



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
42nd session
Agenda item 3

FUND/EXC.42/5
24 March 1995

Original: ENGLISH

INCIDENTS INVOLVING THE IOPC FUND

BRAER

Note by the Director

1 Introduction

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 a machinery failure in severe weather conditions south of the Shetland Islands (United Kingdom). The vessel grounded at Garths Ness, and oil began to escape almost immediately. All crew members were rescued by helicopter before the grounding.

1.2 The heavy weather lasted almost without interruption until 24 January 1993, resulting in the ship breaking up and the cargo and bunkers escaping into the sea. Due to the heavy seas, most of the spilt oil dispersed naturally, and the impact on the shoreline was limited. Oil spray blown ashore by strong winds affected farmland and houses close to the coast.

1.3 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, prohibiting the capture, harvest and sale of all fish and shellfish species from within the zone. The zone was extended on 27 January. The ban on whitefish was lifted on 23 April 1993, and that on salmon placed into cages within the zone in the spring of 1993 was lifted on 8 December 1993. The ban on certain species of shellfish, namely whelks, lobsters, crabs and velvet crabs, was lifted on 30 September 1994 but remained in force for other species of shellfish. On 9 February 1995 the ban was lifted in respect of all other species of shellfish, with the exception of mussels and Norway lobsters for which the ban remains in force.

1.4 The present document sets out the general situation as regards the settlement of claims and indicates the developments which have taken place since the Executive Committee's 41st session. One claim involving a question of principle is submitted to the Committee for consideration, ie a claim presented by a wholesale butcher (paragraph 4).

2 Braer Claims Office

2.1 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. The task of the office was to assist claimants in their presentation of claims and to handle submitted claims.

2.2 At the end of May 1994, the Braer Claims Office was relocated from Lerwick to Aberdeen, since the majority of the claims had been settled and paid. A small office has been maintained in Lerwick where cheques may be collected and receipts signed.

3 Claims for compensation

General situation

3.1 As at 23 March 1995, 1 564 claims for compensation had been presented. Some 1 380 claims had been paid, wholly or partly, for a total amount of approximately £41 million.

Property damage

3.2 So far, 853 persons have received compensation totalling £6 713 020 for costs incurred for the cleaning or repainting of their houses and other property, such as fences and sheds, and the renewal of mineral felt roofs contaminated by wind-blown oil emanating from the *Braer*.

Contamination of grassland

3.3 The oil spray from the *Braer* contaminated some 40-45 km² of grassland on the southern part of Shetland. As a result, some 23 000 sheep had to be moved from their normal grazing and given special feed. The IOPC Fund agreed to pay the cost of feed for sheep, cattle and horses until their normal grazing areas were declared fit for grazing. Feed was supplied to over 200 crofters and farmers. So far, the IOPC Fund and the Skuld Club have paid £719 620 for such feed and £183 638 for fertilizers to regenerate grass for grazing.

3.4 A number of crofters have needed additional labour to cope with the extra work involved in feeding the sheep. The IOPC Fund has approved 165 claims for costs for extra labour and farm machinery, and for lost cattle and sheep, totalling £2 442 729.

Fishermen

3.5 Some 150 fishermen who normally fished within the exclusion zone have been compensated for loss of income as a result of having been unable to fish. Payments totalling £1 323 500 have been made in respect of 35 whitefish fishing boats and £4 532 380 to 115 shellfish fishermen. Only a small number of fishermen continue to claim compensation for loss of income due to being prevented from fishing the species of shellfish for which the exclusion zone is still in force (cf paragraph 1.3).

3.6 The owners of four whitefish catching vessels which normally fish in an area to the west of the Island of Burra, known as the Burra Haaf, which is located within the exclusion zone, have submitted claims for compensation for loss of income due to reduced catches from this area until the end of June 1994. Although the exclusion zone in respect of whitefish was lifted in April 1993, the owners of these vessels have alleged that there was a scarcity of fish in this traditional fishing ground as well as traces of oil on bottom-set fishing gear.

3.7 The owners of two other fishing vessels, who allegedly have traditionally depended partially on this fishing ground, have indicated that they will also submit claims for compensation.

