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REPORT OF THE SEVENTH INTERSESSIONAL WORKING GROUP

Prepared by the Chairman of the Working Group

1 Introduction

.1 The seventh Intersessional Working Group was established by the Assembly at its 16th session to examine the criteria for the admissibility of claims for compensation and the procedures to be applied by the IOPC Fund. The Working Group held two meetings, the first from 7 to 9 February 1994 and the second on 3 and 4 May 1994.

.2 In accordance with the decision of the Assembly, the Working Group was open to all Member States of the IOPC Fund. Furthermore, in accordance with that decision, all States and intergovernmental or international non-governmental organisations which had observer status with the IOPC Fund were invited as observers.

.3 The Working Group instructed its Chairman to submit to the Assembly a report of the Group's work and its conclusions. It should be noted that, whilst the Chairman's report has been prepared with the invaluable assistance of the Director and the Secretariat, the Chairman takes sole responsibility for the report, which is not binding upon the IOPC Fund.

.4 This report comprises a summary of the issues discussed and the conclusions drawn by the Working Group. It does not seek to be a transcript of the complex discussions which took place; the principal ideas, not all interventions, are presented. Annexed to the report (Annex I) is a document which endeavours to summarise the conclusions which the Chairman considers can be drawn from the discussions of the Working

Group. This Annex should be considered only in the light of the main document.

2 Participation

.1 The following Member States were represented:

Canada
Cyprus
Denmark
Finland
France
Gabon^{<2>}
Germany
Greece
Indonesia^{<1>}

Italy
Japan
Liberia^{<1>}
Netherlands
Nigeria
Norway
Poland
Republic of Korea
Russian Federation

Slovenia^{<1>}
Spain
Sri Lanka^{<1>}
Sweden
Tunisia^{<1>}
United Kingdom
Venezuela^{<1>}

- .2 The following non-Contracting States were represented as observers:

Belgium
Chile^{<1>}
China

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Ecuador<1>
Mexico<1>
Panama

Philippines^{<1>}
Saudi Arabia^{<1>}
United States

.3 The following inter-governmental organisations participated in the Working Group as observers:

International Maritime Organization (IMO)
United Nations Environment Programme (UNEP)^{<2>}

.4 The following international non-governmental organisations also participated in the Working Group as observers:

Baltic and International Maritime Council (BIMCO)
Comité Maritime International (CMI)
Cristal Ltd
Friends of the Earth International (FOEI)
International Chamber of Shipping (ICS)
International Group of P & I Clubs
International Tanker Owners Pollution Federation Ltd (ITOPF)
Oil Companies International Marine Forum (OCIMF)

3 Mandate

The mandate of the Working Group, as determined by the Assembly, was as follows (document FUND/A.16/32, paragraph 23.4):

- (a) to examine the general criteria for the admissibility of claims for compensation for "pollution damage" and "preventive measures" within the scope of the 1969 Civil Liability Convention and the 1971 Fund Convention and the 1992 Protocols thereto;
- (b) to study in particular problems relating to claims in respect of so-called "pure economic loss" and "preventive measures" taken to prevent or minimise pure economic loss;
- (c) to consider problems relating to the admissibility of claims for environmental damage within the scope of the definition of "pollution damage" referred to above; and

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- <1> Only present at the first meeting
 - <2> Only present at the second meeting

- (d) to study the procedures to be applied by the IOPC Fund in the assessment and settlement of claims.

4 Election of Chairman

The Working Group elected Mr C Coppolani (France) as its Chairman.

5 Documentation Examined by the Working Group

The Working Group based its deliberations on a number of documents prepared by the Director as well as on documents submitted by some Member States and some international non-governmental organisations. The documents are listed in Annex II.

6 Procedure Followed by the Chairman

.1 The conclusions of the Working Group which the Chairman presents to the Assembly were not adopted following a vote. The Chairman has considered that the Working Group's position can be identified where a clear majority of the delegations participating in the discussions spoke in favour of a position, even if differing views (which are nevertheless incorporated in this report) were voiced.

.2 In a few cases the Chairman has considered that it was not possible to draw any conclusion, since there was no clear majority in favour of one position or another. It should be noted, however, that in the great majority of issues examined, the Working Group was unanimous in its views.

7 Criteria for the Admissibility of Claims

.1 General Questions

.1 The Working Group held a general discussion based on the considerations set out in paragraphs 1-5 of document FUND/WGR.7/2.

.2 The Working Group emphasised that the IOPC Fund was operating within the framework of the 1969 Civil Liability Convention and the 1971 Fund Convention, and that the Working Group's examination should be carried out within the framework of that legal regime.

.3 The Working Group also emphasised that a uniform interpretation of the definition of "pollution damage" was essential for the functioning of the regime of compensation established by the Civil Liability Convention and the Fund Convention. It was considered important that there was consistency in the decisions taken by the Executive Committee regarding the payment of compensation arising from incidents in different Member States. The Working Group took the view that, for this reason, the IOPC Fund should be guided, when taking decisions on individual claims, by the criteria developed within the Fund concerning the admissibility of claims, on the basis of the interpretation of the definitions of the terms "pollution damage" and "preventive measures" as adopted by the Assembly or the Executive Committee. It was recognised, however, that it would not be realistic for the IOPC Fund, when negotiating out-of-court settlements, to disregard the position which the competent court might take with regard to whether or not the damage covered by the claims fell within the scope of the definition of "pollution damage". The point was made that, although the IOPC Fund was established to pay compensation to victims of oil pollution, it was important that the Fund should exercise a certain caution in accepting claims beyond those admissible under the general principles of law in Member States.

.4 The Working Group took the view that national courts should, when making decisions on the interpretation of the definitions of "pollution damage" and "preventive measures", take into account the fact that these definitions were laid down in international treaties. In this context it was argued by some delegations that the decisions taken by the IOPC Fund Assembly and Executive Committee should be considered as constituting agreements between the Parties to the Fund Convention on the interpretation of these definitions in accordance with Article 31.3(a) and (b) of the Vienna Convention on the Law of Treaties.

.5 The Italian delegation stated that it accepted the importance of a uniform application of the Conventions, but maintained that uniformity was appropriate only when the circumstances were the same. In the view of that delegation it was necessary to bear in mind that situations varied greatly from one country to another, and that some areas, such as the Mediterranean Sea, were more sensitive than others from an environmental point of view.

.2 Various Types of Claims for Compensation

.1 On the basis of document FUND/WGR.7/3, which contained a review of the decisions taken by the IOPC Fund during the period 1979 - 1993, the Working Group examined the policy developed by the Fund over the years in respect of the admissibility of claims for compensation. The Group discussed the various types of claim set out in that document.

.2 One delegation referred to the fact that the IOPC Fund Assembly and Executive Committee had, since the Fund's establishment in 1978, taken a number of important decisions on the admissibility of claims for compensation. That delegation stated that, although it had not always supported these decisions, it considered that the practice thus developed by the IOPC Fund should be maintained.

.3 It was stressed by the Chairman that the Working Group was not set up to rejudge past claims but to examine the policy that should be followed in the future.

.4 The Working Group endorsed in general the policy of the IOPC Fund as set out in document FUND/WGR.7/3, both as regards the general criteria for the admissibility of claims and as regards the criteria for the admissibility of various types of claim, subject to the observations reflected below.

Property Damage

.5 The Working Group considered that claims relating to property damage did not normally give rise to any legal issues. It was agreed that difficulties, if any, related to whether the alleged loss was actually caused by the oil in question and to the assessment of the quantum of the loss. In general the Working Group agreed with the criteria for the assessment of such claims which had been applied by the IOPC Fund so far, as set out in document FUND/WGR.7/3.

Clean-up Operations on Shore and at Sea

.6 The Working Group took the view that claims relating to the cost of clean-up operations on shore and at sea gave rise mainly to questions of a technical nature, such as whether certain operations were reasonable and how to assess the quantum of the claim. It was noted that clean-up operations could in most cases be considered as preventive measures.

Measures to Prevent Physical Damage

.7 The Working Group discussed the criteria which should be applied in order to determine whether claims relating to the cost of measures to prevent or minimise physical damage should be accepted. It was noted that "preventive measures" were defined in Article I.7 of the Civil Liability Convention as "any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage". It was agreed that the definition should be understood to require that the measures should be reasonable and that also the cost of the measures should be reasonable.

.8 The Working Group took the view that the question as to whether preventive measures should be considered as reasonable should be decided on the basis of objective criteria, in the light of all the circumstances of a particular case. It was considered that the fact that a government or other public body had decided to take certain measures did not in itself mean that the measures were reasonable for the purpose of the Conventions. It was generally felt that in making the assessment as to whether certain measures were reasonable, the starting point should be the facts available to the person in charge of the operation at the time the measures were decided, in the light of the technical advice given or offered at that time. It was maintained that this person should be required to reassess his decision in the light of developments and further technical advice. The Working Group considered that the fact that measures proved to be ineffective or that a decision was shown, with the benefit of hindsight, to have been incorrect, should not in itself be reason for rejecting a claim for the costs incurred. On the other hand, the point was made that claims for costs should not be accepted when it could have been foreseen that the measures taken would be ineffective or when the measures were instigated because it was felt necessary "to be seen to be doing something", although there was a considerable likelihood that they would be ineffective. It was thus considered that the cost of such measures should be admissible only if there was a reasonable prospect of the measures being successful.

