

 <p>INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS</p>	<b>Agenda item: 3</b>		IOPC/MAR11/3/7	
	Original: ENGLISH		1 March 2011	
	1992 Fund Assembly			<b>92AES15</b>
	1992 Fund Executive Committee			<b>92EC51</b> •
	Supplementary Fund Assembly			<b>SAES4</b>
	1971 Fund Administrative Council			<b>71AC26</b>
	1992 Fund Working Group			<b>92WG6/2</b>

## INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

### HEBEI SPIRIT

#### Note by the Director

<b>Objective of document:</b>	To inform the 1992 Fund Executive Committee of the latest developments regarding this incident.
<b>Summary of the incident so far:</b>	<p>On 7 December 2007, the <i>Hebei Spirit</i> (146 848 GT) was struck by the crane barge <i>Samsung N°1</i> while at anchor about five miles off Taean on the west coast of the Republic of Korea. About 10 900 tonnes of crude oil escaped into the sea from the <i>Hebei Spirit</i>.</p> <p>The <i>Hebei Spirit</i> is insured for pollution risks by China Shipowners Mutual Insurance Association (China P&amp;I Club) and by Assurancéföreningen Skuld (Gjensidig) (Skuld Club).</p> <p>The losses arising out of this incident are expected to exceed the limitation amount applicable to the <i>Hebei Spirit</i> under the 1992 Civil Liability Convention (1992 CLC), ie 89.8 million SDR (KRW 186.8 billion)<sup>&lt;1&gt;</sup>.</p> <p>The Skuld Club and the 1992 Fund have opened a Claims Office, the <i>Hebei Spirit</i> Centre (HSC), in Seoul to assist claimants in the presentation of their claims for compensation and have appointed a number of Korean and international experts to assess claims in the property damage, clean up, fisheries/mariculture and tourism sectors.</p> <p><i>Level of payments</i></p> <p>In June 2008 the 1992 Fund 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, March, June and October 2009, and June and October 2010, the Executive Committee decided to maintain the level of the Fund's payments at 35% of the established claims.</p> <p><i>Fisheries restrictions</i></p> <p>The Korean Government established a number of fisheries restrictions in the weeks following the incident. The restrictions began to be lifted in April 2008. The last restrictions were lifted in September 2008.</p>

<1> The liability of the owner of the *Hebei Spirit* has not yet been established by the Limitation Court. The Skuld Club is basing its calculation of the limitation amount on the exchange rate of 6 November 2008, the date on which the Letter of Undertaking was deposited into the Limitation Court. Otherwise, in this document conversion of currencies has been made on the basis of the exchange rate as at 4 February 2011, £1 = KRW 1 793.57 and 1 SDR = £1.03).

In June 2009, the 1992 Fund Executive Committee decided that the assessment of claims in the fisheries sector should be based on conclusive scientific information available to the Fund. In June 2010, the 1992 Fund Executive Committee noted that the Secretariat and the Republic of Korea had reached a mutual understanding on the reasonable dates for lifting the fisheries restrictions within the 1992 Fund's policy on admissibility, as laid down in the Claims Manual, and on the basis of the instructions given by the Executive Committee in June 2009.

Following the finalisation of the clean-up assessments, the reasonable dates for reopening the fisheries in the Republic of Korea after the *Hebei Spirit* incident were further revised, extending the period in some limited areas (section 9).

*Limitation proceedings by the owner of the Hebei Spirit*

In February 2009, the Limitation Court rendered an order for the commencement of the limitation proceedings by the owner of the *Hebei Spirit* and decided that claims against the limitation fund of the *Hebei Spirit* should be registered with the Court by 8 May 2009.

One hundred and twenty-seven thousand one hundred and eighteen claims totalling KRW 3 932 billion (£2.2 billion) have been submitted in the limitation proceedings.

*Limitation proceedings by Samsung Heavy Industries (SHI)*

In March 2009, the Limitation Court rendered an order for the commencement of the limitation proceedings by SHI, the bareboat charterer of the two towing tugs and of the crane barge, and set the limitation fund, together with legal interest, at an amount of KRW 5 600 million (£3.1 million). A number of claimants have appealed against the decision of the Limitation Court.

In January 2010, the Court of Appeal dismissed the appeal against the commencement of the limitation proceedings by SHI. The claimants appealed to the Supreme Court. The decision of the Court is still pending (cf paragraph 11.2).

*Recourse action against Samsung C&T and SHI*

In January 2009, the owner and insurers of the *Hebei Spirit* and the 1992 Fund commenced recourse action against Samsung C&T and SHI, the owner and operator/bareboat charterer of the two towing tugs, the anchor boat and the crane barge, in the Court of Ningbo in the People's Republic of China combined with an attachment of SHI's shares in two shipyards in China as security (section 12).

By September 2009, proceedings had been served on both Samsung C&T and SHI, but both have filed applications objecting to the jurisdiction of the Ningbo Maritime Court and, in the case of SHI, objecting to the attachment. In September 2010 the Court dismissed the applications. Samsung C&T and SHI lodged an appeal against the decision of the Court in October 2010.

In February 2010, the 1992 Fund signed an agreement with the owner, Skuld Club and China P&I Club ('ship's interests') in connection with the recourse action, under which the 1992 Fund and the ship interests will continue their actions separately in the Ningbo Maritime Court, sharing the costs of the recourse actions and apportioning the proceeds of any recovery by court judgement or settlement on a 50/50 basis (section 12).

**Recent developments:***Claims situation*

As at 1 March 2011, 20 321 claims totalling KRW 2 402 012 million (£1 339 million) had been submitted, including 245 group claims, together representing a total of 127 539 individual claimants. Two thousand five hundred and six claims have been assessed at a total of KRW 133 226 million (£74 million). Eight thousand one hundred and ninety-four have been rejected. The Skuld Club has made payment towards 2 074 claims totalling KRW 115 105 million (£64 million). The remaining claims are being assessed or additional information has been requested from the claimants. Further claims are expected (section 8).

*Investigation into the cause of the incident*

In January 2011 the owners and insurers of the *Hebei Spirit* withdrew their appeal to the Supreme Court of Korea on the results of the investigation by the Central Maritime Safety Tribunal.

In February 2011 the Supreme Court of Korea dismissed the appeal by the owner of the two tugs. The decision of the Central Maritime Safety Tribunal is now final (cf paragraph 10.1.1).

*Limitation proceedings of the Hebei Spirit*

In February 2011 the Limitation Court appointed a Court expert to assess the claims received by the Court. The next hearing of the Limitation Court has been scheduled for November 2011 (cf paragraph 11.1).

*Legal proceedings*

One clean-up company, one boat owner and a number of individuals have filed separate lawsuits against the 1992 Fund for compensation of damages. The 1992 Fund's Korean lawyers are following the cases (cf paragraphs 11.4-11.6).

*Recourse action against Samsung C&T and SHI*

In February 2011 the Court of Appeal issued its decision. In the decision, the Appeal Court accepted the appeal by Samsung C&T and SHI that the Court of Ningbo was a '*forum non-conveniens*' and that a recourse action should be pursued in a Korean Court. The 1992 Fund's Chinese lawyers are preparing the appeal to the Supreme Court.

