INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

ASSEMBLY
9th session
Agenda item 23

92FUND/A.9/20
23 September 2004
Original: ENGLISH

CONSIDERATION OF DRAFT REVISED CLAIMS MANUAL

Note by the Director

Summary:	A draft revised Claims Manual has been prepared. The purpose of the revision is to make the Manual more reader friendly so as to give further assistance to claimants. The revised text does not amend the Fund's policy in respect of the admissibility of claims. The criteria for admissibility have been illustrated by specific examples for each claim sector.
Action to be taken:	(a) Consider the draft revised Claims Manual; and (b) Consider whether to recommend to the Supplementary Fund Assembly that the Supplementary Fund should not have any Claims Manual.

1 Introduction

1.1 At its 22nd session in October 2003 the 1992 Fund Executive Committee considered a document submitted by the Director (document 92FUND/EXC.22/12) on the lessons learned from the *Nakhodka* incident as proposed by the Japanese delegation at the October 2002 session (document 92FUND/EXC.18/14/2). The Director stated that he intended to carry out a further review in the light of the experience gained in dealing with the *Erika* and *Prestige* incidents.

1.2 At its February 2004 session the 1992 Fund Executive Committee considered a document submitted by the Japanese delegation concerning the lessons learned from the *Nakhodka* incident (document 92FUND/EXC.24/7). The Committee took note in particular of the Japanese delegation's proposal to unify the format of the claims documents other than the assessment reports and to modify the format in the Claims Manual to facilitate the understanding of the documents and the prompt handling of claims. It also took note of the proposal to supplement the Claims Manual with examples of actual assessments to ensure uniformity in the assessments and assist victims in the presentation of claims (document 92FUND/EXC24/8, paragraph 3.7.2).

1.3 A number of delegations expressed their support for the concrete proposals made by the Japanese delegation on the basis of an objective review of the lessons learned. The Director was invited to submit a document to a future session of the Executive Committee with detailed proposals on how the Funds could implement the recommendations made by the Japanese delegation, for example through improvements in their internal procedures and changes to the next edition of the Claims Manual (document 92FUND/EXC.24/8, paragraphs 3.7.4 and 3.7.5).

1.4 At its May 2004 session the 1992 Fund Assembly, in the context of the preparations for the entry into force of the Supplementary Fund Protocol, agreed with the Director's proposal that consideration should be given to reviewing the Claims Manual in order to make it more reader-friendly so as to give further assistance to claimants (document 92FUND/A/ES.8/4, paragraph 3.6.7).

2 Revision of the Claims Manual

2.1 The present Claims Manual was adopted by the 1992 Fund Assembly at its October 2002 session (document 92FUND/A.7/29, paragraphs 6.5 and 6.6) and was published in November 2002. This version is available on the IOPC Funds' web site.

2.2 One of obstacles to the rapid assessment and settlement of claims for compensation is that claimants rarely provide sufficient information from the outset in support of their claims. The preparation of a revised Claims Manual should be seen as an important step towards improving the claims-handling process.

2.3 In the light of the lessons learned from past incidents the Director has prepared a draft revised Claims Manual with the overall aim of making the Manual easier to comprehend by claimants by making the text less legalistic and by illustrating the Fund's admissibility criteria through specific examples for each claim sector. The Director also proposes a change to the format of the Manual to enable claimants to focus on those parts of the manual dealing with their own particular claims sector.

2.4 The current version of the Manual is based on admissibility criteria adopted by the 1971 Fund Assembly in October 1994 following considerable preparatory work within the 7th intersessional Working Group. The 1992 Fund Assembly endorsed the criteria at its 1st session in April 1996 (document 92FUND/A.1/34, paragraph 19.2 and Annex III). The governing bodies took some important decisions after 1994 in respect of 'second degree tourism claims' and environmental damage, which are reflected in the current version of the Manual.

2.5 At the Assembly's May 2004 session one delegation expressed the view that more detailed criteria for the admissibility of claims should be developed for the 1992 Fund, which would also be applicable to the Supplementary Fund. The Assembly invited the Director to examine the matter for further consideration at a later session (document 92FUND/A/ES.8/4, paragraph 3.6.3).

2.6 The Director has given considerable thought to this proposal. In this context, reference should be made to the position taken by the governing bodies when the issue of such criteria has been discussed and the position taken by the governing bodies when adopting the successive versions of the Claims Manual. It has been emphasised that each claim has its own particular characteristics, that it is therefore necessary to consider each claim on the basis of its characteristics in the light of the particular circumstances of the case and that the Fund's criteria should therefore allow for a certain degree of flexibility (1992 Fund Claims Manual, November 2002 edition, page 17, second paragraph). Given the position taken by the governing bodies in this regard, the Director takes the view that it would not be appropriate for the 1992 Fund to adopt more detailed criteria for admissibility. He considers that the best way to assist claimants is to make the Manual more reader-friendly and give examples of various types of claim.

2.7 The Director has also given further consideration to the proposal to supplement the Claims Manual with examples of actual assessments, referred to in paragraph 1.2 above. In his view, such examples would of necessity be so simplistic that they would not be of any assistance to claimants in preparing their compensation claims and could be misleading.

2.8 The proposed revised Manual does not seek to amend in any way the Fund's policy regarding the admissibility of claims. However, on some points the language and terminology of the draft revised Manual have been amended to facilitate claimants' understanding of the admissibility

criteria. For example, the expression 'settlement of claims' has in most places been substituted for 'approval', 'acceptance' or 'payment' of claims and the expressions 'admissible' and 'admissibility' have been replaced by 'compensable' or 'acceptable' and by 'qualifying for compensation'. It must be recognised, however, that the international compensation regime is operating within the legal framework of two international Conventions and that it is in many instances difficult to describe the provisions of the Conventions in everyday language.

2.9 The main proposed changes to the Manual are set out below.

2.10 The first two Sections of the existing Manual have been replaced by a simpler explanation of the how the compensation regime works and general information on the types of claims covered by the Conventions, how to submit a claim and how the Fund handles claims.

2.11 In Section I, which describes the international compensation regime, reference has been made to the Supplementary Fund (pages 2, 3 and 4 of the draft).

2.12 Section II contains more detailed information regarding claims-handling procedures. It should be recognised that it is not possible to describe in detail the claims-handling procedures in the Claims Manual, which is intended for use by claimants on a worldwide basis, since the procedures will vary depending on the nature and location of an incident and the attitude of the various parties involved.