.9 The Working Group expressed the view that there should be a reasonable relationship between the costs incurred and the benefits derived or reasonably expected. It was agreed that the scale of the response should be proportional to the size of the spill, the expected level of success and the ability to direct and control the operations effectively. It was also emphasised that in assessing whether certain measures were reasonable, due account should be taken of the particular situation in which they were taken, as well as of any alternative measures available. The point was made that it would be appropriate also to take into account whether the area or resource to be protected by the measures was particularly sensitive from an environmental point of view. It was generally felt that consideration should be given to the implications and repercussions of the preventive measures themselves, ie whether the measures were likely to cause further damage and, if so, the extent of such damage.

.10 One delegation took the view that, in assessing whether the criterion of reasonableness was fulfilled, account should be taken of the particular geographical circumstances of the case. That delegation emphasised that it was not acceptable to base the decision as to admissibility on a cost benefit analysis.

Fixed Costs

.11 The Working Group discussed the question of the admissibility of claims relating to so-called "fixed costs", ie claims submitted by public authorities carrying out clean-up operations or preventive measures for costs which would have arisen for the authorities concerned even if the incident had not occurred (eg normal salaries for permanently employed personnel), as distinguished from additional costs, ie costs incurred solely as a result of the incident which would not have been incurred had the incident and the related operations not taken place.

.12 It was recalled that the admissibility of claims relating to fixed costs had been examined in 1980 by the 5th Intersessional Working Group. It was noted that the Working Group had - though not unanimously - taken the view that a reasonable proportion of fixed costs were admissible, viz those expenses which corresponded closely to the clean-up period in question and which did not include remote overhead charges. It was also recalled that the Assembly had, at its 4th session, generally endorsed the results of the Working Group's discussions, but that the Japanese delegation had reserved its position as to the relationship between fixed and additional costs. It was finally noted that the Executive Committee had repeatedly stressed the necessity of a restrictive approach to fixed costs, and that the Assembly had taken the same position.

.13 The delegation of Japan stated that, although the Japanese delegation had previously reserved its position on this point, that delegation had accepted the policy developed by the Fund in this regard. The Japanese delegation mentioned that no fixed costs were included in any claims presented by Japanese authorities.

.14 The United Kingdom delegation expressed its concern that the present policy of the IOPC Fund might discourage States from maintaining an effective response capability. The delegation proposed that the IOPC Fund should review its policy towards payments to governments for fixed costs in respect of oil spill response resources. In the view of that delegation, the IOPC Fund should contribute a small amount towards the standing costs of maintaining facilities for pollution prevention and clean-up, to promote the improvement of facilities to combat oil spills throughout the world. It was emphasised by that delegation that it did not propose that the IOPC Fund should pay for the entire costs of such facilities, but that its payments should be increased in order to reflect better the value of effective response action for the Fund, as a means of reducing claims against the Fund.

.15 Some delegations agreed with the United Kingdom delegation that the present policy of the IOPC Fund was too restrictive in respect of compensation for fixed costs. It was recognised by these delegations, however, that it would be difficult to establish criteria for determining what proportion of costs for the maintenance of response facilities should be admissible.

.16 A number of delegations took the view that the present policy of the IOPC Fund, which was a compromise arrived at in 1980 by the 5th Intersessional Working Group and endorsed by the Assembly, was a reasonable and balanced solution and that the IOPC Fund's policy should therefore be maintained. It was also pointed out that under the Civil Liability Convention and the Fund Convention the IOPC Fund could pay compensation only for costs incurred after an oil spill had occurred and that the Conventions did not allow compensation to be paid for general measures taken by public authorities to maintain facilities for pollution prevention and clean-up. It was stated that States had an obligation under the 1990 Convention on Oil Spill Preparedness, Response and Co-operation to maintain an oil combatting capability and that the IOPC Fund should not pay States to enable them to fulfil this obligation or to solve budgetary problems. It was also observed that if the IOPC Fund were to pay compensation in the form of a "reward" to States maintaining a good response capacity this would result in injustice, since only States affected by incidents involving the Fund would get such a reward. It was pointed out that the response capability was also used for purposes other than combatting oil spills.

.17 The Working Group noted that there was not a majority in the Group for amending the existing Fund policy, namely that a reasonable proportion of fixed costs was admissible, provided that such costs corresponded closely to the clean-up period in question and did not include remote overhead charges. It was also noted that the proportion of fixed costs payable by the IOPC Fund had to be assessed in the light of the circumstances of the particular incident.

Consequential Loss and Pure Economic Loss

.18 The Working Group considered the IOPC Fund's policy in respect of claims relating to consequential economic loss, ie loss of earnings suffered by the owners or users of property which had been contaminated as a result of an oil spill. It also examined whether and to what extent compensation should be granted for so-called "pure economic loss", ie loss of earnings sustained by persons whose property had not been polluted but who had nevertheless suffered economic loss as a result of an incident.

.19 It was noted that in many cases there was not a clear borderline between consequential economic loss and pure economic loss. It was also recognised that many jurisdictions did not distinguish between these two types of damage. It was accepted, therefore, that the terms were used to assist discussion in the Working Group, rather than as legal distinctions.

.20 In respect of consequential economic loss, the Working Group endorsed the IOPC Fund's policy that such losses should in principle be accepted. It was noted that in most jurisdictions the legal situation was clear as regards economic loss as a consequence of the contamination of property. In respect of loss suffered as a consequence of an infringement of a right other than of property, it was accepted that the recognition of such rights varied from one jurisdiction to another. It was felt, however, that this difference might not be so essential in practice, since solutions could be found within the field of pure economic loss.

.21 As for pure economic loss, the Working Group took the view that the point of departure must be the concept of "loss or damage caused by contamination" laid down in the Civil Liability Convention, ie that the starting point should be the pollution rather than the incident itself. There was general agreement that in principle claims for pure economic loss were acceptable, but that a line had to be drawn between admissible and non-admissible claims. It was also generally felt that there must be a link of causation between the contamination and the loss or damage. It was agreed that attempts should be made to lay down certain criteria in order to establish whether the requirement as to the link of causation was fulfilled. The point was made that in order to be compensated the damage should in any event be certain and quantifiable in economic terms.

.22 The Working Group noted that in some countries the courts applied the criteria of foreseeability and remoteness, or that of proximate cause, or required that the economic loss should be a direct result of the defendant's action, whereas in other jurisdictions there had to be a direct link of causation between the damage and the defendant's action, and the damage had to be certain and quantifiable in monetary terms. The Working Group took note of the fact that in some jurisdictions a claim for pure economic loss was admitted if the claimant had a licence to carry out the activity in which the loss was suffered, or if the loss was sustained in an established trade. Some delegations held the view that compensation should not be paid in respect of activities which were illegal.

.23 Some delegations pointed out that in developing countries fishing activities were often carried out on the basis of local custom rather than legal rights, and that the right to compensation for pollution damage for persons involved in such activities should be safeguarded.

.24 The Working Group recognised that it would be difficult to develop general criteria for the admissibility of claims for pure economic loss, since such criteria should meet various requirements. It was considered that the criteria should contribute to consistency in the IOPC Fund's decisions as to the admissibility of claims, enabling claimants to foresee with some degree of certainty whether a particular claim would be admissible. It was argued that, for this reason, vague and abstract criteria would be of very limited value. On the other hand, it was felt that the criteria should allow a certain flexibility, enabling the IOPC Fund to take into account new situations and new types of claim. The point was also made that it was desirable that the criteria were expressed in a language which was understandable to potential claimants. It was suggested that any such criteria should be elaborated in the light of the IOPC Fund's experience as set out in document FUND/WGR.7/3 and the practical experience of ITOPF (document FUND/WGR.7/9/2). The Committee also took note of the documents presented by the French delegation (FUND/WGr.7/6/Add.1), the United Kingdom delegation (FUND/WGR.7/8), the Swedish delegation (FUND/WGR.7/16), CMI (FUND/WGR.7/17) and the International Group of P & I Clubs (FUND/WGR.7/18).

.25 The Working Group took the view that each claim for pure economic loss should be considered on its own merits in the light of the particular circumstances of the case. It was nevertheless generally considered that it would be useful to develop some criteria for the admissibility of such claims.

.26 It was generally agreed that a claim for compensation would not be admissible on the sole criterion that the loss or damage would not have occurred but for the oil spill in question. The question was raised as to how many links in the chain of events should be allowed for a claim still to be admissible. Several delegations took the view that only one link in the chain of events should be allowed.

.27 The point was made that if the IOPC Fund were to decide to make compensation available to too wide a spectrum of claims, this would have the result that, in cases where the total amount of the established claims exceeded the maximum amount available under the Civil Liability Convention and the Fund Convention, the victims most directly affected by the spill would have their compensation reduced pursuant to Article 4.5 of the Fund Convention.

.28 The Italian delegation expressed the view that the decisive criterion should be whether there was a reasonable link of causation between the incident and the pure economic loss covered by the claim. The question was raised by that delegation of what events should break the link of causation. It stated that in respect of all types of claim it should be required that the damage was certain, but that a claim should not necessarily be rejected because it was impossible or difficult to prove the quantum of the loss. The Italian delegation also stated that it did not agree with all the decisions taken by the IOPC Fund in respect of claims for pure economic loss.

.29 The Working Group agreed that in order for a claim to qualify for compensation the basic criterion should be that there was a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant.

.30 The Working Group took the view that, when considering whether the criterion of reasonable proximity was fulfilled, the following elements should be taken into account:

- ?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's business formed an integral part of the economic activity within the area affected by the spill

.31 The Working Group considered that account should also be taken of the extent to which a claimant could mitigate his loss.

