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INCIDENTS INVOLVING THE IOPC FUND

BRAER

Note by the Director

1 Landcatch Ltd

The Claim

1.1 A claim for £2 601 506 plus interest has been submitted by Landcatch Ltd ("Landcatch"), which rears smolt at Ormsary and Gairloch on the west coast of Scotland, some 500 kilometres from Shetland. Landcatch 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. Landcatch 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. The claim is supported by very extensive documentation.

1.2 The Director has held several meetings with the representatives of Landcatch to discuss the claim, most recently on 26 April 1994.

1.3 A breakdown of the claim as well as a summary of the claim drafted by the claimant are reproduced in the Annex to the present document.

Landcatch's Position

1.4 Landcatch has made the point that the production cycle of salmon is very long. Decisions on broodstock production must therefore, according to Landcatch, be taken up to four years in advance of the date of the envisaged sales, and decision on smolt production levels up to 18 months prior to that date.

1.5 Landcatch has stated that discussions concerning smolt delivery for the following year normally take place between Landcatch and the salmon farmers in the period August to November, and final

decisions concerning the number of smolt to be delivered and the prices are taken in December and January during visits to Shetland made by the Landcatch Chief Executive. According to Landcatch, contracts between the company and the salmon farmers are normally concluded in February and March and deliveries take place in April and May. Landcatch has maintained that only a few contracts were concluded for delivery to Shetland in 1993, due to the negative effect of the BRAER incident. It has been stated that several salmon farmers advised Landcatch in April 1993 that they were not prepared to take delivery of smolts because of the uncertain situation. Landcatch has argued that as long as the 1991 and 1992 stock were in the water, the risk of disease affecting any 1993 smolt would greatly increase. It has been mentioned that in the contracts Landcatch retains title in the smolt until full payment is made and reserves the right to repossess the smolt, should there be any default in payment. It has been argued that the right to repossess the smolt would have been lost if the smolt had been delivered into the exclusion zone, since no fish could be removed from the zone, and that the fish would therefore have been worthless.

1.6 Landcatch has stated that in 1992 4 435 000 smolt were put to sea in the Shetland Islands. According to Landcatch, the fish farmers on Shetland can only produce about one million smolt per year, due to the lack of fresh water, and the Shetland salmon farmers need therefore to import some 3.5 million smolt. According to Landcatch, it has always supplied 25-30% of the total Shetland smolt intake; of the total Landcatch smolt production, an average of 65% has in recent years been supplied to the Shetland salmon farmers. It has been stated that in 1992, the Shetland market represented 83% of the Landcatch output. According to Landcatch, it has concluded contracts to sell 1 723 000 1994 smolts to Shetland. Landcatch has estimated that for 1994 the Shetland market will represent 77% of its total output, and it anticipates to deliver its entire 1994 smolt production earmarked for Shetland. According to Landcatch, the sales made by it to Shetland in 1993 totalled only 795 000 smolt, thus leaving nearly 500 000 smolt earmarked for Shetland unsold, allegedly as a result of the BRAER incident. Landcatch has maintained that it was also forced to reduce prices on all additional smolt sold to salmon farmers in Shetland and mainland Scotland for both 1993 and 1994 smolt inputs.

1.7 In the view of Landcatch, there are a limited number of other smolt suppliers in a position to supply the Shetland salmon farmers. Landcatch has argued that there is thus a high degree of dependency by the Shetland salmon farmers on Landcatch and has pointed out that Landcatch has been associated with the Shetland salmon farming industry from its pioneer days. According to Landcatch, the smolt production of the company forms an integral, fundamental and indispensable part of the biological salmon production cycle of the Shetland Islands, and Landcatch's aquaculture constitutes an organic and functional joint venture with the Shetland salmon farmers, since neither Landcatch nor the farmers can exist without each other. Landcatch has stated that it is not possible to export its smolt to other countries due to their health regulations.

1.8 Landcatch has maintained that the imposition of the exclusion zone as a result of the BRAER incident, which prevented the company from providing smolt to the Shetland salmon farmers, constituted a violation of the company's property right. According to Landcatch, the imposition of the exclusion zone was a "preventive measure" to prevent and minimise damage as a result of the incident. Mention has been made of the fact that in Japan fishing rights are deemed to be a property right. According to Landcatch, the company also has a property right consisting of a right to use the water. It has been stated that under the lease granted by the Crown Commissioner for its smolt rearing activity, Landcatch is under an obligation not to place smolt in polluted water. Landcatch has maintained that it was legally prohibited under the applicable national law to deliver salmon smolts into the waters affected by the oil spill. Landcatch has stated that such deliveries would have been effected by wellboats, ie by vessels with freeflow tanks where seawater enters and departs through holes in vessels, and that any such vessels entering the exclusion zone would have been arrested by the Scottish Office.

