



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND

EXECUTIVE COMMITTEE
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Agenda item 3

FUND/EXC.40/6/Add.1
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INCIDENTS INVOLVING THE IOPC FUND

BRAER

Claim submitted by Landcatch Ltd

Note by the Director

1 Introduction

At its 39th session, the Executive Committee considered a claim which had been submitted by Landcatch Ltd alleging that it had suffered losses as a result of the BRAER incident interrupting the normal stocking of salmon smolt in Shetland waters (document FUND/EXC.39/4/Add.1). The claim was rejected by the Committee (document FUND/EXC.39/8, paragraphs 3.3.14–3.3.18). Landcatch Ltd has requested that its claim be re-examined by the Executive Committee.

2 The Claim

2.1 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 goodwill. The claim is supported by very extensive documentation.

2.2 A breakdown of the claim as well as a summary of the claim drafted by the claimant which were submitted to the Executive Committee at its 39th session are reproduced in Annex I to the present document.

2.3 The present document reproduces for the convenience of the Executive Committee the parts of the document presented to the Committee's 39th session which contain Landcatch's position and the Director's analysis, as well as the relevant part of the Record of Decisions of that session (paragraphs 3, 4 and 5, respectively). The present document then sets out the arguments advanced by Landcatch in support of its request for reconsideration of its claim (paragraph 6) and the Director's position (paragraph 7).

3 Landcatch's Position as Presented to the Executive Committee at its 39th session (document FUND/EXC.39/4/Add.1, paragraphs 1.4-1.10)

3.1 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.

3.2 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.

3.3 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.

3.4 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.

3.5 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.

3.6 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 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.

3.7 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.

4 Director's Analysis Presented to the Executive Committee at its 39th session (document FUND/EXC/39/4/Add.1, paragraphs 1.11-1.21)

4.1 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.

4.2 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.

4.3 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>}.

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

4.5 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".

4.6 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".

4.7 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.

4.8 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.

4.9 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

<1> Landcatch Ltd has received a total of £701 916 in compensation for the destroyed fish.

Court would accept this claim on the basis of the statutes implementing the Civil Liability Convention and the Fund Convention.

4.10 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.

4.11 In the light of these considerations, the Director proposed at the Committee's 39th session that the claim submitted by Landcatch should be rejected.

5 Consideration by the Executive Committee at its 39th Session

5.1 At the Executive Committee's 39th session, the United Kingdom delegation stated that it would not be appropriate for the delegation to participate in the discussions on the details of this claim.

5.2 The Executive Committee held a session in private, pursuant to Rule 12 of the Rules of Procedure, to discuss the legal aspects of this claim. During this closed session, only the delegations representing Fund Member States and the representative of the shipowner's P & I insurer (the Skuld Club) were present.

5.3 The Executive Committee took the view that the claim presented by Landcatch did not fulfil the criteria laid down by the Committee and decided to reject the claim. The principal reasons for the Committee's view were those set out in paragraph 5.4 below.

5.4 The Executive Committee took into account a number of considerations including the following. The Committee was of the opinion that the loss allegedly suffered by Landcatch could not be considered as damage to property rights. The Committee took the view that the loss could not be considered as caused by contamination but was due to the unwillingness of customers to conclude contracts for delivery of smolt and to Landcatch's lack of adequate alternative markets. In the Committee's view the smolt rearing activity of Landcatch was not in reasonable geographical proximity to the area affected by the oil spill from the BRAER. The Committee was of the opinion that although the smolt provided by Landcatch formed 25-30% of the smolt supplied to the Shetland salmon farmers, the smolt rearing activity of Landcatch did not form an integral part of the economic activity of the area affected by the oil spill.