2.13 Section III has been spilt into five sub-sections, each dealing with one of the five main categories of claim covered by the compensations regime. Although the creation of sub-sections inevitably introduces some duplication, the Director considers that this is justified, since it enables the admissibility criteria to be illustrated with specific examples relating to the sector in question, which is a key feature of the proposed revised Manual. It also makes it possible to take into account the different types of supporting documentation that may be appropriate for different sectors, for example fisheries and tourism sectors. In addition, a claimant would normally only have to read the sub-section relevant to his or her claim.

2.14 Although the Funds have, in the past, accepted claims for the costs of cleaning and rehabilitation of oiled wildlife, there is no guidance given in the present Claims Manual on the admissibility and presentation of such claims. Since it is likely that in most future spills where wildlife impacts occur a response will be mounted, the Director considers it appropriate to include a paragraph on claims for wildlife cleaning and rehabilitation in a revised Manual, in the sub-section on clean-up and pollution prevention measures (pages 4, 9 and 11 of the draft).

2.15 It is proposed to include in the revised Manual a paragraph dealing with subsistence fishing, since the Fund has recently dealt with claims in this sector. The information included in the draft is based on the work being undertaken by the Director on the admissibility and assessment of such claims (page 14 of the draft).

2.16 In the context of pure economic loss claims, the Fund has found that many claimants and experts engaged by the Fund have had difficulty with the criterion of 'a reasonable degree of *proximity* between the contamination and the loss or damage' (Claims Manual, November 2002 edition, page 24), adopted on the basis of a proposal by the above-mentioned intersessional Working Group. The word 'proximity' has generally been understood by claimants to refer to a geographical relationship between the contamination and the alleged damage. Experience has also shown that it is difficult to make a translation of this expression into French and Spanish that is understandable in the context of the continental legal system. The Director therefore proposes to replace this expression with the wording 'a sufficiently close link of causation between the contamination and the loss or damage'. The Director is of the view that the proposed new expression is consistent with the criteria adopted by the governing bodies, is more easily understood in countries whose legal systems are not based on common law and can be translated accurately into French and Spanish.

2.17 The section dealing environmental damage in the present edition of the Manual was adopted by the Assembly at its 7th session in October 2002 (document 92FUND/A.7/29, paragraph 6.5 and Annex I) on the basis of a proposal by the 1992 Fund 3rd intersessional Working Group. The Director has proposed small modifications of the text of the present Manual (page 18 of the draft) to reflect the fact that it is virtually impossible to bring a damaged site back to the same ecological state that would have existed had an oil spill not occurred. The Director considers that the existing wording in the Manual on this point is open to misinterpretation. To avoid further misunderstanding a distinction has also been made between costs of reinstatement measures and economic losses due to environmental damage and the different criteria that apply to these two types of claims. A new sub-section on the presentation of claims in these two categories of environmental damage claims has been included to so as to be consistent with the other sectors (page 18 of the draft).

3 Supplementary Fund Claims Manual

At its May 2004 session the Assembly agreed with the Director's proposal that the 1992 Fund and the Supplementary Fund should issue a joint Claims Manual (document 92FUND/A/ES.8/4, paragraph 3.6.6). However, having considered this issue further, the Director takes the view that there is no need for the Supplementary Fund to have a Claims Manual, whether jointly with the 1992 Fund or on its own, since the Supplementary Fund would not make its own examination of claims for compensation. The Director proposes therefore that the 1992 Fund Assembly should make a recommendation to the Supplementary Fund Assembly to this effect.

4 Action to be taken by the Assembly

The Assembly is invited:

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

(b) to consider the draft revised Claims Manual; and

(c) to consider whether to recommend to the Supplementary Fund Assembly that the Supplementary Fund should not have any Claims Manual.

* * *

ANNEX

DRAFT REVISED CLAIMS MANUAL

October 2004

INTRODUCTION

The International Oil Pollution Compensation Fund 1992 (also known as the 1992 Fund or the IOPC Fund 1992) is a worldwide intergovernmental organisation that provides compensation for oil pollution damage resulting from spills of persistent oil from tankers. The 1992 Fund is administered by a Secretariat located in London, United Kingdom. This Claims Manual is a practical guide to presenting claims against the 1992 Fund.

Compensation is only available in respect of claims that fulfil specific criteria. This Manual is designed to assist claimants by giving a general overview of the Fund's obligation to pay compensation. It does not address legal issues in detail and should not be seen as an authoritative interpretation of the relevant international Conventions.

The Manual is divided into three Sections.

- Section I briefly describes the compensation system and how the 1992 Fund works.

- Section II contains general information on how claims for compensation should be submitted. It sets out the 1992 Fund's policy on handling claims and paying compensation.

- Section III provides more specific information to assist claimants in presenting their claims and is divided into five parts, each dealing with one of the main categories of claim covered by the compensation system, namely:

    - pollution prevention measures and clean-up
    - property damage
    - economic losses in the fisheries, mariculture and fish processing sectors
    - economic losses in the tourism and related sectors
    - environmental damage and post-spill studies

The Secretariat of the 1992 Fund can provide guidance on preparing and submitting claims and other matters relating to compensation for pollution damage.

SECTION I -HOW DOES THE COMPENSATION REGIME WORK?

THE COMPENSATION REGIME

The compensation regime was originally established in 1978 and is now based on two 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). A Protocol to the 1992 Fund Convention was adopted in 2003, which established a Supplementary Fund (Supplementary Fund Protocol).

The 1992 Civil Liability Convention

Under the 1992 Civil Liability Convention, claims for compensation for oil pollution damage caused by persistent oil may be made against the registered owner of the ship from which the oil that caused the damage originated (or his insurer). However, the shipowner can normally limit his financial liability to an amount determined by the size (tonnage) of the particular ship involved. The shipowner is obliged to maintain insurance to cover his liability under the Convention, although this obligation does not apply to ships carrying less than 2 000 tonnes of oil as cargo.

The shipowner is liable to pay compensation for pollution damage caused by the escape or discharge of persistent oil from his ship even if the pollution was not due to any fault on his part. The shipowner is exempt from this liability only in very special circumstances.

The 1992 Fund Convention

The 1992 Fund was established in 1996 under the 1992 Fund Convention and is financed by companies and other entities in Member States that receive certain types of oil carried by sea. The Fund is an intergovernmental organisation set up and governed by States.

The 1992 Fund is governed by two bodies: the Assembly and the Executive Committee. The Assembly is composed of representatives of the governments of all Member States. The Executive Committee, composed of 15 Member States, is a subsidiary body elected by the Assembly. The main function of this Committee is to approve claims. However, the Executive Committee normally gives the Fund's Director very extensive authority to approve and pay claims.