.32 The Working Group emphasised that in the application of the criteria laid down in paragraphs 7.2.29-7.2.31 each claim should be considered on its own merits in the light of the particular circumstances of the case. It was also agreed that the IOPC Fund should maintain a certain flexibility enabling it to take into account new situations and new types of claims.

Establishing the Quantum of Losses Sustained

.33 The Working Group endorsed the policy followed by the IOPC Fund that a claimant had to substantiate his loss. It was recognised, however, that in many countries, in particular in developing countries, it would be very difficult and sometimes impossible for claimants to present appropriate documentation to substantiate their claims. The Working Group took the view that the requirements as to supporting documentation would have to be adapted to what could reasonably be expected of a claimant in the country concerned.

Measures to Prevent Pure Economic Loss

.34 It was noted that the IOPC Fund had since its establishment accepted claims relating to the cost of physical operations to prevent or minimise pollution damage, such as deploying booms and spraying dispersants. It was recalled that in some recent cases, claims had been submitted in respect of the cost of activities to prevent or minimise pure economic loss, such as tourism promotion and the marketing of fish products. The Working Group noted the statement made by the Executive Committee that it was likely that the drafters of the Civil Liability Convention had not foreseen that activities of this kind should fall within the definition of "preventive measures". The Working Group took note of the fact that the Committee had accepted that "preventive measures" were defined as "any reasonable measures taken by any person to prevent or minimize pollution damage" and that this definition did not distinguish between various types of pollution damage.

.35 It was recalled that the Executive Committee had taken the position that measures to prevent or minimise pure economic loss which would fall within the definition of "pollution damage" as interpreted by the IOPC Fund should be considered as preventive measures, provided that they fulfilled the following requirements:

- ? the costs of the proposed measures were reasonable;
- ? the costs of the measures were not disproportionate to the further damage or loss which they were intended to mitigate;
- ? the measures were appropriate and offered a reasonable prospect of being successful; and
- ? in the case of a marketing campaign, the measures related to actual targeted markets.

.36 The Working Group took note of the review of the IOPC Fund's decisions in respect of preventive measures of an abstract nature, as set out in paragraphs 3.2.1-3.2.4 of document FUND/WGR.7/3. It was noted that the approach taken by the IOPC Fund in this regard had an innovative character. It was also noted that this issue had been dealt with in documents presented by the French delegation (FUND/WGR.7/6/Add.1), the United Kingdom delegation (FUND/WGR.7/8), ITOPF (FUND/WGR.7/9/2), CMI (FUND/WGR.7/17) and the International Group of P & I Clubs (FUND/WGR.7/18).

.37 The Working Group agreed with the criteria adopted by the Executive Committee as set out in paragraph 7.2.35 above in respect of the admissibility of claims relating to measures to prevent or minimise pure economic loss. It was emphasised that in order to be admissible the costs should relate to measures undertaken to prevent or minimise losses which, if sustained, would qualify for compensation under the Civil Liability Convention and the Fund Convention.

.38 As regards measures relating to marketing campaigns or similar activities, the Working Group took the view that the cost of such measures should be accepted only if the measures taken were in addition to measures normally carried out for this purpose. It was thus agreed that compensation should be granted only for the additional costs resulting from the need to counteract the negative effects of the pollution. It was noted that a promotion or marketing campaign would have an impact on aspects other than those affected by the pollution and that it was important that any compensation paid should be restricted to counteracting the effects of pollution damage.

.39 One delegation took the view that it was necessary, when considering claims relating to tourism campaigns, to look beyond the individual claims and consider the effects of the incident on the whole region affected by the spill.

.40 The question was raised whether the fact that the cost of the measures had been paid from funds allocated in the claimant's normal budget should result in a claim for compensation being rejected. The Working Group noted that the Executive Committee had in the HAVEN case rejected a claim of this type on the ground that only funds already allocated in the budget for tourism promotion had been used and no actual economic loss had been suffered or additional expenses incurred. Several delegations took the view that the origin of the funds used was of little importance and that the question should be whether the incident had made it necessary for the measures to have been taken. It was felt by some delegations that compensation should be granted if a public authority could demonstrate that, because certain activities had been carried out to counteract the negative effects of the pollution, the authority had been unable to undertake other marketing measures which normally would have been carried out. The Chairman proposes that the Assembly should consider this matter and, in particular, whether such claims should be rejected on the sole ground that the claimant's budget contained an appropriation for tourism promotion.

.41 The Working Group discussed the criteria that the measures should be reasonable and that they should offer a reasonable prospect of success. It was agreed that the measures must be reasonable in the light of the particular circumstances of the case and taking into account the interests involved. The Working Group expressed the view that the IOPC Fund should take its decision on the basis of the facts known at the time that the measures were taken, independent of whether or not the measures were in fact successful. It was noted that these were the criteria applied by the IOPC Fund in respect of preventive measures relating to physical operations. It was recognised, however, that it was difficult or impossible to assess the effects of abstract preventive measures and that this was particularly so in the case of the promotion of services such as tourism.

.42 As for the requirement that a marketing campaign should relate to actual targeted markets, several delegations stated that it was necessary to reject measures of too general a nature. It was argued that, since the issue was how to repair the damage caused, it would be appropriate to direct a campaign towards existing clients or particular clients lost as a result of an incident.

.43 The Working Group also discussed whether claims of this type should not be accepted by the IOPC Fund until the activities had been carried out and the results could be assessed, or whether the Fund should agree to pay for a proposed programme of such activities. It was noted that the Executive Committee had decided that, in principle, the IOPC Fund should not consider such claims until the activities had been carried out. The Working Group took note of the fact that the claimant in many cases did not have sufficient economic resources to carry out such activities unless the IOPC Fund made funds available and that in respect of one incident the Executive Committee had authorised the Director to make advance payments for marketing campaigns up to a certain maximum amount. It was noted that the Executive Committee had decided that the IOPC Fund should take a cautious approach in respect of advance payments and that the Fund should not take the role of the claimant's bankers.

.44 The Working Group agreed with the policy adopted by the Executive Committee with regard to advance payments for marketing campaigns and similar activities as set out in paragraph 7.2.43.

.45 It was recognised that negative publicity was on occasions created by the victims themselves (grouped or individually). It was maintained that this could be considered "contributory negligence" on the part of these victims. The Working Group expressed the view that when considering whether the IOPC Fund should pay the cost of marketing activities planned by an organisation, it was appropriate to take into account the attitude taken by the organisation in its contacts with the media after the incident and, in particular, whether that attitude had increased the negative effects of the pollution.

Employer/Employee Questions

.46 The Working Group considered whether and, if so, to what extent the IOPC Fund should pay compensation for loss of income suffered by employees in certain sea-related activities who had been made redundant or put on part-time work as a result of an oil pollution incident. The Group also addressed the situation where employers in sea-related activities maintained their work force, although there was either insufficient work to keep the employees occupied or no work at all for many months; the question was whether, in such cases, in the assessment of compensation to the employer, deductions should be made for salaries paid to such employees. It was noted that these issues had been addressed in documents presented by the French delegation (FUND/WGR.7/6/Add.1), the Spanish delegation (FUND/WGR.7/7), the United Kingdom delegation (FUND/WGR.7/8 and FUND/WGR.7/20/1), the Director (FUND/WGR.7/12) and the International Group of P & I Clubs (FUND/WGR.7/18).

.47 The Working Group recalled that the Executive Committee had considered claims by salmon farmers in the BRAER case who were unable to harvest their fish and had maintained their workforce although there was either insufficient work to keep the employers fully occupied or no work at all for many months. It was noted that the Executive Committee had taken the view that the damage suffered by these salmon farmers related to damage to property and that it would be for the individual salmon farmer to decide whether or not to retain his staff without this having any impact on the amount of compensation available.

.48 As regards claims submitted in the BRAER case by fish processors in similar situations, it was recalled that the Executive Committee had decided that, when examining whether deductions should be made for salaries to the employees who were retained, each claim would have to be considered on its own merits in the light of the circumstances of the individual claimant. It was noted that the Executive Committee had taken the view that the decision should be based on whether or not the claimant had acted reasonably in the circumstances vis-a-vis the following criteria:

- ? what would have been the cost of redundancy payments?
- ? what would be the cost of re-employing staff?
- ? for how long would there be insufficient work?
- ? what would be the difficulties in re-employing suitable staff?
- ? what damage would be done to the claimant's reputation as a responsible employer if employees were made redundant?
- ? what difficulties would there be for those made redundant in finding new employment?

.49 The Working Group agreed with the position taken by the Executive Committee in the cases of the employers referred to in paragraphs 7.2.47 and 7.2.48 above.

.50 The Working Group also recalled that, as regards claims for loss of income submitted by employees in certain sea-related activities who had been made redundant, the Executive Committee had taken the view that losses suffered by such employees were a more indirect result of the contamination than losses suffered by companies or the self-employed, since the losses of employees were the result of their employers having been affected by the consequences of a spill and therefore deciding to reduce their workforce; the losses suffered by such employees were one step more remote than losses suffered by fish processors. It was noted that the Executive Committee had concluded that such losses could not be considered as "damage by contamination" and therefore did not fall within the definition of "pollution damage".

.51 It was noted that, at a later Executive Committee session, some delegations had observed that the position taken by the Committee as set out in paragraph 7.2.50 above was an unfortunate decision concerning the "weakest in society", and that it was not appropriate to make such a distinction between employees, on the one hand, and companies or the self-employed, on the other. It was recalled that the Committee had decided that it would reconsider the matter if new evidence or facts were presented to justify re-examination.

