Department (SOAFD). Compensation in the amount of £20 555 was paid for the damaged produce. The farmer's 1992 crop of potatoes had already been harvested and was in store at the time of the incident. The contaminated land was monitored and soil samples were analysed by SOAFD experts during early 1993, who advised all farmers in the area to plant their crops as normal in the spring of 1993. In July 1993 all produce from the previously contaminated area was declared fit for human consumption.

8.2 The claimant has stated that for 20 years prior to the incident his farm was the sole provider of potatoes to the only supermarket in Shetland. The claimant has maintained that customer resistance aggravated by adverse publicity generated by one of the farmer's neighbours in respect of produce grown in once contaminated soil caused the supermarket to purchase potatoes from the United Kingdom mainland to offer alternative supplies to customers. The potatoes from the mainland were prewashed and prepacked in plastic bags. According to the claimant, during 1993 and 1994 some consumers of potatoes on Shetland have preferred to buy the washed and bagged variety rather than the potatoes produced by him. The claimant has maintained that he has suffered a reduction in his income from the sale of potatoes as a result of being unable to compete with the produce from the mainland. The farmer has not submitted a claim for his loss of income, but has requested a 50% contribution towards the cost of machinery that would sort, wash, dry and bag his potatoes. The farmer has stated that he is confident that with this machinery he would be able to regain his market share on the island.

8.3 It should be noted that the claim relates to the cost of upgrading the operation of the claimant's farm in order to compete with produce from the mainland first brought to Shetland after the incident. The supermarket continued to buy potatoes from the mainland in view of the perception of the Shetland customers even after the 1993/94 years crop had been declared fit for consumption. The Director takes the view that the losses allegedly suffered in 1994 cannot be considered as damage by contamination. The Director, therefore, proposes that the claim for a contribution towards the purchase of the above-mentioned equipment bought should be rejected.

9 Tourism

9.1 At its 39th session, the Executive Committee was informed that the IOPC Fund and the Skuld Club had engaged a company to provide expert tourism advice and to assess whether the operations within the Shetland tourist industry had suffered economic losses during 1993 as a result of the incident and whether it was likely that further losses would be sustained in the future if special marketing activities were not carried out. The tourism experts were also instructed to examine the claims of individual tourist operators and to give an expert opinion on whether or not the loss claimed in whole or part may be attributable to the BRAER incident.

9.2 After reviewing a Report entitled "Shetland Tourism; Braer Oil Spill Impact Assessment" commissioned by the Shetland Islands Council, information collected from the Shetland Islands Tourism (SIT) and the results of their own investigations, the tourism experts concluded that although the Shetland tourism economy had suffered a reduction in leisure tourism income when comparing 1993 with 1992, there were several significant factors other than BRAER incident that contributed to the decline in business. The tourism experts have remarked that some businesses have not suffered any reduction in business at all, but have benefited from extra non-leisure visitors as a result of the incident. The tourism experts employed by the Skuld Club and the IOPC Fund have expressed the view that the contributory factors may affect different types of tourism businesses to a greater or lesser extent.

9.3 It will be recalled that SIT has estimated the loss of the Shetland tourism industry as a result of the BRAER incident at £2.1 million for 1993 and at £3.8 million for 1994. According to SIT, further losses for the next five years are estimated at £24.6 million if no marketing activity is carried out. SIT has proposed to carry out a marketing campaign over the next five years for a total cost of £3 395 800 which, in SIT's view, would reduce the estimated loss by £20 million.

9.4 Based on the advice of the tourism experts, the Director takes the view that the Shetland tourism industry as a whole has not suffered as a result of the BRAER incident to the extent alleged by SIT and that it is unlikely that there will be any significant losses in the future caused by the incident. For this reason, the Director considers that the marketing activity proposed by SIT does not fulfil the requirements for admissibility laid down by the Executive Committee (document FUND/EXC.35/10, paragraph 3.4.19; cf Report of the Seventh Intersessional Working Group, document FUND/A.17/23, paragraphs 7.2.34-7.2.45) and that the IOPC Fund cannot therefore make any payment to SIT in respect of these activities.

9.5 Ten claims have been submitted by individual tourist operators relating to loss of income. These claims are being examined by the tourism experts in order to determine what proportion of the loss, if any, should be attributed to the BRAER incident. The Director intends to consider each claim on its own merits. In his consideration, the Director will take into account that the significance of the BRAER incident and other factors may vary from one type of tourist business to another.

