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CRITERIA FOR THE ADMISSIBILITY OF CLAIMS FOR COMPENSATION

REVIEW OF DECISIONS TAKEN BY THE IOPC FUND 1979 - 1993

Note by the Director

1 Introduction

1.1 Definitions in the Civil Liability Convention

1.1.1 The payment of compensation by the IOPC Fund is governed by the definitions of "pollution damage", "preventive measures" and "incident" contained in Articles I.6, I.7 and I.8 of the Civil Liability Convention. These definitions read as follows:

> I.6 "Pollution damage" means loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures.
>
> I.7 "Preventive measures" means any reasonable measures taken by any person after an incident has occurred to prevent or minimise pollution damage.
>
> I.8 "Incident" means any occurrence, or series of occurrences having the same origin, which causes pollution damage.

1.1.2 The Assembly, the Executive Committee and the Director of the IOPC Fund have applied and interpreted these definitions in the context of the consideration of various types of claims which have been presented to the Organisation. The present document contains a review of the decisions taken and the reasoning behind these decisions.

1.1.3 For further information regarding the incidents mentioned in this document, reference is made to the Summary of Incidents in the IOPC Fund Statistics of October 1993.

1.2 Uniform Interpretation of "Pollution Damage"

1.2.1 The IOPC Fund Assembly has expressed the view that a uniform interpretation of the definition of "pollution damage" is essential for the functioning of the regime of compensation established by the Civil Liability Convention and Fund Convention.

1.2.2 The Executive Committee of the IOPC Fund has stressed the importance of consistency in the decisions taken regarding the payment of compensation arising from incidents in different Member States.

1.3 General Criteria Applied to Date

1.3.1 The IOPC Fund has, since the first cases involving the Organisation, applied the following general criteria for the admissibility of claims:

- any expense/loss must actually have been incurred
- there must be a link between any expense/loss and the incident
- any expense must relate to measures which were deemed reasonable and justifiable

1.3.2 At its 35th session, the Executive Committee made statements in the following terms as to the general criteria for the admissibility of claims:

- a claimant's loss or damage is admissible only if and to the extent that it could be considered as caused by contamination
- there must be a link of causation between the loss or damage covered by the claim and the contamination caused by the spill
- a claimant is entitled to compensation only if he has suffered a quantifiable economic loss
- the claimant has to prove the quantum of his loss or damage

1.3.3 The Italian delegation has taken the view that the criterion for the admissibility of a claim should be whether the damage covered is certain, and that the quantum should be established by a reasonable assessment or should be decided by an equitable judgement.

2 Pollution Damage

2.1 Physical Damage

2.1.1 Onshore Clean-up Costs

The IOPC Fund compensates the cost of measures taken to clean shorelines and coastal installations. Claims for onshore clean-up operations may include costs incurred for equipment hired or purchased and materials, as well as personnel costs[<1>].

The cost of cleaning and repairing clean-up equipment and of replacing materials consumed during the operations is accepted by the IOPC Fund.

Following the TANIO incident, claims were submitted for the loss of two pieces of heavy clean-up equipment, the second machine having been lost in attempts to rescue the first which had become stranded. Whilst the cost of losing the first machine was accepted, the loss of the second was not admissible since this could have been avoided.

<1> It should be noted that onshore clean-up operations could in most cases be considered as "preventive measures"; cf section 3.1.1.

In the case of equipment purchased for a particular spill, deductions are made for the residual value. If materials or equipment have been purchased and stored so that they would be immediately available if an incident occurred, compensation is paid for a reasonable part of the purchase price of the material and equipment actually used.

2.1.2 Repairing Property Damaged During Onshore Clean-up Operations

Measures taken to combat an oil spill may cause damage to roads, piers and embankments, and the cost of the resulting necessary repairs is admissible.

Road repair costs were accepted in the TANIO case, to the extent that the roads in question had actually been affected. The repair work related to damage resulting from use of the road by clean-up vehicles; allowance was made for the state of the roads before the incident and the normal life expectancy of the roads concerned. A claim for repairs to lodgings used by personnel involved in the clean-up operations in the TANIO case was not accepted, however, on the grounds that the cost of repairs should either have been borne by the person or persons who had caused the damage or should have been covered by the rental paid for the lodgings.

2.1.3 Disposal of Collected Oil and Debris

Clean-up operations frequently result in considerable quantities of oil and oily debris being collected. Reasonable costs for disposing of the collected material are admissible.

If a claimant has received any extra income following the sale of recovered oil these proceeds should be deducted from any compensation to be paid, as happened in the TANIO case.

2.1.4 Additional and Fixed Costs

In several cases the question has arisen of whether and, if so, to what extent a public authority carrying out clean-up operations or preventive measures is entitled to compensation for the cost of permanently employed personnel and for the cost of operating vessels owned by the public authority.

Costs incurred by public authorities can be distinguished as either "fixed" costs or "additional" costs. Additional costs are those expenses which are incurred solely as a result of the incident and which would not have been incurred had the incident and related operations not taken place. Such costs may relate to overtime allowances, extra allowances for heavy duties and travel costs. Fixed costs are those costs which would have arisen for the authorities concerned even if the incident had not occurred, eg normal salaries for permanently employed personnel.

The 5th Intersessional Working Group agreed that reasonable additional costs were always recoverable under the Civil Liability Convention and the Fund Convention.

The Working Group recognised that it was in the interest of both Member States and the IOPC Fund for a State to maintain a response force so that it could respond quickly and cheaply if an oil spill occurred. If clean-up operations were left to private firms, fixed costs would be excluded from claims but additional costs would increase accordingly, and might be higher than if the work had been carried out by State employees with fixed costs claimed. For this reason, the Working Group took the view - though not unanimously - that a reasonable proportion of fixed costs were admissible, viz those expenses which correspond closely to the clean-up period in question and which do not include remote overhead charges.

At its 4th session, the Assembly generally endorsed the results of the Working Group's discussions. The Japanese delegation reserved its position as to the relationship between fixed and additional costs.

When discussing the question of fixed and additional costs following the BRADY MARIA incident, the Japanese delegation expressed the view that the objective of the Civil Liability Convention

was to provide compensation for losses and costs which would not have been incurred without a pollution incident, and that the principles of compensation should be applied in accordance with this objective.

Bearing in mind that a uniform interpretation of the definition of "pollution damage" is essential for the functioning of the regime of compensation created by the Conventions, the Executive Committee has repeatedly stressed the necessity for a restrictive approach to fixed costs. The Assembly has taken the same position.

2.1.5 Cleaning, Repairing or Replacing Damaged Property

Claims for the cost of cleaning or repairing property which has been contaminated by oil are accepted by the IOPC Fund. Examples of such claims include damage to the unfinished paintwork of a vessel under construction in a dock that was contaminated (*TSUNEHISA MARU N°8*), cleaning or replacing seaweed farm nets (SHOWA MARU), cleaning of yachts (VISTABELLA), cleaning the water intakes of power stations (OUED GUETERINI) and the cleaning of buildings affected by dispersed droplets of oil in wind-blown spray (AEGEAN SEA and BRAER). If it is not possible for the property to be cleaned or repaired, then replacement costs are accepted, though with a reduction for wear and tear.

Claims relating to work which involves improvements rather than the repair of damage caused by a spill are not accepted, as was the case of certain claims for the repair of sea defences in the TANIO case.