.52 Several delegations took the view that employees who had been made redundant as a result of an oil spill should in principle be entitled to compensation for the loss incurred. It was argued that the decisive criterion should be whether the activity in question had been affected by the spill, regardless of the corporate structure of the activity. It was pointed out by these delegations that if an employer laid off staff, thereby reducing his loss, the loss did not disappear but was transferred to the persons who were made redundant. Some delegations maintained that the employer's action to lay off his staff should be considered as measures taken to minimise his loss and that the loss suffered by the employees should therefore be considered as "loss or damage caused by preventive measures" which would qualify for compensation under Article I.6 of the Civil Liability Convention. These delegations recognised that an acceptance of claims of this type would give rise to difficult questions of how to assess the losses and what should be the limit of the IOPC Fund's obligation to pay compensation in such cases. In the view of these delegations, difficulties of this type which were of a practical nature should not be an obstacle to these claims being accepted in principle. These delegations accepted that the IOPC Fund could not pay compensation to such employees for an indefinite period of time.

.53 A number of delegations supported the position taken by the Executive Committee and maintained that claims of this type should be rejected since the losses suffered by the employees were a more indirect result of the contamination than the losses suffered by companies or the self-employed.

.54 Some delegations expressed the view that the IOPC Fund should take a flexible approach to claims for losses suffered by employees who had been made redundant and that such claims should be decided on a case by case basis, in the light of the circumstances of the particular claimant.

.55 It was noted that there was a diversity of opinions within the Working Group in respect of whether the IOPC Fund should pay compensation for loss of income to employees who had been made redundant as a result of an oil spill. The Working Group considered, therefore, that the matter should be referred to the Assembly for decision.

.56 The Working Group recognised that if the IOPC Fund were to accept in principle claims by employees of the type discussed above, several additional questions would have to be addressed, namely:

?which groups of employees would be entitled to compensation?

?for what period of time would compensation be payable?

? what would be the relationship between social security systems and compensation under the Civil Liability Convention and the Fund Convention?

.57 Some delegations made the point that social security payments were not recoverable from the IOPC Fund.

.3 Environmental Damage

.1 The Working Group considered certain issues relating to the admissibility of claims for environmental damage within the scope of the definition of "pollution damage" in the 1969 Civil Liability Convention, the 1971 Fund Convention and the 1992 Protocols thereto. The discussions took place on the basis of documents presented by the Director (FUND/WGR.7/4), the French delegation (FUND/WGR.7/6/Add.2), the United Kingdom delegation (FUND/WGR.7/8) and ITOFF (FUND/WGR.7/9/3).

.2 The Working Group took note of the Resolution adopted by the IOPC Fund Assembly in 1980 (Resolution N°3) which stated that "the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models". It noted that the 5th Intersessional Working Group established by the Assembly had taken the view that compensation could be granted only if a claimant who had a legal right to claim under national law had suffered quantifiable economic loss. It was also noted that the position taken by that Working Group had been endorsed by the Assembly at its 4th and 12th sessions.

.3 The Working Group noted that the definition of "pollution damage" in the 1992 Protocol to the 1969 Civil Liability Convention contained a proviso to the effect that claims relating to impairment of the marine environment per se were not admissible, but that reasonable costs incurred in reinstating the marine environment after a pollution incident were in principle admissible under the 1992 Protocols to the Civil Liability Convention and the Fund Convention.

.4 One delegation stated that the aim of the 1969 Civil Liability Convention and the 1971 Fund Convention was to ensure that victims were not financially worse off as a result of an oil spill.

.5 The Working Group took note of the Director's assessment of the IOPC Fund's position in respect of the admissibility of claims relating to damage to the marine environment (document FUND/WGR.7/4, paragraph 7.1), as set out below:

(a) The IOPC Fund accepts claims which, in accordance with the terminology used in document FUND/WGR.7/4^{<1>}, relate to "quantifiable elements" of damage to the marine environment, for example:

(i) reasonable costs of reinstatement of the damaged environment; and

(ii) loss of profit (income, revenue) resulting from damage to the marine environment suffered by persons who depend directly on earnings from coastal or sea-related activities, eg loss of earnings suffered by fishermen or by hoteliers and restaurateurs at seaside resorts.

(b) (i) The IOPC Fund has consistently taken the position that claims relating to unquantifiable elements of damage to the marine environment cannot be admitted.

(ii) The Assembly has rejected claims for compensation for damage to the marine environment calculated on the basis of theoretical models.

(iii) Compensation can be granted only if a claimant has suffered quantifiable economic loss.

(c) (i) Damages of a punitive character, calculated on the basis of the degree of the fault of the wrong-doer and/or the profit earned by the wrong-doer, are not admissible.

(ii) Criminal and civil penalties for oil pollution from ships do not constitute compensation and do not therefore fall within the scope of the Civil Liability Convention and the Fund Convention.

.6 All but one of the delegations participating in the discussions took the view that the IOPC Fund should maintain its position that claims relating to impairment of the environment should be accepted only if the claimant had sustained a quantifiable economic loss, and that the loss must be such that it could be quantified in monetary terms.

¹

For the purpose of that document, the expression "quantifiable elements" was taken to mean damage to the environment in respect of which the value of the damage can be assessed in terms of market prices; the expression "non-quantifiable elements" was taken to mean damage in respect of which the quantum of the damage cannot be assessed according to market prices.

.7 It was maintained by several delegations that the policy adopted by the Assembly constituted an agreement between Member States on the interpretation of the Fund Convention in accordance with Article 31.3(a) and (b) of the Vienna Convention on the Law of Treaties.

.8 In this regard, the Italian delegation stated that it could not agree with the consequences of Resolution N°3 as interpreted by the IOPC Fund. That delegation indicated that in its view claims relating to impairment of the environment should be admissible, and that it could not accept that such claims should be rejected because the damage resulting from such impairment was not directly and easily quantifiable.

.9 The observer delegation of Friends of the Earth International (FOEI) did not agree with the restrictive approach taken by the IOPC Fund in respect of environmental damage.

.10 All but one of the delegations which participated in the discussion of this issue generally favoured a rapid entry into force of the 1992 Protocols. One delegation stated that if one wanted to take a wider approach concerning compensation for damage to the environment than the 1992 Protocols allowed, solutions had to be found in other legal instruments.

.11 The Italian delegation stated that, for the same reason that it did not accept the consequences of Resolution N°3, it could not accept the definition of "pollution damage" laid down in the 1992 Protocol to the Civil Liability Convention and that Italy would therefore not ratify the 1992 Protocols.

.12 The Working Group examined in particular the part of the definition of "pollution damage" in the 1992 Protocol to the Civil Liability Convention which dealt with measures of reinstatement, and took note of documents dealing with this issue presented by the Director (FUND/WGR.7/2, FUND/WGR.7/4 and FUND/WGR.7/13), the French delegation (FUND/WGR.7/6/Add.2), the United Kingdom delegation (FUND/WGR.7/8) and ITOFF (FUND/WGR.7/9/3).

.13 The Working Group recognised the importance of environmental issues in general and of the need for measures to be taken to reinstate the environment after certain oil spills. It was generally accepted that the question as to whether the IOPC Fund should pay compensation for the costs of measures to reinstate the marine environment would have to be decided on the basis of the definition of "pollution damage" laid down in the 1992 Protocol to the Civil Liability Convention, viz that the compensation should be limited to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken. It was agreed that the test of reasonableness should be an objective one, ie that the measures should be reasonable from an objective point of view in the light of the information available when the specific measures were taken. It was also noted that the word "actually" in the text of the Protocol referred not only to "undertaken" but also to the expression "to be undertaken". It was considered that payment for reinstatement measures not yet undertaken should be made by the IOPC Fund only if the claimant was unable to finance them and that the claimant would have to present detailed plans of the measures to be undertaken before any payments could be made.

.14 The observer delegation of FOEI spoke in favour of a very wide acceptance of costs for reinstatement, which should include costs for restoration, rehabilitation, replacement and acquisition of equivalent resources.

.15 The Working Group noted the point made by the Director that a major oil spill would in most cases not cause permanent damage to the environment, that the marine environment had a great potential for natural recovery and that there were limits to what man could actually do in taking measures to improve on the natural process.

.16 The Working Group agreed that in order to be admissible for compensation measures for reinstatement of the environment would have to fulfil the following criteria:

?the cost of the measures should be reasonable;

- ? the cost of the measures should not be disproportionate to the results achieved or the results which could reasonably be expected; and
?the measures should be appropriate and offer a reasonable prospect of success.

.17 The Working Group considered that it would normally be necessary to carry out an in-depth study before any measures for reinstatement were undertaken. As for the discussion of this issue, reference is made to Section 9 below.

.18 The Working Group took the view that the admissibility of claims relating to costs for reinstatement of the environment would have to be kept under review by the IOPC Fund.

8 Procedures Applied by the IOPC Fund in the Assessment and Settlement of Claims

.1 General Considerations

.1 The Working Group based its discussion of the procedures to be applied by the IOPC Fund in the assessment and settlement of claims on a document submitted by the Director which dealt with a number of issues relating to such procedures (document FUND/WGR.7/14). The Group also took into account a document presented by the French delegation (FUND/WGR.7/6/Add.3) and documents submitted by the United Kingdom delegation (FUND/WGR.7/8, FUND/WGR.7/20/3 and FUND/WGR.7/20/4).

.2 The Working Group agreed in general with the procedures developed by the IOPC Fund over the years for the assessment and settlement of claims, as set out in document FUND/WGR.7/14. The Group took the view that it was important that the IOPC Fund continued to take a flexible approach in respect of claims handling procedures, so that they could be adapted to the particular circumstances of the case. It was emphasised that the IOPC Fund's objective should - as in the past - be the prompt out-of-court settlement of claims.

