



INCIDENTS INVOLVING THE 1992 FUND

HEBEI SPIRIT

Note by the Director

Objective of document:

1. To inform the Executive Committee of the latest developments in respect of this incident, in particular regarding the assessment of large numbers of artisanal and subsistence fisheries claims.
2. To invite the Executive Committee to decide on the technical reasonableness of the fishing and marketing restrictions put in place by the Korean Government after the incident, and on the level of payments to apply to the claims arising out of the incident.

Recent developments:

So far, 20 361 claims have been submitted by artisanal and subsistence fishermen totalling KRW 270 545 million (£134 million)^{<1>}. The great majority of these claimants are not in possession of a valid license or registration, nor do they have sufficient supporting information to substantiate their losses. A number of claimants are being interviewed by the Club's and the Fund's experts. The Korean Government has suggested a systematic approach to the assessment of these claims.

The Korean Government established a number of restrictions on harvesting and commercialising marine products in the weeks following the incident. The restrictions began to be lifted in April 2008. The last restrictions were lifted in September 2008, following consultations with the stakeholders in the affected areas, on the basis of the results of the monitoring and the concerns expressed by the local fishermen.

In June 2008 the Executive Committee, in view of the increased uncertainty as to the total amount of the admissible claims, decided to reduce the level of payments to 35% of the established claims. In October 2008 and March 2009 the Executive Committee decided to maintain the level of the Fund's payments at 35% of the established claims.

The most recent estimate by the Fund's experts of the total amount of the losses caused by the spill is between KRW 580 000 million and KRW 615 000 million (£288-306 million) (paragraph 3.4).

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In this document conversion of currencies has been made on the basis of the exchange rates as at 26 May 2009 (£1 = KRW 2 015.46 and SDR 1 = £1.0329), except in respect of payments made by the Fund where the conversion has been made at the rate of exchange on the date of payment.

On the basis of the information available the Director proposes to maintain the level of the Fund's payments at 35%, to be reviewed at the next session of the Executive Committee (paragraph 3.7).

Action to be taken:

- a) Decide whether to assess claims in the fisheries and aquaculture sector based on the fishing restrictions imposed by the Korean Government (section 2); and
- b) Decide whether to maintain the level of payments at 35% (section 3).

1 Claims in the subsistence and artisanal fisheries sector

- 1.1 As at 1 June 2009, 20 361 claims totalling KRW 270 545 million (£134 million) have been submitted to the Club and the Fund for losses allegedly suffered by subsistence and artisanal fishermen, consisting, for the vast majority, of hand gatherers but also of woman divers and boat fishermen.
- 1.2 As at 8 May 2009, 125 885 claims had been submitted to the Limitation Court. It is understood that the vast majority of the claims submitted into the limitation proceedings have been submitted by hand gatherers and other subsistence fishermen. It is expected that these claims will also be submitted to the Club and the Fund in the near future.
- 1.3 In the Korean Fisheries Act there are three categories of fishing defined for the purpose of the Act: 'licensed fishing', 'permitted fishing', and 'registered fishing'. A person engaged in 'licensed fishing', for example set-netting and village fishing, would need a proper license to fish from the authorities. 'Permitted fishing', such as boat fishing and sectional fishing, would require a permit from the authorities. 'Registered fishing' such as hand gathering, however, would only require a registration with the authorities, which is normally accepted automatically upon request.
- 1.4 'Licensed' and 'permitted' fishing
 - 1.4.1 With regard to claims submitted by fishermen who fall within the categories of 'licensed' and 'permitted' fishing, the Fund's policy, expressed by the 1971 Fund Executive Committee at its 60th session in February 1999 and confirmed by the 1992 Fund Executive Committee at its 2nd session in February 1999, was to not accept claims from fishermen who carried out their activities in breach of licensing requirements laid down in, or based on, national legislation. At the same time, however, the Committee considered that some flexibility should be exercised in respect of such claims and that the scope for such flexibility would have to be considered further (cf document 92FUND/EXC.2/10, paragraphs 5.3-5.4).
 - 1.4.2 As mentioned above, a person engaged in 'licensed' or 'permitted' fishing would need a proper license or permit to fish from the authorities. 'Licensed' and 'permitted' fishing are restricted under the Act for the purpose of prevention of overfishing, and non-compliance would give rise to criminal sanctions or liability up to a maximum of three years' imprisonment and a fine of KRW 20 million under Korean law.
 - 1.4.3 The Director therefore intends to reject, in principle, claims submitted by fishermen not in possession of a valid license or permit where such license or permit is legally required.
- 1.5 'Registered' fishing
 - 1.5.1 While 'licensed' and 'permitted' fishing are restricted under the Act, the 'registered' fishing is granted limitlessly, and the registration has a value mostly for statistical purposes. Thus, non-compliance by a registered fisher, such as a hand gatherer, would give rise to only an administrative fine up to a maximum KRW 5 million, but would not give rise to any criminal sanction. As a consequence,

under Korean law and based on Korean Courts' practice, income made from fishing without valid registration is not an illegal income *per se* and hand gatherers are entitled to claim regardless of their registrations with the competent Korean authority as long as they can prove that a loss or damage was incurred as a result of the incident.