1.9 It has been stated that Landcatch must be considered as fishermen, since the concept of fishermen includes also smolt suppliers. Landcatch has maintained that, like fishermen and fish farmers, its activities depend on the water which was polluted as a result of the BRAER incident. Landcatch has stated that since the IOPC Fund has accepted in the TAIKO MARU case claims from fishermen collecting abalone, sea urchins and hokkigai shellfish, the Fund is obliged to compensate

Landcatch. It has also been argued that since the IOPC Fund has for many years compensated fishermen for loss of income, the Fund is under a duty to accept Landcatch's claim. Landcatch has drawn the attention to the fact that the IOPC Fund pays compensation for economic loss suffered by persons who depend directly on earnings from coastal or sea-related activities even if the person concerned has not suffered any damage to property, such as fishermen and hoteliers and restaurateurs at seaside resorts. According to Landcatch, its livelihood depends on the water polluted as a result of the BRAER incident. Reference has been made by Landcatch to the IOPC Fund's acceptance in the HAVEN case of claims by operators of beach facilities ("bagni") for loss of income as a result of a reduction in tourism. In Landcatch's view, Landcatch is more closely and directly affected by the oil pollution than "bagni" and hotels. Landcatch has also referred to the fact that the IOPC Fund had decided in the HAVEN case that all hotels, restaurants and shops in the same town or village should be treated equally, independent of their location in that town or village. The point has been made that fishermen suffering loss of income as a result of being unable to fish in polluted waters are compensated by the IOPC Fund independent of their domicile, and therefore Landcatch has argued that the fact that the Landcatch fish farm is not located in Shetland is without relevance. Landcatch has also emphasised that its losses are entirely quantifiable.

1.10 Landcatch has argued that the Scottish Courts would accept its claim and has referred to a number of court cases, both in the United Kingdom and elsewhere, in support of this position.

Director's Analysis

1.11 Landcatch has not provided conclusive evidence that the company would actually in 1993 have sold the alleged quantities of smolt to Shetland, or that the prices on which the claim calculations are based would actually have been paid. It appears that there were no formal sales contracts concluded before the incident occurred. It is recognised, however, that the company has in recent years normally sold corresponding quantities to Shetland, and this appears to be the case also for 1994.

1.12 Landcatch took a board decision not to deliver 1993 smolt for rearing in the exclusion zone but did later deliver smolt to two farms within the zone. The IOPC Fund had, by letter of 5 February 1993, informed the Shetland Salmon Farmers' Association that it would be unreasonable not to stock 1993 smolt into salmon farms within the exclusion zone. The same point was made in a letter from the IOPC Fund dated 4 March 1994 to all salmon farmers within the exclusion zone.

1.13 It should be noted that contract rearing of 1992 salmon was carried out in a salmon farm within the exclusion zone where Landcatch had an ownership share of 75% of the fish and the salmon farmer a share of 25%. Since these fish had encountered serious health problems and showed a much higher degree of taint than the fish at other farms within the zone, in July 1993 the IOPC Fund accepted the total destruction of this fish. This destruction was carried out on 17 and 18 July 1993. Compensation totalling £489 787 has been paid to Landcatch for the fish thus destroyed, and further payments will be made once an agreement on the quantum of the loss has been reached.

1.14 The Director considers that the claim presented by Landcatch gives rise to a number of important legal questions which are dealt with below.

1.15 Landcatch has argued that the IOPC Fund is, by virtue of the strict liability laid down in the Conventions, under an obligation to compensate any damage or loss resulting from the BRAER incident. The Director does not share this view, since the Conventions only apply to "loss or damage caused by contamination". The question is, therefore, whether the alleged losses, or any part of them, can be considered as "damage caused by contamination".

1.16 The Director does not share Landcatch's view that the damage should be considered as caused to its property rights. In the Director's opinion, Landcatch does not hold a proprietary right to the waters which were contaminated as a result of the BRAER incident. The Director considers, therefore, that the losses allegedly suffered by Landcatch fall within the concept of "pure economic loss".