.2 Notification of Incidents to the IOPC Fund

The Working Group noted that the IOPC Fund sometimes was not informed immediately of new incidents in which it might become involved. It recalled that the Assembly had at its 9th session drawn the attention of Governments of Member States and other parties concerned (such as the authorities responsible for clean-up operations, shipowners and P & I Clubs) to the importance of the IOPC Fund being informed as soon as possible of any new incident in respect of which it would have to pay compensation or indemnification, or in respect of which there was a real possibility that the IOPC Fund might have to make such payments (document FUND/A.9/18, paragraph 20.1). The Working Group took the view that experience had shown the importance of the IOPC Fund being informed promptly of any such incidents.

.3 Co-operation with P & I Clubs

The Working Group took note of the fact that the IOPC Fund had over the years co-operated closely with insurer of the shipowner's third party liability (normally one of the P & I Clubs) in its claims settlement procedures, in accordance with the Memorandum of Understanding signed in 1980 by the International Group of P & I Clubs and the IOPC Fund and the Memorandum signed in 1985 by the Japan Ship Owners' Mutual Protection and Indemnity Association (JPIA) and the IOPC Fund. The Working Group agreed with the Director that the co-operation between the P & I Clubs and the IOPC Fund had proved to be extremely valuable.

.4 Claims Handling Procedures

.1 The Working Group took note of the information contained in document FUND/WGR.7/14 on the use of experts by the IOPC Fund and matters relating thereto. The policy applied by the IOPC Fund was endorsed by the Working Group. The Group stressed the importance that experts attended the site of a spill as soon as possible, that they were allowed to follow any operations, that they were given access to information relating to the incident by the authorities involved, and that discussions took place between the competent authorities and these experts. It was generally agreed that there was great value in the use of the experts of ITOPF and that it was advantageous if the P & I Club and the IOPC Fund could use joint experts, provided that there was no conflict of interest or no potential conflict of interest between the Club and the Fund in the particular case. The Working Group took the view that the IOPC Fund should use the most appropriate experts for any aspect of a case.

.2 The Working Group noted that the role of the technical experts used by the IOPC Fund, such as those of ITOPF, was to provide objective technical advice and assistance to those in charge of the clean-up operations, with the aim of mitigating any damage caused by the spill, and that these experts were frequently called upon to assess the extent of damage at the time of the spill. It was also noted that such experts regularly undertook to assess on behalf of the IOPC Fund the technical merits of the claims for compensation for both clean-up measures and damage.

.3 The Working Group noted the Director's statement in document FUND/WGR.7/14 that he was considering whether it might be appropriate, in the light of developments in recent years, to review the position taken in 1978 that the number of cases involving the payment of compensation under the Fund Convention would probably be insufficient to justify the IOPC Fund having its own technical experts.

.4 The Working Group noted that, in order to assist claimants, the Director intended to revise and expand the IOPC Fund's Claims Manual in the light of the Working Group's Report to the Assembly and any ensuing Assembly decisions.

.5 It was recalled that in two recent cases giving rise to a very large number of claims, namely the AEGEAN SEA and BRAER incidents, Local Claims Offices had been established in co-operation with the P & I Club concerned in La Coruña (Spain) and in Lerwick, Shetland (United Kingdom). It was noted that the role of the Local Claims Offices had been to assist claimants to present their claims, to make a preliminary examination of the claims and to submit the claims to the Director and the P & I Club for a decision on their admissibility. The Working Group agreed with the Director that the experience gained from the use of Local Claims Offices in these cases was very good. The Working Group recognised that the question as to whether or not a Local Claims Office should be established and, if so, how it should operate, would have to be considered in the light of the particular circumstances of the case and the situation in the country concerned.

.6 The Working Group noted the statement by the Director that no decisions on whether to accept or reject a claim had been taken by the Local Claims Offices and that these decisions had always been made by the Director in consultation with the P & I Club. The Working Group agreed that this was the correct procedure.

.7 The Working Group also took note of the fact that methods other than that of establishing a Local Claims Office had been used in some cases which had given rise to large number of claims, for example by employing local marine surveying firms to co-ordinate claims, carry out preliminary examinations and submit recommendations to the IOPC Fund and the P & I Club. The Working Group took note of the fact that these firms had, to a large extent, carried out the same tasks as a Local Claims Office would have undertaken.

.5 Risk of Over Payment by the IOPC Fund

.1 The Working Group noted that in cases where the amounts claimed exceeded the total amount

available under the Civil Liability Convention and the Fund Convention (60 million SDR or approximately 757 million), or where there was a risk that the amounts claimed would exceed that limit, the IOPC Fund had to take measures to ensure that all claimants were treated equally, in accordance with Article 4.5 of the Fund Convention. It was also noted that in some recent cases where the total amount claimed greatly exceeded the maximum cover under the Conventions, the Executive Committee had instructed the Director that the IOPC Fund should, for the time being, make only partial payments in respect of accepted claims, up to a certain percentage of any amounts approved.

.6 Relationship Between Compensation and Recourse Action

.1 The Working Group considered the relationship between compensation and recourse action. The Working Group agreed with the policy applied so far by the IOPC Fund, following a decision in the context of the TANIO case, namely that the fact that legal action had been taken by victims against other parties did not necessarily mean that no compensation would be paid by the IOPC Fund before this action was completed.

.2 It was also noted that the Executive Committee had taken the position that, except in collision cases, the IOPC Fund should only take recourse action in cases where there were very strong reasons for taking such actions and where, in addition, there was a considerable likelihood of success (document FUND/EXC.20/6, paragraph 4.2).

.7 Director's Authority to Settle Claims

The Working Group took note of the information contained in paragraph 7 of document FUND/WGR.7/14 concerning the Director's authority to settle claims for compensation. The Group agreed with the Director that no amendments to the provisions in the Internal Regulations in this regard should be made for the time being, but that this issue should be considered in the context of the preparations for the entry into force of the 1992 Protocol to the Fund Convention.

.8 Consideration of Claims by the Executive Committee

The Working Group took note of the contents of paragraph 8 of document FUND/WGR.7/14 dealing with the consideration of claims by the Executive Committee. The Group agreed with the Director that the working methods of the Executive Committee would best be considered within the framework of the preparations for the entry into force of the 1992 Protocol to the Fund Convention.

.9 Legal Action Against the IOPC Fund

The Working Group agreed that the fact that legal action had been taken by victims in a particular case should not necessarily result in the IOPC Fund withdrawing from negotiations for the purpose of reaching out-of-court settlements.

.10 Limitation Proceedings

The Working Group considered various issues relating to limitation proceedings, as set out in paragraph 11 of document FUND/WGR.7/14. The Group agreed with the policy which had been applied by the IOPC Fund so far in respect of limitation proceedings. In particular, the Working Group emphasised the importance that limitation proceedings did not unduly delay the payment of compensation to victims.

.11 Contamination of Fish and Shellfish, and Issues Relating to Sampling

.1 On the basis of document FUND/WGR.7/15 submitted by the Director, the Working Group considered the problems relating to the contamination of farmed fish and shellfish in relation to the sampling and technical requirements to assess claims for compensation for destroyed fish.

.2 The Working Group recalled that, following the AEGEAN SEA and BRAER incidents, the Executive Committee had examined the question of the admissibility of claims for compensation based on the destruction of farmed fish or shellfish as a result of orders issued by public authorities in the form of fishing bans and exclusion zones. It was noted that according to the Committee, the fact that a government had imposed a fishing ban or exclusion zone should not be regarded as conclusive. The Executive Committee had taken the view that such claims should be admissible if and to the extent that:

? the destruction of the produce was reasonable on the basis of scientific and other evidence available

.3 It was also recalled that the Executive Committee had stated that the following aspects should be taken into account when assessing whether the destruction of the produce was reasonable, ie whether:

? the produce was contaminated

? it was likely that the contamination would disappear before the normal harvesting time

? the retention of the produce in the water would prevent further production

? it was likely that the produce would be marketable at the time of normal harvesting

.4 Several delegations agreed with the Director's analysis of the situation as set out in document FUND/WGR.7/15. Other delegations stated that although they to a large extent accepted the analysis they had not had the possibility of consulting the appropriate experts in order to take a more definite position. One delegation drew attention to the fact that protection of health was in its country the statutory responsibility of the Government and that the Government's decision would have to be taken on the basis of reasonableness.

.5 In conclusion, the Working Group agreed that, as decided by the Executive Committee, the decisive criteria would be whether the destruction of the produce was reasonable, on the basis of scientific and other evidence available, and that the aspects set out in paragraph 8.11.3 should be taken into account in assessing whether the destruction of the produce was reasonable. For this reason, it would in the Working Group's view be important that sampling and testing were carried out, in particular that testing for taint would be important in order to establish whether the criterion of reasonableness was fulfilled.

.6 The Working Group generally agreed that the procedure for tests set out in paragraph 3.2 of document FUND/WGR.7/15 was reasonable. The tests should thus be carried out by a panel consisting of 6-10 persons familiar with the product to be tasted, although prior testing experience was not essential. The panellists should preferably be impartial, although they could be representatives of all the interested parties in equal proportions. The panel should be composed of the same individuals throughout the monitoring of the taint, in order to ensure continuity and consistency. Both samples from an area affected by the oil spill ("suspect samples") and control samples from outside that area should be tested at the same time, preferably in equal numbers. Taste testing should be competently supervised and conducted in such a way that the panellists are not given any clues about the identity of the sample being tasted, ie whether a suspect or control sample ("blind testing"). Procedures should be agreed before the test for evaluating and recording taint and for defining when a sample is classified as being tainted.