*Level of payments*

The most recent estimate of the total amount of the losses caused by the spill is around KRW 354 200 million (£197.5 million). The total amount claimed against the Club and the 1992 Fund is around KRW 2 402 012 million, whilst the total amount claimed in the Limitation Court is around KRW 3 932 854 million.

The Korean Government has recently submitted a document requesting the 1992 Fund Executive Committee to increase the level of payment to 100% subject to certain safeguards. The Director proposes to accept the proposal of the Korean Government subject to the safeguards being satisfactorily in place before the 1992 Fund commences making payments (section 13).

In view of the remaining uncertainty with regard to the final amounts assessed, the Director further proposes that, in case the safeguards proposed by the Korean Government are not in place by the time the 1992 Fund commences making

payment, the level of the 1992 Fund's payments is maintained at 35%, to be reviewed at the next session of the 1992 Fund Executive Committee or until the safeguards are satisfactorily in place (section 13).

**Action to be taken:** 1992 Fund Executive Committee:

(a) Decide whether to increase the level of payment to 100% subject to a number of conditions (section 13).

or

(b) Decide whether to maintain the level of payments at 35% (section 13); and

(c) Give the Director such other instructions in respect of the handling of this incident as it may deem appropriate.

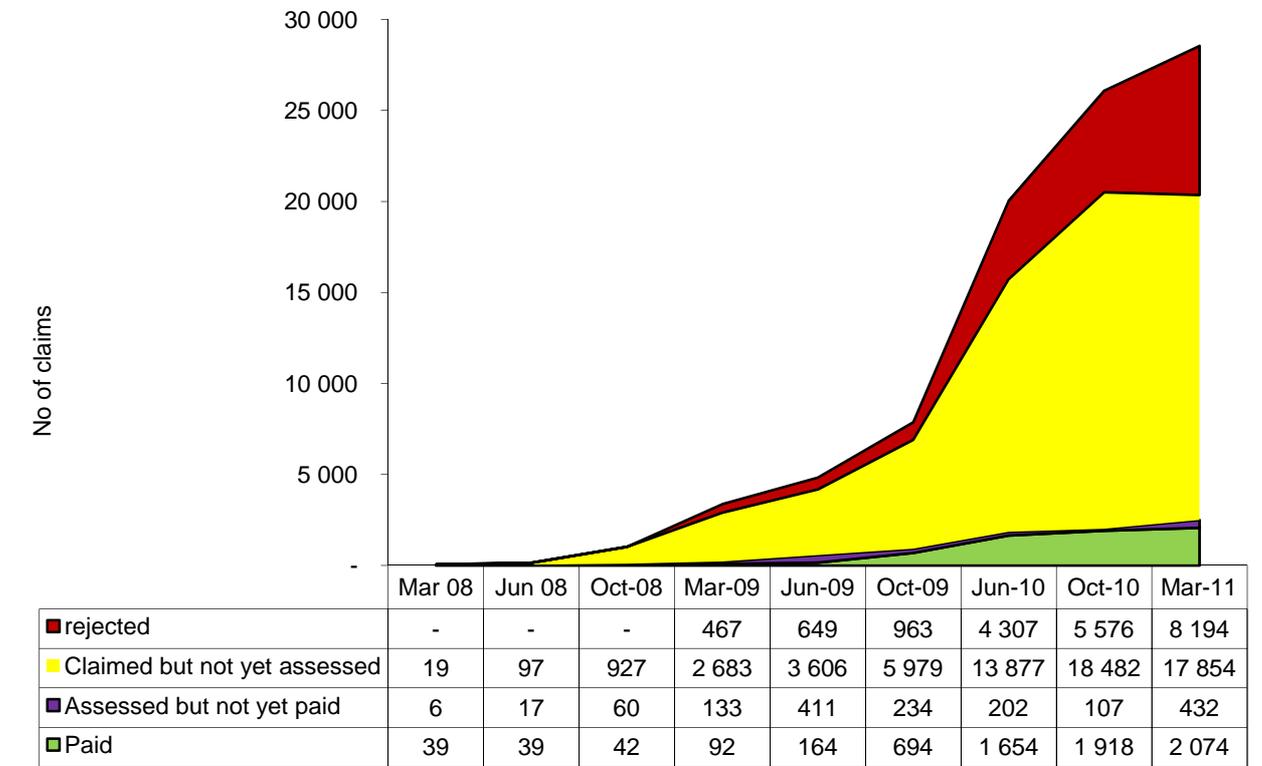
## 1 Summary of incident

Ship	<i>Hebei Spirit</i>						
Date of incident	07.12.07						
Place of incident	Taeon, Republic of Korea						
Cause of incident	Collision						
Quantity of oil spilled	Approximately 10 900 tonnes of crude oil						
Area affected	The three southerly provinces on the west coast of the Republic of Korea						
Flag State of ship	China (Hong Kong Special Administrative Region)						
Gross tonnage (GT)	146 848 GT						
P&I insurer	China Shipowners Mutual Insurance Association (China P&I)/ Assuranceföreningen Skuld (Gjensidig) (Skuld Club)						
CLC Limit	89.8 million SDR (approximately KRW 186.8 billion)						
STOPIA/TOPIA applicable	No						
CLC + Fund limit	KRW 321 619 million						
Compensation	Claimed but not yet assessed		Assessed but not yet paid		Paid		Rejected
	No. of claims	Amount KRW million	No. of claims	Amount KRW million	No. of claims	Amount KRW million	No. of Claims
TOTAL	17 854	2 268.8	316	18.1	2 074	115.1	8 077
TOTAL (£ million)		1 265		10		64	
Standing last in the queue:	The Korean Government has expressed the intention to stand last in the queue for some claims by a number of Ministries and Local authorities totalling KRW 273.3 billion (£152 million)						
Legal proceedings:	<ol style="list-style-type: none"> <li>1. Limitation proceedings of the owners of the <i>Hebei Spirit</i> in the Republic of Korea.</li> <li>2. Limitation proceedings of the owners/operators of the Marine Spread in the Republic of Korea.</li> <li>3. Recourse action by the 1992 Fund against the owners/operators of the Marine Spread in the People's Republic of China.</li> <li>4. Recourse action by the Skuld Club against the owners/operators of the Marine Spread in the People's Republic of China.</li> <li>5. Lawsuit by one clean-up company against the owners and insurers of the <i>Hebei Spirit</i> and against the 1992 Fund.</li> <li>6. Lawsuit by a number of fishermen and fish sellers against the 1992 Fund and the Korean Government.</li> <li>7. Lawsuit by one shipowner against the owners of the <i>Hebei Spirit</i> and the 1992 Fund.</li> </ol>						
Notes	Further claims are expected.						

## 2 Development of claims

The development of the incident in terms of volumes of claims processed by the Skuld Club and the 1992 Fund is reflected in Figure 1 below:

Figure 1: Development of claims (number of claims)



## 3 The incident

The *Hebei Spirit* (146 848 GT) was struck by the crane barge *Samsung N<sup>o</sup>1* while at anchor about five miles off Taeon on the west coast of the Republic of Korea. The crane barge was being towed by two tugs when the tow line broke. As a result of the collision an estimated total of 10 900 tonnes of crude oil escaped into the sea. Details of the incident, impact of the spill and clean-up operations can be found in the IOPC Funds' publication, 'Incidents involving the IOPC Funds 2010' (Incident Report 2010), pages 32-33.

