

# Claims Manual

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INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1992



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## INTRODUCTION

This Claims Manual is a practical guide to presenting claims against the International Oil Pollution Compensation Fund 1992. The Organisation was established in 1996 and is known as the 1992 Fund (or IOPC Fund 1992).

The 1992 Fund is a worldwide intergovernmental organisation, ie it is set up by States. The 1992 Fund provides compensation for oil pollution damage resulting from spills of persistent oil from tankers in States which are Members of the Organisation. The 1992 Fund is financed by levies on certain types of oil carried by sea. The levies are paid by entities which receive oil after sea transport, and normally not by States.

The 1992 Fund is administered by a Secretariat, headed by a Director. The Secretariat is located in London, United Kingdom. Lists of Member States may be obtained from the Secretariat or from the Organisation's website.

Section I of this Manual, which is divided into three main parts, sets out the legal framework within which the 1992 Fund operates and describes how the Organisation works. Section II explains how claims for compensation should be presented. The different types of admissible claims are dealt with in Section III.

This Manual does not consider legal questions in detail. These questions vary according to the type of claims submitted and the circumstances of the incident. The Manual does not give an exhaustive presentation of the obligations of the 1992 Fund to pay compensation. The 1992 Fund examines each claim on its merits, in the light of the particular circumstances. The statements in this

Manual are therefore without prejudice to the position of the Organisation concerning individual claims.

It should be noted that the 1992 Fund is able to pay compensation only in respect of claims fulfilling the criteria for admissibility laid down in the relevant international conventions referred to below, ie the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 Civil Liability Convention) and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention).

This Manual should not be seen as an interpretation of the 1992 Civil Liability Convention and the 1992 Fund Convention. The admissibility of claims for compensation is governed by the texts of the Conventions.

# I LEGAL FRAMEWORK: THE 1992 CONVENTIONS

## Introduction

The 1992 Fund operates within the framework of two international Conventions: the 1992 International Convention on Civil Liability for Oil Pollution Damage (1992 Civil Liability Convention) and the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention).

Under the 1992 Civil Liability Convention, claims for compensation for oil pollution damage may be brought against the owner of the ship which caused the damage (or his insurer). In certain circumstances, claims may also be brought against the 1992 Fund under the 1992 Fund Convention.

## Geographic scope

The 1992 Civil Liability Convention and the 1992 Fund Convention apply to pollution damage caused in the territory or territorial sea of a State which is Party to the Convention in question, and to pollution damage caused in the exclusive economic zone (EEZ), or equivalent area, of such a State.

Compensation is also payable for the cost of reasonable measures to prevent or minimise pollution damage in the above-mentioned areas of a State Party to the Convention in question, wherever these measures are taken. For example, if a response on the high seas to an oil spill succeeds in preventing or reducing pollution damage within the territorial sea or exclusive economic zone of such a State, the response would in principle qualify for compensation.

## Types of oil covered

The Conventions apply to spills of *persistent* oil, for example crude oil, fuel oil, heavy diesel oil and lubricating oil. Damage caused by spills of non-persistent oil, such as gasoline, light diesel oil and kerosene, is not compensated under the Conventions.

The term *persistent* is used to describe those oils which, because of their chemical composition, are usually slow to dissipate naturally when spilled into the marine environment and are therefore likely to spread and require cleaning up. Non-persistent oils tend to evaporate quickly when spilled and do not require cleaning up. Neither persistence nor non-persistence is defined in the Conventions. However, under guidelines developed by the Fund, an oil is considered non-persistent if at the time of shipment at least 50% of the hydrocarbon fractions, by volume, distil at a temperature of 340°C (645°F), and at least 95% of the hydrocarbon fractions, by volume, distil at a temperature of 370°C (700°F), when tested in accordance with the American Society for Testing and Materials' Method D86/78 or any subsequent revision thereof.