6 Landcatch's Request for Reconsideration of its Claim and Arguments in Support of that Request

6.1 After having been informed of the Executive Committee's decision to reject the claim, Landcatch has requested that the claim should be re-examined, since in Landcatch's view the Committee might not have appreciated the very particular situation of Landcatch. Landcatch has presented a note dealing with two of the main issues involved, namely the geographic proximity and the financial inter-dependency of Landcatch and the Shetland salmon industry. This note is reproduced at Annex II of the present document.

6.2 In the note, Landcatch has maintained that the criterion of geographic proximity must be viewed in the light of the impossibility of Shetland to cater for its own smolt requirements. The reasons for this are, according to Landcatch, a lack of adequate freshwater resource on Shetland. Landcatch has also maintained that, even if this were not the case, the risk of disease would make it impossible to produce sufficient quantities of salmon smolt.

6.3 Landcatch has in the note also mentioned several factors which in its view show the financial inter-dependency of Landcatch and the Shetland salmon industry. Firstly, Landcatch has stated that

it ranks next to major banks and the Shetland Islands Council as the biggest provider of working capital to the Shetland salmon farming industry. Landcatch has emphasised that it is therefore a major supporter of jobs in Shetland. Landcatch has drawn attention to the fact that a sister company of Landcatch employs more than 100 persons in Shetland, building supply boats and cages for the Shetland salmon farming industry, that this company provides a full range of repair services to the Shetland fishing fleet and that it is the only company in Shetland with major shipping and dry dock facilities. According to Landcatch, this sister company is therefore a major employer and supporter of the salmon farming and fishing industries in Shetland. It is mentioned that the total turnover in Shetland of the two sister companies is approximately £6 million per annum. Landcatch has maintained that, since the group of companies is a major employer and a major backer in the Shetland economy, this clearly demonstrates the inter-dependency which has been built up over more than a decade.

6.4 Landcatch has presented an opinion by a Scottish Counsel which supports its claim. In his conclusion, Landcatch's Counsel states that, in his opinion, Landcatch should be successful in prosecuting its claim. He declares that it seems to him that the claim would fall within the ambit of the 1974 Merchant Shipping Act, that it should be acceptable to the IOPC Fund having regard to the Fund's other decisions in relation to the HAVEN and BRAER incidents and that, if the matter were to be litigated before the Scottish courts, the claim would not fail upon an argument that the Fund had no liability to Landcatch in relation to pure economic loss. Landcatch's Counsel expresses the opinion that the claim should be acceptable in principle whereas the matter of quantification would undoubtedly require detailed discussion between Landcatch and the IOPC Fund. He also states that if the claim were to be litigated, all the issues would be open to the Court, including liability under the 1974 Act and whether, and if so the extent to which criteria such as those considered by the Fund in relation to such claims were in fact appropriate.

6.5 Landcatch's Counsel expresses the view that, given certain requirements of salmon farming in general, it is not wholly appropriate to separate that part of the farming industry in Shetland from that part outside Shetland. He states that, since the structure of Landcatch's operations is so inextricably bound up with salmon farming in waters polluted by the BRAER, there are good prospects that this claim would be treated by the courts as an exception to the current antithesis to pure economic loss claims in the United Kingdom. According to Landcatch's Counsel the claim should be acceptable in principle although the relevant operations of Landcatch in which the relevant losses were sustained are at some geographical distance from the location of the oil spill, since Landcatch's operations are inextricably bound to salmon farming on Shetland. He states that Landcatch's losses are compensable under the 1974 Merchant Shipping Act, being losses of property, loss of profits, cost of preventive measures and further damage caused by preventive measures.

6.6 Landcatch's Counsel maintains that the Landcatch's salmon producing operations are inextricably linked with those of the Shetland farmers in the Shetland farming industry either in a way which might appropriately be characterised as a form of joint venture or to such an extent that they could not but be directly affected by the consequence of the pollution of Shetland waters by the BRAER oil spill. In view of the difficult situation in which Landcatch found itself, he expresses the opinion that Landcatch adopted a perfectly reasonable course of action by deciding (a) to hold a limited number of smolt at a site outside the exclusion zone, (b) to sell certain quantities of smolt at reduced price, and (c) to cull other smolt due to lack of sales.