## 4 Claims handling

- 4.1 The Skuld Club and the 1992 Fund appointed a number of Korean and international surveyors to monitor the clean-up operations and investigate the potential impact of the pollution on fisheries, mariculture and tourism activities. A total of 75 experts are currently working on the assessment of claims.
- 4.2 In January 2008 the Skuld Club and the 1992 Fund opened a Claims Office, the *Hebei Spirit* Centre (HSC) in Seoul to assist claimants in the presentation of their claims for compensation. The HSC has a manager and six supporting staff.

## 5 The 1992 Civil Liability and Fund Conventions

- 5.1 At the time of the incident, the Republic of Korea was a Party to the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention, but not a Party to the Supplementary Fund Protocol. As a consequence, since it is almost certain that the total amount of damages will exceed the limitation amount applicable under the 1992 CLC, the 1992 Fund will be liable to pay compensation to the

victims of the spill.

- 5.2 The tonnage of the *Hebei Spirit* (146 848 GT) is in excess of 140 000 GT. The limitation amount applicable is therefore the maximum under the 1992 CLC, namely 89.8 million SDR. The limit of liability of the shipowner has not yet been established by the Limitation Court. The shipowner and the Skuld Club are basing their calculation of the limitation amount on the exchange rate of the date on which the Letter of Undertaking was deposited into the Limitation Court, ie 6 November 2009. The conversion rate on the basis of the rate applicable to that date gives 89.8 million SDR = KRW 186 826 630 900.
- 5.3 The amount available for compensation under the 1992 CLC and Fund Convention is 203 million SDR. The conversion on the basis of the rate applicable to this incident gives 203 million SDR = KRW 321 618 990 000 (cf Incident Report 2010, page 33).

## **6 Actions by the Korean Government**

### **6.1 Hardship payments made by the Korean Government**

The Korean Government has informed the 1992 Fund that payments totalling KRW 117.2 billion (£65 million) have been made to residents in the affected areas and that these payments were made as donations to the affected residents. The payments therefore did not constitute payment of compensation of pollution damage and would not fall within the scope of Article 9.3 of the 1992 Fund Convention.

### **6.2 Payments made by local authorities**

The governments of seven local authorities made payment totalling KRW 15 970 million to 20 claimants towards clean-up costs incurred in the period January to August 2008. One local authority made payment to one claimant for clean-up costs incurred after August 2008. All of these local authorities have submitted claims in respect of these payments, which have been paid (cf Incident Report 2010, page 34).

### **6.3 Special Law for the support of the victims of the *Hebei Spirit* oil pollution incident**

6.3.1 In June 2008, the Korean Government informed the 1992 Fund Executive Committee that a special law for the support of the victims of the *Hebei Spirit* incident had been approved by the National Assembly in March 2008. Details of the Special Law can be found in the Incident Report 2010, page 34.

6.3.2 As at 1 March 2011, the Korean Government has made payments totalling KRW 33 023 million in respect of 435 claims in the clean up, tourism and fisheries and aquaculture sectors based on assessments provided by the Skuld Club, and 1992 Fund and has claimed for part of these payments. The Skuld Club has paid the Government KRW 28 499 million in respect of 375 of these claims.

6.3.3 The Korean Government has, under the Special Law, set up a scheme to provide loans to victims of pollution damage for an amount fixed in advance if they have submitted a claim to the Skuld Club and the 1992 Fund but have not received an offer of compensation within six months. As at 28 February 2011, the Korean Government had granted loans totalling KRW 49 812 million to 20 433 claimants.

### **6.4 Korean Government's decision to 'stand last in the queue'**

6.4.1 At the June 2008 session of the 1992 Fund Executive Committee, the Korean Government informed the Committee of its decision to 'stand last in the queue' in respect of compensation for clean-up costs and other expenses incurred by the central and local governments.

6.4.2 In February 2011, the Korean Government informed the 1992 Fund that the amounts for which the

Government intended to 'stand last in the queue' would total some KRW 273 347 million (£152 million) corresponding to costs incurred by the Government in respect of clean up and preventive measures, environmental studies, restoration, marketing campaigns, tax relief and other expenses incurred to deal with the pollution and that this figure was likely to increase as the Government continued to pay costs to regenerate the local economy and promote consumer spending.

- 6.4.3 The Skuld Club and the 1992 Fund maintain frequent contact with the Korean Government to ensure a coordinated system for the exchange of information regarding compensation in order to avoid duplication of payments.

## **7 Cooperation Agreements between the shipowner/Skuld Club, KMPRC and MOMAF**

- 7.1 In January 2008, a First Cooperation Agreement on compensation matters was concluded between the shipowner, Skuld Club, Korean Marine Pollution Response Corporation (KMPRC) and the Korean Government (Ministry of Maritime Affairs and Fisheries (MOMAF)). The 1992 Fund was consulted during the negotiations but is not a party to the Agreement. Details of the First Cooperation Agreement can be found in the Incident Report 2010, page 34-35.
- 7.2 In July 2008, a Second Cooperation Agreement was concluded between the shipowner, Skuld Club and the Korean Government (Ministry of Land, Transport and Maritime Affairs (MLTM), which had incorporated part of the functions of MOMAF). Details of the Second Cooperation Agreement can be found in the Incident Report 2010, page 35.

## **8 Claims for compensation**

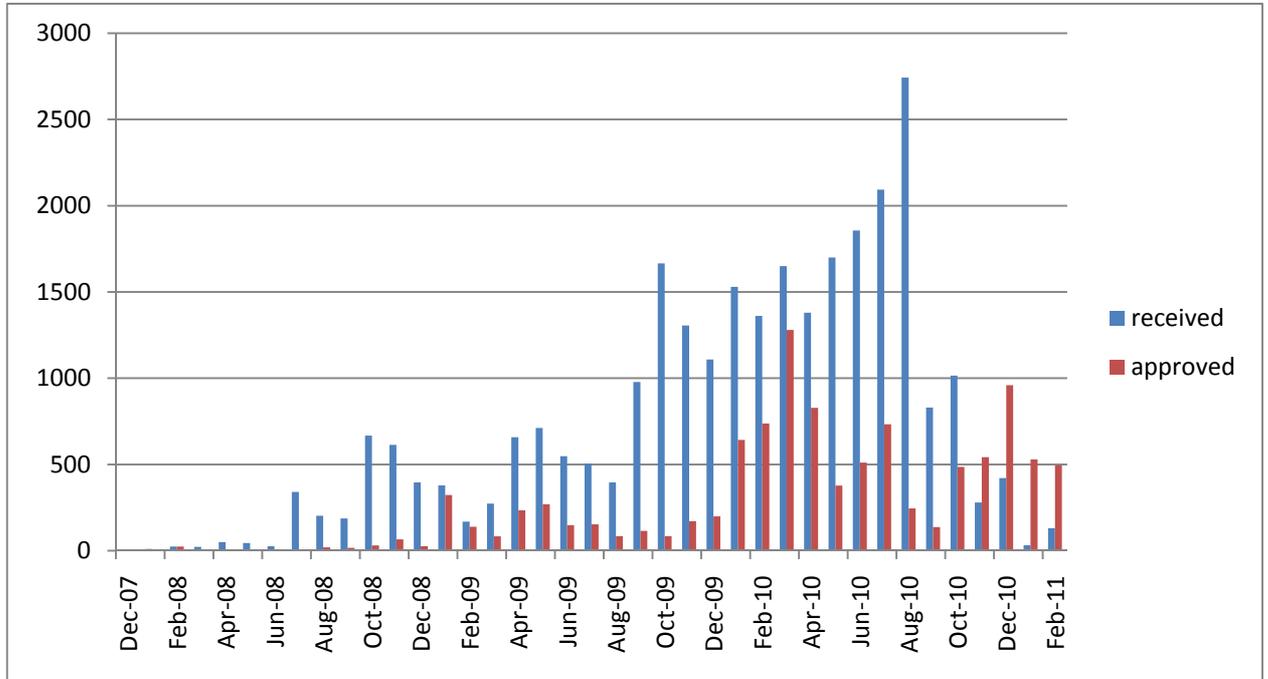
- 8.1 The table below provides an update of the claims registered in the HSC as at 1 March 2011:

Category of claim	Number of claims	Claimed amount (KRW million)	Claims assessed > 0	Assessed amount (KRW million)	Claims paid	Paid amount (KRW million)	Claims rejected
Clean up and preventive measures	299	367 192	204	90 419	174	85 799	28
Property damage	21	3 022	12	440	7	394	4
Fisheries and mariculture	10 711	1 581 507	501	23 212	192	10 638	1 959
Tourism and other economic damage	17 289	448 096	1 789	19 155	1 701	18 274	6 203
Environmental damage	1	2 195	-	-	-	-	-
<b>Total</b>	<b>28 321</b>	<b>2 402 012</b>	<b>2 506</b>	<b>133 226</b>	<b>2 074</b>	<b>115 105</b>	<b>8 194</b>
<b>Total (£ million)</b>		<b>1 339</b>		<b>74.17</b>		<b>64.18</b>	

- 8.2 As at 1 March 2011, 28 321 claims had been registered in the HSC. Of these claims, 245 had been submitted by fishery cooperatives or committees on behalf of 99 463 small-scale fishermen affected by the oil spill. The total number of individual claimants was 127 539. Further claims are expected.
- 8.3 Ten thousand seven hundred claims have been assessed. Of these, 8 194 have been rejected. A total of 2 074 claims, totalling KRW 115 105 million have been paid by the Skuld Club. These payments also include a number of subrogated claims submitted by the Korean Government (cf paragraph 6.3.2). One claim on behalf of 6 557 small-scale handgatherers, which has been assessed at KRW 7 042 million in late 2010, has not been paid yet as the claimants' representative has refused to sign receipt and release documents due to issues related to the recovery of the loans their members received by the Government under the Special Law.

8.4 Figure 2 below shows the number of claims registered and assessed each month since the incident occurred. It can be seen that the rate at which claims have been assessed has broadly kept in step with the rate at which claims are received. The peaks in registration in October 2008 and October 2009 correspond to increases in the staffing of the HSC. The peak in assessment of claims in March and April 2010 relates to a great number of similar claims being rejected in that period on the grounds that there was no link of causation between the contamination and the loss. The peak in registration in August 2010 corresponds to the submission of some 2 500 claims in the aquaculture sector.

Figure 2: Claims Handling Process



8.5 Figure 3 below and Figure 4 overleaf show the distribution of claims between the various categories, both in terms of number of claims and in terms of amount claimed, as of 1 March 2011.

Figure 3: Distribution of claims by amount (KRW billion)