Under the 1992 Fund Convention additional compensation is made available by the 1992 Fund when claimants do not obtain full compensation under the 1992 Civil Liability Convention. This can happen in the following cases:

- The damage exceeds the limit of the shipowner's liability under the 1992 Civil Liability Convention.
- The shipowner is not liable under the 1992 Civil Liability Convention if the damage was caused either by a grave natural disaster, or wholly caused intentionally by a third party, or wholly caused as a result of 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 pay valid compensation claims.

The 1992 Fund does not pay compensation if:

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

The Supplementary Fund Protocol

The 2003 Protocol to the 1992 Fund Convention established a Supplementary Fund to provide additional compensation for pollution damage in those States that are Members of the Supplementary Fund. The criteria under which compensation claims qualify for compensation from the Supplementary Fund are identical to those of the 1992 Fund. The 1992 Fund's claims settlement policy set out in this Manual therefore applies also to compensation payments by the Supplementary Fund.

HOW MUCH COMPENSATION IS AVAILABLE?

(a) Under the 1992 Civil Liability Convention – the shipowner pays

The shipowner is normally entitled to limit his liability to an amount calculated on the basis of the tonnage of the ship. For a ship not exceeding 5 000 units of gross tonnage, the limit is 4.51 million Special Drawing Rights (SDR) <[1]> (US$xx million); for a ship with a tonnage between 5 000 and 140 000 units of tonnage, the limit is 4.51 million SDR (US$xx million) plus 631 SDR (US$yy) for each additional unit of tonnage; and for a ship of 140 000 units of tonnage or over, the limit is 89.77 million SDR (US$zz million). The shipowner 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 occur.

(b) Under the 1992 Fund Convention – the 1992 Fund pays

The maximum compensation payable by the 1992 Fund for any one incident is 203 million SDR (US$xxx million) whatever the size of the ship. This maximum amount includes the compensation paid by the shipowner or his insurer under the 1992 Civil Liability Convention.

If the total amount of the established claims exceeds the total amount of compensation available under the two 1992 Conventions, 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 compensation payments to ensure that all claimants are given equal treatment. The payment level may increase at a later stage if the uncertainty about the total amount of the established claims is reduced.

(c) Under the Supplementary Fund Protocol - the Supplementary Fund pays

The Supplementary Fund makes additional compensation available, so that the total amount of compensation payable for any one incident for damage in a State that is a Member of that Fund is 750 million SDR (US$x xxx million), including the amount payable under the 1992 Civil Liability and Fund Conventions. One important benefit of the Supplementary Fund is that, even in the most serious pollution incidents, there should rarely be any need to reduce compensation payments proportionately for pollution damage in States that are Members of that Fund: it should be possible from the outset for claimants to receive 100% of their proven compensation claim.

WHAT TYPES OF INCIDENT ARE COVERED?

The 1992 Civil Liability and Fund Conventions cover incidents in which persistent mineral oil is spilled 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 cargo and bunker oil (the vessel's own fuel) from laden tankers, but also in certain circumstances spills of bunker oil from unladen tankers.

Examples of persistent mineral oil are crude oil, fuel oil, heavy diesel oil and lubricating oil. Such oils are usually slow to dissipate naturally when spilled into the sea and are therefore likely to spread and require

<[1]> Amounts in the 1992 Conventions are expressed in the Special Drawing Right (SDR) of the International Monetary Fund. The SDR is converted into the currency of the State where the pollution damage occurred on the basis of the appropriate exchange rate. In this Manual, the conversion from Special Drawing Rights to US Dollars has been made using the rate of exchange applicable on [1 January 2005], ie 1 SDR = US$xx. Up to date conversions may be found on the Organisation's website.

cleaning up. Damage caused by spills of non-persistent mineral oil, such as gasoline, light diesel oil and kerosene, is not compensated under the Conventions. Such oils tend to evaporate quickly when spilled and do not normally require cleaning up.

WHAT TYPES OF DAMAGE ARE COVERED?

The 1992 Conventions cover 'pollution damage', which is defined 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. However, compensation for impairment of (damage to) the environment other than loss of profit from such impairment is limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken'.

Pollution damage includes preventive measures, which are defined in the 1992 Conventions as:

> 'any reasonable measures taken by any person after an incident has occurred to prevent or minimize pollution damage'.

The 1992 Civil Liability and Fund Conventions and the Supplementary Fund Protocol apply to pollution damage caused in the territory, territorial sea and exclusive economic zone (EEZ), or equivalent area of States that are Party to these treaties. Lists of these States may be obtained directly from the 1992 Fund or from its website: www.iopcfund.org.

The main types of pollution damage covered are described below.

(a) Clean-up and preventive measures

Compensation is payable for the cost of reasonable clean-up measures and other measures taken to prevent or minimise pollution damage in a State Party, wherever these measures are taken. For example, if a response were undertaken on the high seas or within the territorial waters of a State that is not a Party to the Conventions in order to prevent or reduce pollution damage within the territorial sea or EEZ of a State Party, the cost of the response would in principle qualify for compensation. 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.

Compensation is also payable for reasonable costs associated with the capture, cleaning and rehabilitation of wild life, in particular birds, mammals and reptiles.

(b) Property damage

Compensation is payable for reasonable costs of cleaning, repairing or replacing property that has been contaminated by oil.

(c) Consequential loss

Compensation is payable for loss of earnings suffered by the owners of property contaminated by oil 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 oiled, which prevents him from fishing until his nets are either cleaned or replaced.

(d) Pure economic loss

Under certain circumstances compensation is also payable for loss of earnings caused by oil pollution suffered by persons whose property has not been polluted (pure economic loss). For example, a fisherman whose nets have not been contaminated may nevertheless be prevented from fishing because the area of the sea where he normally fishes is polluted and he cannot fish elsewhere. Similarly, an owner of a hotel or a restaurant located close to a contaminated public beach may suffer losses because the number of guests falls during the period of the pollution.

Compensation may also be payable for the costs of reasonable measures, such as marketing campaigns, which are intended to prevent or reduce economic losses by countering the negative effects which can result from a major pollution incident.

(e) Environmental damage

Compensation is payable for the costs of reasonable reinstatement measures aimed at accelerating natural recovery of environmental damage. Contributions may be made to the costs of post-spill studies provided that they relate to damage which falls within the definition of pollution damage under the Conventions, including studies to establish the nature and extent of environmental damage caused by an oil spill and to determine whether or not reinstatement measures are necessary and feasible.