- 1.5.2 In view of the expected number of claims to be received in the fisheries sector, and since it was expected that the vast majority of these claimants would be hand gatherers, who would not be able to provide sufficient evidence that they were actually active at the time of the incident and/or to prove their losses, the Fund and the Club asked the Korean Government for assistance in determining who were genuine hand gatherers so as to render the assessment as efficient as possible.
- 1.5.3 The Korean Government suggested the following process and order for surveying and assessing fishermen's, in particular hand gatherers', claims:
 - 1.5.4 The first group would consist of those fishermen who were in possession of a valid fishing license, permit or registration at the date of the incident and who were capable of proving the loss or damage suffered.
 - 1.5.5 The second group would consist of fishermen who the Korean Government considers to be genuine even though they did not have a valid registration at the time of the incident and/or are not capable of proving the loss or damage suffered. This group was identified as persons who:
 - were resident and lived in the affected areas;
 - obtained a registration following the incident; and
 - had no alternative means of revenue.
 - 1.5.6 Finally, a third group would consist of fishermen who have claimed compensation but do not fall within the first or second group.

Director's considerations

- 1.6 In view of the very large number of fishermen and of the difficulty for many of these claimants to provide sufficient supporting information, the Director considered the approach suggested by the Korean Government as a suitable method in principle to ensure that the assessment of these claims is carried out in the most efficient way.
- 1.7 The Club and the Fund have therefore instructed their experts to begin interviewing the first group of subsistence fishermen. As at 1 June 2009, the experts have interviewed over 30 400 subsistence fishermen in this group, including more than 26 000 hand gatherers.
- 1.8 Once the assessment process of the first group is completed, the Club and the Fund will consider those claimants falling within the second group. The assessment of these claims will be carried out in accordance with the guidelines for the assessment of claims in the subsistence and artisanal fisheries sector.
- 1.9 The fishermen belonging to the third group will be rejected, unless they can prove that they have suffered a loss as a result of the contamination.

2 Issues to be considered by the Executive Committee

2.1 Fishing and harvesting restrictions

- 2.1.1 In the aftermath of the incident, the Korean Government issued a number of fishing and harvesting restrictions in the areas affected by the spill. The 1992 Fund requested the Korean Government to provide detailed information as to the basis on which the restrictions were imposed, maintained and lifted. In October 2008 the Korean Government provided the 1992 Fund with documentation on the

restrictions. The Club and the 1992 Fund asked their experts to examine the documentation.

2.1.2 Based on the information provided to the 1992 Fund and on a number of meetings held with the Korean Government, the procedure followed to lift the fishing restrictions would appear to be as follows:

- The Government instructed the Korea Ocean Research and Development Institute (KORDI) and the National Fisheries Research and Development Institute (NFRDI), two leading scientific organisations in Korea, to carry out environmental and seafood monitoring including sampling of water and marine organisms in the months following the incident.
- Sampling was also carried out from time to time at the request of fishing cooperatives in the affected areas, which approached the Korean authorities and requested the reopening of their fishery areas.
- Once the sampling results, carried out either by KORDI and NFRDI directly or as requested by the fishing cooperatives, showed that the levels of contaminants had dropped below threshold levels, the Korean Government consulted with the local authorities and the fishing communities and once all parties reached an agreement as to whether to lift the restriction in a particular area, the Korean Government decided on the date for lifting that restriction.
- In some cases the Korean Government delegated the decision on the dates to the local Government authorities in the affected areas.

2.1.3 In early May 2009 the Korean Government provided additional information regarding the fishing restrictions. The additional information, comprising several hundred pages of documents, was in Korean and the Club and the Fund are having these documents translated so that their experts can study them.

2.1.4 In late May 2009 the Fund met with representatives of the Korean Government to discuss the contents of the documents provided. At the meeting, the Korean Government provided a summary in English of the additional documents submitted and explained the procedure followed to monitor and sample as well as the decision making procedures followed in maintaining and lifting the restrictions. During the discussion it was clarified that technical criteria were only part of the considerations of the Government and that economic and social concerns were also taken into account when deciding when to lift the restrictions.

2.1.5 On the basis of the information supplied to date by the Korean Government and the best interpretation of the data provided, the Club's and Fund's experts consider it clear that all of the fisheries should reasonably have been reopened before the actual date of the lifting of the respective fishing restrictions.