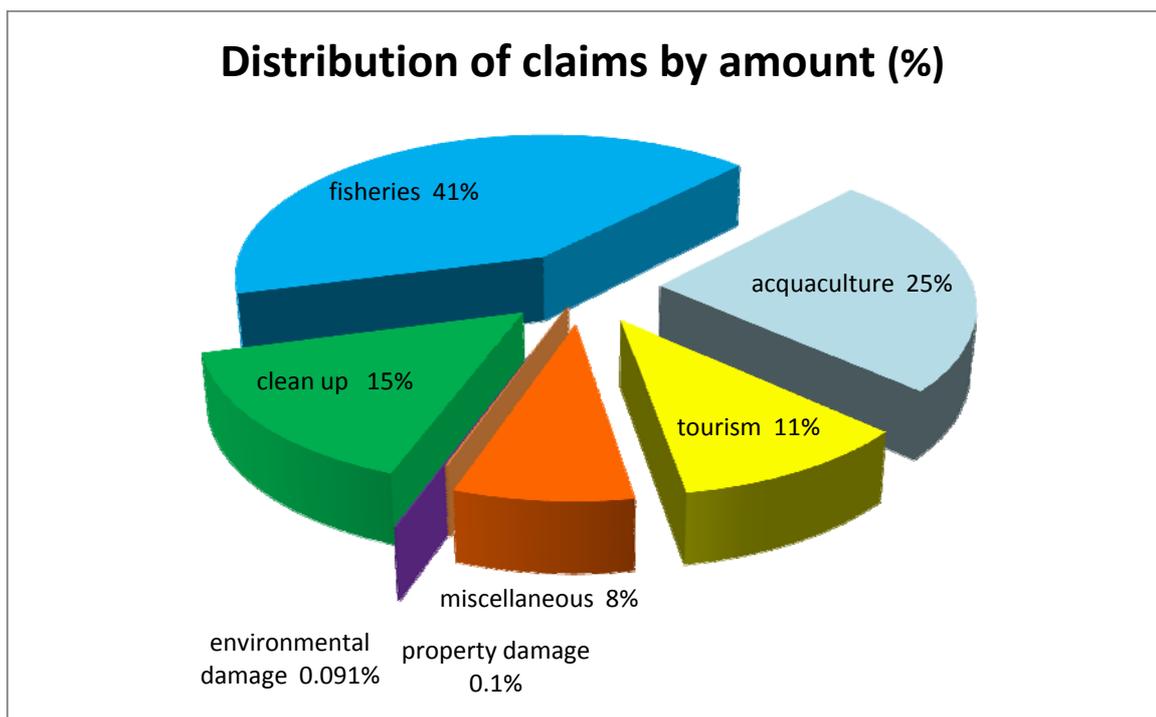
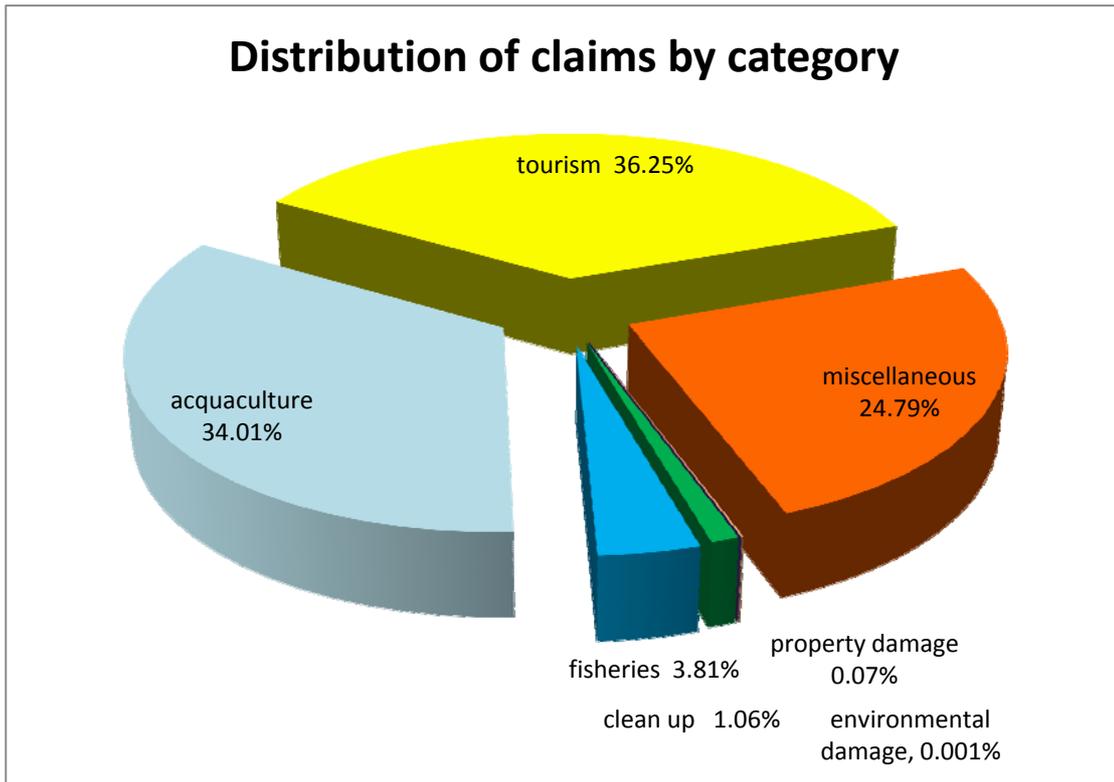
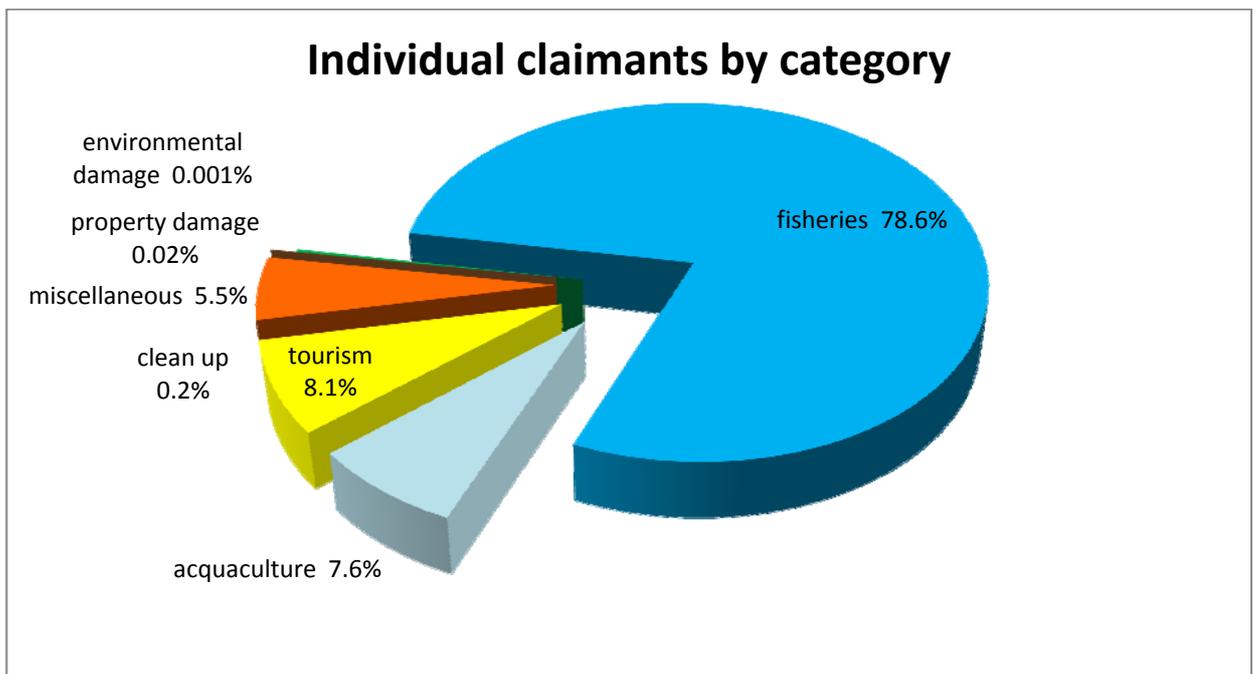


Figure 4: Distribution of claims by category



8.6 The significant difference between the number of claims and the amount claimed for the fisheries sector is due to the fact that the vast majority of the individual claims in the fisheries sector have been submitted as part of group claims. Figure 5 below shows the distribution of individual claimants by category.

Figure 5: Individual claimants by category



*Small-scale non-fisheries related claims*

8.7 Many tourism claims are poorly documented and would, in normal circumstances, be rejected. In

October 2009 the Director presented to the 1992 Fund Executive Committee a methodology developed by the Club's and 1992 Fund's experts for assessing small non-fisheries claims in case the claimant is not able to prove his/her losses. Details of this methodology can be found in document IOPC/OCT09/3/8/1, section 4. The 1992 Fund Executive Committee endorsed the Director's intention to apply this methodology on a trial basis, in order to gain experience with it and further develop the pool of reliable data.

- 8.8 As at 1 March 2011, about 76% of the small-scale business claims submitted had been assessed using the methodology described above. The others are being assessed. Further claims from small-scale businesses are expected.
- 8.9 The Director intends to present the results of the application of this methodology once all small-scale claims for which the methodology is suitable have been assessed.