6.7 Landcatch's Counsel states that, since the IOPC Fund has strict liability under the Merchant Shipping Act 1974, the Fund is placed in the position of the ultimate insurer in respect of marine disasters which could not be foreseen by those affected by them. He takes the view that in these circumstances consideration relating to the admissibility of economic loss under common law is irrelevant. He declares that, having regard to the environmental requirements of salmon, this is a case of actual physical damage or anticipated physical damage.

6.8 Landcatch's Counsel rejects the idea that the admissibility of claims under the Convention should in any way be related to the common law of the country concerned. While admitting that under common law very few persons other than the owner of the damaged property are entitled to

compensation, Counsel maintains that this rule is subject to exceptions. The restrictive approach is, in his view, perhaps less appropriate when the person sustaining the loss has a particularly close connection with and a significant interest in the damaged property. He points out that a very major part of Landcatch's operations is inextricably bound up with the area where damage was sustained. He finds it difficult to see how a reasonable distinction can be made between Landcatch's claim and, for example, the claim for government laboratory work carried out in Aberdeen.

6.9 Landcatch's Counsel takes the view that, if the case were to be decided on the basis of common law in relation to pure economic loss, there would be no question of the claim being undoubtedly excluded and there could be prospect of success.

6.10 Landcatch's Counsel states that the IOPC Fund seeks to draw a geographical line limiting the area within which the affected business of the claimant must be located and that the way in which this line is chosen varies from incident to incident. In his view, this is not the approach which would be adopted by a United Kingdom court; the court would rather apply certain rules such as those identifying duty of care, foreseeability of damage and remoteness of loss. He states, however, that given the complexity of the problems facing the IOPC Fund, the manner of constitution of the Fund and its experience in dealing with numerous claims, such an approach by the Fund, if reasonable in all the circumstances, would probably have to be accepted as within its discretion. He declares that this approach may not be unreasonable in order to avoid deciding between various claims of doubtful acceptability but that it should not be used to exclude a claim otherwise acceptable in principle. The proper approach suggested by Landcatch's Counsel is to look at the various claims being put forward and, if necessary, identify a dividing line or, alternatively, determine that the nature of the incident and the nature of the claims render the dividing line principle inappropriate in all circumstances.

6.11 Landcatch's Counsel cannot see the soundness of the IOPC Fund's approach in this case. He contends that, since the totality of the required smolt production for the Shetland Islands could not be carried out within the Shetland Islands, a claim such as that by Landcatch should not be excluded. He refers to the fact that claims for loss of income suffered by fishermen are admissible, even if the fishermen come from far away, and contends that Landcatch's claim is in at least as good a position as that of the trawlers; like the trawlers, Landcatch was gaining profit from the Shetland waters, and those waters were not available. He also refers to the fact that the IOPC Fund has accepted claims from fish processors on Shetland. In his view, the test should be whether the business is so inextricably linked with an operation carried out in polluted waters that the claimant must necessarily be affected by the inability to use those waters, whether it is affected to a significant degree and whether it has no opportunity of avoiding the damage.

6.12 Landcatch's Counsel has also examined Landcatch's claim against the criteria adopted by the IOPC Fund's Intersessional Working Group. For the reasons given above, he considers that the claim satisfies the various criteria, ie proximate cause, foreseeability, geographical proximity, economic dependency, lack of alternative markets, obligation to mitigate damage and business forming an integral part of the economic activity within the area. He expresses the view that there should be no doubt over the admissibility of Landcatch's claim once it has been appraised carefully against each of the criteria and the issue of appropriate weight properly addressed.