1.17 The first question is then whether Landcatch's claim fulfils the criteria laid down by the Executive Committee and applied by the IOPC Fund so far for the admissibility of claims for pure economic loss. It is recalled that these criteria were discussed by the Seventh Intersessional Working Group at its first meeting. It was generally felt that there must be a link of causation between the contamination and the loss or damage. The Working Group agreed that when considering whether the requirement as to the link of causation was fulfilled, the following elements merited examination (document FUND/WGR.7/10, paragraph 6.3.24):

- ▶ the notion of proximate cause
- ▶ the concepts of adequate causation, remoteness and foreseeability of the damage
- ▶ the geographic proximity between the claimant's activity and the contamination
- ▶ the degree to which a claimant was economically dependent on an affected resource
- ▶ the extent to which a claimant had alternative sources of supply
- ▶ the extent to which a claimant could mitigate his loss
- ▶ the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.

1.18 The Director considers that the claim by Landcatch differs from the claims for pure economic loss previously accepted by the IOPC Fund. Landcatch's smolt rearing activity is geographically more remote from the contamination than the activities of other claimants (such as salmon farmers and fish processors) who have received compensation as a result of the BRAER incident or other previous cases. In the Director's view, the smolt rearing activity carried out by Landcatch does not form an integral part of the economic activity of the area affected by the oil spill, although the smolt provided by Landcatch form 25-30% of the smolt supplied to the Shetland salmon farmers. The Director takes the view that the claim presented by Landcatch does not fulfil the criteria laid down by the Executive Committee.

1.19 Should the Executive Committee agree with the Director that the claim submitted by Landcatch does not fulfil the above-mentioned criteria, it has to be considered whether the competent courts in the BRAER case, viz the Scottish Courts, would accept the claim presented by Landcatch (cf document FUND/WGR.7/10, paragraph 6.2.3). Landcatch has in its submission answered this question in the affirmative. The legal advice which the Director has received does, however, not give support to this position. On the basis of this advice, the Director takes the view that it is very unlikely that a Scottish Court would accept this claim on the basis of the statutes implementing the Civil Liability Convention and the Fund Convention.

1.20 A further question would be whether the Scottish Courts would take the view that Landcatch's claim would be considered as "loss or damage caused by contamination" and thus be admissible in the light of the other claims for pure economic loss which have been accepted by the IOPC Fund. On the basis of legal advice, the Director believes that the Scottish Courts would consider rejection of this claim consistent with Fund policy.

1.21 In the light of these considerations, the Director proposes that the claim submitted by Landcatch should be rejected.

2 Kinloch Damph Ltd

2.1 A claim for £195 011 has been received from a supplier of smolt (Kinloch Damph Ltd) from its installation on mainland Scotland. The claimant has maintained that a quantity of smolt was going to be reared on its behalf under contract by a salmon farmer within the exclusion zone (farm A) 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. The claimant has stated that he sold these smolt at a reduced price to another farm within the exclusion zone (farm B) where cages were available. In addition, the claimant has alleged that he suffered loss of profit through not being able to implement the rearing contract.

2.2 There was not any formal contract between the supplier and the company which was to rear the salmon (farm A), but only a very short note of a meeting in December 1993 at which it was agreed that this company would grow 30 000 smolt "as before". There is no evidence of delivery dates, terms, etc. It is recognised that there had been on a previous occasion rearing arrangement between the parties.

2.3 It appears that Kinloch Dampn Ltd was due to supply 60 000 smolt to the second farm within the exclusion zone (farm B) at £3 per smolt. In the end, that farm accepted to take 60 000 smolt plus the 30 000 smolt which were allegedly to have been reared by the first farm (farm A) but negotiated a reduction of the price to £2.50 per smolt for all 90 000 smolt.

2.4 The claim relates to loss of income for the rearing arrangements (£220 686), some smaller items for increased mortalities and extra fee for holding the fish longer than normal, less the amount of £75 000 resulting from the sale of the fish to farm B.

2.5 The Director considers that this claim does not fulfil the criteria laid down by the Executive Committee in that the claimant's activities do not form an integral part of the economic activity of Shetland and are not in geographic proximity to the contamination. For this reason, he takes the view that this claim should be rejected.

3 Shetland Sea Farms Ltd

3.1 A claim for £2 004 867 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. According to the company, it 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. The company has also alleged that it suffered loss of profit through not growing these fish.

3.2 The claimant company was supplied by a smolt producing company on mainland Scotland. Both these companies are members of a group of aquaculture companies with common majority share holding. The company to which the smolt was eventually sold at 50% of the purchase price and which then reared and sold the fish also belongs to the same group. A single individual who is a director of all the companies within the group controls the group.