2.1.6 Sale of Farm

A claimant whose farm was about to be placed on the market for sale at the time of the BRAER incident indicated that he was unable to obtain a satisfactory price for the farm as a result of the incident. The Executive Committee decided that it was premature to consider any question relating to the sale of this farm until a claim for compensation had been submitted. The Committee endorsed the Director's rejection of a request by the farmer that the IOPC Fund should buy the farm.

2.1.7 Damage to Property Without Escape of Oil into the Sea

In two cases oil escaped from a ship and caused damage without any oil being spilled into the sea. In the TSUBAME MARU N°58 case fuel oil was erroneously pumped into the wrong tank whilst supplying a fishing boat, causing damage to the fish cargo, and in the TSUBAME MARU N°16 case oil was spilled onto fish which had been unloaded on a pier. In both of these instances, the Executive Committee considered that, although no oil had escaped into the sea, the damage should nevertheless be covered by the definition of "pollution damage", ie contamination caused outside the ship carrying the oil which caused the damage.

2.1.8 Personal Injury Claims

A number of personal injury claims relating to alleged health problems have been submitted in the BRAER case. The Executive Committee took note of the Director's view that, in the light of the discussions at the 1969 Conference which adopted the Civil Liability Convention, claims for personal injury were in principle admissible, provided that the injury was caused by contamination. It was noted that it would be for the claimant to prove that the alleged damage was caused by contamination and to prove the amount of the loss or damage sustained. No decision was taken by the Committee on these claims.

Requests for humanitarian payments for people who allegedly were exposed to health risks and anxiety and suffered loss of environmental amenities, were submitted in relation to the BRAER incident. The Executive Committee took the position that the IOPC Fund could not make humanitarian payments since, under the Civil Liability Convention and the Fund Convention, compensation could be paid only to claimants who had demonstrated a quantifiable economic loss. In that context, the Committee took

the view that claims relating to exposure to health risks, anxiety and loss of environmental amenities would not fall within the definition of "pollution damage" and could therefore not be accepted.

2.1.9 Environmental Damage

This matter is dealt with in a separate document (FUND/WGR.7/4).

2.2 Consequential Loss and Pure Economic Loss

General Considerations

2.2.1 Consequential Loss: Losses Suffered by the Owners/Users of Contaminated Property

The IOPC Fund accepts claims for losses incurred by the owners or users of property which has been contaminated as a result of an oil spill. Examples of such claims which have been accepted by the IOPC Fund include a fisherman for loss of income as a result of his nets being contaminated (VOLGONEFT 263), a hotel/restaurant owner's claim for two days' lost income whilst the establishment was closed during the removal of oil from the approach road (TANIO), and loss of income claimed by the owner of a power station which had to be closed as oil had entered the sea-water intake (OUED GUETERINI).

2.2.2 Pure Economic Loss: Losses Suffered by Persons Whose Property Has Not Been Contaminated

An important group of claims are those which relate to loss of income suffered by persons whose losses do not derive from the fact that they are the owners or users of contaminated property (pure economic loss). When claims of this kind were first received, the criterion used by the IOPC Fund in considering their admissibility was the following:

- the loss must have been suffered by persons who depend directly on earnings from coastal or sea-related activities (eg hoteliers at seaside resorts or fishermen)

The Executive Committee has recognised that it is essential to study in detail the factual situation in respect of each claim for pure economic loss, so as to establish the extent to which the loss can be considered as "caused by contamination". At its 35th session, the Executive Committee laid down the following criterion for such claims:

- there must be a link, with reasonable proximity, between the contamination and the alleged loss of each claimant

The Italian delegation to Executive Committee meetings has expressed the view that the decisive criterion should be whether there is a reasonable link of causation between the incident and the pure economic loss covered by the claim.

In connection with discussions concerning claims relating to pure economic loss, the Executive Committee has noted that, although the IOPC Fund was established to pay compensation to victims of oil pollution, it was important that it exercised a certain caution in accepting claims beyond those admissible under the general principles of law in Member States.

2.2.3 Assessment of Quantum of Pure Economic Loss

The Executive Committee has endorsed the policy that the assessment of the quantum of claims for pure economic loss should be based on the actual financial results of the individual claimant for appropriate periods during years preceding the incident; the assessment should thus not be based on budgeted figures. The Committee has stated, however, that the IOPC Fund should be prepared to take into account the particular circumstances of the claimant and consider any evidence presented by him in respect of the quantum of his loss.

2.2.4 Financial and Banking Difficulties Encountered by Claimants

Some claimants in the TANIO and BRAER cases submitted claims for bank charges and similar costs incurred as a result of overdrafts and loans which became necessary as a result of their loss of income following the incident. Such costs have been accepted as valid claims for compensation.

In the BRAER case, banks have been unwilling to extend the existing overdrafts of some claimants affected by the incident. In one instance, a claimant requested that the IOPC Fund should provide a guarantee for the financing of the building of fishing boats, as the claimant's original guarantor had withdrawn his support following the BRAER incident. The Executive Committee has considered that such unwillingness on the part of lenders to make financial arrangements for businesses does not in itself constitute grounds for compensation under the Civil Liability Convention and the Fund Convention.

Following the BRAER incident, two claimants have requested the IOPC Fund to give loans to resolve cashflow difficulties resulting from the incident. The Director rejected these requests. The Committee has since expressed the view that the IOPC Fund should not take on the role of a claimant's banker and that it could not provide funds to resolve cash flow problems.

2.2.5 Overview of Claims for Consequential Loss and Pure Economic Loss

The claims for consequential loss and pure economic loss dealt with in sections 2.2.6 – 2.2.36 below are set out in tabular form in the Annex to the present document. The table has been elaborated only as an illustration of the various categories of claims and shall not be taken as representing in any way the IOPC Fund's position as to the legal basis of a particular claim or group of claims, or the admissibility thereof.

Fishery Related

2.2.6 Fishermen: Loss of Income Resulting from Damaged Equipment

Fishermen whose fishing gear has been polluted may lose income during the period when they are prevented from fishing, pending the cleaning or replacement of the polluted gear. The IOPC Fund accepts claims for loss of earnings in such situations. For example, compensation was paid to a fisherman who had had his salmon nets damaged by oil following the VOLGONEFT 263 incident, and following the DAINICHI MARU N°5 incident compensation for loss of earnings was paid to the owner of a fishing boat which had been damaged by oil.

2.2.7 On-Land Fish Farms and Purification Plants

The sea water used to supply on-land fish farms and purification plants was contaminated by oil following the AEGEAN SEA incident, which led to an interruption of the activities of these farms and plants. Claims for loss of income by these farms and plants were accepted in principle by the Executive Committee as "damage caused by contamination".

2.2.8 Aquaculture: Loss of Income

The IOPC Fund has dealt with many cases where oil spilled from tankers has polluted fish or seaweed farms, as a result of which the farmers concerned have claimed for loss of income. Compensation for such losses has been paid in several cases in Japan.

Claims for loss of income have been submitted in the AEGEAN SEA case by near-shore cultivators of mussels, salmon, oysters and scallops. The Executive Committee has taken the view that these claims were admissible in principle, since the activities were carried out within the area contaminated by oil.

Following the AEGEAN SEA and BRAER incidents, the question arose as to 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. The Executive Committee stated that the fact that a government had imposed a fishing ban or exclusion zone should not be regarded as conclusive. The Committee decided 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

The Committee stated that the following aspects should be taken into account in the assessment whether the destruction 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

Following the BRAER incident oil contaminated several salmon farms, and an exclusion zone (within which fishing and the harvesting of farmed fish was prohibited) was established by the United Kingdom Government under the Food and Environment Protection Act 1985. Salmon from those farms that had been affected and the fish that were due to be marketed at that time and in subsequent months could not be sold (the 1991 intake). The Executive Committee took the view that the salmon farmers' claims for compensation for loss resulting from the destruction of their fish related to damage to property and was therefore admissible.