7 Director's Reconsideration of Landcatch's Claim

7.1 The note submitted by Landcatch and its Counsel's opinion have been considered by the Scottish Counsel who advised the Director prior to the Executive Committee's 39th session. In view of the importance of the issue, the Director has taken further legal advice from its Scottish Counsel. In particular, Landcatch's Scottish Counsel's opinion has been thoroughly discussed with the Fund's legal advisers. The Fund's Legal Advisers and Counsel disagree with the legal contentions of the Counsel instructed by Landcatch. Their advice remains, as previously indicated, that it is very unlikely that the Scottish Court would support Landcatch's claim.

7.2 The Director presented to the Executive Committee at its 39th session a detailed analysis of the various issues involved, as set out in paragraph 4 above, and he refers to the reasons given there. The note submitted by Landcatch and the opinion by its Scottish Counsel give rise, however, to some further observations by the Director.

7.3 In the Director's view, even in the field of strict liability, a claim is not admissible solely on the grounds that the damage or loss *would not have been incurred* had the defendant's action not taken place; the test is not a "but for" test. In his view, there must also be other criteria which distinguish admissible and non admissible claims. The Director considers that a claim must fulfil other criteria which will depend on the particular requirements of the applicable legal regime in question. In the present case, the Conventions and the Merchant Shipping Acts require that the alleged loss or damage is "caused by contamination". The question is, therefore, whether Landcatch's alleged losses can be considered as caused by contamination. The Executive Committee and the Intersessional Working Group have developed certain criteria which should be used for determining whether the requirement as to the link of causation is fulfilled in respect of a particular claim.

7.4 The Director takes the view that the application of a geographical criterion is reasonable. Landcatch's smolt-rearing activity is geographically more remote from the contamination than the activities of other claimants who have received compensation as a result of the BRAER incident or previous cases. He takes the view, therefore, that the smolt-rearing activity of Landcatch is not in reasonable geographic proximity to the area affected by the oil spill from the BRAER.

7.5 The Director does not agree with the view expressed by Landcatch's Counsel that Landcatch's smolt production should be seen as a joint venture with the Shetland salmon farming industry. He notes the points made by Landcatch and its Counsel about the financial interdependency of Landcatch and the Shetland salmon industry. The Director maintains his position, nevertheless, that Landcatch's smolt-rearing activity does not form an integral part of the economic activity of the area affected by the oil spill. He also considers that Landcatch's claim differs from other claims for pure economic loss previously accepted by the IOPC Fund, for the reasons given in paragraph 4.8 above.

7.6 The arguments put forward in Landcatch's note and its Counsel's opinion have not made the Director change his view that the claim presented by Landcatch does not fulfil the criteria laid down by the Executive Committee.

7.7 In spite of the arguments advanced by Landcatch's Counsel and on the basis of legal advice, the Director maintains the view that it is very unlikely that a Scottish Court would accept Landcatch's claim on the basis of the United Kingdom statutes implementing the Civil Liability Convention and the Fund Convention. The Director also continues to believe that the Scottish courts would consider rejection of this claim as consistent with the IOPC Fund policy.

7.8 After a very careful re-examination of all the issues involved, the Director takes the view that the reasons given by the Executive Committee in its decision at the 39th session rejecting the claim remain valid (cf paragraph 5.4 above). For this reason, the Director proposes that the Executive Committee should maintain its position to reject Landcatch's claim.

8 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 submitted by Landcatch Ltd.

ANNEX ICLAIM 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	£19 000	£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	£5 032	£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

- 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.
- 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;
- 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.

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ANNEX IINOTE SUBMITTED BY LANDCATCH LTD1 GEOGRAPHIC PROXIMITY

- (A) Salmon farming requires freshwater resources which are not available in Shetland in sufficient quantity to cater for smolt production.
- (B) Atlantic salmon are migratory fish by nature, commencing their lives in freshwater rivers and then swimming to rich feeding grounds thousands of kilometres distant before returning to the river of their birth when sexually mature. Salmon farmers follow nature by separating freshwater and seawater production phases to optimise the on-growing environments. Due to its location, seafaring people, rugged coastline with many voes, climatic conditions and seawater quality, Shetland is recognised as one of the best areas for on-growing Atlantic salmon in their seawater phase; it is the substitute for the rich feeding grounds of nature.
- (C) The attributes which make Shetland so good for on-growing Atlantic salmon, coupled with its topography, make it very poor for smolt production.