10 Mitigation of Loss

10.1 When claims for economic loss are submitted, investigations take place to determine whether the claimants have earned any additional income as a result of the incident. Fishermen who become involved in clean-up operations is a typical example. The IOPC Fund has taken the view that in principle any such additional income should be deducted from the amount payable to the claimant for loss of income suffered as a result of the spill.

10.2 Representations have been made to the IOPC Fund by individuals in the Republic of Korea, Spain and the United Kingdom who consider that this treatment is unfair. It has been argued by some fishermen that if payment for carrying out the dirty work of beach cleaning is to be deducted from the compensation for loss of income, then a fisherman who stays at home receives more in compensation than the fisherman who labours on the beach. Some individuals have argued that should a spill occur in their area again, they certainly would not volunteer for such work. Other fishermen who have provided men and boats to assist fishery experts working for the IOPC Fund have argued that, had they known that the sums paid to them for this work would be deducted from any compensation payable for loss of income, then they might not have assisted the experts.

10.3 In the Director's view, in principle income which a claimant earns in connection with an oil spill should be deducted from any compensation for loss of income to which he may be entitled. It should be noted, however, that fishermen and other persons in coastal areas have no obligation to take part in clean-up operations, nor to assist the IOPC Fund. It appears therefore that the IOPC Fund should take a flexible approach in this regard, since it is in the Fund's interest that individuals in the affected area actually do assist in the clean-up operations and other activities related to the spill. For this reason, the Director suggests that the IOPC Fund should not insist on a deduction of small amounts paid to individuals who, without acting to protect their own property or trade, take part in clean-up operations or assist the IOPC Fund in connection with an incident.

11 Losses Allegedly Caused as a Result of Failed Attempts at Mitigation

11.1 The question has been raised as to the admissibility of a claim in respect of loss incurred as a result of a failed attempt to mitigate a loss. A fish processing company on Shetland sold large quantities of smoked salmon to France, the market for which collapsed in early 1993. The company has maintained that this was due to the BRAER incident, although research carried out by experts appointed by the IOPC Fund shows that there were other significant factors that caused the reduced demand for smoked salmon in France at that time. The fish processing company, however, found buyers in another European country and supplied quantities of smoked salmon to the new buyers. Unfortunately, the new buyers have failed to pay for the smoked salmon that was supplied. It has been indicated that the fish processing company will submit a claim for the loss suffered in the effort to mitigate the loss which is attributed to the BRAER.

11.2 The Director considers that the loss allegedly suffered by this potential claimant cannot be considered as damage caused by contamination but is a result of normal business risks. For this reason, the Director takes the view that such a claim should be rejected.

12 Professional Fees

12.1 At its 37th session, the Executive Committee considered the issue of claimants' advisers seeking fees on a contingency basis and on a percentage of the compensation recovered.

12.2 The Executive Committee decided that reasonable fees for work done would be considered, but that fees would not be paid on a contingency or percentage basis. The Committee took the view that the question of whether and to what extent fees were payable should be assessed in connection with the examination of a particular claim, taking into account the necessity for the claimant to use expert advice, the usefulness of the work carried out by the expert, the quality of that work, the time needed and the normal rate for work of that kind (document FUND/EXC.37/3, paragraph 4.221).

12.3 The matter of fees has been discussed further with two firms giving professional advice to a number of claimants and groups of claimants. The Director has stated that the IOPC Fund does not have any contractual relationship with these firms and that their right to fees from their clients is governed by any contractual arrangement which these firms may have with the respective claimants. He has taken the view, therefore, that the IOPC Fund can only compensate professional fees to claimants being entitled to compensation for pollution damage. He has informed the firms that they should submit a detailed breakdown of the work carried out in respect of the individual claims and that, once such breakdown has been received, the IOPC Fund will examine what amount, if any, would be payable in respect of fees incurred by each claimant, on the basis of the criteria laid down by the Executive Committee.

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 relating to:
 - (i) Kinloch Dampn Ltd (paragraph 1);
 - (ii) Ettrick Trout Company Ltd (paragraph 2);
 - (iii) Wadbister Salmon Ltd (paragraph 3);
 - (iv) Shetland Marine Salmon Fisheries Ltd (paragraph 4);
 - (v) McConnel Salmon Ltd (paragraph 5);
 - (vi) Fishermen operating in Burra Haaf (paragraph 6);
 - (vii) Wholesale butcher (paragraph 7);
 - (viii) Farming claim (paragraph 8);
 - (ix) Tourism (paragraph 9);
 - (x) Mitigation of loss (paragraph 10);
 - (xi) Losses allegedly caused as a result of failed attempts at mitigation (paragraph 11); and
 - (xii) Professional fees (paragraph 12).
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