3.3 In view of the close link between the three companies involved, the Director takes the view that it has not been shown that the group of companies has suffered any economic loss in relation to the smolt in question. For this reason, he proposes that this claim should be rejected.

4 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:
 - (i) Landcatch Ltd; smolt supplier (paragraph 1);
 - (ii) Kinloch Dampn Ltd; smolt supplier (paragraph 2); and
 - (iii) Shetland Sea Farms Ltd; salmon farmer (paragraph 3).

ANNEXClaim Submitted by Landcatch Ltd

1.	Smolt culled due to lack of sales, 226 000 smolt at £1.53		£345 780
2.	Reduction in price of smolt sold in 1993; 1 136 000 smolt for a price reduction of £0.37		£420 320
3.	Subsequent loss because of price reduction during the year following the incident, 1 600 000 smolt for a price reduction of £0.40		£640 000
4.	a) 260 000 smolt delivered and held pending sale at £1.53	£397 800	
	b) estimated additional rearing costs to 1 May 1994	£250 000	
	c) cost of financing overdraft due to delay in sales income	£20 677	
	d) loss of profit at expected 20%	£55 000	
	e) cost of management time	<u>£19 000</u>	£742 477
5.	Management costs		£160 875
6.	Increased production costs		
	a) increased cost for freshwater to keep smolt	£39 971	
	b) increased cost of feeding smolt	£9 608	
	c) increased labour cost for feeding smolt	<u>£5 032</u>	£54 431
7.	Increased insurance cost to keep stock of smolt longer than normal		£4 515
8.	Increased finance cost		£33 198
9.	Loss of goodwill due to the impact of the incident on the presumption of quality of Scottish salmon		£100 000
10.	Estimate of expenses incurred		£100 000
			<u>£2 601 506</u>

The interest on the claim has been indicated at £191 288.

Summary of the Arguments as Presented by Landcatch

- 1 The claim is well within the parameters of the rules of compensation by the IOPC Fund and involves no new question of principle. The claim may involve certain economic loss but such loss as suffered by Landcatch has been compensated by the Fund in other cases.
- 2 The type of loss to Landcatch is one which has been caused directly by the oil which was discharged or which escaped from the BRAER, and Landcatch is thus a member of a small and limited class of claimants who are regularly compensated by the Fund as
 - deriving their livelihood from sea- and coastal-related activities directly affected by the pollution;
 - deriving their livelihood from fisheries in waters directly affected by the pollution;
 - directly affected by quantifiable pollution damage, being prevented from delivering salmon smolt for on-growing in polluted waters;
- 3 Landcatch is, like fishermen and fish farmers, overwhelmingly dependent on the exploitation of the water area affected by pollution caused by the BRAER. The profits, earnings and livelihood of Landcatch are thus overwhelmingly dependent on the participation in the biological cycle of rearing salmon in the Shetland Islands. The fisheries activities of Landcatch form an

integral part of the salmon rearing in the Shetland Islands, to such a degree that its aquaculture and fish farming constitute an organic and functional joint venture with the Shetland fish farmers. Neither Landcatch, nor the Shetland fish farmers can exist without each other. Landcatch has, under its contracts to supply salmon smolt to these waters polluted by the BRAER, a proprietary right in these waters. Landcatch must thus, in law, be considered to have directly suffered pollution damage as defined in the Conventions and in the practice of the IOPC Fund.