The 1992 intake of salmon in the salmon farms within the exclusion zone was due to be harvested between July 1993 and May 1994. The IOPC Fund considered at length whether – in view of the significant improvement in monitored hydrocarbon and taint levels of the fish – the loss which would result from the destruction of this fish could be considered an admissible claim. The Executive Committee took the view that any destruction of fish should be based on a thorough examination of all aspects of the case and that it was important that an exhaustive sampling programme (using internationally accepted techniques) should be carried out at regular intervals. It was noted that as natural depuration took place, an increased sampling effort was required. Whilst it would have been preferable to have had the results of more exhaustive sampling, it was considered that the forthcoming main marketing season (pre-Christmas) created a considerable time constraint. Having considered all the factors involved (scientific and technical aspects, the timing of sales and the marketing consequences of selling fish which had previously been contaminated) against the criteria established by the IOPC Fund, the Executive Committee accepted, at its 36th session in October 1993, that it would not be an unreasonable course of action for the farmers concerned to slaughter the 1992 intake of salmon. The Committee decided that, if this was done, the IOPC Fund should pay compensation for the destroyed fish.

2.2.9 Sampling of Fish which has been Contaminated

In the light of the discussions concerning the destruction of the 1992 salmon intake in the BRAER case, the Executive Committee considered that it would be useful if the 7th Intersessional Working Group considered in depth the problems relating to contamination of farmed fish and shellfish, in order to spell out the sampling and technical requirements to assess claims for compensation for destroyed fish. This issue is dealt with in a document submitted by the International Tanker Owners Pollution Federation Limited (FUND/WGR.7/9/2, paragraph 2.4). This matter will be considered further by the Director.

The Executive Committee stated in connection with the destruction of mussels following the AEGEAN SEA incident that both the authorities and the claimants concerned should allow the experts of the IOPC Fund and the P & I Club to take samples of the fish or shellfish in order to facilitate the assessment of claims. In addition, the Committee stated that endeavours should be made to keep

alive a representative portion of the stock to be destroyed, in order to monitor the evolution of tainting for future assessments of the contamination of the produce.

2.2.10 Fishermen: Loss of Income Caused by Suspension of Activities

Claims for fishermen's loss of income were first submitted in the MIYA MARU N°8 case following the suspension of fishery activities during clean-up operations. These losses resulted from the contamination of the area of the sea where the fishermen normally carried out their activities. Claims of this kind have been accepted by the IOPC Fund in a number of Japanese cases (eg SHOWA MARU and FUKUTOKU MARU N°8). More recently, such claims have arisen following the AEGEAN SEA, BRAER, TAIKO MARU and KEUMDONG N°5 incidents.

The question arose in the AEGEAN SEA case whether unlicensed fishermen or shellfish gatherers' claims for loss of income were admissible. The Executive Committee took the view that, since the question of a claimant's right to compensation was governed by civil law, the decisive criteria should be whether the claimant had suffered an actual economic loss and that the right of compensation should not depend upon whether or not a licence was held,.

As regards fishermen's claims for loss of income, the claimant has to show that he was actually prevented from fishing as a result of the incident and prove the quantum of the loss resulting from his inability to fish.

The requirement that the claimant has to prove the quantum of his loss would normally make it very difficult for a fisherman to prove the extent of any losses which he may suffer in the future. The IOPC Fund has in the past rejected such claims, due to lack of evidence.

2.2.11 Cost of Maintaining Staff: Fish Farmers

Some salmon farmers in the BRAER case who were unable to harvest their fish nevertheless maintained their workforce, although there was either insufficient work to keep the employees fully occupied or no work at all for many months. The Executive Committee noted that the damage suffered by these salmon farmers consisted of damage to property (ie to the salmon) and that the compensation related to the value of the destroyed property. In the view of the Committee, it would be for the individual salmon farmer concerned to decide whether or not to retain the staff, without this having any impact on the amount of compensation payable.

2.2.12 Loss of Income Caused by Reduced Fishing or Fish Farming Activities

As a consequence of reduced fishing activity or the ban on fishing following a spill, certain related businesses may be unable to carry out their own normal level of activities. For example, in the AEGEAN SEA case a net repairer had fewer fishermen's nets to repair, and less fishing equipment was given to a repair company to work on following the BRAER case, both as a result of the fishermen not taking their boats out as usual. Similarly, a claim for loss of income was received in the BRAER case from a diver who was unable to carry out his usual fish farm maintenance work, as the cages had not been cleared of salmon at the usual times. The Executive Committee decided that the loss of income suffered by these claimants should be considered as "damage caused by contamination" since their businesses were an integral part of the fishing or fish farming activities in the affected area.

2.2.13 Loss of Income Caused by Reduced Supplies of Fish: Fish Processors

Claims for loss of income were submitted following the BRAER incident by fish processors whose normal supply came from a government-imposed exclusion zone. The Executive Committee recognised that although these losses were caused only indirectly by the contamination, they were nevertheless a foreseeable consequence of a major oil spill in the area. The Committee decided that losses suffered by fish processors as a result of having been deprived of their supply of fish from the exclusion zone should be considered as having been caused by contamination. The Executive

Committee stated that it had to be established in respect of each item of a claim by such fish processors whether:

- the alleged expenses or losses were "caused by contamination" in the sense given by the Executive Committee to that expression
- the amounts claimed were substantiated by sufficient supporting documentation
- the claimant had taken all reasonable steps to minimise the damage

2.2.14 Other Loss of Income Caused by Reduced Supplies of Fish

Examples of other claims submitted to the IOPC Fund for losses allegedly caused by a reduced supply of fish include a fish porter who had less fish to carry (AEGEAN SEA) and an ice manufacturer whose product was no longer required by salmon farmers who were not harvesting their fish (BRAER). The Executive Committee decided that these losses should be considered as "damage caused by contamination", since the activities of these claimants were an integral part of the fishing activities in the affected area.

Another type of claim for loss of income arising from reduced fish production in the BRAER case was submitted by a fish buyer for alleged loss of income, as the boats from which he purchased fish were prevented from fishing. This claim was accepted by the Director.

A sales company/marketing confederation presented a claim for loss of sales commission, as the farms which supplied the company had had to destroy the salmon as a result of the BRAER incident. The Executive Committee took the view that the alleged loss was not "damage caused by contamination" and rejected the claim.

Following the BRAER incident a London-based fish trader who marketed salmon farmed within the exclusion zone presented a claim for loss of income, since he normally purchased nearly half of his salmon from a farm situated within the exclusion zone. The Executive Committee decided that the loss allegedly incurred was not a direct result of contamination but an indirect result of the damage by contamination caused to a certain area of water around the Shetland Islands. On this basis, the Committee decided that the damage allegedly suffered by the claimant did not fall within the definition of "pollution damage" and therefore rejected this claim.

2.2.15 Cost of Maintaining Staff: Fish Processors

In the BRAER case, some employers in the fish processing industry had maintained their workforce, although there was either insufficient work to keep the employees fully occupied or no work at all until for many months. The Executive Committee noted that the claims by these fish processors related to loss of profit resulting from the reduction in the supply of fish due to the destruction of the salmon or the imposition of the exclusion zone.