## **9 Fisheries restrictions**

- 9.1 Following the incident, the Korean Government established a number of fisheries restrictions, which were lifted between April and September 2008. Details can be found in document IOPC/OCT09/3/8/1, paragraph 2.3.
- 9.2 After examination of the data provided by the Korean Government regarding the basis on which the fisheries restrictions were imposed and lifted, the 1992 Fund and its experts considered that the sampling and decision-making for seafood safety purposes had taken significantly longer than could be considered reasonable under the circumstances.
- 9.3 In June 2009, the 1992 Fund Executive Committee decided that the assessment of claims in the fisheries sector should be based on conclusive scientific information available to the 1992 Fund. Details of the decision can be found in document 92EXC.45/8, paragraph 3.4.21.
- 9.4 Following a number of meetings with the Korean Government, the Secretariat presented at the October 2009 session of the 1992 Fund Executive Committee, the result of a review of the reasonable dates when fisheries restrictions could have been safely lifted (cf document IOPC/OCT09/3/8/1, paragraph 2.4).
- 9.5 In accordance with the 1992 Fund Executive Committee's instructions to resolve the remaining differences of opinion with the Korean Government, the 1992 Fund and its experts conducted another thorough review of the information provided and the circumstances and conditions following the incident. As a result of the review, the dates when fisheries restrictions could have been safely lifted were adjusted (cf document IOPC/OCT10/3/10, paragraph 9.5).
- 9.6 A meeting took place in June 2010 in London between representatives of the Korean Government and the 1992 Fund. At that meeting the Director laid out the considerations described above, and the fact that they are within the current policy on admissibility of claims as laid down in the 1992 Fund's Claims Manual and in accordance with the decision of the 1992 Fund Executive Committee taken in June 2009. As a result of that meeting, the differences between the Korean Government and the 1992 Fund on the fisheries restrictions were narrowed.
- 9.7 At its June 2010 session the 1992 Fund Executive Committee noted that the Secretariat and the Republic of Korea had narrowed their differences of opinion and had reached a mutual understanding on the reasonable dates for lifting the fisheries restrictions and on the basis of the instructions given by the Executive Committee in June 2009 (cf document IOPC/JUN10/6/1, paragraph 3.5.36).
- 9.8 Following the completion of the assessment of reasonable clean-up operations, the periods for the resumption of fisheries activities were further extended in some locations.

## **10 Investigations into the cause of the incident**

### **10.1 Investigation in the Republic of Korea**

- 10.1.1 An investigation into the cause of the incident was initiated after the incident by the Incheon District Maritime Safety Tribunal in the Republic of Korea. Details of the results of the investigation, and of the decisions taken by the Incheon Maritime Safety Tribunal in September 2008 and by the Central Maritime Safety Tribunal in December 2008 can be found in the Incident Report 2010, page 36.
- 10.1.2 The owners of the two tugs and the owners of the *Hebei Spirit* have appealed to the Supreme Court against the decision of the Central Maritime Safety Tribunal on the cause of the incident and on the sanctions upon the concerned crewmembers.
- 10.1.3 In January 2011 the owners of the *Hebei Spirit* discontinued their proceedings.
- 10.1.4 In February 2011 the Supreme Court dismissed the appeal by the owners of the two tugs. The decision of the Central Maritime Safety Tribunal has therefore become final.

### **10.2 Investigation in China (Hong Kong Special Administrative Region (HKSAR))**

An investigation into the cause of the incident was also carried out by the ship's flag State administration in China (HKSAR). The investigation found that the decision by the operator of the Marine Spread to commence the towing voyage when adverse weather had been forecast was the main contributory factor to this accident. Moreover, the delay by the Marine Spread in notifying the Vessel Traffic Information Station (VTIS) and other ships in the vicinity resulted in insufficient time being given to the *Hebei Spirit* to take necessary actions to avoid the collision. The investigation further indicated that the actions taken by the Master and the crew of the *Hebei Spirit* after the collision had fully complied with the provisions as set out in the ship's Shipboard Oil Pollution Emergency Plan.

## **11 Legal proceedings**

### **11.1 Limitation proceedings by the owner of the *Hebei Spirit***

- 11.1.1 In February 2008, the owner of the *Hebei Spirit* made an application to commence limitation proceedings before the Seosan Branch of the Daejeon District Court (Limitation Court).
- 11.1.2 In February 2009, the Limitation Court rendered an order for the commencement of the limitation proceedings. A number of claimants appealed to the Court of Appeal against this decision.
- 11.1.3 In July 2009 the appeal was dismissed. A number of claimants appealed to the Supreme Court.
- 11.1.4 On 26 November 2009 the Supreme Court dismissed the appeal and consequently, the Limitation Court's decision for the commencement of the limitation proceedings for the owner of the *Hebei Spirit* became final.
- 11.1.5 One hundred and twenty-seven thousand one hundred and eighteen claims totalling KRW 3 932 billion (approximately £2.2 billion) have since been submitted to the Limitation Court. The claimants still have time to modify the amount of their claim until such time as the Administration appointed by the Limitation Court completes the assessment of the claims.
- 11.1.6 In February 2011 the Court appointed a Court expert to review the evidence filed by both sides with the intention for the Court to issue a decision by the end of 2011. The Court also scheduled its next hearing for November 2011.
- 11.1.7 The 1992 Fund's Korean lawyer is following the developments in the limitation proceedings.

## 11.2 Limitation proceedings by SHI

- 11.2.1 In December 2008, SHI, the bareboat charterer of the two towing tugs and of the crane barge, filed a petition requesting the Limitation Court to issue an order granting the right to limit its liability at the amount of 2.2 million SDR (£2.1 million).
- 11.2.2 In March 2009, the Limitation Court rendered the order for the commencement of the limitation proceedings and set the limitation fund, together with legal interests, at an amount of KRW 5 600 million (£3.1 million). The Limitation Court also decided that claims against the limitation fund should be registered with the Court by 19 June 2009.
- 11.2.3 In June 2009, a number of claimants appealed to the Court of Appeal against the decision of the Limitation Court to grant to SHI the right to limit its liability.
- 11.2.4 On 20 January 2010, the appeal filed by the claimants against the decision of the Limitation Court was dismissed by the Court of Appeal, which confirmed the Limitation Court's decision. The claimants appealed to the Supreme Court and the case is still pending.

## 11.3 Legal proceedings by a clean-up company against the Korean Government

- 11.3.1 In July 2008 following the *Hebei Spirit incident*, a clean-up company which had been involved in clean-up operations at the instruction of the Incheon Coast Guard, initiated a lawsuit in the Incheon District Court (Court of First Instance) against the Republic of Korea, claiming costs for KRW 727 578 150. The clean-up company claimed that it had entered into a service contract with the Korean Government. Alternatively, it argued that if the Court held that no such service contract existed, the clean-up company should nevertheless be compensated by the Government, who should have borne the clean-up costs in any event, and who would otherwise gain unjust enrichment were it not to pay the company's costs.
- 11.3.2 In early 2010, the Court of First Instance decided that there was no service contract between the company and the Korean Government but accepted that the Korean Government was still liable to compensate the company for their clean-up costs as claimed by the plaintiff. The Court ordered the Korean Government to pay a sum of KRW 674 683 401 as reasonable compensation for the plaintiff's claim. Both parties appealed against the decision of the Court.
- 11.3.3 In July 2010, after two preliminary hearings, the Court of Appeal ordered a mediation session to explore a possibility of settlement between the parties.
- 11.3.4 In July 2010 the 1992 Fund intervened in this lawsuit as an interested party and participated to the mediation. At the mediation hearing, the Appeal Court Mediator requested the plaintiffs to submit the claim for clean-up costs to the Club and the 1992 Fund for an assessment. The plaintiff duly submitted a claim to the Club and 1992 Fund in September 2010.
- 11.3.5 It is expected that once the assessment by the Club and the 1992 Fund is completed, it will subsequently be submitted to the Appeal Court by the plaintiff clean up company.