3.8 As reported to the Executive Committee at its 40th session (document FUND/EXC.40/6, paragraph 9.3), the Director commissioned a sediment sampling programme in certain areas around Shetland, including the Burra Haaf area. The results of the sampling show that the sediments in this area remained moderately too heavily contaminated, with hydrocarbon contents between 30-600 times background levels in July 1994.

3.9 The IOPC Fund, in conjunction with its fishery experts, has studied the records of fishing activity of the above-mentioned four vessels in great detail. These studies have shown that there has been a scarcity of fish in this area since the exclusion zone was lifted and that these vessels had cause to alter their fishing patterns, travelling to more distant grounds to fish. The experts have assessed the loss of catches of these vessels by comparing their catches in 1992 to those after the *Braer* incident. As a result, the IOPC Fund has paid compensation totalling £101 435 to the owners of the four vessels for losses sustained up until the end of June 1994.

3.10 It is likely that the sediments in this area will remain contaminated for some years. Further data will be available in the middle of 1995 from analysis of samples taken by the Scottish Office in 1993 and 1994. The Director will make a further assessment of the situation when these data have been studied.

Salmon farms

3.11 Dispersed oil affected 18 salmon farms within the exclusion zone. In 1993, the IOPC Fund accepted as reasonable, on the basis of scientific and other evidence available, the slaughter and disposal of the 1991 and 1992 salmon intakes which were in these farms at the time of the *Braer* incident.

3.12 The destruction of the 1991 salmon intake was completed in May 1993, and compensation totalling £7 175 470 was paid in 1993.

3.13 The destruction of the 1992 salmon intake within the exclusion zone was completed in March 1994. Final settlement has been made with all but two salmon farms. Payments to date total £13 043 629. The IOPC Fund expects to make further payments in the region of £800 000 to the remaining farms.

3.14 A number of claims for damage sustained by salmon farmers other than for destruction of contaminated stock are being examined by the IOPC Fund's experts. These claims relate to loss of growth and increased mortalities that occurred between the time of the incident and the destruction. Compensation for these losses is expected to amount to some £350 000.

Fish processors' claims for loss of supply of fish

3.15 Fish processors presented claims for economic loss as a result of having been deprived of a supply of fish from the exclusion zone. The Executive Committee recognised that it could be argued that such losses, although caused only indirectly by the contamination, were a foreseeable consequence of a major oil spill in the area. The Committee took the view that such losses should be considered as damage caused by contamination. The Executive Committee has taken the position that the criterion for the assessment of compensation should be whether the fish processor's activity as a whole has suffered losses as a result of the *Braer* incident.

3.16 Compensation totalling £3 072 973 has been paid to 16 fish processors for claims of the type referred to above.

Loss of income suffered by fishermen due to reduction in prices- Whitefish

3.17 Whitefish fishermen on Shetland have maintained that, in spite of the imposition of the exclusion zone, extensive media coverage of the incident caused a loss of confidence on the part of the buyers of whitefish from Shetland, which in its turn caused a drop in the first sale price and a reduction in demand. The claimants stated that, in their view, the amount 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. They developed statistical models to predict for each species what the price should have been had the incident not occurred, resulting in an alleged total loss of £1 072 300.

3.18 The technical experts appointed by the IOPC Fund took the view that the method used by the claimants was in principle reasonable, except that the method did not identify the "*Braer* effect" as distinct from other prevailing market influences. In their assessment, the IOPC Fund's experts used identical data but applied different assumptions in order to take account of other market influencing factors. In December 1994, the IOPC Fund and representatives of the fishermen agreed on the results of the analysis of the price information for the eight species of whitefish under consideration. The claims submitted on behalf of 58 fishermen were settled at a total amount of £446 180 and payments were made in January 1995.

- Salmon

3.19 Shetland salmon farmers have maintained that the price of Shetland farmed salmon sold from outside the exclusion zone, on both the domestic and the export market, is still depressed as a result of the incident. Salmon farmers operating outside the exclusion zone have presented claims for losses resulting from such price depression. On the basis of the analysis presented by the claimants, the aggregate amount of the claims would be in the region of £8.3 million for losses up to the end of 1993, plus losses of a similar order for 1994 and beyond.