The Executive Committee decided that each claim by a fish processor would have to be considered on its own merits in the light of the situation of the individual claimant when examining whether deductions should be made for salaries paid to employees who were retained. The Committee took the view that account should be taken of whether the claimant had acted reasonably in the circumstances, against 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?

2.2.16 Loss of Income Caused by Reduction in Prices and/or Sales: Fish Farms

Following the BRAER incident, salmon farmers whose farms were located outside the exclusion zone claimed compensation for loss of income resulting from depressed prices and from reduced sales of salmon. These losses were a more indirect result of contamination than those suffered by farms which were situated within the exclusion zone, since the alleged loss resulted from the perception of third parties of the consequences of the incident on the quality of farmed salmon from outside the zone.

The Japanese delegation to the Executive Committee held the view that the reduction in the price of salmon harvested outside the exclusion zone did not fall within the definition of "pollution damage", since the loss was not caused by contamination but by the media.

The Committee noted that there was a similarity between these claims and those submitted in respect of hotels and restaurants (see paragraph 2.2.23 below) which were situated in places that had not been directly affected by pollution, and decided that the admissibility of any such claim should be based on the following considerations:

- the decisive criterion was not whether the alleged loss resulted from the suspension of activities within the zone or from the reduction of activities outside that zone
- the spill of oil must have actually caused economic loss
- it would not necessarily be required that the contamination had affected the claimant's fish
- it was for the claimant to show that the contamination had affected the area where his activities were carried out, and that this had resulted in his being either unable to sell his produce or being forced to sell it at a lower price
- the further away from the zone, the more difficult it would be for the claimant to prove the link of causation between the spill and the alleged loss

2.2.17 Loss of Income Caused by Reduction in Orders (Fall in Market Confidence): Fish Processors and Fish shop

A claim for loss of income was also submitted in the BRAER case by a fish processor on the grounds that alleged loss of confidence on the part of buyers and consumers in the quality of Shetland salmon in general, including in salmon farmed outside the exclusion zone, had caused a reduction in orders. This fish processor had been able to obtain supplies of fish, but claimed loss of income as a result of the cancellation or reduction in orders for the finished product.

The Executive Committee was of the view that these losses were a more indirect result of the contamination. The Committee was unable at that time to take a decision on what it considered a borderline case between admissible and non-admissible claims. It later transpired that part of this fish processor's supply of fish was from within the exclusion zone, and his supply had therefore been reduced. This claim was therefore of the type referred to in section 2.2.14 above, and would be acceptable to the extent it fulfilled the criteria set out therein.

A similar claim for loss of profit resulting from a reduction in the sale of fish and shellfish for the three months after the incident was submitted in the AEGEAN SEA case by the owner of a fish shop; the reduced sales allegedly resulted from a drop in market confidence in fish on sale in La Coruña. The Executive Committee decided that this claim should in principle qualify for compensation to the extent that it was established that the losses were caused by the incident.

2.2.18 Loss of Income Caused by Reduced Production by Fish Processors

Several claims were submitted to the IOPC Fund in connection with the BRAER incident for loss of income resulting from the reduced activities of the fish processors (see section 2.2.13 above).

In the case of a collector of offal from a processing plant (the fish having been destroyed and not processed) and a manufacturer of boxes in which processed fish are transported, the Executive Committee decided that these claims were admissible in principle as they should be considered as

"damage caused by contamination", since the activities were an integral part of the fishing activities in the affected area.

A haulage company based on Shetland, which transported salmon from three farms within the exclusion zone, submitted a claim for losses incurred allegedly as a result of its vehicles not having been fully loaded on the outward journey from Shetland. The Committee decided that these losses allegedly suffered as a result of a reduction in demand for transport services could not be considered as "damage caused by contamination", and were therefore not admissible.

The Director was instructed by the Executive Committee to examine whether losses allegedly suffered by a Shetland based manufacturer of pallets on which processed fish is transported could be considered as "damage caused by contamination" on the basis that a reduction in the number of pallets required was a result of the destruction of the 1991 intake of salmon or the imposition of the exclusion zone which had prevented the harvest of the 1992 intake of salmon. No decision has yet been taken on this claim.

2.2.19 Employees Put on Part-Time Work or Made Redundant by Employers in Sea-Related Activities

Following the AEGEAN SEA and BRAER incidents, claims for loss of income were submitted by employees at fish processing plants, mussel farms or shellfish purification plants who had either been placed on part-time work or who had been made redundant.

When the Executive Committee examined these claims, some delegations expressed the view that the losses should be governed by the contractual relationship between the employer and the employee. The Spanish delegation was of the view that these losses were a direct result of the pollution and the Italian delegation considered that the claims were admissible provided that there was a link of causation between the incident and the loss.

The Committee took the view that the losses suffered by employees were a more indirect result of contamination than losses suffered by companies or the self-employed, since the losses of employees were the result of their employers being affected by the consequences of a spill and therefore having to reduce their workforce; the losses suffered by such employees were one step more remote than losses suffered by fish processors. The Committee concluded that such losses could not be considered as "damage caused by contamination" and therefore did not fall within the definition of "pollution damage".

At a later Executive Committee session, some delegations observed that this was an unfortunate decision concerning the "weakest in society", and that it was not appropriate to make such a distinction between employees and companies or the self-employed. The Committee decided that it would reconsider the matter if new evidence or facts were presented to justify re-examination.

2.2.20 After-Effects of Oil Pollution on Fisheries

Claims have been submitted in respect of the alleged after-effects of oil pollution on fisheries, for example in the KOHO MARU N°3 case. These claims were not accepted by the IOPC Fund, as the claimant did not provide sufficient data to prove that damage was actually sustained.

2.2.21 Loss of Rental from Salmon Farms

The salmon farmers in Shetland pay rent to the Crown Estates. The Crown Estates have submitted a claim to the IOPC Fund in connection with the BRAER incident for loss in rental, as the rent is paid on the basis of the quantity of fish harvested. The Director has informed the Crown Estates that the alleged loss could not be considered as "damage caused by contamination".

Tourism-Related

2.2.22 Operators of Beach Facilities on Polluted Beaches

Claims for loss of income were submitted by the operators of beach facilities in Italy ("bagni") located along the stretch of coast affected by the HAVEN incident. The Executive Committee decided that the claimants' loss of income as result of the reduction in tourism should be considered as "damage caused by contamination" to the extent that the reduction had been caused by the HAVEN incident, and that the operators had suffered an infringement of their recognised legal right, ie to operate the facility on the beach. The Committee decided that these claims were in principle admissible.

2.2.23 Owners of Hotels, Restaurants and Campsites

Claims for loss of income as a result of alleged reduction in tourism have been presented in the TANIO, HAVEN, AEGEAN SEA and BRAER cases. During 1993 the Executive Committee considered such claims submitted by establishments not directly affected by an oil spill. The Committee noted that tourism in general was influenced by many external factors, and that considerable yearly variations often occurred in the number of tourists visiting a given area for reasons which were normally difficult or impossible to establish. The Executive Committee took the view that the following points should be taken into consideration when assessing claims submitted by the operators of hotels and restaurants:

- each claim should be considered on its merits
- there should be a link of causation between the loss or damage and the contamination resulting from the incident
- all hotels and restaurants in the same town or village should be treated equally in principle, independent of their precise location, because if there had been contamination of beaches which had resulted in a reduction in tourist activity in the town or village, it would probably have affected all establishments of the same kind in the locality
- equal treatment should in principle be given to all claims for loss of income submitted in respect of establishments along the coast affected by an oil spill, independent of whether the particular town or village where they were located was directly affected by the oil
- the period of loss to be compensated should be considered on the merits of each claim

One factor to be considered which may affect the number of tourists frequenting an establishment is the price charged. In the TANIO case, for example, the claim submitted by a municipal campsite for loss of income was not accepted in full, as the increase in prices that season might have led to a decrease in the use of that site.