## Types of ships covered

The 1992 Civil Liability Convention and the 1992 Fund Convention cover incidents in which persistent oil has escaped or has been discharged from a sea-going vessel constructed or adapted to carry oil in bulk as cargo (normally a tanker). The 1992 Conventions cover not only spills of bunker oil from laden tankers but also in certain circumstances spills of persistent oil (including bunker oil) from unladen tankers.

## **Definition of pollution damage and preventive measures**

The 1992 Fund, as well as the shipowner and his insurer, pays compensation under the Conventions for *pollution damage*.

This term is defined in the 1992 Conventions as “loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken”. *Pollution damage* again includes costs of reasonable *preventive measures*. Expenses for preventive measures are recoverable even if no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.

The interpretation of the terms *pollution damage* and *preventive measures* by the 1992 Fund is set out in Section III.

## **The 1992 Civil Liability Convention - the shipowner pays**

Under the 1992 Civil Liability Convention, the shipowner has strict liability for pollution damage caused by the escape or discharge of persistent oil from his ship. This means that he is liable even in the absence of fault on his part. He is exempt from liability under this Convention only if he proves that:

- the damage resulted from an act of war, hostilities, civil war, insurrection or a grave natural disaster, or

- the damage was wholly caused by an act or omission done with intent to cause damage by a third party (eg sabotage), or
- the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.

The shipowner is normally entitled to limit his liability to an amount determined by the size of the ship. Under the 1992 Convention, the limit is (a) for a ship not exceeding 5 000 units of gross tonnage, 3 million SDR (£2.5 million or US\$4.0 million)<sup>1</sup> ; (b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 3 million SDR plus 420 SDR (£356 or US\$557) for each additional unit of tonnage; and (c) for a ship of 140 000 units of tonnage or over, 59.7 million SDR (£50.6 million or US\$79.2 million). These amounts will be increased by 50% for incidents occurring on or after 1 November 2003.

The owner is deprived of the right to limit his liability, however, if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause pollution damage, or recklessly and with knowledge that such damage would probably result.

The shipowner is obliged to maintain insurance to cover his liability under the 1992 Civil Liability Convention. This obligation does not apply to ships carrying less than 2 000 tonnes of oil as cargo.

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<sup>1</sup> *Amounts in the 1992 Conventions are expressed in the Special Drawing Right (SDR) of the International Monetary Fund. In this Manual, the conversion from Special Drawing Rights to Pounds Sterling and US Dollars has been made using the rates of exchange applicable on 1 November 2002, ie 1 SDR = £0.84839 or US\$1.32714. Up to date conversions may be found on the Organisation's website.*

## The 1992 Fund Convention - the 1992 Fund pays

The 1992 Fund exists to pay compensation when those suffering oil pollution damage do not obtain full compensation under the 1992 Civil Liability Convention in the following cases:

- the shipowner is exempt from liability under the 1992 Civil Liability Convention because the damage was caused by a grave natural disaster, or wholly caused intentionally by a third party or the negligence of public authorities in maintaining lights or other navigational aids
- the shipowner is financially incapable of meeting his obligations under the 1992 Civil Liability Convention in full, and the insurance is insufficient to satisfy the claims for compensation
- the damage exceeds the limit of the shipowner's liability under the 1992 Civil Liability Convention.

The 1992 Fund does not pay compensation if:

- the damage occurred in a State which was not a Member of the 1992 Fund, or
- the pollution damage resulted from an act of war, hostilities, civil war or insurrection or was caused by a spill from a warship, or
- the claimant cannot prove that the damage resulted from an incident involving one or more ships as defined (ie a laden or unladen sea-going vessel or seaborne craft constructed or adapted to carry oil in bulk as cargo).

The compensation payable by the 1992 Fund for any one incident is limited to 135 million SDR (approximately £115 million or US\$179 million). This amount will be increased to 203 million SDR (approximately £172 million or US\$269 million) for incidents occurring on or after 1 November 2003. This maximum amount includes the sum actually paid by the shipowner or his insurer under the 1992 Civil Liability Convention.