3.20 The IOPC Fund's experts have analysed the data provided by the claimants and other information relating to the salmon trade. In the light of the results of this analysis, the Director has accepted that there was a fall in the relative price of Shetland salmon during the months immediately following the incident. The extent and duration of the price depression have been analysed by the IOPC Fund's experts. The results of this analysis were presented to the salmon farmers in May 1994. On the basis of the results of this analysis, the IOPC Fund made payments over the summer of 1994 amounting to £311 593 in respect of claims from 27 salmon farms located outside the exclusion zone.

3.21 The salmon farmers have not accepted, however, that the IOPC Fund's position reflects the full extent of the damage suffered. In May 1994, the Director informed the salmon farmers that if they maintained their claim for compensation in excess of the amount accepted by the IOPC Fund, they would have to present evidence that the losses exceeded that amount. The claimants submitted further data on the development of salmon prices in March 1995, and the data is being studied by the IOPC Fund's experts.

Tourism

3.22 The IOPC Fund and the Skuld Club have engaged a company to provide expert tourism advice and to examine, inter alia, 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.

3.23 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.

3.24 Thirteen claims have been submitted by individual tourist operators relating to loss of income. The tourism experts have been given the task to examine these claims in order to determine what proportion of the loss, if any, should be attributed to the *Braer* incident. The Director has considered each claim on its own merits. In his consideration, the Director has taken into account that the significance of the *Braer* incident and other factors may vary from one type of tourist business to another.

3.25 Three claims presented by individual tourist operators have been rejected since in the Director's view the alleged losses were not caused by the *Braer* incident but were due to other factors. Three claims in this category have been approved for a total amount of £11 433.

Shell fishermen

3.26 Compensation totalling £3 674 709 has been paid to a number of shell fishermen who have been unable to operate within the exclusion zone and who are unable for various reasons to operate outside the zone.

3.27 As previously mentioned, the fishing ban was lifted in respect of all shellfish species except mussels and Norway lobsters on 9 February 1995. The inshore fishing fleet reported lower than expected landings of certain shellfish species during the first weeks of fishing in that area after that date, together with many fewer than expected juveniles amongst catches. The members of the fleet are alleging that this reduction is a result of the *Braer* incident. The Director has decided to investigate this matter.

Herring roe

3.28 The roe in herring generates substantial income to Shetland when herring are exported whole to Japan where the roe is considered a delicacy.

3.29 According to data made available to the IOPC Fund, there has been a significant reduction in the catches of herring roe in 1993, compared with preceding years. The Shetland Fishermen's Association has maintained that the failure of the 1993 herring roe fishery was attributable to the *Braer* incident. It should be noted, however, that the roe in herring catch has varied greatly over the years preceding the *Braer* incident.

3.30 Some fishermen have maintained that *Braer* oil had settled on the habitual spawning grounds of herring in the waters around Shetland and that this might jeopardise the herring roe fishery in 1994 and beyond. After discussions with technical experts the Director commissioned a sediment sampling programme in the areas identified by local fishermen as the normal herring spawning ground. Samples were collected from 39 stations around the south of Shetland and in the vicinity of Fair Isle. The collected samples were frozen and sent to the Torry Food Science Laboratory (Aberdeen) for analysis. The results of the analysis show that hydrocarbon concentrations were at background levels at all but one station. One sample close to Sumburgh Airport is slightly over background level, and attempts are being made to "fingerprint" the small quantity of oil in the sample to establish if the oil originated from the *Braer*. Other samples taken by the Scottish Office in 1993 and 1994 in the same area are being analyzed for hydrocarbon content. It is expected that the results of the analysis of these two sets of data might assist in determining whether the *Braer* oil spill had any negative effect on the herring spawning and, if so, the duration of that effect.

P & O Ferries Ltd

3.31 A claim has been submitted for £902 561 by P & O Scottish Ferries Ltd, the only ferry company operating between Shetland and the United Kingdom mainland (Aberdeen). The claim is for loss of income as a result of a reduction in the number of tourists visiting the Islands and a reduction in the volume of freight. The claim is at present under examination.