Director's considerations:

2.2 The Director takes the view that a procedure as outlined above is likely to have prolonged unnecessarily the duration of the fishing restrictions since, even where scientific justification to lift the restrictions existed on the basis of satisfactory survey results, there was no guarantee that the fishing communities or cooperatives would request or agree to lift a restriction at the earliest reasonable time.

2.3 He considers, therefore, that a procedure as described above was not necessarily a reasonable method of determining whether or not from a scientific point of view the fishing restrictions should be lifted in order to get a fishery working as soon as it was safe to do so. For that reason, the outcome of such procedure cannot be relied upon for the purpose of determining which period of business interruption for fisheries should be considered as reasonably unavoidable.

- 2.3.1 Based on the information available, it appears that the fishing restrictions for all types of fishing were extended well beyond the period which could have been considered reasonable based on the results of the testing carried out by the Korean authorities. Other considerations, both of an economic and of a social nature, appear to have been taken into account in the decision to extend the restrictions beyond the time when it would have been safe to resume fishing. The Club's and Fund's experts have also indicated that in their experience, in some cases, the fact that satisfactory wages could be earned from clean-up operations in practice worked as a disincentive for fishing communities to request or consent to lifting the restrictions, in particular when there was an expectation of full compensation for losses for the duration of the restriction.
- 2.4 The Director further takes the view that any losses allegedly suffered by fishermen after a point in time where the Korean Government could reasonably have had the opportunity to lift the restrictions on the basis of conclusive scientific information indicating that the level of contamination was back within safe levels, should not be considered due to the contamination caused by the incident.
- 2.5 For these reasons the Director intends to reject claims for losses suffered by the fishermen after those dates.

3 Level of payments

Since the issue of document 92FUND/EXC.44/7/Add.1, the Director has obtained from the Fund's experts the most up-to-date information on the estimated total exposure of the Fund. The revised estimated figures are set out below:

3.1 Clean up

- 3.1.1 The original estimates for the costs in the clean-up sector were based on the assumption that clean-up operations would finish by June 2008. By that time, clean-up operations had indeed been completed or significantly scaled down in several sites along the western coast of the Republic of Korea. However, public concerns as to the level of clean up have prompted the authorities to request the clean-up contractors to continue their work in some areas. As a result, clean-up operations were still ongoing in some remote locations well beyond the first half of 2008. Further clean-up operations have been resumed in spring 2009 in some locations and are expected to continue until summer 2009.
- 3.1.2 The updated estimate of the expected costs for the at-sea and onshore clean up, consequent disposal of waste and for environmental restoration and monitoring as a result of the incident totals approximately KRW 173 282 million (£86 million).
- 3.1.3 This figure is based on the total amount of the claims submitted so far, both by private companies and government agencies. It also takes into consideration the assessed amount of the claims settled so far, as well as the claims for property damage related to clean-up operations that have been submitted so far.

3.2 Fisheries and aquaculture

- 3.2.1 The Fund's experts have reviewed the most recent information available on the impact the pollution has had on the fisheries and aquaculture industry in the areas affected. The experts have considered the impact of the fishing restrictions on the losses suffered by the various capture fishery sectors in the affected provinces, the fact that fishing restrictions had continued longer than expected and that some capture fishery activities had not returned to normal until September 2008.

Capture fisheries

- 3.2.2 The losses to capture fisheries arising from the *Hebei Spirit* incident have been estimated by the Club's and the Fund's experts at KRW 61 868 million (£31 million). This estimate is based on the

impact of the spill on the fishery sector if the fishing restrictions imposed by the authorities were to be accepted and would therefore be lower if the losses were to be quantified using a shorter period of business interruption, as intended by the Director (cf paragraphs 2.2-2.5).

- 3.2.3 It should be noted that the additional amount recently claimed by hand gatherers and similar artisanal and subsistence fisheries totals about KRW 270 544 million (£134 million). The great majority of these claims have been submitted with no or very poor supporting information. It is therefore impossible at this stage to predict, with any useful degree of certainty, what the total amount of these claims as assessed may be in the future, even though, as set out in section 1, the Club and the Fund, in cooperation with the Korean Government, are making an effort to determine which are the genuine hand gatherers and to render the assessment process as efficient as possible. It seems clear though, that a significant proportion of these claims cannot be considered admissible if no sufficient supporting information is made available and that, in view of the nature of these activities, it will be very difficult for many of the claimants involved to provide such supporting information. For this reason these claims have not, for the time being, been taken into account for the purpose of estimating the total amount of capture fisheries damage.