(f) Use of advisers

Claimants may wish to use advisers to assist them in presenting claims for compensation. Compensation is paid for reasonable costs of work carried out by advisers in connection with the presentation of claims falling within the scope of the Conventions. The question of whether such costs will be compensated is assessed in connection with the examination of the particular claim for compensation. Account is taken of the necessity for the claimant to use an advisor, the usefulness and quality of the work carried out by the adviser, the time reasonably needed and the normal rate in the country concerned for work of that kind.

WHEN ARE CLAIMS ADMISSIBLE FOR COMPENSATION?

The 1992 Fund's governing bodies, that is, the Assembly and the Executive Committee, have emphasised that a uniform interpretation of the Conventions in all Member States is essential for the functioning of the compensation regime. They have established the Fund's claims policy and have adopted criteria on the admissibility of claims, that is, when claims qualify for compensation. The following general criteria apply to all claims:

- Any expense, loss or damage must actually have been incurred.
- Any expense must relate to measures that are considered reasonable and justifiable.
- Any expense, loss or damage is compensated only if and to the extent that it can be considered as caused by contamination resulting from the spill.
- There must be a reasonably close 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 or she has suffered a quantifiable economic loss.
- A claimant has to prove the amount of his or her expense, loss or damage by producing appropriate documents or other evidence.

A claim therefore qualifies for compensation only to the extent that the amount of the loss or damage is actually demonstrated. All elements of proof are considered, but sufficient evidence must be provided to give the shipowner, his insurer and the 1992 Fund the possibility of making their own judgement as to the amount of the expense, loss or damage actually suffered. The extent to which claimants are able to reduce their losses is taken into account.

However, each claim has its own particular characteristics, and it is therefore necessary to consider each claim on the basis of its own merits. The criteria therefore allow for some degree of flexibility depending on the particular circumstances of the claimant, industry or country concerned, for example, in respect of the requirement to present documents.

The specific criteria that apply to various types of claims are set out in Section III.

SECTION II - SUBMISSION AND ASSESSMENT OF CLAIMS

WHO CAN MAKE A CLAIM?

Anyone who has suffered pollution damage in a State that is Party to the 1992 Conventions may make a claim for compensation. If the damage is caused in a State that is only Party to the 1992 Civil Liability Convention, claims can only be made against the shipowner and his insurer. Claims for damage in States that are Parties to both the 1992 Civil Liability Convention and the 1992 Fund Convention, however, may be made against the shipowner and his insurer and the 1992 Fund. As mentioned earlier, lists of States Parties to these Conventions and to the Supplementary Fund Protocol may be obtained from the Fund Secretariat or from the Organisation's web site.

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, which will also facilitate the processing and assessment of the claims.

TO WHOM SHOULD A CLAIM BE SUBMITTED?

When an incident occurs the 1992 Fund co-operates closely with the shipowner's insurer, which will normally be one of the Protection and Indemnity Associations (P&I Clubs) that insure the third-party liabilities of shipowners, including liability for oil pollution damage. The P&I Club concerned and the 1992 Fund usually co-operate in the handling of claims, particularly when it is clear from the outset that compensation will be paid under both Conventions. Since in most cases the 1992 Fund only pays compensation once the shipowner/insurer has paid up to the limit applicable to the ship involved, claims should first be submitted to the shipowner or his P&I Club. In practice, claims are often channelled through the office of the P&I Club's correspondent closest to the incident location. Because of the close co-operation between the Fund and the insurer, claims, including supporting documentation, need only be sent to either the P&I Club/correspondent or the Fund.

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.

If claimants suffer damage in a State that is Party to the Supplementary Fund Protocol, their claims will automatically be considered for compensation from the Supplementary Fund, if the amount available from the shipowner/insurer and the 1992 Fund is insufficient to pay full compensation for proven losses.

Claimants who wish to claim directly against the 1992 Fund should submit their claims to 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

All claims are referred to the 1992 Fund and the shipowner's P&I Club for decisions on whether or not they qualify for compensation, and if so, the amounts of compensation due to the claimants. Neither designated local correspondents nor local claims offices have the authority to make these decisions.

HOW SHOULD A CLAIM BE PRESENTED?

Claims should be made in writing (including telefax or electronic mail). If appropriate, the P&I Club and/or the Fund will issue claims forms to assist claimants in the presentation of claims. However, it is not possible for the Fund or the insurer to issue standard claims forms applying to all incidents since the form will vary according to the circumstances of each incident and the situation in the country concerned.

A claim should be presented clearly and with sufficient information and supporting documentation to enable the amount of the damage to be assessed. 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 sufficient evidence to support their claims. It is important that the documentation is complete and accurate. 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.

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 (see Section III).

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.

If claimants are unable to reach agreement with the 1992 Fund and the shipowner's insurer on their claims within three years of the date on which the damage occurred, they could lose their rights to compensation. To avoid this happening, it is necessary for claimants to bring a court action against the shipowner/insurer and the 1992 Fund before the three-year deadline. Alternatively, claimants could bring court action against the shipowner/insurer and make a formal notification to the 1992 Fund of their court action within the three-year period. In any event court actions against the shipowner, the insurer and the 1992 Fund must be brought within six years of the date of the incident. If steps have been taken to protect the claim against the 1992 Fund, any rights to additional compensation from the Supplementary Fund will be automatically protected.

It is the Fund's policy to notify all known claimants whose claims have not been agreed of the need to take legal action before the competent court in advance of the third anniversary of an incident.

CLAIMS ASSESSMENT AND PAYMENT

The 1992 Fund, normally in co-operation with the shipowner's insurer, usually appoints experts to monitor clean-up operations, to investigate the technical merits of claims and to make independent assessments of the losses.

The 1992 Fund and the P&I Clubs have developed a worldwide network of experts with expertise in the various sectors likely to be affected by oil pollution. It also draws on the advice of the International Tanker Owners Pollution Federation Ltd (ITOPF), a non-profit making organisation funded primarily by shipowners through their insurers. ITOPF's technical staff has acquired considerable experience in spill response and are very familiar with the Fund's criteria for accepting claims. During the clean-up phase of

an incident members of ITOPF's technical staff usually attend on site where they are able to offer technical advice on the most appropriate response measures consistent with the Fund's admissibility criteria.

Although the 1992 Fund and the P&I Clubs rely on experts to assist in the assessment of claims, the decision as to whether to approve or reject a particular claim rests entirely with the Club concerned and the Fund.