- 4 From the outset of salmon farming, on-grown smolt salmon has been brought to the Shetland Islands by boat from Landcatch as part of the integrated biological cycle. Shetland has always been the principal market for Landcatch and the Islands are dependent on Landcatch. The pollution of the BRAER caused a major disturbance in the business of Landcatch.
- 5 Success or failure as a salmon farmer depends on containing naturally occurring diseases resulting from high stress at below epidemic levels. Any pollution of sea water, necessary for salmon growth, will cause stress-related disease within the salmon, may cause permanent damage, and will affect quality grading. The oil spill from the BRAER was of considerable magnitude, as 84 700 tonnes of crude oil and 1 600 tonnes of bunker fuel oil polluted the sea water around Shetland, entering the water column and settling on the seabed in huge quantities where it still lies to this day. The overwhelming scientific knowledge expressed in 1993 was that it was not known what effects the huge residue of crude on the seabed would have on salmon placed in those waters, on traditional quality standards of reared salmon and on ensuing effects on human health.
- 6 To limit the extent of the pollution damage, the United Kingdom Government imposed an exclusion zone, as a preventive measure, and the zone covered, only in part, the affected sea water off the Shetlands where the BRAER had discharged its cargo. Initially no fish or shellfish could be taken out of the area covered by the zone. Fishermen could not fish, nor could salmon farmers move fish elsewhere or harvest their crop. Any salmon farmer choosing to place fresh smolt into the exclusion zone would be prohibited from harvesting those fish until the relevant exclusion zone status was lifted. It must be stressed that salmon is a particularly sensitive fish: when restrictions were lifted for white fish they remained in force for salmon. The IOPC Fund was guided, with regard to the treatment of salmon smolt in 1993, by consultants who do not specialise in salmon. Landcatch made a proposal in April 1993 to mitigate losses which was wrongly dismissed by the IOPC Fund.
- 7 In some parts, the exclusion zone, prohibiting fishing and fish farming, is still in force and only exemptions have been granted to date. Fish, and especially the sensitive types like salmon which might have been damaged by pollution if placed in polluted waters, carried a very high potential disease threat and diseases such as vibriosis and furunculosis, as well as the possibility of lice infestation, with ensuing dangers to human health, were all distinct possibilities following the pollution from the BRAER.
- 8 The growing of farmed salmon requires that the smolt salmon must enter clean, unpolluted sea water at the smolt stage of their development. The transport of smolt salmon also requires to be carried out in pollution-free water as the wellboats take in and depend on sea water through the freeflow hold in which the smolt salmon are transported: the wellboats were prohibited by law to enter the exclusion zone as the polluted water would have damaged their cargo of smolt salmon.
- 9 Fishing and fish farming of salmon is a distinct and specially protected activity in the laws of many countries and under specific Conventions. The 1982 Law of the Sea Convention specifically protects fisheries from marine pollution from vessels. Salmon represents an especially sensitive type of fish. Numerous Conventions like, for example, the Convention on the Conservation of Salmon in the North Atlantic, specifically protect the growth of salmon.

- 10 The rights of fishermen and fish farmers are exercised in the waters they use and are independent of domicile. The waters in which Landcatch enjoyed such legal rights in the Shetland Islands, and the waters which Landcatch needed to pass to transport the smolt salmon in wellboats through which sea water flows, were heavily polluted by oil from the BRAER.
 - 11 Landcatch also enjoyed other proprietary rights. Ownership of salmon smolt sold by Landcatch does not pass to the salmon farmer until he has paid for the smolt in full. Payment is not due when the smolt are first put in the sea water. If payment were not made by fish farmers for deliveries of salmon smolt after the BRAER disaster, smolt delivered into the exclusion zone could not be removed in exercise of those proprietary rights under the contract of sale. Any pollution suffered by salmon smolt, including stress-related disease, after being placed in sea water, would have further damaged these reserved property rights of Landcatch in the salmon.
 - 12 The environmental risks of oil pollution are recognised by the principle of the polluter pays in all recent Conventions and case law regarding environmental damage. In the specific event, the IOPC Fund represents the polluter and has, under its constitution, taken over the obligation to compensate. Furthermore, the environmental risks of pollution are recognised by the principle of strict liability, adopted in all recent Conventions on Environmental Liability. Against the background of these two principles, it would go against all recent trends of environmental liability if a company, engaged in fish farming of salmon, and dependent on the waters which have been polluted, were not immediately and fully compensated by the IOPC Fund for all losses incurred because of the oil pollution.
 - 13 The overwhelming effect of the existence and continuance of the exclusion zone as a preventive measure was to cause Landcatch serious economic loss. Landcatch could not, as a prudent fisherman, introduce its salmon smolt, in which it enjoyed property rights, into polluted waters and deliberately expose them to severe pollution damage. Landcatch therefore delivered only small consignments to fish farmers whose sites were, in the opinion of Landcatch, less at risk from further oil movement.
 - 14 Whilst in every year Landcatch has always been able to sell its entire season's crop, in 1993 it was left with nearly half a million smolt unsold. Had it not been for the BRAER disaster, these smolt would have been delivered to salmon farmers in the Shetland Islands for the on-growing biological growth cycle. They would have been sold at normal rather than depressed prices created by frustrated sales of a product in an unstoppable biological cycle.
 - 15 Landcatch has thus suffered serious loss as a direct result of the BRAER oil spill of £2 601 506. The direct link between the Landcatch and the oil pollution caused by the BRAER is the very water where Landcatch was precluded from delivering the salmon smolt for further growth. As a direct consequence of the BRAER disaster nearly half a million smolt that had been earmarked for the Shetland fish farmers could not be delivered to go into their growing phase in the Shetland Islands, causing Landcatch a substantial ensuing loss.
-