## II PRESENTING A CLAIM

### **The role of the 1992 Fund**

The role of the 1992 Fund is to compensate those suffering pollution damage. The 1992 Fund endeavours to settle claims out of court, so that claimants receive compensation as promptly as possible. Claimants nevertheless have the right to take their claims to the competent national court.

The Secretariat of the 1992 Fund is pleased to advise on the preparation and submission of claims. Claimants may consult the Secretariat on other matters, for example before undertaking preventive measures or engaging experts for surveying purposes.

### **Who is entitled to compensation?**

Anyone who has suffered pollution damage in a Member State of the 1992 Fund may make a claim against that Organisation for compensation. Claimants may be private individuals, partnerships, companies, private organisations or public bodies, including States or local authorities.

If several claimants suffer similar damage, they may find it more convenient to submit co-ordinated claims. This can also facilitate claims handling by the Secretariat of the 1992 Fund.

### **To whom should a claim be addressed?**

Claims for compensation under the 1992 Civil Liability Convention should be brought against the shipowner liable for the damage, or directly against his insurer. The insurer will normally be one of the Protection and Indemnity Associations (P & I Clubs) which insure the third-party liabilities of shipowners.

To obtain compensation under the 1992 Fund Convention, claimants should submit their claims directly to the 1992 Fund at the following address:

**International Oil Pollution Compensation Fund 1992  
(1992 Fund)**

**Portland House**

**Stag Place**

**London SW1E 5PN**

**United Kingdom**

**Telephone: +44-20-7592 7100**

**Telefax: +44-20-7592 7111**

**E-mail: [info@iopcfund.org](mailto:info@iopcfund.org)**

The 1992 Fund co-operates closely with the P & I Clubs in the settlement of claims. The P & I Club concerned and the 1992 Fund usually jointly investigate the incident and assess the damage. Full supporting documentation should be submitted either to the shipowner/P & I Club or to the 1992 Fund. If the documentation is presented to the shipowner or the P & I Club, the 1992 Fund should be notified directly of any claim against it under the 1992 Fund Convention.

In some cases, claims are channelled through the office of a designated local surveyor. Claimants should in such cases submit their claims to that office, for forwarding to the 1992 Fund and the P & I Club for decision. Occasionally, when an incident gives rise to a large number of claims, the 1992 Fund and the P & I Club jointly set up a local claims office so that claims may be processed more easily. Claimants should then submit their claims

to that local claims office. Details of claims offices are given in the local press. All claims are referred to the P & I Club and to the 1992 Fund for decision on their admissibility. Neither designated local surveyors nor local claims offices may decide on the admissibility of claims.

### **Within what period should a claim be made?**

Claimants should submit their claims as soon as possible after the damage has occurred. If a formal claim cannot be made shortly after an incident, the 1992 Fund would appreciate being notified as soon as possible of a claimant's intention to present a claim at a later stage.

Claimants will ultimately lose their right to compensation under the 1992 Fund Convention unless they bring court action against the 1992 Fund within three years of the date on which the *damage occurred*, or make formal notification to the 1992 Fund of a court action against the shipowner or his insurer within that three-year period (see Articles 6.1 and 7.6 of the 1992 Fund Convention). Although damage may occur some time after an incident takes place, court action must in any case be brought within six years of the date of the *incident*. The same applies to claimants' right to compensation from the shipowner and his insurer under the 1992 Civil Liability Convention. Claimants are recommended to seek legal advice on the formal requirements of court actions, to avoid their claims becoming time-barred.

The 1992 Fund endeavours to settle claims out of court. However, claimants are advised to present their claims against the 1992 Fund well in advance of the expiry of the periods mentioned above. This allows time for claims to be examined and settled out of court, but

also ensures that claimants will be able to sue the 1992 Fund for compensation and prevent their claims from being time-barred, if they and the 1992 Fund are unable to agree on amicable settlements of the claims.