2.2.24 Travel Agent's Loss of Income Caused by Lost Commission

In the HAVEN case, a claim was submitted by a local Italian travel agent/tourist accommodation bureau for loss of commission on contracts for hotel and other holiday accommodation. The Executive Committee decided that these losses were not different in character from those suffered by hoteliers in the same area, and so were acceptable in principle.

2.2.25 Shopkeepers

The criteria indicated in section 2.2.23 above should be applied to claims submitted by shopkeepers.

When considering claims for loss of income submitted by various shopkeepers in connection with the HAVEN incident, the Executive Committee stated that it would not be reasonable to make a distinction dependent on the type of goods sold, except in respect of shops selling goods not normally bought by tourists (such as capital items).

Examples of claims accepted include those of shops selling souvenirs or nautical leisure equipment (TANIO and AEGEAN SEA). Examples of rejected claims include those of a butcher and a car salesman (TANIO).

Following the HAVEN incident, claims were presented by three retailers (clothes retailer, lingerie shop, stationary/toy shop) in Savona (Italy). In view of the fact that Savona did not depend on beach tourism, its beaches being mainly used by its own citizens, the Executive Committee took the view that there was no link of causation between the losses and the contamination resulting from the HAVEN incident. The Committee decided, therefore, that these retailers did not have a valid claim for compensation.

2.2.26 Travel Agent's Loss of Income Caused by Reduction in Prices

A claim was submitted by a travel agent in connection with the HAVEN incident for loss of income as a result of a reduction in the rates of hotel rooms and other tourist accommodation. The Executive Committee considered it necessary to study the issue further and to establish whether there was a general price reduction in the area for tourist accommodation in the relevant year, whether such a reduction in prices in the region was due to the incident and whether price reductions had been made by the claimant in order to get a competitive advantage over other operators. A decision has not yet been taken on this claim.

2.2.27 Local Authorities' Loss of Tax Revenue

Claims by public authorities for loss of tax revenue have been submitted to the IOPC Fund in two cases.

In the TANIO case, a local authority presented a claim in respect of a fall in tax revenue resulting from a reduction in the earnings of local businesses because of the reduced number of tourists. The claimed amount was based on an estimate of the money spent by tourists (30% of total business income in the area) and an estimate of the number of tourists who did not go there. The Executive Committee took the view that it might be very difficult for a public authority to prove that a loss in tax revenue had actually occurred as a direct result of a pollution incident. This claim was rejected because the Committee considered that the documentation submitted by the local authority was insufficient, the claim having been based on abstract calculations.

Claims by local authorities in the HAVEN case for loss of tax revenue from tourism were rejected by the Executive Committee on the grounds that it had not been shown that the alleged loss resulted from the incident. The French delegation expressed the view that the rejection of these claims could only be justified by the fact that the losses claimed could not, on the basis of the supporting documents, be considered as losses caused by contamination, ie that the losses resulted from a reduction in tourism significantly greater than the normal fluctuation from one year to another. The French delegation noted that, if this was not the reason for rejection, the rejection was at variance with the position taken by the IOPC Fund in previous cases. It was maintained by that delegation that local authorities which depended only on beach tourism and which could not offset the losses of taxes on tourism by other income would suffer an economic loss which should be compensated if there was a reasonable proximity between the contamination and the loss.

Port-Related

2.2.28 Ferry Operator

In the AEGEAN SEA case, the operator of a passenger ferry submitted a claim for loss of income as a result of two factors: firstly, the ferry service was suspended or irregular for several days while the harbour was severely oiled and, secondly, when the service resumed the number of passengers was lower than normal since the journey by sea was unpleasant due to the contamination.

The Executive Committee decided that these losses should be considered as "damage caused by contamination" and were therefore admissible.

2.2.29 Loss of Hire

A time charterer and a shipowner presented claims in connection with the AEGEAN SEA incident because their ships were prevented from sailing as the port of La Coruña had been closed. The Executive Committee decided that these losses should be considered as "damage caused by contamination" and therefore admissible.

The P & I insurer involved in the case reserved its position in respect of these claims as it had doubts about whether the losses could be considered as "damage caused by contamination".

2.2.30 Port Chemist's Advice to Port Authorities

A port chemist submitted a claim to the IOPC Fund for advice given to the port authority in connection with the PATMOS incident. The Executive Committee took the view that the services rendered by the claimant were merely the fulfilment of the normal duties of a port chemist, and that the claim was therefore not admissible.

2.2.31 Loss of Income of Oil Inspection Companies

A claim submitted by two oil inspection companies related to loss of income caused as a result of tankers having been diverted to other ports while the port of La Coruña was closed following the AEGEAN SEA incident. The Executive Committee took the view that it was likely that quantities of oil corresponding to those on board the diverted ships would later be transported to the port of La Coruña on other ships and that the claimants would inspect those cargoes. The Committee decided that the claimants had not shown that they had suffered any economic loss.

2.2.32 Yacht Owner's Mooring Fees and Insurance Premium

A claim was submitted by a yacht owner who had his boat moored in a port which was polluted following the HAVEN incident; the claim was for reimbursement of part of the annual mooring fees and insurance premium. On the basis of a legal opinion on Italian law, the Executive Committee was advised that mooring fees and insurance premiums were not recoverable under Italian law of tort, ie liability of the kind governed by the Civil Liability Convention and the Fund Convention. The Committee noted that these costs would have been incurred by the claimant whether or not the incident had occurred and that there was therefore no link of causation between the contamination and these costs. In the light of these considerations, the Executive Committee decided that the claim was not admissible.

The Italian delegation held the view that this claim had been incorrectly presented, since it should have related to the loss of enjoyment of the use of the boat during a certain period of time. That delegation maintained that such claims were admissible under Italian law.

Miscellaneous

2.2.33 Farming: Emergency Feed Required Because Land Contaminated

In the BRAER case, droplets of dispersed oil in wind-blown spray caused contamination of agricultural land. As a result, supplies of feed were provided for animals which could no longer graze on their usual pastures. The Executive Committee took the view that the cost of this feed was an admissible claim for compensation.

2.2.34 Farming: Subsequent Losses Caused by Disruption of Normal Agricultural Activity

The Executive Committee decided that additional labour costs and other expenses incurred by farmers and crofters in the BRAER case as a result of the subsequent disruption caused by the contamination of farm land were admissible. Within this category, claims have included the supply of equipment for lambing in fields not normally used for this purpose, the provision of farm machinery to handle conditions not normally encountered and the provision of animal housing so as to allow grazing land to recover from unusual overuse. In respect of capital items, farmers have received a contribution towards the cost.

2.2.35 Research Studies

The question of whether the cost of research studies could constitute admissible claims was discussed by the 5th Intersessional Working Group. The Group took the view that expenses for such studies were acceptable only if the study was carried out as a part of the spill response as a direct consequence of a particular oil spill. The Assembly generally endorsed the results of the Working Group's discussions.