Aquaculture

- 3.2.4 When analysing the possible losses in the aquaculture sector, the experts have mainly considered the information on business revenues in the area, as well as the physical contamination in the facilities and the actual claims submitted so far to the *Hebei Spirit* Centre (HSC). Based on the information available, the losses to the aquaculture sector arising from the *Hebei Spirit* incident have been estimated at up to KRW 119 300 million (£59 million).
- 3.2.5 A significant proportion of the estimate for property damage and economic loss to the aquaculture industry relates to possible losses arising from destruction of aquaculture stock and equipment. While such destruction has been accepted in principle by the Club and Fund in one area, the situation is still not sufficiently clear for other areas, in particular as regards the justification for the amount of stock and equipment destroyed. The experts are examining the information available.
- 3.2.6 In estimating the losses to the aquaculture sector in the affected areas, the experts considered that there was some evidence that many aquaculture businesses had struggled to return to normal business levels although it was still unclear whether that was caused by the pollution resulting from the *Hebei Spirit* incident or by other circumstances.
- 3.2.7 The estimates are still, however, based on a number of assumptions and therefore, for lack of better data, the estimated total damages are based on losses as claimed for the total destruction of the production for one or more seasons rather than the likely losses when the actual impact of the oil is considered.

Ancillary industries

- 3.2.8 The experts also took into account the possible losses of ancillary industries (to fisheries and aquaculture), both upstream (eg gear supply, fuel and ice supply) and downstream (eg marketing, processing, distribution) and have estimated their losses at KRW 27 914 million (£14 million). The losses in this sector have been estimated on the basis of the length of the official fishing restrictions and would therefore be lower if the losses were to be quantified using a shorter period of business interruption, as intended by the Director (cf paragraphs 2.2-2.5).

Estimated total for fisheries and aquaculture

- 3.2.9 For the reasons set out above, at this stage, the total losses in the fisheries and aquaculture sector are estimated to be KRW 209 082 million (£104 million).

3.3 Tourism

- 3.3.1 The number of tourism claims received to date is still limited and the supporting information provided is not sufficient to predict, with any useful degree of certainty, what the total claimed amount may be in the future. From a preliminary observation of the tourism activities, in comparison with the statistics provided by various tourism bodies within the affected area, it is clear that tourism businesses have suffered a decline following the incident. Also, due to the extension of the clean-up activities well beyond the first half of 2008, the losses in the tourism sector may turn out to be higher than what was originally estimated. More accurate statistics are likely to become available once data for the whole 2008 tourism season have been collected.
- 3.3.2 Additional statistical information made available since the last session of the Executive Committee tends to confirm that circumstances other than the contamination caused by the incident may have had an impact on tourism activities. Data on those other circumstances and the impact they may have had are being collected and will have to be considered by the Fund's experts before any changes can be made to the estimates of the overall impact of the *Hebei Spirit* incident on the tourism sector.
- 3.3.3 Therefore, at this stage, the October 2008 estimate that the total losses in the tourism sector will be in the range of KRW 198 billion to KRW 233 billion (£98-116 million) is still valid.

Director's considerations

- 3.4 On the basis of the information set out above, the Director considers that the total amount of the losses arising from the *Hebei Spirit* incident could be estimated as set out in the table below:

Category of loss	Estimated losses October 2008 (KRW billion)	Estimated losses March 2009 (KRW billion)	Estimated losses June 2009 (KRW billion)	Estimated losses June 2009 (£ million)
Clean up	162.3	163.3	173	86
Fisheries and mariculture	206	206	209	104
Tourism	198-233	198-233	198-233	98-116
Total	566.3-601.3	567.3-602.3	580-615	288-306

- 3.5 The total amount available for compensation under the 1992 Civil Liability Convention (1992 CLC) and the Fund Convention is 203 million SDR or KRW 321 618.9 million (£159 million) (cf document 92FUND/EXC.45/6, paragraph 7.4).
- 3.6 At its June 2008 session the Executive Committee decided that, in view of the uncertainty as to the total amount of the potential claims, and in view of the need to ensure equal treatment for all claimants, any payments made by the Fund should for the time being be limited to 35% of the amount of the damage actually suffered by the respective claimant as assessed by the Fund's experts. This percentage was maintained by the Executive Committee at its October 2008 and March 2009 sessions (cf documents 92FUND/EXC.42/14, paragraphs 3.9.7 and 3.9.8 and 92FUND/EXC.44/10, paragraph 3.5.7).
- 3.7 In view of the information set out above and the remaining uncertainties as to the total amount of admissible claims, the Director proposes to maintain the level of payments at 35% of the amount of the loss or damage as assessed by the Fund's experts. He also proposes that this percentage should be reviewed at the Executive Committee's next session.

4 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
 - (b) to decide whether to assess claims in the fisheries and aquaculture sector based on the fishing restrictions imposed by the Korean Government (section 2);
 - (c) to decide whether to maintain the level of payments at 35% (section 3); and
 - (d) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.
-