Once the Fund and the P&I Club have made their decision regarding a claim, the claimant is contacted, usually in writing, to explain the basis of the assessment. If the claimant decides to accept an offer of compensation, he or she will be asked to sign a receipt upon payment of the amount due. In the event that the claimant does not agree with the assessment of the claim, he or she may provide additional information and request a further evaluation.

The 1992 Fund's Director has been given extensive authority to approve and pay or reject claims. However, in certain situations, for example if a claim gives rise to questions of principle, the Director must refer the claim to the Executive Committee for decision (see page xx above). The Executive Committee normally meets two or three times a year.

HOW LONG DOES IT TAKE TO ASSESS AND PAY CLAIMS?

The 1992 Fund and the P&I Clubs try to reach agreement with claimants and pay compensation as promptly as possible. They may make provisional payments before a final agreement can be reached if a claimant would otherwise suffer undue financial hardship.

The speed with which claims are agreed and paid depends largely on how long it takes for claimants to provide the required information. Claimants are therefore advised to follow this Manual as closely as possible and to co-operate fully with the Fund's experts and provide all information relevant to the assessment of the claims.

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

WHAT IF A CLAIMANT DOES NOT AGREE WITH THE FUND'S DECISION?

If it is not possible to reach an agreement on the assessment of the claim, the claimant has the right to bring his or her claim before the competent court in the State in which the damage occurred. However, since the international compensation regime was established in 1978, court actions by claimants have not proved necessary in the majority of incidents involving the 1992 Fund and its predecessor.

SECTION III GUIDELINES ON THE SUBMISSION OF DIFFERENT TYPES OF CLAIM

Claims for costs of clean-up and pollution prevention measures

Scope of compensation

Clean-up operations at sea and on shore are in most cases considered as preventive measures since such measures are usually intended to prevent or minimise pollution damage.

Compensation is payable for the costs of reasonable measures taken to combat oil at sea, to protect resources vulnerable to oil (such as sensitive coastal habitats, seawater intakes of industrial plants, mariculture facilities and yacht marinas), to clean shorelines and coastal installations and to dispose of collected oil and oily wastes. Compensation is also paid for the costs of mobilising clean-up equipment and salvage resources for the purpose of preventive measures even if no pollution occurs, provided that the incident created a grave and imminent threat of causing pollution damage and on the condition that the measures were in proportion to the threat posed.

Loss or damage caused by reasonable 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 repairs is compensated. However, claims for work that involves improvement rather than the repair of damage resulting from a spill are not accepted.

As a consequence of concerns for animal welfare, efforts are often made to clean contaminated animals, particularly oiled birds, mammals and reptiles. The capture, cleaning and rehabilitation of oiled wildlife requires trained personnel and the work is normally carried out by special interest groups, often with the assistance of volunteers who establish cleaning stations close to the spill location. Cleaning is difficult and slow and causes the animals further distress, and should only be undertaken if there is a reasonable chance of the animals surviving the process. Claims for reasonable costs associated with the provision of local reception facilities appropriate to the scale of the problem, materials, medication and food are normally compensable, as are reasonable food and accommodation costs of volunteers. If several special interest groups undertake cleaning and rehabilitation activities these should be properly co-ordinated to avoid duplication of effort. Deductions will be made for funds raised from the public for the specific purpose of maintaining the field operations for a specific incident.

Claims for the costs of 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 compensation under 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 technical advice.

Claims for costs of response measures are not accepted when it could have been foreseen that the measures taken would be ineffective, for example if dispersants were used on solid or semi-solid oils or if booms were deployed with no regard to their ineffectiveness in fast flowing waters. On the other hand, the fact that the measures proved to be ineffective is not in itself a reason for rejection of a claim.

The costs incurred, and the relationship between those costs and the benefits derived or expected, should be reasonable. For example, a high degree of cleaning, beyond removal of bulk oil, of exposed rocky shores inaccessible to the public is rarely justified, since natural cleaning by wave action is likely to be more effective. On the other hand, thorough cleaning is usually necessary in the case of a public amenity beach, particularly immediately prior to or during the holiday season. Account in taken of the particular circumstances of an incident.

Costs of reasonable aerial surveillance operations to establish the extent of pollution at sea and on shorelines and to identify resources vulnerable to contamination are accepted. Where several organisations are involved in the response to an incident, aerial surveillance should be properly co-ordinated to avoid duplication of effort.

Claims for clean-up operations may include the cost of personnel and the hire or purchase of equipment and materials. Claims for the costs of equipment placed on standby, but not actually deployed, are assessed at a lower rate to reflect the reduced wear on the equipment. Reasonable costs of cleaning and repairing clean-up equipment and of replacing materials consumed during clean-up operations are accepted. In the assessment of claims for the cost of equipment purchased for a particular spill, deductions will be made to take into account the remaining value of the equipment if it is suitable for use in future incidents or for some other purpose. If a public authority, as part of its contingency planning, has purchased and maintained materials or equipment so that they are immediately available to respond should an oil spill occur, compensation is paid for a reasonable part of the purchase price of the items actually used. This is usually based on a daily rate that is calculated in such a way that the capital cost of the item is recovered over its expected useful working life, plus a proportion of the costs of storing and maintaining the equipment. A reasonable element of profit would also be included if the equipment were owned by a private contractor.

Clean-up operations frequently result in considerable quantities of oil and oil debris being collected. Reasonable costs for storing and disposing of the collected material are accepted. If the claimant has received any extra income following the sale of the recovered oil, these proceeds would normally be deducted from any compensation to be paid.

Clean-up operations are often carried out by public authorities or quasi-public bodies using permanently employed personnel or vessels and vehicles owned by such authorities or bodies. Compensation is paid for reasonable *additional costs* incurred by such organisations, that is, expenses that arise solely as a result of the incident and which would not have been incurred had the incident and related operations not taken place.

Compensation is also paid for a reasonable proportion of so-called *fixed costs* incurred by public authorities and quasi-public bodies, that is, costs which would have arisen for the authorities or bodies even if the incident had not occurred, such as normal salaries for permanently employed personnel. However, in order to qualify for compensation, such costs must correspond closely to the clean-up period in question and should not include remote overhead charges.

Salvage operations may in some cases include an element of preventive measures. If the primary purpose of such operations is to prevent pollution damage, the costs incurred qualify in principle for compensation under the 1992 Conventions. However, if salvage operations have another purpose, such as saving the ship and/or the cargo, the costs incurred are not accepted under the Conventions. If the operations are undertaken for the purpose of both preventing pollution and saving the ship and/or the cargo, but it is not possible to establish with any certainty the primary purpose, the costs are apportioned between pollution prevention and salvage. The assessment of claims for the costs of preventive measures associated with salvage is not made on the basis of the criteria applied for determining salvage awards, but the compensation is limited to costs, including a reasonable element of profit.