## 11.4 Legal proceedings by a clean-up company against the Club and the 1992 Fund

- 11.4.1 In November 2010, a clean-up contractor who was engaged in clean-up operations after the *Hebei Spirit* incident filed a lawsuit against the owners and insurers of the *Hebei Spirit* and the 1992 Fund in the Seoul Central District Court.
- 11.4.2 The claimant had submitted a claim to the Club and the 1992 Fund totalling KRW 889 427 355 for costs incurred carrying out clean-up operations from January to June 2008. The 1992 Fund and the Club assessed the claim for costs of clean-up operations for the period January to March 2008 at KRW 233 158 549 (£130 000). The Club and the 1992 Fund rejected the claim for costs for part of March and the remaining period since it was determined that the area in which the claimant operated

was cleaned by mid-March 2008 and therefore further clean-up operations were deemed to be technically unreasonable.

- 11.4.3 The claimant has claimed in Court for the balance between the amount claimed and the amount assessed, totalling KRW 656 268 806 (£366 000) plus interest.
- 11.4.4 According to Article 4 of the 1992 Fund Convention and Article 21 of the Korean Oil Pollution Compensation Act, a person suffering pollution damage is entitled to compensation from the 1992 Fund only if the person has been unable to obtain full compensation under the 1992 CLC. Under the circumstances, the 1992 Fund would not be liable unless and until it is proved that the amount of the owner's liability was insufficient to fully cover the loss arising from the *Hebei Spirit* incident.
- 11.4.5 In January 2011 the 1992 Fund's lawyers filed an answer in court on behalf of 1992 Fund stating that the claim was rejected by the 1992 Fund on the basis that the claimant had failed to prove that they had been unable to obtain compensation under 1992 CLC, which would not be proved until the current limitation proceedings for the owners had been finalised.
- 11.4.6 The first hearing by the Court is expected in March 2011.

11.5 Lawsuit by a group of fishermen and sellers of marine products

In December 2010 a group of some 50 residents in two villages in the area affected by the *Hebei Spirit* incident filed a lawsuit against the 1992 Fund and the Korean Government. The 50 claimants, all engaged in fishery or selling marine products, requested compensation totalling KRW 150 000 000 (£84 000). At present it is unclear for what type of damage and on what basis this claim has been calculated. The first hearing of the Court is set for March 2011.

11.6 Lawsuit by the owner of a vessel

In February 2011 a vessel owner filed a lawsuit against the owners of the *Hebei Spirit* and the 1992 Fund. The Plaintiffs argue that their vessel was polluted by the oil leaked by the *Hebei Spirit* and that they incurred cleaning costs. On that basis, the plaintiffs are claiming KRW 99 878 861 (£56 000) and interest of 5% per annum from 11 December 2007 reserving their right to increase the claim amount to cover the loss of income during the period of cleaning work. In this case, as in the case described in section 11.4, the 1992 Fund's position is that it would not be liable unless, and until, it is proved that the amount of the owner's liability was insufficient to fully cover the loss arising from the *Hebei Spirit* incident. The 1992 Fund's Korean lawyers are preparing an answer to that effect in response to the lawsuit.

**12 Recourse action against Samsung C&T and SHI**

- 12.1 Details of the recourse action by the owner and the insurers of the *Hebei Spirit* (ship's interests) and the 1992 Fund against Samsung C&T and SHI can be found in document 92FUND/EXC.44/7, paragraph 13.3.
- 12.2 At its session in March 2009, the 1992 Fund Executive Committee endorsed the decision taken by the Director in January 2009 to commence and continue the recourse action against Samsung C&T and SHI in the Ningbo Maritime Court in the People's Republic of China at the same time as the owner and the insurers of the *Hebei Spirit*. Details on the decision of the Executive Committee can be found in document 92FUND/EXC.44/10, paragraphs 3.5.28 and 3.5.29.
- 12.3 In February 2010, the 1992 Fund signed an agreement with the ship's interests in connection with the recourse action under which the 1992 Fund and the ship's interests will continue their actions separately in the Ningbo Maritime Court, sharing the costs of the recourse actions and enjoying the proceeds of any recovery by court judgement or settlement on a 50/50 basis. Details of the agreement and the payments made by the 1992 Fund pursuant the agreement can be found in document

92FUND/EXC.44/7, paragraph 13.3.31).

- 12.4 By September 2009, proceedings had been served on both Samsung C&T and SHI. Both have filed applications objecting to the jurisdiction of the Court of Ningbo and, in the case of SHI, objecting to the attachment. Submissions in response to the applications were lodged on behalf of the 1992 Fund.
- 12.5 In September 2010 the Ningbo Maritime Court dismissed the applications. Samsung C&T and SHI lodged an appeal against the decision of the Ningbo Maritime Court in October 2010.
- 12.6 In February 2011 the Court of Appeal issued its decision. In the decision the Appeal Court accepted the appeal by Samsung C&T and SHI that the Court of Ningbo was a '*forum non-conveniens*' and that a recourse action should be pursued in a Korean Court. The 1992 Fund's Chinese lawyers are preparing the appeal to the Supreme Court.

### **13 Level of payments**

- 13.1 At its June 2008 session, the 1992 Fund 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 1992 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 1992 Fund's experts. The Executive Committee decided to maintain the level of payment at 35% of the amount of the established damages, and to review the situation at its next session in October 2008, as well as in March, June and October 2009, June and October 2010 (cf Incidents Involving the IOPC Funds October 2009, page 32 and documents 92FUND/EXC.44/10, paragraph 3.5.7, 92FUND/EXC.45/8, paragraph 3.4.25, IOPC/OCT09/11/1 paragraph 3.8.27 and IOPC/JUN10/6/1 paragraph 3.5.26, IOPC/OCT10/11/1 paragraph 3.10.21).
- 13.2 The Director has continued to collect the most up-to-date information on the estimated total exposure of the 1992 Fund. The revised estimated figures are set out in the following paragraphs.

#### **13.3 Clean up**

- 13.3.1 The revised estimate of the expected admissible 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 KRW 176 225 million.
- 13.3.2 The estimate has been reduced slightly to take into account the increased understanding of the total levels of claims and of the losses assessed so far. The revised estimate takes into consideration the assessed amount of the claims settled to date, as well as the claims for property damage related to clean-up operations that have been submitted so far. It is worth noting that the Korean Government has recently submitted additional claims for clean-up costs incurred by government bodies and local authorities in excess of KRW 110 billion. The Korean Government has indicated that these claims would be amongst those for which it intends to stand last in the queue. It is unclear at this point in time whether these claims are for costs already considered in the estimates or represent costs hitherto unknown. These estimates may therefore still be subject to change if it is found that these costs should be considered admissible.

#### **13.4 Fisheries and aquaculture**

- 13.4.1 The total estimated losses in the fisheries, aquaculture and ancillary industries sector have been decreased to around KRW 118 000 million.
- 13.4.2 Previous global estimates had been based on official historical fisheries landings data, with a number of assumptions about what actually happened. For this updated estimate, the experts engaged by the Club and 1992 Fund have reviewed the claims already received and considered the likely level of established losses based on the assessment of the claims already submitted and those likely to follow, and comparing the results with the available official statistics.

- 13.4.3 Differences between this estimate and the previous one are due to a better understanding of the likely losses in certain categories of aquaculture loss and, in the capture fisheries sector, to the application of the reasonable cut off dates identified by the Club and 1992 Fund. The estimates are based on the review of the claims submitted, and a comparison of the data obtained during the assessment process with the official estimates existing for the fisheries and aquaculture sectors.