In following nature and good husbandry practices to avoid the spread of disease, freshwater and seawater salmon farming production phases are ALWAYS SEPARATED. Many vertically integrated salmon farms have their freshwater and seawater production phases separated by long distances. (Unique local geography backed up by sophisticated onshore technology protects the Landcatch breeding unit).

Even if Shetland did have the freshwater resource to be self-sufficient in meeting its own smolt requirements, which it clearly has not, and given its topography, it would require the proliferation of small hatcheries throughout the Shetland Isles which would be discharging effluent into voes already occupied by salmon on-growers resulting in the recycling of disease and the ensuing disastrous consequences which would follow. Furunculosis and IPN virus are prevalent in Shetland waters due to the high concentration of on-growing seawater sites in this area. This would lead to the likely cross-infection of any nearby freshwater hatchery if any were present. Evidence of this is already available – the transfer of IPN from stocks held by Wadbister Salmon into the adjacent hatchery at Girsta resulted in the subsequent slaughter of the freshwater stock.

- (D) The Shetland climate does not favour production of the class of smolts required for commercial salmon farming. The Kergord Hatchery operated by John White was financially unviable because of the very low S1 yield and the small smolts which it produced.
- (E) Geographic proximity must therefore be viewed in light of the impossibility of Shetland to cater for its own smolt requirements because (a) there is a lack of adequate freshwater resource and (b) even if there were not, the prospect of disease would present an insuperable obstacle.

2 FINANCIAL INTER-DEPENDENCY OF LANDCATCH AND THE SHETLAND SALMON INDUSTRY

(A) Besides Shetland being the major market for Landcatch (65% – 75% of its annual smolt production, including all production from the Island of Jura) **Landcatch ranks next to the major banks and Shetland Islands Council as the biggest provider of working capital to the Shetland salmon farming industry** providing over £2m of funding on average in each of the last three years in support of the industry. Since the establishment of the Shetland salmon farming industry in 1983 Landcatch has financed, and in certain instances still does, some of the most important salmon farming interests in Shetland. This has been done in a variety of ways which has changed from year to year. Examples are:-

i	Extended credit (most Shetland Smolt Customers)	£1 750 000	(1994)
ii	The supply of cages (G Johnson (Shetland) Ltd)	£690 000	(1992)
iii	Loans (Wast Banks Salmon Ltd)	£40 000	(1993)
iv	Contract Rearing Agreements (Punds Voe Salmon, Shetland Salmon Company)	£1 750 000	(1987–1994)
v	Crop Sharing Agreements (Shetland Atlantic Salmon)	£90 000	(1990–1991)
vi	Sea Site Lease (Vementry Salmon Ltd)	£12 000	(1994)

NOTE: These figures are the maximum amounts provided under each heading in the years specified.

Landcatch is therefore a major supporter of jobs in Shetland.

(B) Malakoff & Wm. Moore, a sister company of Landcatch (both subsidiaries of Lithgows Limited), employs more than 100 locally in Shetland involved in building supply boats and cages for the Shetland salmon farming industry. Malakoff also provides a full range of repair services to the Shetland fishing fleet and is the only company in Shetland with major slipping and drydock facilities.

Malakoff & Wm. Moore is therefore a major employer and supporter of the salmon farming and fishing industries in Shetland.

(C) Lithgows' turnover in Shetland through Landcatch and Malakoff & Wm. Moore has been approximately £6m per annum.

(D) Lithgows, through its subsidiary companies, is therefore a major employer and a major backer in the Shetland economy **thus clearly demonstrating the inter-dependency which has been built up over more than a decade.**