Presentation of claims

It is essential that claims for the costs of clean-up are submitted with supporting documentation showing how the expenses for the operations are linked with the actions taken. The key to the successful recovery of costs is good record keeping. A claim should clearly set out what was done and why, where and when it was done, by whom, with what resources and for how much. Invoices, receipts, worksheets and wage records, whilst providing useful confirmation of expenditure, are insufficient by themselves. A brief report describing the response activities and linking these with expenses will greatly facilitate the assessment of claims.

Spreadsheets offer a particularly useful way of summarising some of the key information required in support of a claim. Each response organisation or contractor should maintain a daily log of activities, including details of the number of personnel involved, the type and quantity of equipment and materials used and the type and length of shoreline cleaned. If response vessels are used to combat oil at sea, extracts from their deck logs covering their period of deployment provide a useful source of information. Specific information 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, video tapes or other recording media).
- 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, the name of their employer, hours or days worked, regular or overtime rates of pay, method of calculation or basis of rates of pay and other costs).
- Travel, accommodation and living costs for response personnel.
- Equipment costs at each site (types of equipment used, by whom supplied, rate of hire or cost of purchase, method of calculation of hire rates, quantity used, period of use).
- Cost of replacing equipment damaged beyond reasonable repair (type and age of equipment, by whom supplied, original purchase cost and circumstances of damage supported by photographs, video or other recording material).
- Consumable materials (description, by whom supplied, quantity, unit cost and where used).
- Any remaining value at the end of the operations of equipment and materials purchased specifically for use in the incident in question.
- Age of equipment not purchased specifically for use in the incident in question, but used in that incident.
- Transport costs (number and types of vehicles, vessels or aircraft used, number of hours or days operated, rate of hire or operating cost, method of calculating rates claimed).
- Cost of temporary storage (if applicable) and of final disposal of recovered oil and oily material, including quantities disposed, unit cost and method of calculating the claimed rate.

Claims for the costs of treatment of oiled wildlife should essentially follow a similar pattern to that set out above for clean-up costs. Details of the number of animals treated and the number successfully released back into the wild should be provided. If the specialist groups undertaking the work mounted campaigns to raise public funds for the purpose of maintaining field operations for a specific incident, details should be provided, including the costs of the campaigns, the amounts raised and how the money was used.

Claims for property damage

Scope of compensation

Reasonable costs of cleaning, repairing or replacing property that has been contaminated by oil, for example the hulls of vessels, including pleasure craft, fishing gear and mariculture facilities, are compensable. This also applies to the costs of cleaning the intakes, machinery and equipment of industrial installations that abstract seawater, such as power stations and desalination units. If it is not possible for the property to be cleaned or repaired, then replacement costs are accepted. However, compensation is not paid for the full costs of replacing old items with new ones, but account is taken of the age of the property and its expected durability. For example, if a two-year old fishing net has to be replaced due to heavy contamination, but it would have needed replacing after three years' use anyway, only one third of the replacement cost would be compensated.

Property damage may in some cases result in an economic loss until the property is cleaned, repaired or replaced as a consequence of the owner of the property not being able to conduct his or her normal business. For example, mariculture may be disrupted if the facilities are contaminated by oil. Such consequential loss is compensable (see sub-sections dealing with claims for economic loss, pages xx - yy).

Claims are also accepted for costs of repairs to roads, piers and embankments damaged by heavy vehicles, such as trucks and earth-moving equipment, involved in clean-up operations. In assessing these claims account is taken of the condition of the property prior to the incident and the normal repair schedules.

Presentation of claims

Claimants should provide evidence of the damage to their property and invoices confirming that repairs, cleaning or replacement have been undertaken or quotations for the work to be carried out. It is important that property is retained or at least photographed. Claimants are advised to contact the 1992 Fund or the P&I Club (or where appropriate the designated surveyor or local claims office) without delay so that a joint survey of the damaged property can be carried out if appropriate.

Specific information 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 cleaning, repair or replacement (for example boats, fishing gear, roads, clothing), including their location.
- Cost of repair work, cleaning or replacement of items.
- Age of items of damaged items 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.

Claims for economic loss in the fisheries, mariculture and fish processing sectors

Scope of compensation

Compensation is payable in the fisheries, mariculture and fish processing sectors for loss of earnings by the owners of property contaminated by oil (consequential loss). For example, a fisherman whose gear becomes contaminated may suffer loss of income for the period when he is prevented from fishing pending the gear being cleaned or replaced.

However, losses can also be suffered by persons whose property has not been contaminated by oil (pure economic loss). For example, a fisherman whose gear does not become contaminated may decide not to go fishing in order to prevent his gear and catch becoming contaminated resulting in economic loss.

In some instances natural and cultivated stocks of fish, shellfish and other marine products may become contaminated with oil to such an extent that governments, due to human health concerns, impose temporary fishing and harvesting bans. Owners of mariculture facilities may suffer losses as a result of the interruption of feeding, growth or normal stocking cycles. If the level of contamination is not sufficient to cause health concerns, fishermen and fish cultivators may nevertheless impose their own temporary bans to protect markets. Owners of fish processing facilities may suffer losses due to the contamination of premises and equipment or shortages of supply due to interruption of fishing and mariculture activities.

Claims for economic loss not resulting from property damage, for example from businesses that depend directly on the fisheries and mariculture activities (including suppliers of fuel and ice, fish porters, fish wholesalers and retailers), qualify for compensation only if the loss was caused by contamination. In other words, a claim is not accepted solely because a pollution incident occurs. All claims in the fisheries, mariculture and fish processing sectors should satisfy the general criteria set out in Section II. However, in order for a claim for pure economic loss to be accepted for compensation there should be a sufficiently close link of causation between the contamination and the loss or damage. When considering whether such a close link exists, the Fund takes into account the following factors:

- The geographic proximity of the claimant's business activity to the contaminated area (for example whether a fisherman operates predominantly in the affected area or whether a fish farm or processing facility is located on or very close to the affected coast).
- The degree to which a claimant's business is economically dependent on an affected resource, such as a polluted fishing ground (for example whether a fisherman also exploits a nearby, unaffected fishing ground, or is able to exploit an alternative fishing ground to the one affected without being economically disadvantaged).
- The extent to which a claimant had alternative sources of supply or business opportunities (for example whether a fish processor was able to find alternative sources of fish).