### **How should a claim be presented?**

Claims against the 1992 Fund should be made in writing (including telefax or electronic mail). A claim should be presented clearly and with sufficient detail for the 1992 Fund to assess the amount of the damage on the basis of the facts and the supporting documentation presented. Each item of a claim must be substantiated by an invoice or other relevant supporting documentation, such as work sheets, explanatory notes, accounts and photographs. It is the responsibility of claimants to submit evidence supporting their claims.

The 1992 Fund usually appoints surveyors and technical advisers to investigate the technical merit of claims. Claims can be settled promptly only if claimants co-operate fully with these surveyors and advisers and provide all information relevant to the assessment of the claims.

The speed with which claims are settled depends largely on how long it takes for claimants to provide the 1992 Fund with the required information. Claimants are therefore advised to follow this Manual as closely as possible. If the documentation in support of a claim is likely to be considerable, claimants should contact the 1992 Fund (or where appropriate the designated surveyor or local claims office) as soon as possible after the incident to discuss claim presentation.

The working languages of the 1992 Fund are English, French and Spanish. Claim settlement will proceed more quickly if claims, or at least claim summaries, are submitted in one of these languages.

### **What information should a claim contain?**

Each claim should contain the following basic information:

- the name and address of the claimant, and of any representative
- the identity of the ship involved in the incident
- the date, place and specific details of the incident, if known to the claimant, unless this information is already available to the 1992 Fund
- the type of pollution damage sustained
- the amount of compensation claimed.

Additional information may be required for specific types of claim. This is described in more detail in Section III (pages 21-23 and 28).

### **Claim settlement procedure**

The claim settlement procedure of the 1992 Fund is laid down in its Internal Regulations, which are adopted by the Governments of Member States.

Claims submitted to the 1992 Fund are dealt with as promptly as possible.

The Director of the 1992 Fund has the authority to make final settlement of claims within certain limits. If those limits are exceeded, the Director has to submit the claim settlements for decision by the Executive Committee of the 1992 Fund, which is composed of representatives of the Governments of Member

States. The Executive Committee may give the Director extended authority to settle claims arising from a particular incident.

The Director may make provisional payments before the final settlement of a claim, if victims would otherwise suffer undue financial hardship. Provisional payments are subject to special conditions and limits.

If the total amount of the claims approved by the 1992 Fund, or established by a court for a particular incident, exceeds the total amount of compensation available under the 1992 Fund Convention, the compensation paid to each claimant will be reduced proportionately. When there is a risk that this situation will arise, the 1992 Fund may have to restrict payments of approved claims or provisional payments to a fixed percentage, to ensure that all claimants are given equal treatment.

## III ADMISSIBLE CLAIMS

### Claims policy of the 1992 Fund

The 1992 Fund can accept only those claims which fall within the definitions of *pollution damage* and *preventive measures* laid down in the 1992 Conventions. A uniform interpretation of the definitions is essential for the functioning of the system of compensation established by the Conventions.

The policy of the 1992 Fund on the admissibility of claims for compensation has been established by the Governments of Member States. Each claim has its own particular characteristics, and it is therefore necessary to consider each claim on the basis of its own merits, in the light of the particular circumstances of the case. The criteria adopted by the 1992 Fund therefore allow for a certain degree of flexibility.

### General criteria

The following general criteria apply to all claims:

- any expense/loss must actually have been incurred
- any expense must relate to measures which are deemed reasonable and justifiable
- a claimant's expense/loss or damage is admissible only if and to the extent that it can be considered as caused by contamination
- there must be a link of causation between the expense/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

- a claimant has to prove the amount of his loss or damage by producing appropriate documents or other evidence.

A claim is thus admissible only to the extent that the amount of the loss or damage is actually demonstrated. A certain flexibility is nevertheless exercised in respect of the requirement to present documents, taking into account the particular circumstances of the claimant or industry concerned or of the country in question. All elements of proof are considered, but the evidence provided must give the 1992 Fund the possibility of forming its own opinion on the amount of the loss or damage actually suffered.