.7 It was emphasised by the Working Group that the IOPC Fund should adopt a flexible approach in these matters in order to take account of the particular circumstances of the individual case.

.8 The Working Group took note of the approach suggested in paragraph 4.5 of document

FUND/WGR.7/15 in respect of the statistical basis for lifting a fishing ban or harvesting restrictions, ie to establish at what point in time a representative number of samples from the polluted area were no more tainted than an equal number of samples from a nearby commercial outlet outside the area affected by the spill. It was noted that this approach recognised that tainted samples (not necessarily due to oil spills) could occur in any population. It was also noted that the comparison of suspect and control samples was normally made using a so-called confidence test, which sought to demonstrate statistically that there was at least 95% certainty that the two samples did not differ in terms of taint. The Working Group took note of the fact that the confidence in accepting that the fish or shellfish were clean and safe came from an adequate time-series of monitoring data showing the progressive reduction in taint, and not from "proof" that every fish was free from taint.

.9 The Working Group recognised that the instructions given by the Executive Committee to the Director were limited to the study of the problems relating to the sampling and technical requirements for the assessment of claims for compensation for destroyed fish. It was emphasised by the Working Group, nevertheless, that an additional and very important factor, when examining whether destruction of the produce was reasonable, would be whether and, if so, to what extent the produce would be marketable at the time of normal harvesting, even if it was established that the fish were no longer contaminated or tainted. It was accepted that scientific data showing that the produce was free of taint did not necessarily remove the consumer's perception that the produce was still affected.

.12 Economic Implications of Harvesting Bans for Fish Farmers

.1 The Working Group examined the question of the economic implications of harvesting bans for fish farmers, raised by the Director in document FUND/WGR.7/19.

.2 The Working Group noted that it might be in the IOPC Fund's interest in some cases to suggest that fish farmers should delay harvesting of contaminated fish, as an alternative to outright destruction, in order to allow depuration of the fish. It was recognised that such delay in harvesting could cause serious financial difficulties for the fish farmers involved, resulting in bankruptcies, which in turn could lead to significant claims for compensation. It was noted that this might be avoided in many cases if the IOPC Fund were to support companies or individuals suffering financial hardship.

.3 It was generally considered that, if the IOPC Fund were to grant such support, a number of difficult issues would arise. It was noted that the Executive Committee had stated that the IOPC Fund should not take on the role of the claimant's banker and that the IOPC Fund was not intended to be a lending institution. For this reason, a number of delegations emphasised that great caution had to be exercised before the IOPC Fund would grant financial aid of the type under consideration. It was also recognised that if the delays in harvesting were to result in the fish depurating, thereby allowing the produce to be sold, the loss suffered by the claimants might be lower than the financial support which the IOPC Fund had provided in the interim to meet the cash flow requirements while harvesting was delayed, and that there was no guarantee that the Fund would be able to recover the balance. It was also noted that should a business fail for other reasons, the IOPC Fund might be liable for further payments of compensation.

.4 It was suggested that if the IOPC Fund were to grant financial support, it should only be made if the benefits from the IOPC Fund's point of view outweigh the risks involved. Some delegations considered that the IOPC Fund should adopt a flexible approach to situations of the type under consideration. It was suggested by some delegations that any such support should be restricted to small businesses, whereas other delegations did not consider it appropriate to differentiate between small and big businesses. It was pointed out that, if the IOPC Fund were to grant such support, the Fund might enter into a situation of competition vis-à-vis local banks.

.5 In conclusion, the Working Group took the view that, although the idea that the IOPC Fund should consider granting financial support in situations of the type referred to in paragraphs 8.12.2-8.12.4 above was not categorically rejected, any action by the Fund would give rise to a number of very difficult issues; such

financial support should therefore be considered only in very special cases and great caution should be exercised.

.6 The Director stated that, pending instructions by the Assembly or the Executive Committee, he would not grant such financial support.

9 Funding of Studies

.1 It was recalled that, at the 5th Intersessional Working Group, established to consider the IOPC Fund's policy in respect of claims settlement procedures and the admissibility of claims, there had been agreement that expenses for research studies should be compensated under the Civil Liability Convention or the Fund Convention only if these studies were carried out as a direct consequence of a particular oil spill and as a part of the oil spill response (document FUND/A.4/10, Annex, page 7). It was noted that the Assembly had generally endorsed the results of the Working Group's discussions (document FUND/A.4/16, paragraph 13). The present Working Group also noted the policy applied by the IOPC Fund over the years as set out in paragraph 5.4.2 of document FUND/WGR.7/14.

.2 It was recalled that the IOPC Fund had taken a restrictive position in respect of studies. It was noted that the Fund had in some cases agreed in principle to pay the costs of studies which were necessary for the effective carrying out of clean-up operations of preventive measures, or which facilitated such operations, whereas it had refused to pay for studies of a general or purely scientific character. It was also noted that the IOPC Fund had declined to contribute to the costs of studies relating to alleged damage to the marine environment as such, since in the IOPC Fund's view claims for such damage were not admissible under the Civil Liability Convention and the Fund Convention. It was also recognised that the IOPC Fund should in principle be prepared to pay reasonable costs for studies which were necessary for the preparation, or which would facilitate the Fund's examination of those parts of a claim which were admissible. It was pointed out that the IOPC Fund would be authorised to make payments only within the scope of the definitions of "pollution damage" and "preventive measures" laid down in the Civil Liability Convention and the Fund Convention.

.3 The Working Group took note of the documents on this issue presented by ITOPF (document FUND/WGR.7/9/3) and the United Kingdom delegation (document FUND/WGR.7/20/3).

.4 During the discussions most delegations stated that they agreed with the policy applied by the IOPC Fund so far. The question was raised, however, of whether and to what extent the IOPC Fund should pay compensation for the costs of studies relating to the need to reinstate the marine environment. Some delegations took the view that the IOPC Fund should in certain circumstances contribute to the funding of such studies. Some other delegations made the point, however, that the IOPC Fund should not become a research funding body.

.5 In conclusion, the Working Group agreed in general to maintain the present policy applied by the IOPC Fund in respect of the funding of studies. As regards the situation when it was envisaged that measures should be taken to reinstate the contaminated environment, it was accepted by the Working Group that post-spill studies would sometimes be necessary and useful in order to establish the precise nature and extent of the pollution damage caused by an oil spill and/or the need for reinstatement measures, given the potential of the marine environment for natural recovery. In this situation, it would be appropriate, in the view of the Working Group, if the IOPC Fund were to contribute to the expenses of such studies, provided that the studies related to damage of a type which fell within the definition of "pollution damage" laid down in the Civil Liability Convention and the Fund Convention as interpreted by the IOPC Fund, or related to reasonable measures to reinstate the environment. If the claimant were to request that the IOPC Fund participated in the funding of such studies, it would in the Working Group's view be important that the Fund should be given the possibility of becoming involved at an early stage in the selection of the experts who would carry out the studies and in the determination of the mandate of these experts. The Working Group

emphasised that it would be necessary to ensure that the scale of such studies was not out of proportion to the extent of the contamination and the predictable effects. It was also considered important that the studies should be practical and that they should be likely to deliver the required data. It was emphasised that the criterion of reasonableness would always be applied, ie that the extent of the study should be reasonable from an objective point of view and that the costs incurred should also be reasonable.

10 Work Carried out Within the Comité Maritime International (CMI)

.1 It was recalled that work had been carried out within the Comité Maritime International (CMI) on the subject of admissibility and assessment of claims for pollution damage. The Working Group took note of a document submitted by CMI (FUND/WGR.7/17) on this issue and in particular the Appendix to that document which contained CMI Draft Guidelines on Admissibility and Assessment of Claims for Oil Pollution Damage which had been elaborated by a CMI Working Group. It was noted that the CMI Conference to be held in Sydney in October 1994 would decide on whether to adopt such guidelines and, if so, on their content. The Working Group noted that the Director had been invited to attend the CMI Conference.

.2 The Working Group expressed its appreciation of the valuable work carried out by CMI on this issue and expressed its gratitude for the input which the CMI had made to the work carried out by the Working Group.

.3 The Working Group discussed the relationship between the criteria for the admissibility of claims adopted by the IOPC Fund and the criteria set out in the draft CMI Guidelines. Some delegations expressed the view that guidelines adopted by CMI could be useful and that such guidelines could be of particular importance in States which were not Parties to the Fund Convention. Other delegations considered that guidelines adopted by CMI would not be of any use. Several delegations stated that CMI was a private organisation and that any guidelines or other documents adopted by CMI would not have any legal status.

.4 It was pointed out that if the CMI Guidelines were to be at variance with the criteria laid down by the IOPC Fund through its Assembly and Executive Committee, this would contribute to an increased uncertainty as to the status of law in this field. For this reason, and since it was likely that the CMI Conference would adopt guidelines or some other document dealing with the issue, a number of delegations emphasised the importance of the CMI document being brought as closely as possible into line with the criteria adopted by the IOPC Fund.

.5 It was emphasised that a great advantage of the policy followed by the IOPC Fund was that decisions on the admissibility of claims were taken in the context of actual incidents and not in the abstract, which had made it possible to develop criteria for admissibility in the light of experience. The point was also made that any guidelines adopted by CMI did not have this possibility of adapting to new situations.