- The extent to which a claimant's business forms an integral part of the economic activity within the area affected by the spill (for example whether a claimant's business is located or has assets in the affected area, or provides employment for people living there).

Experience shows that mortalities of wild fishery stocks arising from oil spills are very rare. However, if there is concern amongst fishermen that mortalities have occurred then they should contact the 1992 Fund or the P&I Club (or where appropriate the designated surveyor or local claims office) without delay so that a joint survey of the damaged resource can be carried out.

Mortalities in mariculture stocks following an incident are also rare, but if they do occur the claimant should document the loss by preserving samples and taking photographic records to demonstrate the nature and extent of the loss. Claimants are again advised to contact the 1992 Fund or the P&I Club (or where appropriate the designated surveyor or local claims office) without delay so that a joint survey of the damaged resource can be carried out.

If farmed fish or shellfish are destroyed, it is important that scientific or other evidence in support of the destruction decision is provided. The decision by a public authority to impose fishing or harvesting bans is not considered as conclusive justification for destroying produce affected by a ban. Claims for losses resulting from the destruction of marine products or fishing or harvesting bans are accepted if and to the extent that such destruction or bans were reasonable. When assessing whether the destruction or a ban was reasonable, account is taken of the following factors:

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

Presentation of claims

The assessment of claims for economic loss in the fisheries, mariculture and processing sectors is, whenever possible, based on a comparison between the actual financial results during the claim period and those for previous periods, for example in the form of audited accounts or tax returns of the individual claimant for the three years before the incident. The assessment is not based on budgeted figures. The criterion is whether the claimant's business as a whole has suffered economic loss as a result of the contamination. The purpose of examining historical financial results is to make it possible to determine the revenue that could have been expected during the period covered by the claim if the spill had not occurred by taking into account the past economic performance of the claimant's business, for example whether its revenues had been increasing or decreasing or had remained stable over recent years, and any underlining reasons for such trends. In doing so, account is taken of the particular circumstances of the claimant and any evidence presented. In addition, catch records, sales records and records of fishing expenses, or other evidence that indicates normal fishing income and expenditure, may be considered, as well as various aspects of fishing regulations that apply to the fisheries in the polluted area. Consideration is also given, as appropriate, to changes in fishing effort, species mix, catch rates, sales prices and expenses, according to prevailing trends in the fishing activities in which the claimant is engaged and their regulation. In the case of a relatively new fishing activity or business with incomplete or no trading records, the average reduction from similar activities or businesses in the affected area can sometimes be used by assuming that the new enterprise would have suffered a similar downturn.

Compensation is paid on the basis of lost gross profit, and so saved overheads or other normal expenses not incurred as a result of the incident have to be deducted from the loss in revenue. Such variable costs fluctuate depending on the level of business achieved. The nature of items to be taken into account would be business-specific but could include cost of purchases such as food, fishing bait, ice and packaging, fuel

and lubricants, utilities such as gas and electricity, and transport. Any saved labour or crew costs should also be deducted from the reduction in turnover.

Claimants need to substantiate their loss with appropriate evidence, including the following information:

- Nature of the loss, including evidence that the alleged loss resulted from the contamination.
- Monthly breakdown of income for the period of the loss and over the previous three years.
- Where possible, monthly breakdown of the quantity (kilograms) of each marine product caught, harvested or processed for the period of the loss and over the previous three years.
- Saved overheads or other normal variable expenses.
- Method of calculation of loss.

Claimants should indicate whether they have received any extra income as a result of the incident. For example, claimants should indicate whether they have received any payments or interim compensation from public authorities or other bodies in connection with the incident. Deductions will not normally be made, however, for small amounts paid to individuals who, without acting to protect their own property or trade, take part in clean-up operations.

It is recognised that some fishery and mariculture sectors are operated on a very small scale, some of which are at a subsistence or only semi-commercial level. Such claimants may not be required to maintain records of catches or income and will therefore have difficulty in submitting documentary evidence in support of their claims. In such circumstances claims would be assessed on the basis of relevant information available, such as government statistics or other published information and field surveys of the affected fishery and similar unaffected fisheries.

Claims for economic loss in the tourism sector

Scope of compensation

Businesses in the tourism sector, or that derive a large part of their income from tourists, which are located close to contaminated public amenity beaches may suffer loss of profit because the number of guests falls during the period of the pollution. However, claims for such economic loss (normally referred to as pure economic loss, see page xx above) qualify for compensation only if the loss was caused by contamination. In other words a claim is not accepted solely on the grounds that a pollution incident occurs. All claims in the tourism sector should satisfy the general criteria set out in Section II. However, in order for a claim within this sector to qualify for compensation there should be a sufficiently close link of causation between the contamination and the loss or damage. When considering whether such a close link exists, the Fund takes into account the following factors:

- The geographic proximity of the claimant's business activity to the contaminated area (for example whether a tourist hotel, campsite, restaurant or bar is located on or close to the affected coast).
- The degree to which the claimant's business is economically dependent on an affected coastline (for example whether a hotel or restaurant located close to an affected coast caters solely or predominantly for leisure visitors or for the business community).
- The extent to which a claimant had alternative sources of supply or business opportunities (for example whether a reduction in income from tourists was offset by income from those involved in the response to an oil pollution incident, such as clean-up personnel and representatives from the media).
- The extent to which the claimant's business forms an integral part of the economic activity within the area affected by the spill (for example whether the business is located or has assets in the area, or employs people living there).

A distinction is made between (a) claimants who sell goods or services directly to tourists (for example the owners of hotels, campsites, bars and restaurants) 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 (for example wholesalers, manufacturers of souvenirs and postcards and hotel launderers). It is considered that in the case of category (b) there is

not a sufficiently close link of causation between the contamination and any losses suffered by claimants. Claims of this type will therefore normally not qualify for compensation in principle.

Presentation of claims

The assessment of claims for pure economic loss in the tourism sector is, whenever possible, based on a comparison between the actual financial results during the claim period and those for previous periods, for example in the form of audited accounts or tax returns of the individual claimant for the three years before the incident. The assessment is not based on budgeted figures. The criterion is whether the claimant's business as a whole has suffered economic loss as a result of the contamination. The purpose of examining historical financial results is to make it possible to determine the revenue that could have been expected during the period covered by the claim by taking into account the past economic performance of the claimant's business, for example whether its revenues had been increasing or decreasing or had remained stable over recent years, and any underlying reasons for such trends. In doing so, account is taken of the particular circumstances of the claimant and any evidence presented. In the case of relatively new businesses with incomplete or no trading records, the average reduction of similar businesses in the affected area can sometimes be used by assuming that the new business would have suffered a similar downturn.