Public authorities

3.32 In May 1994, the United Kingdom Government submitted a claim for compensation for costs incurred for clean-up operations at sea and on shore, for disposal of oily waste, for monitoring the operations carried out for the purpose of salvaging ship and cargo, and for the cost of carrying out tests on water to establish the extent of hydrocarbon content. The claim is for a total amount of £2 642 310. An additional claim will be submitted.

3.33 Shetland Islands Council submitted an interim claim for £1 083 707 in March 1994, and a final claim for an additional £417 737 in June 1994, making a total claim of £1 501 444. The claim covers the costs allegedly incurred by the Council as a result of the incident.

3.34 The Government's and the Council's claims have been examined by the IOPC Fund and the Skuld Club, and the Director has requested further information on a number of points in respect of both claims.

4 Claim submitted to the Executive Committee for consideration

Wholesale butcher

4.1 At its 40th session, the Executive Committee considered a claim for £392 509 submitted by a wholesale butcher whose slaughterhouse was located in the southern part of Shetland. It was noted that in October 1992 the butcher had entered into an agreement to supply lamb to a customer in the Faroe Islands during 1993 and in subsequent years. It was also noted that in August 1993 the customer had cancelled his order for up to 320 tonnes of lamb that would have been supplied during September 1993.

4.2 The United Kingdom delegation stated that, in its view, there was a similarity between the claim under consideration and other claims for pure economic loss which had previously been accepted by the Committee.

4.3 The Executive Committee took the view that the order from the Faroe Islands was cancelled as a result of adverse media coverage and not because the lamb was contaminated. It considered, therefore, that the losses allegedly suffered by the claimant could not be considered as damage caused by contamination. For this reason, the Committee rejected the claim (document FUND/EXC.40/10, paragraph 3.5.26).

4.4 After the Committee's 40th session, the claimant has requested that his claim be re-examined and has submitted additional information in support of his claim. In view of this additional information, the Director considers it appropriate that the claim be re-examined.

4.5 The claimant has stated that the Faroe Islands have traditionally been supplied with lamb from Iceland, although changes in subsidies in Iceland and taxes in Faroe caused a substantial increase in the price of Icelandic lamb. He has maintained that Shetland was considered to be a suitable alternative source of supply to the Faroe Islands for two reasons. He has declared that firstly, the normally pollution free environment of Shetland would meet the strict health requirements and regulations of the Faroe Islands and the special requirements of the Faroe Islands consumers as to the conditions in which the sheep providing their meat have been reared. Secondly, the meat of

sheep grazed in coastal areas acquired a special flavour because of the quantity of salt consumed, and this was to the taste of consumers of lamb on the Faroe Islands.

4.6 In 1991, the claimant leased a slaughterhouse located on southern Shetland. In October 1992, he entered into an agreement with a customer in the Faroe Islands to supply lamb meat during 1993 and subsequent years. The customer intended to air dry the lamb meat in the Faroes. In a letter of 24 October 1992, the customer in the Faroe Islands confirmed an order of up to 320 tonnes of lamb during the 1993 season under certain conditions. In the letter it was stated: "All lamb must have been born reared and grazed on the clean and unpolluted grazing in the Shetland Islands". After this sale had been agreed, the claimant purchased the slaughterhouse and gave up his previous employment.

4.7 Following the *Braer* incident, the Faroe customer expressed concern about the impact of the oil on the lamb to be delivered. In a letter dated January 1993, the customer referred to mass media coverage of the incident. The matter was discussed between the claimant and the customer per telephone and per letter. In a letter dated 1 June 1993, the customer stated that his main concern was that if oil had been blown across the land light pollution would have occurred. He emphasised that he had to be very careful as dried lamb was stored for many months and any problem would only be seen months later. The customer stated that he had noted that sheep and lamb were tested for pollution but maintained that it was impossible to check every lamb and sheep on every farm. He pointed out that he had to be very careful because any such problem would destroy his trade and could cause a lot of damage to the image of Shetland lamb in the Faroes. In a letter of 24 August 1993, the customer cancelled the order, stating that he was not prepared to take the risk of importing Shetland lamb in September 1993 as agreed.