## Clean-up operations and property damage

### **Clean-up operations on shore and at sea, and property damage**

Clean-up operations on shore and at sea would in most cases be considered as *preventive measures*, ie measures to prevent or minimise *pollution damage*.

The 1992 Fund compensates the cost of reasonable measures taken to combat the oil at sea, to defend sensitive resources and to clean shorelines and coastal installations.

Loss or damage caused by measures to prevent or minimise pollution is also compensated. For example, if clean-up measures result in damage to roads, piers and embankments, the cost of the resulting necessary repairs is admissible. However, claims for work which involves improvements rather than the repair of damage resulting from a spill are not accepted.

Claims for measures to prevent or minimise pollution damage are assessed on the basis of objective criteria. The fact that a

government or other public body decides to take certain measures does not in itself mean that the measures are reasonable for the purpose of the Conventions. The technical reasonableness is assessed on the basis of the facts available at the time of the decision to take the measures. However, those in charge of the operations should continually reappraise their decisions in the light of developments and further technical advice.

Claims for costs are not accepted when it could have been foreseen that the measures taken would be ineffective. On the other hand, the fact that the measures prove to be ineffective is not in itself a reason for rejection of a claim for the costs incurred. The costs incurred, and the relationship between these costs and the benefits derived or expected, should be reasonable. In the assessment, the 1992 Fund takes account of the particular circumstances of the incident.

Claims for clean-up operations may include the cost of personnel and the hire or purchase of equipment and materials. The cost of cleaning and repairing clean-up equipment and of replacing materials consumed during the operations is accepted. If the equipment used was purchased for a particular spill, deductions are made for the residual value when the amount of compensation is assessed. If a public authority has purchased and maintained materials or equipment so that they are immediately available if an incident occurs, compensation is paid for a reasonable part of the purchase price of the materials and equipment actually used.

### **Salvage and preventive measures**

Salvage operations may in some cases include an element of preventive measures. Such operations can be considered as *preventive measures* only if the primary purpose is to prevent *pollution damage*. If the operations have another purpose, such as salvaging hull and cargo, the costs incurred are not admissible under

the Conventions. If the activities are undertaken for the purpose of both preventing pollution and salvaging the ship and cargo, but it is not possible to establish with any certainty the primary purpose of the operations, the costs are apportioned between pollution prevention and other activities. The assessment of compensation for activities which are considered to be *preventive measures* is not made on the basis of the criteria applied for assessing salvage awards; the compensation is limited to costs, including a reasonable element of profit.

### **Disposal of collected material**

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 would be deducted from any compensation to be paid.

### **Property damage**

Claims for the cost of cleaning or repairing property which has been contaminated by oil (for example boats, yachts and fishing gear) are accepted. 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.

### **Cost of studies**

Expenses for studies are compensated only if the studies are carried out as a direct consequence of a particular oil spill, and as a part of the oil spill response or to quantify the level of loss or damage. The 1992 Fund does not pay for studies of a general or purely scientific character. Reference is made to pages 30 and 31.

### **Fixed costs**

Clean-up operations are often carried out by public authorities which use permanently employed personnel, or vessels, vehicles and equipment owned by those authorities. The authorities may then incur *additional costs*, ie expenses which arise solely as a result of the incident and which would not have been incurred had the incident and related operations not taken place. Reasonable *additional costs* are accepted by the 1992 Fund.

Authorities may claim compensation for so-called *fixed costs*, ie costs which would have arisen for the authorities concerned even if the incident had not occurred, such as normal salaries for permanently employed personnel and capital costs of vessels owned by the authorities. The 1992 Fund accepts a reasonable proportion of *fixed costs*, provided that these costs correspond closely to the clean-up period in question and do not include remote overhead charges.

### **Claim presentation**

It is essential that supporting documentation shows how the expenses for clean-up operations are linked with the actions taken at specified work sites.