In the BRAER case two claims for research studies regarding the effects of the oil spill on wildlife were not considered admissible by the Director.

2.2.36 Damage Caused by Road Accident

Claims were submitted in the TANIO incident in respect of compensation for road accidents involving clean-up vehicles. The Director decided that the damage covered by these claims was not a direct result of the pollution arising from the incident.

3 Preventive Measures

3.1 Preventing Physical Damage

3.1.1 Offshore Clean-up Operations and Other Preventive Measures

Offshore clean-up operations are carried out to prevent oil from reaching the coast or other sensible areas. Claims may include expenses for the deployment of vessels, the salaries of crew, the use of booms, dispersants and other materials. One particular example of a preventive measure was the temporary sealing of the holes in the wreck of the sunken TANIO, as an interim solution to prevent further escape of oil, pending a decision on the permanent removal of the threat of further pollution.

Claims of this kind are admissible to the extent that the operations are reasonable and the amount claimed is reasonable. As in the case of onshore clean-up operations[<2>], deductions are made for the residual value of equipment purchased for the clean-up of or in response to a particular spill. For example, in the TANIO case a 50% reduction was made in respect of the cost of dispersant spraying equipment which was in sufficiently good order to permit future use. If materials or equipment have been purchased and stored so that they would be immediately available if an incident occurred, compensation is paid for a reasonable part of the purchase price of the equipment actually used.

As regards measures taken by public authorities the question arises whether so-called "fixed costs" are to be compensated. In this respect, reference is made to section 2.1.4.

<2> As mentioned in note <1> above, also on-shore clean-up operations could in most cases be considered as "preventive measures".

3.1.2 Repairing Property Damaged During Offshore Clean-up Operations

The IOPC Fund accepts claims relating to damage to property caused by preventive measures. In the KOEI MARU N°3 case, for example, absorbents drifted into nori seaweed farms and claims for the cost of removing the absorbents were accepted.

3.1.3 Car Repairer's Losses Following Closure of Area During Clean-Up Operations

The operator of a car repair firm submitted a claim in connection with the AEGEAN SEA incident for loss of income during the eight days immediately following the incident, during which the area where the business was located was closed by the authorities during the clean-up operations. The Executive Committee first questioned whether the alleged loss could be considered as damage caused by contamination, since the main purpose of closing the area was not clear. When it was established that the main reason for the closure was to ensure that preventive measures, clean-up operations and other activities following the incident would not be obstructed by the general public, the Committee took the view that the losses should be considered as damage caused by preventive measures and the claim was therefore accepted in principle.

The P & I insurer involved in the case reserved its position concerning this claim, as it had some doubts as to whether the losses covered by the claim could be considered as "damage caused by contamination".

3.1.4 Voluntary Groups' Activities to Protect Wildlife

Claims for compensation have been presented to the IOPC Fund by voluntary groups involved in the protection of wildlife. The Executive Committee decided in the BRAER case that the costs incurred by voluntary groups to clean birds and other animals were in principle admissible as costs of preventive measures, provided that the operations were carried out in a responsible manner, that they were useful for mitigating the impact on birds and other animals, that they were carried out efficiently, and that the costs were reasonable. A similar claim was accepted in the TANIO case.

3.1.5 Operations to Remove Oil from Tanker

In a number of cases claims have been accepted for expenses incurred in the removal of oil from the tanker involved in an incident. In the case of the TANIO, a joint technical assessment was made by the experts of the IOPC Fund and the French Government to establish the best way of removing the threat of pollution from the sunken wreck. Whilst having been accepted in principle, the claim for the chosen method (pumping the oil) was nevertheless not accepted in full: considerable deductions were made since certain measures were considered not reasonable (such as not demobilising during the winter period when operations were impossible).

3.1.6 Relationship between Salvage and Preventive Measures

Following the PATMOS case, the Executive Committee considered the relationship between salvage operations and "preventive measures" as defined in the Civil Liability Convention. The Committee took the position that operations could be considered as falling within the definition of "preventive measures" only if the primary purpose was to prevent pollution damage; if the operations had another purpose, such as salving hull or cargo, the operations would not be covered by this definition and would therefore not be admissible. In reaching this decision, the Committee noted that it was necessary to encourage preventive measures. It was noted that the assessment of compensation in respect of operations whose primary purpose was to prevent pollution damage should not be made on the basis of criteria applied for assessing salvage awards, but should be limited to costs (including a reasonable element of profit). This "primary purpose test" was endorsed by the Italian Court of first instance which stated that salvage operations could not be considered as preventive measures since the primary purpose of such operations was that of rescuing the PATMOS and her cargo; this applied even if the operations had the further effect of preventing pollution.

This "primary purpose test" was applied to claims submitted in respect of the removal of the stranded RIO ORINOCO and her cargo.

Following the AGIP ABRUZZO incident certain activities were undertaken both for the purpose of preventing pollution and for the salvage of ship and cargo, but in respect of which it was not possible to establish with any certainty the primary purpose of the operations. Accordingly the costs were apportioned between pollution prevention and other activities.

In the PORTFIELD case, a claim was submitted for certain operations connected with the salvage of the tanker. The claimant maintained that if his sole purpose had been to salve the tanker, without considering the risk of causing further pollution, he could have chosen a method which would have been both quicker and cheaper. The Executive Committee accepted that the measures had a dual purpose. In the settlement of this claim, the Director took the view that the costs should be apportioned, with two-thirds attributed to preventive measures and one third to salvage.

3.1.7 Towage

Following the TARPENBEK incident, a claim was submitted for the towage of the tanker to a sheltered bay where the cargo could be transhipped and thereafter the ship could be towed to another port. The Executive Committee took the view that while the oil was still on board, there was a considerable risk of spillage; measures taken up to the moment when the pumping of the oil from the ship was completed were therefore considered to be "preventive measures". Costs incurred after the cargo was transhipped, however, were not accepted.

3.1.8 Dredging of Port Berth to Receive a Tanker

The IOPC Fund decided that the dredging of a port berth to receive the laden section of the TANIO, where the oil was to be pumped out, was a reasonable measure to prevent further pollution and therefore accepted this claim by the port authority. The IOPC Fund made a contribution towards the cost of this operation.

3.1.9 Activities Involved in Mooring a Burnt Out Wreck

Claims for costs incurred in mooring the burnt out wreck of the PATMOS were not accepted, as they could not be considered as "preventive measures", since there was no longer any risk of pollution. Similarly, a claim for checking the mooring of the wreck during the transhipment of the cargo from the PATMOS was not accepted, as the IOPC Fund maintained that the discharge of the cargo and any activity related thereto could not be considered as "preventive measures".

3.1.10 Underwater Inspection of Sunken Tanker

In the KASUGA MARU N°1 case, the Japanese authorities requested that an underwater inspection of the sunken tanker be carried out. It was first understood that the reason for the request was a wish to explore possible measures to prevent further leakage of oil. As it was not technically possible to prevent further leakage, the IOPC Fund opposed the request. Later, another reason for the survey was advanced, namely the desirability of establishing the exact location and condition of the wreck so as to make it possible for fishermen to avoid having their trawls damaged when fishing in the area. The Executive Committee decided that the proposed inspection could not be considered as "preventive measures", since the purpose of the inspection was not to prevent damage by contamination.

3.1.11 Creation of Crab Protection Area

In the KASUGA MARU N°1 case, the Executive Committee endorsed the Director's rejection of a claim submitted by fishery associations for the cost of the creation of a crab protection area, on the grounds that the purpose of the operation would not have been to prevent damage by contamination

but to prevent physical damage to fishing nets; these expenses could therefore not be considered as falling within the definition of "pollution damage".