4.8 The claimant has stated that a quantity of 320 tonnes of lamb corresponds to some 20 000 animals and that it was not possible for him to buy a significant number of lambs from the non-polluted part of the island. He has maintained that the lamb reared in the northern part were not suitable for sale as meat to be dried in Faroe, mainly due to different grazing conditions. The claimant has emphasized that since the Faroe customer had made it a specific condition that the lamb should have been born, reared and grazed in the Shetland Islands, it was not possible to fulfill the contract by providing lamb from outside Shetland.

4.9 The claimant has stated that sheep and lambs were contaminated by eating grass and by oil on their wool. He has maintained that the tests carried out were unsatisfactory, since the number of animals tested was very low. He has argued that even if a chemical analysis does not discover any contamination, human taste may be more sensitive and detect contamination.

4.10 It should be noted that oil spray from the *Braer* contaminated a considerable area (some 40-45 km²) of grassland on the southern part of Shetland which is used for grazing by sheep. On 11 February 1993, approximately 30-35km² were declared fit for grazing, and a corresponding declaration was made on 10 September 1993 for the remaining areas.

4.11 The claimant 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 and that this restriction was lifted on 11 February 1993. He has pointed out that the lamb which he would have bought had undoubtedly been born by ewes which had grazed during pregnancy in the contaminated area. He has mentioned that the slaughterhouse itself was contaminated.

4.12 In reply to a request from the Director, the Faroe customer set out the reasons for his cancelling the order in a letter of 5 February 1995. The customer stated that results of tests based on limited samples showed that young lambs were contaminated to levels much higher than could be considered normal and acceptable. He also mentioned that when lamb is dried, there would be a considerable increase in the hydrocarbon level compared to values relative to wet weight.

4.13 The Director would like to draw attention to the following elements. The land where the ewes and lambs in question were grazing had been contaminated by the oil emanating from the *Braer*. The contract between the butcher and the customer on the Faroe Islands contained a clause to the effect that "all lamb must have been born reared and grazed on the clean and unpolluted grazing in the Shetland Islands". It is not unreasonable to interpret this clause to include also the pre-natal period. The fact that this short contract included a specific reference to "unpolluted grazing" indicates, in the Director's view, that this was an important point for the buyer. The buyer has confirmed that he cancelled the order since, in his view, the Shetland lambs had been contaminated. The butcher could not fulfill the order by providing his customer with lamb from outside Shetland, since the contract specifically provided that the lamb should have been born, reared and grazed in the Shetland Islands. The quantity of the order (up to 320 tonnes) corresponds to some 20 000 lambs, and that quantity could not be obtained from the uncontaminated part of Shetland.

4.14 The butcher did not at the time of the incident own the lambs to be delivered to his buyer, but would have bought them from local farmers during the period of slaughter, ie late summer and autumn of 1993. The claim relates, therefore, to pure economic loss. The IOPC Fund has accepted as admissible claims for losses suffered by fishermen as a result of reduction in prices of whitefish caught outside the exclusion zone, although the fishermen did not own the fish and that in addition this fish was not contaminated. Given the very special contractual situation, the link of causation between the contamination and the losses suffered by the butcher is, in the Director's view, similar to the link of causation in the case of these fishermen. The Director takes the view that the claim under consideration fulfils the criteria laid down by the Executive Committee and endorsed by the Assembly in connection with its consideration of the Report of the 7th Intercessional Working Group (documents FUND/A.17/23, paragraph 7.2.30 and FUND/A.17/35, paragraph 26.5). The Director proposes, therefore, that this claim should be accepted in principle.

4.15 If the Executive Committee were to accept the claim in principle, the Director would examine the evidence presented as to the amount of the losses sustained as a result of the incident.

5 Investigations into the cause of the incident

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

5.2 The reports of these investigations were published on 20 January 1994. The Director is examining these reports with the assistance of the IOPC Fund's Scottish lawyer and technical experts.

6 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 the claim presented by a wholesale butcher (paragraph 4).
-