.6 The Working Group expressed the view that it would be valuable if, before the CMI Conference, the Director were to hold discussions with representatives of CMI on the problems which would arise if the CMI Guidelines were to be at variance with the criteria adopted by the IOPC Fund, in order to suggest ways of eliminating any differences. The Director was advised to emphasise to the CMI Conference the importance that any document adopted by CMI did not deviate from the criteria developed by the IOPC Fund and to suggest that CMI guidelines be modified so as to eliminate any such differences.

11 Action to be Taken by the Assembly

.1 The Assembly is invited to:

(a) take note of the information contained in the present document;

(b) take any decisions that it considers appropriate on the matters dealt with in the report of the Working Group, in particular in respect of:

- (i) tourism promotion costs when budget allocations exist for such promotion (paragraph 7.2.40); and
- (ii) employees who have been made redundant as a result of an oil spill (paragraphs 7.2.46-7.2.57).

.2 The Chairman of the Working Group proposes that the Assembly may wish to consider endorsing the conclusions set out in the Working Group's Report, including Annex I.

* * *

ANNEX II

Documents Submitted to the Working Group

DOCUMENT N°	SUBMITTED BY	TITLE
7/1 Director	Provisional Annotated Agenda of the Seventh Intersessional Working Group	
7/2 Director	Criteria for the Admissibility of Claims for Compensation <i>-General Issues and Questions Relating to Pure Economic Loss</i>	
7/3 Director	Criteria for the Admissibility of Claims for Compensation <i>-Review of Decisions Taken by the IOPC Fund 1979 - 1993</i>	
7/4 Director	Criteria for the Admissibility of Claims for Compensation <i>-Environmental Damage Claims</i>	
7/5 Polish Delegation	Criteria for the Admissibility of Claims for Compensation <i>[Document Withdrawn]</i>	
7/6 French Delegation	Intersessional Working Group to Consider Criteria for the Admissibility of Claims for Compensation	
7/6/Add.1	French Delegation	Criteria for the Admissibility of "Pure Economic Loss" and "Preventive Measures" Taken to Prevent or Minimise "Pure Economic Loss"
7/6/Add.2	French Delegation	Criteria for Admissibility of Claims for Compensation for Environmental Damage
7/6/Add.3	French Delegation	Procedures that the IOPC Fund Should Apply in Evaluating and Settling Claims for Compensation
7/7 Spanish Delegation	Criteria for the Admissibility of Claims for Compensation <i>-Loss of Income of Laid-off Workers as Consequence of a Major Pollution Accident</i>	
7/8 United Kingdom Delegation	Compensation	Criteria for the Admissibility of Claims for
7/9 The International Tanker Owners Pollution Federation Limited		Criteria for the Admissibility of Claims for Compensation
7/9/1 Federation Limited	The International Tanker Owners Pollution 1	Criteria for the Admissibility of Claims for Compensation <i>Preventive Measures and Property Damage</i>

DOCUMENT N°	SUBMITTED BY	TITLE
7/9/2 Federation Limited	The International Tanker Owners Pollution 2	Criteria for the Admissibility of Claims for Compensation <i>Economic Loss</i>
7/9/3	The International Tanker Owners Pollution Federation Limited	Criteria for the Admissibility of Claims for Compensation 3 <i>Environmental Damage</i>
7/10	Director	Report of the First Meeting of the Seventh Intersessional Working Group
7/11 Director Intersessional Working Group	Provisional Annotated Agenda of the Second Meeting of the Seventh	
7/12 Director <i>-Employment-Related Questions</i>	Criteria for the Admissibility of Claims for Compensation	
7/13 Director <i>-Reinstatement of the Marine Environment</i>	Criteria for the Admissibility of Claims for Compensation	
7/14 Director Claims	Procedures Applied by the IOPC Fund in the Assessment and Settlement of	
7/15 Director	Sampling of Contaminated Fish	
7/16 Swedish Delegation <i>- The Line Between Admissible and Non-Admissible Claims for Economic Loss</i>		Consequential Loss and Pure Economic Loss
7/17 Comité Maritime International Compensation		Criteria for the Admissibility of Claims for
7/18 P & I Clubs	International Group of Compensation	Criteria for the Admissibility of Claims for
7/19 Director	Economic Implications of Harvesting Bans for Fish Farming	
7/20	United Kingdom delegation	Criteria for the Admissibility of Claims
7/20/1	United Kingdom delegation	Employment Issues
7/20/2	United Kingdom delegation	Fixed Costs
7/20/3	United Kingdom delegation	Impact Studies
7/20/4	United Kingdom delegation	Information to Claimants

ANNEX I

SUMMARY OF THE CONCLUSIONS OF THE INTERSESSIONAL WORKING GROUP

Prepared by the Chairman of the Working Group

1 General Approach to the Assessment of Claims

.1 The Working Group considered that it was important to draw precise conclusions in respect of each main issue, so that the Executive Committee had a framework for its consideration of individual claims. As regards certain issues, the Working Group established lists of criteria or recommended certain procedures. In so doing, the Working Group was aware of the fact that each claim had its own particular characteristics. For this reason, the Working Group emphasised that it was necessary to consider each claim on the basis of its own merits in the light of the particular circumstances of the case. The Working Group also took the view that it was essential that any criteria adopted by the IOPC Fund should allow a certain flexibility, enabling the Fund to take into account new situations and new types of claims. In addition, the Working Group considered that the pragmatic approach followed by the IOPC Fund so far should be maintained, so as to facilitate out-of-court settlements.

.2 The Working Group took the view that, in addition to this general approach, the following considerations should be taken into account in the assessment of claims for compensation:

?A uniform interpretation of the definition of "pollution damage" was essential for the functioning of the system of compensation established by the Civil Liability Convention and the Fund Convention.

?It was also essential that, to the extent possible, there was consistency in the IOPC Fund's decisions as to the admissibility of claims, and this should be independent of the legal systems of the Member States where the damage was caused.

?The IOPC Fund should give the reasons for the acceptance or rejection of a claim for compensation, which would give claimants an explanation of the reasons for their claims not being accepted

.3 The Working Group stated that the Fund was operating within the framework of the 1969 Civil Liability Convention and the 1971 Fund Convention and could therefore only accept claims falling within the definitions of "pollution damage" and "preventive measures" laid down in these Conventions. The Group considered it essential to base the IOPC Fund's decisions on the interpretation of these terms as adopted by the Assembly or Executive Committee, and on the definition of "pollution damage" in the 1992 Protocol to the Civil Liability Convention, which had codified the IOPC Fund's interpretation of this concept.

.4 The Working Group took the view that national courts should, when making decisions on the interpretation of the definitions of "pollution damage" and "preventive measures", take into account the fact that these definitions were laid down in international treaties.

2 Various Types of Claims for Compensation

.1 Property Damage and Clean-Up Operations On Shore and at Sea

.1 The Working Group did not make any observations in respect of claims relating to property damage or clean-up operations on shore and at sea, and agreed with the criteria for the admissibility of such claims applied by the IOPC Fund so far.

.2 The Group considered that clean-up operations on shore and at sea could in most cases be considered as "preventive measures".

.2 Measures to Prevent Physical Damage

As regards measures to prevent physical damage, the requirement of reasonableness laid down in Article I.7 of the Civil Liability Convention should be assessed on the basis of objective criteria.

?The assessment of technical reasonableness should be made on the basis of the facts available at the time of the decision to take the measures, in the light of the technical advice given or offered at that time. The person in charge should reassess his decision in the light of developments and further technical advice.

?The costs incurred should also be reasonable. There should be a reasonable relationship between the costs and the benefits derived or reasonably expected. In the assessment, due account should be taken of the particular situation of the case.

.3 Fixed Costs

The Working Group took the view that the present policy of the IOPC Fund as regards so-called "fixed costs" should be maintained, namely that a reasonable proportion of fixed costs should be admissible, provided that such costs corresponded closely to the clean-up period in question and did not include remote overhead charges.

.4 Consequential Loss and Pure Economic Loss

.1 The Working Group endorsed the IOPC Fund's policy to accept in principle claims relating to loss of earnings suffered by the owners or users of property which had been contaminated as a result of a spill (consequential loss).

.2 As regards so-called "pure economic loss" (loss of earnings sustained by persons whose property had not been polluted), the Working Group took the view that the point of departure must be the concept of "loss or damage caused by contamination", ie that the starting point should be the pollution rather than the incident itself. It was agreed that in principle claims for pure economic loss were acceptable, but that certain criteria had to be fulfilled for such claims to be admissible. In particular, a claim would not be admissible on the sole criterion that the loss or damage would not have occurred but for the oil spill in question.

.3 The Working Group considered that in order to qualify for compensation the basic criterion should be that there was a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant.

.4 The Working Group took the view that, when considering whether the criterion of reasonable proximity was fulfilled, the following elements should be taken into account:

?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's business formed an integral part of the economic activity within the area affected by the spill

.5 The Working Group considered that account should also be taken of the extent to which a claimant could mitigate his loss.

.5 Establishing the Quantum of the Losses Sustained

The Working Group endorsed the policy followed by the IOPC Fund that the claimant had to substantiate his loss by the production of appropriate documents, but that, in view of the economic and social situation in many countries, this requirement had to be adapted to what could reasonably be expected of a claimant in the country concerned.

.6 Measures to Prevent Pure Economic Loss

.1 Recognising that this constituted an innovation, the Working Group endorsed the position taken by the Executive Committee that claims relating to costs of measures to prevent pure economic loss could be admissible on certain conditions.

.2 The Working Group agreed with the criteria for the admissibility of such claims established by the Executive Committee, namely that they fulfilled the following requirements:

- ? the costs of the proposed measures were reasonable;
- ? the cost of measures were not disproportionate to the further damage or loss which they were intended to mitigate;
- ? the measures were appropriate and offered a reasonable prospect of being successful; and
- ? in the case of a marketing campaign, the measures related to actual targeted markets.