3.2 Preventing Pure Economic Loss

3.2.1 General Considerations

Claims for measures of an abstract nature taken or under consideration in order to prevent or minimise pure economic loss were discussed by the Executive Committee at length during 1993. Claims for tourism promotion were submitted in the HAVEN and BRAER cases, and expenses in connection with the marketing of fish products were claimed in the BRAER case.

In a general discussion of this issue in the Executive Committee, some delegations suggested that claims of this kind were admissible if they related to measures taken to prevent or minimise damage which in itself would fall within the definition of "pollution damage". Other delegations expressed hesitation concerning the admissibility of claims of this kind and stated that the drafters of the Civil Liability Convention had not foreseen that such activities should fall within the definition of "preventive measures". The Executive Committee noted in this context that, although the IOPC Fund had been established to pay compensation to victims of oil pollution, it was important that it exercised a certain caution in accepting claims beyond those admissible under the general principles of law in Member States.

The Executive Committee discussed this matter in detail in the context of a claim presented by three organisations representing the Shetland fishing industry relating to marketing activities to be undertaken in order to counteract the negative effect of the BRAER incident on the reputation of Shetland fish products.

The Committee decided that costs incurred for such activities could not be considered as falling within the definition of "pollution damage" unless they were to be considered as costs of "preventive measures". As indicated above, it was unlikely, in the Committee's view, that the drafters of the Civil Liability Convention had foreseen that activities of the kind envisaged by these three organisations should fall within the definition of "preventive measures".

The Japanese delegation stated that the joint marketing claim submitted by these organisations should be rejected, since losses which allegedly would be prevented or minimised by the activities mentioned in the claim did not fall within the definition of "pollution damage". In that delegation's view, the link of causation between the escape of oil and these losses was vague and losses of this kind would not be accepted by Japanese courts. The Japanese delegation maintained that for this reason measures to prevent or minimise loss of this kind should not be considered as "preventive measures" provided for in the Convention, because the loss itself was not "pollution damage".

The Italian observer delegation maintained that it was necessary to take into account any direct or indirect effects of contamination on the economy of a region when considering claims for compensation. It would therefore, in the view of that delegation, be unreasonable not to accept claims relating to costs incurred to mitigate economic damage suffered by the local economy.

Several delegations expressed their concern as to the consequences of accepting claims of this kind.

Other delegations maintained, however, that since the IOPC Fund accepted that pure economic loss under certain conditions fell within the definition of "pollution damage", it should also accept costs of measures to prevent or minimise pure economic loss. These delegations emphasised that "preventive measures" were defined as "any reasonable measures taken by any person to prevent or minimise pollution damage" and that this definition did not distinguish between various types of pollution damage. It was stated that in order to qualify for compensation, the measures must have the purpose of preventing or minimising a quantifiable economic loss.

The Executive Committee agreed with the approach referred to in the preceding paragraph and decided that measures to prevent or minimise pure economic loss should be considered as preventive measures, provided that they fulfilled the following requirements:

- the cost of the proposed measures was reasonable
- the cost of the measures was 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
- in the case of a marketing campaign, the measures related to actual targeted markets

3.2.2 Marketing Campaign Planned by the Shetland Fishing Industry

A joint claim was submitted by the Shetland Salmon Farmers' Association, the Shetland Fish Processors' Association and the Shetland Fish Producers' Organisation for costs relating to activities to be undertaken in order to counteract the negative effect of the BRAER incident on the reputation of Shetland fish products. A pilot project was carried out in Japan by the organisations in order to re-establish the image of quality of Shetland seafood products in that country and eliminate any misconceptions concerning the extent of the damage caused to fish stocks as a result of the BRAER incident.

This claim has been examined by the Director against the criteria laid down by the Executive Committee. The Director has only approved a few items of the claim, which covered measures relating to actual targeted markets.

3.2.3 Damage Limitation Measures Immediately After Incident

Claims were submitted to the IOPC Fund by the Shetland Salmon Farmers' Association in respect of measures taken in the few months following the BRAER incident to limit the damage caused to the reputation of Shetland salmon. The activities related inter alia to mass media management and contacts with major buyers to persuade them either not to stop or to resume buying Shetland salmon. The Executive Committee agreed that the activities covered by the claims should be considered as falling within the definition of "preventive measures" to the extent that the activities fulfilled the criteria set out in section 3.2.1 above.

3.2.4 Tourism Promotion Campaigns

Following the HAVEN and BRAER incidents, claims for campaigns to promote tourism were submitted by tourist authorities, local authorities and a travel agency.

When considering the campaign planned by the tourist authority in Shetland to counteract the negative effect of the incident on tourism in the region, the Executive Committee noted that the authority had not provided any details of the losses allegedly suffered during the 1993 tourist season. The Committee instructed the Director to examine the claim relating to this campaign on the grounds that measures to prevent or minimise pure economic loss should be considered as preventive measures provided that they fulfilled the criteria set out in section 3.2.1 above.

The Executive Committee discussed claims submitted by Italian regional and local authorities for the cost of tourism promotion following the HAVEN incident, including damage to the "touristic image" which was not quantified. The Italian delegation maintained that costs for activities of this kind fell within the scope of the Civil Liability Convention since they should be considered as costs of "preventive measures", and that these items should therefore be admissible in principle since a marketing campaign was considered necessary to counteract the negative effects of the incident on the area. In the view of that delegation, damage to the "touristic image" was also admissible.

The Committee decided that the claim presented by one regional authority should be rejected since only funds already allocated in the budget for tourism promotion had been used and no actual economic loss had been suffered or additional expense incurred. Two other claims of this kind were

also rejected, one because the claimant had not shown that the expenses covered by the claim were linked to the HAVEN incident, and the other because it had not been shown that the activities covered by the claim had contributed to counteracting the negative effect on tourism of the publicity resulting from the incident. The item of a claim relating to damage to "touristic image" was rejected as only a claimant who has suffered a quantifiable economic loss is entitled to compensation.

Following the HAVEN incident a claim for the cost of an advertising campaign was also submitted by an Italian travel agent/tourist accommodation bureau which arranged bookings of holiday flats and hotel rooms at the request of foreign travel agents. The Executive Committee decided that this claim should be rejected since it did not fulfil the criteria for the admissibility of so-called "preventive measures" of an abstract kind as set out in section 3.2.1 above.

4 Miscellaneous

4.1 Damage Arising from an Incident which Occurred Before the Entry into Force of the Civil Liability Convention and Fund Convention

Following the CZANTORIA and NESTUCCA incidents, claims were submitted to the IOPC Fund in respect of damage sustained in Canada after the entry into force of the Civil Liability Convention and the Fund Convention for that State, but which resulted from an incident which had taken place before the entry into force of the Conventions. The Executive Committee took the position that the claimants had no right to compensation in such cases, as the Conventions did not apply to damage caused by incidents which occurred before their entry into force for the State concerned.

4.2 Legal Basis of Claims

After the BRAER incident a number of persons requested advance hardship payments on the basis of documents in which it was stated that they were not submitting formal claims and that the documents should not be considered as constituting claims under the Civil Liability Convention and the Fund Convention. The IOPC Fund had been informed that the purpose of this construction was to preserve for the claimants the possibility of taking legal action in any jurisdiction. The Executive Committee confirmed that the IOPC Fund could not entertain any claims except on the basis of the Civil Liability Convention and Fund Convention, as implemented into United Kingdom law by the Merchant Shipping (Oil Pollution) Act 1971 and the Merchant Shipping Act 1974, and that the IOPC Fund could pay compensation only if the claimant concerned accepted that the payment was made under the Conventions.