Compensation is paid on the basis of lost gross profit, and so saved overheads or other normal variable expenses not incurred as a result of the incident have to be deducted from the loss in revenue. Such variable costs fluctuate depending on the level of business achieved. The nature of items to be taken into account would be business-specific but could include cost of purchases such as food, hotel toiletries and goods for sale such as souvenirs, utilities such as fuel and electricity, cleaning and maintenance costs. Any saved labour costs should also be deducted from the reduction in turnover.

Claimants need to substantiate their loss with appropriate evidence, including the following information:

- Nature of the loss, including evidence that the alleged loss resulted from the contamination.
- Monthly breakdown of income for the period of the loss and for the same period for the previous three years.
- Where possible, monthly breakdown of the number of units sold for the period of the loss and for the previous three years (for hotels the number of bedrooms let, for campsites the number of pitches let, for self-catering accommodation the number of weeks let, for restaurants the number of meals sold and for tourist attractions the number of visitors/tickets sold; for other businesses such as shops and bars, only a breakdown of income is required).
- Details of changes in capacity of the business (for example the number of bedrooms in a hotel) and changes in opening hours or prices charged in the year in which the loss occurred and during the previous three years.
- Saved overheads or other normal variable expenses.
- Method of calculation of loss.

Claimants should indicate whether they have received any extra income as a result of the incident. For example, claimants should indicate whether they have received any payments or interim compensation from public authorities or other bodies in connection with the incident.

Claims for costs of measures to prevent pure economic loss

Scope of compensation

Claims may be accepted for the costs of measures to prevent or minimise pure economic loss, which if sustained, would qualify for compensation under the Conventions. Such measures may be aimed at counteracting the negative impact of the pollution on the fishery and tourism sectors. In order to qualify for compensation the measures should fulfil the following requirements:

- The cost of the measures should be reasonable.
- The cost of the measures should not be disproportionate to the further damage or loss that they are intended to mitigate.

- The measures should be appropriate and offer a reasonable prospect of being successful (for example, measures to restore confidence in seafood products should normally only be undertaken once fishing grounds are cleared of contamination and there is little or no risk of further contamination).
- In the case of marketing campaigns, the measures should relate to actual targeted markets (for example, measures to counteract the negative effects on tourism in a particular area should normally be focused on the normal visitor client base of that area).

Claims for the costs of marketing campaigns or similar activities are accepted only if the activities undertaken are additional to measures normally carried out for this purpose. In other words, compensation is granted only for additional costs resulting from the need to counteract the negative effects of the pollution. Marketing campaigns of too general a nature are not accepted. If several public bodies undertake campaigns relating to the same negative effects, these campaigns should be properly co-ordinated to ensure that there is no duplication of effort. Claims for measures to prevent pure economic loss are not normally accepted until the measures have been carried out.

The criterion of *reasonableness* is assessed in the light of the particular circumstances of the case, taking into account the interests involved and the facts known at the time the measures were taken. When claims for the cost of an organisation's marketing activities are considered, account is taken of the claimant's attitude towards the media after the incident and, in particular, whether that attitude increased the negative effects of the pollution.

Presentation of claims

Claims relating to marketing campaigns should include the following information:

- Details of the nature, purpose, timing and target group for each additional marketing activity
- undertaken.
- Detailed breakdown of the costs of any marketing strategy or campaign to mitigate the economic impact of the incident with relevant invoices/documentation to support costs.
- Details and costs of the claimant's normal marketing strategies and campaigns (if any).
- Results of the additional marketing activity, where measurable results are available.

Environmental damage and post-spill studies

Scope of compensation

Under the 1992 Conventions compensation for impairment of (damage to) the environment is limited to loss of profit from such impairment and costs of reasonable measures of reinstatement actually undertaken or to be undertaken.

Examples of acceptable claims for economic loss due to environmental damage include a reduction in revenue for a marine park or nature reserve which charges the public for admission or a reduction in catches of commercial species of marine products directly affected by the oil. Reference is made to the previous sections in the Manual dealing with economic losses in the fisheries, mariculture and processing sectors and in the tourism sector (pages yy–zz).

In most cases a major oil spill will not cause permanent damage to the marine environment due to its great potential for natural recovery. Whilst there are limits to what measures can be taken 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 for compensation under certain conditions.

In view of the fact that it is virtually impossible to bring a damaged site back to the same ecological state that would have existed had the oil spill not occurred, the aim of any reasonable measures of reinstatement should be 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 Conventions (see pages xx-yy).

In addition to satisfying the general criteria for the acceptance of claims for compensation set out in Section II, claims for the costs of measures of reinstatement of the environment will qualify for compensation only 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.

Claims are assessed on the basis of the information available when the reinstatement measures were undertaken. Compensation is paid only for reasonable measures of reinstatement actually undertaken or to be undertaken. Claims for economic loss as a result of environmental damage that can be quantified in monetary terms are assessed in a similar way to other economic loss claims. Compensation is not paid in respect of claims for environmental damage based on an abstract quantification calculated in accordance with theoretical models. Nor is compensation paid for damages of a punitive nature on the basis of the degree of fault of the wrong-doer.

Studies are sometimes required to establish the 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 impact.

The Fund may contribute to the cost of such studies provided that they concern damage that falls within the definition of pollution damage in the Conventions, including reasonable measures to reinstate a damaged environment. In order to qualify 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 the 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 planning and establishing the terms of reference for the study. In this context the Fund can play an important role in helping to ensure that 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 the participation of the Fund in the planning of environmental studies does not necessarily mean that any measures of reinstatement later proposed or undertaken will qualify for compensation.

Presentation of claims

Claims for the costs of reinstatement measures and associated studies should be itemised as follows:

- Delineation of the area affected by the spill, describing the extent, distribution and level of pollution and the resources impacted by the oil (for example using maps or nautical charts, supported by photographs, video tapes or other recording media).
- 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).
- Details and results of any studies undertaken to assess environmental damage and to monitor the effectiveness of any reinstatement measures proposed, together with a breakdown of the costs involved.
- Detailed description of any reinstatement measures undertaken or to be undertaken and a breakdown of the costs.

Claims for economic losses resulting environmental damage should essentially follow a similar to pattern to those set out for pure economic losses (see pages xx – yy)