Major expenditures may be incurred for the use of aircraft, vessels, specialised equipment, heavy machines, trucks and personnel. Some of these may be government-owned; others may be the subject of contractual arrangements. Claimants should keep comprehensive records of all operations and expenditures resulting from an incident. Supervisory personnel should daily record the operations in progress, the equipment in use, where and how it is being used, the number of personnel employed, how and where they are deployed and the materials consumed. Standard work sheets, designed to suit the particular circumstances of the spill and

the response organisation in the country concerned, are useful for such records. It is often useful to appoint a financial controller to keep adequate records and control expenditure.

Claims for *clean-up operations* and *preventive measures* should be itemised as follows:

- Delineation of the area affected, describing the extent of the pollution and identifying those areas most heavily contaminated (for example using maps or nautical charts, supported by photographs or video tapes)
- Analytical and/or other evidence linking the oil pollution with the ship involved in the incident (such as chemical analysis of oil samples, relevant wind, tide and current data, observation and plotting of floating oil movements)
- Summary of events, including a description and justification of the work carried out at sea, in coastal waters and on shore, together with an explanation of why the various working methods were selected
- Dates on which work was carried out at each site
- Labour costs at each site (number and categories of response personnel, regular or overtime rates of pay, hours or days worked, other costs)
- Travel, accommodation and living costs for response personnel
- Equipment costs at each site (types of equipment used, rate of hire or cost of purchase, quantity used, period of use)
- Consumable materials (description, quantity, unit cost and where used)
- Any remaining value at the end of the operations of equipment and materials purchased
- Age of equipment not purchased but used in the incident

- Transport costs (number and types of vehicles, vessels or aircraft used, number of hours or days operated, rate of hire or operating cost)
- Cost of temporary storage (if applicable) and of final disposal of recovered oil and oily material.

Claims for *damage to property* should be itemised as follows:

- Extent of pollution damage to property and an explanation of how the damage occurred
- Description and photographs of items destroyed, damaged or needing replacement, repair or cleaning (for example boats, fishing gear, roads, clothing), including their location
- Cost of repair work, cleaning or replacement of items
- Age of items to be replaced
- Cost of restoration after clean-up, such as repair of roads, piers and embankments damaged by the clean-up operations, with information on normal repair schedules.

### **Consequential loss and pure economic loss**

The 1992 Fund accepts in principle claims for loss of earnings suffered by the owners or users of property contaminated as a result of a spill (*consequential loss*). One example of consequential loss is a fisherman's loss of income as a result of his nets becoming polluted.

An important group of claims comprises those relating to *pure economic loss*, ie loss of earnings sustained by persons whose property has not been polluted. A fisherman whose boat and nets have not been contaminated may be prevented from fishing because the area of the sea where he normally fishes is polluted and he cannot fish elsewhere. Similarly, a hotelier or restaurateur whose premises are close to a contaminated public beach may suffer loss

of profit because the number of guests falls during the period of pollution.

Claims for pure economic loss are admissible only if they are for loss or damage caused by contamination. The starting point is the pollution, not the incident itself.

To qualify for compensation for pure economic loss, there must be a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant. A claim is not admissible for the *sole* reason that the loss or damage would not have occurred had the oil spill not happened. When considering whether the criterion of reasonable proximity is fulfilled, the following elements are 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 or business opportunities
- the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.

The 1992 Fund also takes into account the extent to which a claimant was able to mitigate his loss.

As regards the tourism sector, the 1992 Fund makes a distinction between (a) claimants who sell goods or services directly to tourists and whose businesses are directly affected by a reduction in visitors to the area affected by an oil spill, and (b) those who provide goods

or services to other businesses in the tourist industry, but not directly to tourists. The 1992 Fund considers that in this second category there is generally not a sufficient degree of proximity between the contamination and the losses allegedly suffered by claimants. Claims of this type will therefore normally not be admissible in principle.

The assessment of a claim for pure economic loss is based on the actual financial results of the individual claimant for appropriate periods during the years before the incident. The assessment is not based on budgeted figures. The 1992 Fund takes into account the particular circumstances of the claimant and considers any evidence presented. The criterion is whether the claimant's business as a whole has suffered economic loss as a result of the contamination.