4.3 Financial Assistance to Solicitors Wishing to Represent Claimants

Following the BRAER incident, a request for funding was received from a group of solicitors which intended to represent claimants who would be submitting claims to the IOPC Fund. The Executive Committee decided that it would not be appropriate for the IOPC Fund to provide financial assistance either to the Group or to the solicitors who were members of the Group.

4.4 Fees of Claimants' Advisers or Representatives

In a few cases, most notably the BRAER case, claims have included fees paid by the claimant for advice received in connection with the presentation of the claim. The Executive Committee has decided that reasonable fees for work carried out would be considered and that the question of whether and to what extent fees were payable should be assessed in connection with the examination of the particular claim on the basis of the following criteria:

- the claimant's need of expert advice

- the usefulness of the adviser's work
- the quality of the work carried out
- the time required for the work
- the normal rates for such work

In addition, the Executive Committee decided that fees charged as a percentage of the compensation obtained for the claimant or fees charged only if some compensation is obtained for the claimant (ie on a contingency basis) were not admissible.

4.5 Interest on Agreed Claims

4.5.1 The question of whether interest on agreed claims should be paid by the IOPC Fund was discussed by the 5th Intersessional Working Group in 1980. Most participating delegations expressed the opinion that interest was in principle an acceptable item of a claim. Whilst there was a strong wish for a harmonised approach to the issue, the Working Group took the view that, if interest was admissible under national law, the IOPC Fund would be obliged to follow the applicable national law, although the rate and period of interest could be agreed between claimants and the Fund during negotiations. The Assembly generally endorsed the results of the Working Group's discussions.

4.5.2 This approach was illustrated in the first ANTONIO GRAMSCI case. In this case the Swedish Government was entitled, under Swedish law, to interest on its claim against the IOPC Fund. In view of the prompt settlement of the claim by the IOPC Fund, however, the Swedish Government waived a part of its valid claim for interest.

4.6 Provisional and Advance Payments

4.6.1 Provisional payments to claimants are governed by Internal Regulation 8.6 which reads as follows:

> Where the Director is satisfied in respect of an incident that the owner is entitled to limit his liability under the Liability Convention or has no liability under the said Convention and that the Fund will be liable under the Fund Convention to pay compensation to victims of pollution damage arising from the incident, the Director shall make provisional payment to such victims if in his view this is necessary in order to mitigate undue financial hardships to them. These payments shall be at the discretion of the Director who shall endeavour to ensure that no person receiving such payment receives more than 60% of the amount which he is likely to receive from the Fund in the event of claims being abated pro rata. Total payments under this paragraph shall not exceed 90 million francs in respect of any one incident. The relevant date for conversion shall be the date of the incident in question. Such provisional payments may be made before the shipowner has established the limitation fund in accordance with Article V.3 of the Liability Convention.

4.6.2 Payments by the IOPC Fund in accordance with this Regulation have been made in several cases. One example is the VOLGONEFT 263 incident in which provisional payments were made, in order to mitigate undue financial hardship to a fisherman who had had 400 of his salmon nets damaged by oil. In the BRAER case, the Executive Committee agreed that advance payments could be made to fish processors for their loss of income, but only in respect of those parts of their claims which were acceptable in principle.

4.6.3 The question of whether advance payments could be made in respect of measures to prevent or minimise pure economic loss (see section 3.2 above) was raised in connection with the BRAER incident. The Executive Committee considered that in principle claims relating to such measures should not be considered in advance of such measures being carried out. The Committee decided, however, that advance payments could be made up to a certain amount, provided that the claimant had insufficient economic resources to carry out the proposed activities and that the Director considered that the activities fulfilled the criteria laid down by the Committee.

4.7 Legal Fees for High Court Injunction

A claim was presented by a local authority in the TARPENBEK case for legal fees incurred in applying for a high court injunction (which was not granted) against certain preventive measures being taken. The IOPC Fund did not accept this claim, on the grounds that it was not covered by the definition of "pollution damage".

4.8 Penalties Imposed Under National Law for Delay in Payment

In one Member State, the shipowner is obliged under national law to pay a penalty unless the full amount claimed by the authorities for clean-up operations is paid within a short period; he is subsequently allowed to challenge the amount of the claim in court. The IOPC Fund has taken the position that such an obligation does not apply to compensation payable under the Conventions, as the Fund is only obliged to pay compensation for reasonable measures and reasonable costs incurred.

5 Action to be Taken by the Working Group

The Working Group is invited to:

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

(b) examine the practice of the IOPC Fund in respect of the admissibility of claims;

(c) identify the kinds of claim for which, in its view, the practice of the IOPC Fund should be maintained;

(d) identify the kinds of claim, if any, for which, in its view, the practice of the IOPC Fund should be modified and indicate the scope of the modification required; and

(c) make such recommendations to the Assembly in respect of the various kinds of claim dealt with in this document as the Working Group may deem appropriate.

* * *

Consequential Loss and Pure Economic Loss

This table has been prepared as an illustration of the various categories of claims dealt with in document FUND/WGR.7/3 and should not be taken as representing in any way the IOPC Fund's position as to the legal basis of a particular claim or group of claims or the admissiblity thereof

Consequential Loss: Claimant Owner/User of Damaged Property	Pure Economic Loss: Claimant Not Owner/User of Damaged Property	
Fishery Related Fishermen: loss of income resulting from damaged equipment Fish farmers: cost of maintaining staff Aquaculture: loss of income caused by contaminated produce	**Fishery Related** Operational difficulties - On-land fish farms and purification plants: loss of income resulting from interruption of activities Fishermen: loss of income caused by suspension of activities Various businesses: loss of income caused by reduced fishing, fish farming or fish processing activities Difficulties due to Reduced Supply of Fish - Fish processors: loss of income caused by reduced supply of fish - Various businesses: loss of income caused by reduced supply of fish - Fish processors: cost of maintaining staff although insufficient work - Employees in sea-related activities: loss of income caused by their having been made redundant	Difficulties resulting from Reduction of Sales or Reduction in Prices - Fish farmers: loss of income caused by reduction in sales or prices due to fall in market confidence - Fish processors: loss of income caused by reduction in orders due to fall in market confidence - Fish shop: loss of income caused by reduction in sales due to fall in market confidence Others - Public body: loss of income for rental from salmon farms
Tourism Related - Operators of beach facilities on polluted beaches: loss of income due to reduction in tourism	**Port Related** - Ferry operator: loss of income by reduction in ferry services - Shipowner and charterer: loss of hire caused by closure of port - Port chemist: fee for advice to port authorities - Oil inspection companies: loss of income as a result of tankers being diverted - Yacht owner: mooring fees and insurance premium	**Tourism Related** - Owners of hotels, restaurants and campsites: loss of income resulting from reduction in tourism - Travel agent: loss of income caused by lost commission - Shopkeepers: loss of income resulting from reduction in tourism - Travel agent: loss of income caused by reduction in prices - Local authorities: loss of tax revenue
Miscellaneous - Farming: cost of emergency feed required because land contaminated - Farming: losses caused and costs incurred by disruption of normal agricultural activity		**Miscellaneous** - Cost of research studies - Damage caused by road accident