.3 The Working Group emphasised that in order to be admissible the costs should relate to measures undertaken to prevent or minimise losses which, if sustained, would qualify for compensation under the Civil Liability Convention and the Fund Convention. In addition, the Working Group took the view that the costs of marketing campaigns or similar activities should be accepted only if the activities undertaken were in addition to measures normally carried out for this purpose, ie that compensation should be granted only for the additional costs resulting from the need to counteract the negative effects of the pollution.

.4 The criterion of "reasonableness" should be assessed in the light of the particular circumstances of the case and taking into account the interests involved. The assessment should be made on the basis of the facts known at the time that the measures were taken. The Working Group recognised the difficulty of assessing the effects of abstract preventive measures. As regards marketing campaigns, the point was made that it was necessary to reject measures of too general a nature.

.5 The Working Group considered that the IOPC Fund should normally not consider claims for preventive measures of this type until they had been carried out. It was agreed that a cautious approach should be taken in respect of advance payments and that the Fund should not take on the role of the claimant's banker.

.6 The Working Group expressed the view that when considering whether the IOPC Fund should pay the cost of marketing activities planned by an organisation, it was appropriate to take into account the attitude taken by the organisation in its contacts with the media after the incident and, in particular, whether that attitude had increased the negative effects of the pollution.

.7 Environmental Damage

.1 The Working Group based its consideration of the admissibility of claims relating to environmental damage on the definitions of pollution damage laid down in the 1969 Civil Liability Convention, the 1971 Fund Convention and the 1992 Protocols thereto. It also took note of Resolution N°3 adopted by the Assembly and the conclusions of the 5th Intersessional Working Group which had been endorsed by the Assembly. The Working Group took the view that the IOPC Fund should maintain its position that claims relating to the impairment of the environment should be accepted only if the claimant had sustained a quantifiable economic loss, and that the loss must be such that it could be quantified in monetary terms.

.2 The Working Group considered in particular the question as to whether the IOPC Fund should pay compensation for the cost of measures to reinstate the marine environment, and took the view that this matter would have to be decided on the basis of the definition of "pollution damage" laid down in the 1992 Protocol to the Civil Liability Convention.

.3 The Working Group agreed that measures for reinstatement of the environment would have to fulfil the following criteria in order to be admissible for compensation:

?the cost of the measures should be reasonable;

? the cost of the measures should not be disproportionate to the results achieved or the results which could reasonably be expected; and

?the measures should be appropriate and offer a reasonable prospect of success.

.4 The Working Group stated that the test of reasonableness laid down in Article I.6 of the 1992 Protocol to the Civil Liability Convention should be an objective one, ie that the measures should be reasonable from an objective point of view in the light of the information available when the specific measures were taken.

.5 The Working Group noted that compensation should be paid only in respect of measures actually undertaken or to be undertaken.

.6 The Working Group considered that it would normally be necessary to carry out an in depth study before any measures of reinstatement were undertaken, and that the cost of such studies would qualify for compensation only if they fulfilled the requirements generally applied by the IOPC Fund in this regard.

3 Procedures Applied by the IOPC Fund in the Assessment and Settlement of Claims

.1 General Considerations

The Working Group agreed in general with the procedures developed by the IOPC Fund over the years for the assessment and settlement of claims, as set out in document FUND/WGR.7/14.

.2 Notification of Incidents to the IOPC Fund

The Working Group took the view that it was important that the IOPC Fund was informed promptly of any incidents in respect of which it would have to pay compensation or indemnification or in respect of which there was a real possibility that the IOPC Fund might have to make such payments.

.3 Co-operation with P & I Clubs

The Working Group agreed that the co-operation with the P & I Clubs, in accordance with the Memoranda of Understanding signed by the Fund and the Clubs, had proved extremely valuable.

.4 Claims Handling Procedures

.1 The Working Group endorsed the policy applied by the IOPC Fund in respect of claims handling procedures, as set out in document FUND/WGR.7/14.

.2 The Working Group stressed the importance that experts engaged by the IOPC Fund attended a spill as soon as possible, that they were allowed to follow any operations, that they were given access to information relating to the incident by the authorities involved, and that discussions took place between these authorities and the experts. It was agreed that there was great value in the use of the experts of ITOPF and that it was advantageous if the IOPC Fund and the P & I Clubs could use joint experts, provided that there was no conflict of interest or potential conflict of interest in the particular case.

.3 The Working Group recognised the very good experience gained from the use of Local Claims Offices in two recent cases which had given rise to a very large number of claims. It was considered that the question as to whether a Local Claims Office should be established would have to be decided in the light of the particular circumstances of the case. It was emphasised that Local Claims Offices should not take any decision in respect of the admissibility of claims. It was noted that there were also methods other than that of establishing a Local Claims Office for dealing with incidents which gave rise to large numbers of claims.

.5 Relationship Between Compensation and Recourse Action

The Working Group agreed with the policy applied by the IOPC Fund that the fact that legal action had been taken by victims against other parties did not necessarily mean that no compensation would be paid by the IOPC Fund before this action was completed.

.6 Legal Action Against the IOPC Fund

The Working Group agreed that the fact that legal action had been taken by victims in a particular case should not necessarily result in the IOPC Fund withdrawing from negotiations for the purpose of reaching out-of-court settlements.

.7 Limitation Proceedings

The Working Group agreed with the policy which had been applied by the IOPC Fund so far in respect of limitation proceedings. It emphasised the importance that limitation proceedings did not unduly delay the payment of compensation to victims.

.8 Contamination of Fish and Shellfish, and Issues Relating to Sampling

.1 The Working Group agreed with the position taken by the Executive Committee in respect of the admissibility of claims for compensation based on the destruction of farmed fish and shellfish as a result of orders issued by public authorities in the form of fishing bans or exclusion zones. The Working Group took the view that the fact that a public authority had imposed a fishing ban or exclusion zone should not be considered as conclusive. Such claims should in the Working Group's view be admissible if and to the extent that:

? the destruction of the produce was reasonable on the basis of scientific and other evidence available.

.2 The Working Group also agreed with the Executive Committee that the following aspects should be taken into account in assessing whether the destruction of the produce was reasonable, ie whether:

- ? the produce was contaminated
- ? it was likely that the contamination would disappear before the normal harvesting time
- ? the retention of the produce in the water would prevent further production
- ? it was likely that the produce would be marketable at the time of normal harvesting

.3 Since the decision as to whether destruction was reasonable should be taken on the basis of scientific and other evidence, the Working Group considered it important that sampling and testing were carried out, in particular testing for taint.

.4 The Working Group generally agreed that the procedure for testing set out in paragraph 3.2 of document FUND/WGR.7.15 was reasonable. It emphasised that both samples from an area affected by the spill ("suspect" samples) and control samples from a nearby commercial outlet outside the polluted area should be tasted at the same time. In addition, the Working Group took the view that taste testing should be carried out in such a way that the panellists were not given any clues about the identity of the sample being tasted, ie whether a suspect or control sample ("blind" testing).

.5 The Working Group recognised that an additional very important factor, when examining whether destruction of the produce was reasonable, would be whether and, if so, to what extent the produce would be marketable at the time of normal harvesting, even if it was established that the fish were no longer contaminated or tainted. It was accepted that scientific data showing that the produce was free of taint did not necessarily remove the consumer's perception that the produce was still affected.

.9 Economic Implications of Harvesting Bans for Fish Farmers

.1 The Working Group noted that it might be in the IOPC Fund's interest in some cases to suggest that fish farmers should delay the harvesting of contaminated fish, as an alternative to outright destruction, in order to allow depuration of the fish. It was recognised that such a delay in harvesting could cause serious financial difficulties for the fish farmers involved, resulting in bankruptcies, which in turn could lead to significant claims for compensation. The Working Group examined whether the IOPC Fund should grant financial support in such cases.

.2 The Working Group recognised the complexity of this question and the implications which decisions to grant such support would have. It took the view that, although the idea of the IOPC Fund's granting financial support in situations of this type was not categorically rejected, such financial support should be considered only in very special cases and great caution should be exercised.

4 Funding of Studies

.1 The Working Group agreed in general to maintain the policy applied by the IOPC Fund in respect of the funding of studies, which was based on the conclusions of the 5th Intersessional Working Group which had been generally endorsed by the Assembly. Under this policy, expenses for research studies should be compensated only if these studies were carried out as a direct consequence of a particular oil spill and as a part of the oil spill response. It was noted that the IOPC Fund had refused to pay for studies of a general or purely scientific character.

.2 As regards environmental studies, the Working Group accepted that post spill studies would sometimes be necessary and useful in order to establish the precise nature and extent of the pollution damage caused by an oil spill and/or the need for reinstatement measures. In this situation, it would in the Working Group's view be appropriate if the IOPC Fund were to contribute to the expenses of such studies, provided that the studies related to damage of a type which fell within the definition of "pollution damage" laid down in the Civil Liability Convention and the Fund Convention as interpreted by the IOPC Fund, or related to reasonable measures to reinstate the environment.

.3 The Working Group considered that, in such cases, the IOPC Fund should be given the possibility of becoming involved at an early stage in the selection of the experts who would carry out the studies and in the determination of the mandate of these experts. It was also considered important that the studies should be practical and that they should be likely to deliver the required data. It was emphasised that the scale of the study should not be out of proportion to the extent of the contamination and the predictable effects, that the extent of the studies should be reasonable from an objective point of view and that the costs incurred should also be reasonable.