Any saved overheads or other normal expenses not incurred as a result of the incident should be subtracted from the loss suffered by the claimant, for both consequential loss and pure economic loss.

### **Measures to prevent pure economic loss**

Claims for the cost of measures to prevent pure economic loss may be admissible if they fulfil the following requirements:

- the cost of the proposed measures is reasonable
- the cost of the measures is not disproportionate to the further damage or loss which they are intended to mitigate
- the measures are appropriate and offer a reasonable prospect of being successful
- in the case of a marketing campaign, the measures relate to actual targeted markets.

To be admissible, the costs should relate to measures to prevent or minimise losses which, if sustained, would qualify for compensation under the Conventions. Claims for the cost of marketing campaigns or similar activities are accepted only if the activities undertaken are in addition to measures normally carried out for this purpose. In other words, compensation is granted only for the additional costs resulting from the need to counteract the negative effects of the pollution.

The criterion of *reasonableness* is assessed in the light of the particular circumstances of the case, taking into account the interests involved. The assessment is made on the basis of the facts known at the time that the measures are taken. As for marketing campaigns, measures of too general a nature are not accepted.

The 1992 Fund does not normally accept claims for measures to prevent pure economic loss until they have been carried out. The 1992 Fund is cautious about advance payments for such measures, since it will not take on the role of a claimant's banker.

When considering the admissibility of claims for the cost of an organisation's marketing activities, the 1992 Fund takes into account the organisation's attitude towards the media after the incident and, in particular, whether that attitude increased the negative effects of the pollution.

### **Contamination of fisheries and aquaculture produce**

If there are mortalities in fish and aquaculture stocks following an incident, the claimant should document the loss by preserving samples and using photographic and other forms of recording to demonstrate the nature and extent of the loss. Claimants are advised to contact the 1992 Fund (or where appropriate the

designated surveyor or local claims office) without delay so that a joint survey of the loss incurred can be carried out.

The 1992 Fund has in the past received 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 1992 Fund does not consider a fishing ban or exclusion zone imposed by a public authority as conclusive justification for destroying produce affected by a ban. Such claims are admissible if and to the extent that the destruction of the produce was reasonable on the basis of the scientific and other evidence available.

When assessing whether the destruction of produce was reasonable, the 1992 Fund considers the following points:

- whether the produce was contaminated
- the likelihood that the contamination would disappear before the normal harvesting time
- whether the retention of the produce in the water would prevent further production
- the likelihood that the produce would be marketable at the time of normal harvesting.

Since the assessment by the 1992 Fund of whether the destruction was reasonable is based on scientific and other evidence, it is important that sampling and testing are carried out, in particular testing for taint. Samples from an area affected by the spill (*suspect* samples) and *control* samples from a nearby commercial outlet outside the polluted area should be tested at the same time. The two groups of samples should be of equal numbers. Taste testers should not be able to identify whether the sample being tasted is a suspect or a control sample (*blind* testing).

## **Claim presentation**

Claimants should substantiate their loss with appropriate documents or other evidence.

Claims for *consequential loss* and *pure economic loss* should include the following information:

- Nature of loss, including proof that the alleged loss resulted from the contamination
- Comparative figures for earnings in previous periods and during the period when economic loss was suffered, for example in the form of audited accounts or tax returns
- Comparison with similar areas outside the area affected by the oil spill
- Method of assessment of loss
- Saved overheads.

Claimants should indicate whether they have received any extra income as a result of the incident. For instance, fishermen who take part in clean-up operations may have been paid for their participation. Similarly, claimants should indicate whether they have received any aid or payments from public authorities or other international organisations in connection with the incident.

Claimants may wish to use advisers to assist them in presenting claims for compensation. The 1992 Fund will consider reasonable costs for work carried out by advisers in connection with the presentation of claims falling within the scope of the Conventions. The question of whether and to what extent costs are payable is assessed in connection with the examination of the particular claim for compensation. The 1992 Fund takes into account the necessity for the claimant to use expert advice, the usefulness of the work carried out by the adviser, the quality of the work, the time reasonably needed and the normal rate for work of that kind.

## Environmental damage

In most cases a major oil spill will not cause permanent damage to the environment as the marine environment has a great potential for natural recovery. Whilst there are limits to what man can do in taking measures to improve on natural processes, in some circumstances it is possible to enhance the speed of natural recovery after an oil spill through reasonable reinstatement measures. The costs of such measures will be accepted by the 1992 Fund under certain conditions.

The aim of any reasonable measures of reinstatement should be to bring the damaged site back to the same ecological state that would have existed had the oil spill not occurred, or at least as close to it as possible (that is to re-establish a biological community in which the organisms characteristic of that community at the time of the incident are present and are functioning normally). Reinstatement measures taken at some distance from, but still within the general vicinity of, the damaged area may be acceptable, so long as it can be demonstrated that they would actually enhance the recovery of the damaged components of the environment. This link between the measures and the damaged components is essential for consistency with the definition of *pollution damage* in the 1992 Civil Liability and Fund Conventions (see page 7).

In addition to satisfying the general criteria applied to the admissibility of claims for compensation under the 1992 Fund Convention (see page 17), claims for the costs of measures of reinstatement of the environment will only be considered admissible if the following criteria are fulfilled:

- the measures should be likely to accelerate significantly the natural process of recovery

- the measures should seek to prevent further damage as a result of the incident
- the measures should, as far as possible, not result in the degradation of other habitats or in adverse consequences for other natural or economic resources
- the measures should be technically feasible
- the costs of the measures should not be out of proportion to the extent and duration of the damage and the benefits likely to be achieved.

The assessment should be made on the basis of the information available when the specific reinstatement measures are to be undertaken.

Compensation is paid only for reasonable measures of reinstatement actually undertaken or to be undertaken, and if the claimant has sustained an economic loss that can be quantified in monetary terms. The Fund will not entertain claims for environmental damage based on an abstract quantification calculated in accordance with theoretical models. It will also not pay damages of a punitive nature on the basis of the degree of fault of the wrong-doer.

Studies are sometimes required to establish the precise nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible. Such studies will not be necessary after all spills and will normally be most appropriate in the case of major incidents where there is evidence of significant environmental damage.

The Fund may contribute to the cost of such studies provided that they concern damage which falls within the definition of *pollution damage* in the Conventions, including reasonable measures to reinstate a damaged environment. In order to be admissible for

compensation it is essential that any such post-spill studies are likely to provide reliable and usable information. For this reason the studies must be carried out with professionalism, scientific rigour, objectivity and balance. This is most likely to be achieved if a committee or other mechanism is established within the affected Member State to design and co-ordinate any such studies, as well as reinstatement measures.

The scale of the studies should be in proportion to the extent of the contamination and the predictable effects. On the other hand, the mere fact that a post-spill study demonstrates that no significant long-term environmental damage has occurred or that no reinstatement measures are necessary, does not by itself exclude compensation for the costs of the study.

The Fund should be invited at an early stage to participate in the determination of whether or not a particular incident should be subject to a post-spill environmental study. If it is agreed that such a study is justified the Fund should then be given the opportunity of becoming involved in the planning and in establishing the terms of reference for the study. In this context the Fund can play an important role in helping to ensure any post-spill environmental study does not unnecessarily repeat what has been done elsewhere. The Fund can also assist in ensuring that appropriate techniques and experts are employed. It is essential that progress with the studies is monitored, and that the results are clearly and impartially documented. This is not only important for the particular incident but also for the compilation of relevant data by the Fund for future cases.

It is also important to emphasise that participation of the Fund in the planning of environmental studies does not necessarily mean that any measures of reinstatement later proposed or undertaken will be considered admissible.

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