#### *Capture fisheries*

- 13.4.4 The losses to capture fisheries have now been estimated at KRW 25 600 million, a net decrease compared to October 2010. Given that a vast amount of claims have already been submitted, the Club's and 1992 Fund's experts have used the information obtained through the individual surveys already carried out to prepare a more accurate estimate of the overall losses in this sector.
- 13.4.5 The previous estimates were based on the period of the fisheries restrictions applied by the Korean Government since discussions between the 1992 Fund Secretariat and the Korean Government were still ongoing. Following the conclusion of the bilateral discussions, this estimate is based on the impact of the spill on the fishery sector based on the cut off dates determined by the 1992 Fund on the basis of technical reasonableness. They would therefore be significantly higher if the fishing restrictions imposed by the authorities were to be applied (section 9).

#### *Aquaculture*

- 13.4.6 In the most recent analysis of the expected losses in the aquaculture sector, the Club's and 1992 Fund's experts have mainly considered the number and type of claims submitted so far, as well as the result of the assessments carried out until now. Where the two sources of information above were not sufficient to carry out an accurate estimate, official government statistics on business revenues in the area, as well as data concerning the physical contamination in the facilities were also utilised.
- 13.4.7 Based on the information available, the losses to the aquaculture sector arising from the *Hebei Spirit* incident have been estimated at about KRW 76 600 million, which is slightly lower than in October 2010. The estimates for this sector have taken into consideration the 1992 Fund Executive Committee's decision to reject, in principle, claims submitted by fishermen not in possession of a valid license or permit where such license or permit was legally required (cf document 92FUND/EXC/45/8, paragraph 3.4.11).

#### *Ancillary industries*

- 13.4.8 The Club's and the 1992 Fund's experts also took into account the possible losses of ancillary industries to fisheries and aquaculture, both upstream (eg gear, fuel and ice) and downstream (eg marketing, processing, distribution) and have estimated their losses at KRW 16 200 million, which is lower than in October 2010. Where the hard data could be obtained from the assessment of existing claims, this has been used. In other cases, a proportion of the estimated value of lost catches and crops in the fisheries and aquaculture sectors has been used to estimate losses to marketing and processing.

### 13.5 Tourism and other economic losses

- 13.5.1 On the basis of the available information the experts have revised the total estimated loss in the tourism sector and this is expected not to exceed KRW 60 000 million. This estimate takes into account that further claims may be submitted.
- 13.5.2 In line with the previous estimates, the value above is based on the application of actual ratios of assessed claim value to un-assessed claims by geographic region by claim category. Where there are insufficient assessed claims to be used as a basis for estimation, a reasonable average has been applied based on similar areas and claim categories.

13.6 Director's considerations*Current situation*

13.6.1 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 June 2010 (KRW billion)	Estimated losses October 2010 (KRW billion)	Estimated losses March 2011 (KRW billion)	Estimated losses March 2011 (£ million)
Clean up	186.9	180.1	176.2	98
Fisheries and mariculture	166.2	186	118	66
Tourism	100	72.4	60	33
<b>Total</b>	<b>453.1</b>	<b>438.5</b>	<b>354.2</b>	<b>197</b>

13.6.2 The total amount available for compensation under the 1992 CLC and Fund Convention is 203 million SDR or KRW 321 619 million (cf section 5).

13.6.3 The table below shows the amount available for compensation under the 1992 CLC and Fund Convention as a percentage of the amounts claimed in the HSC, of the amounts claimed in the limitation proceedings, and of the total losses estimated by the 1992 Fund's experts.

	Exposure (KRW billion)	Percentage of the 1992 Fund's limit of KRW 321.6 billion (KRW billion)
Amount claimed in HSC	2 402	13.4%
Amount claimed in limitation proceedings	3 932	8.2%
Estimate of losses	354.2	90.8%

13.6.4 The Korean Government, has stated its intention to 'stand last in the queue' for claims in respect of some claims for compensation for clean-up costs and other expenses incurred by the central and local governments (cf paragraph 6.4.2) with the aim of facilitating the increase of the level of payment in the incident. The claims for which the Korean Government has stated its intention to 'stand last in the queue' however total some KRW 273.3 billion (£152 million), which corresponds to about 11.2% of the total amount claimed so far, and would therefore have no significant impact on the 1992 Fund's total exposure.

13.6.5 The total amount of the claims against the 1992 Fund registered at the HSC so far is KRW 2 402 billion (£1 339 million) and claims are still being received. Currently, the amount available under the 1992 Conventions corresponds to 13.4% of the total amount claimed. By applying an appropriate safety margin for the 1992 Fund, it would mean a level of payment of about 10% of the established claims.

13.6.6 The amount available under the 1992 Conventions corresponds to 8.2% of the total amount claimed in the limitation proceedings, ie KRW 3 932 billion (£2 192 million). Applying these figures, with an appropriate safety margin for the 1992 Fund, would mean a level of payment of about 5%.

13.6.7 The amount available under the 1992 Conventions as a percentage of the total estimated losses, based on the current estimates prepared by the Skuld Club's and the 1992 Fund's experts, is 90.8%. That would mean that the level of payment could be raised to 75-80%.

13.6.8 Taking into account that the advice of the Club's and 1992 Fund's experts is still the most reliable and realistic estimate of the total exposure of the 1992 Fund in this case, but taking into consideration the

circumstances considered in the paragraphs above and the remaining uncertainties surrounding the claims situation in this incident, the Director takes the view that maintaining the level of payment at 35% will continue to provide the 1992 Fund with reasonable protection against a possible overpayment situation.

*Korean Proposal to increase the level of payment*

- 13.6.9 At the 1992 Fund Executive Committee's October 2010 session the Korean delegation proposed that the 1992 Fund should, subject to certain safeguards, raise the level of payment to claimants to 100% of the established losses.
- 13.6.10 At that session the Executive Committee decided to endorse the proposal by the Korean delegation to continue exploring, together with the Director, the possibility of increasing the level of payments to 100% and to submit a proposal to the Executive Committee at its next session (cf IOPC/OCT10/11/1, paragraph 3.10.31). The Acting Director has been working in close cooperation with the Korean Government in exploring the possibility of increasing the level of payment to 100% subject to sufficient safeguards against overpayment.
- 13.6.11 In March 2011, the Korean Government has submitted a document to the Executive Committee which details the Korean proposal for the 1992 to increase the level of payment to 100% as well as the safeguards to be established by the Korean Government in the event that the Committee agreed with the proposal (cf document IOPC/MAR11/3/7/2).

13.7 Bank to issue the guarantee

- 13.7.1 The Korean Government in their document (IOPC/MAR11/3/7/2) have indicated it would prefer the bank guarantee to be issued by Suhyup Bank and have set out the reasons for this in paragraph 3 of their document. The Acting Director had suggested to the Korean Government that the bank guarantee be issued by Standard Chartered First Bank Korea based on the Bank's credit ratings as it is a full subsidiary of Standard Chartered Bank, which fulfils the IOPC Funds' investment criteria.
- 13.7.2 The suitability of both banks was discussed in depth with the Investment Advisory Body (IAB) at its meeting in February 2011. Though Standard Chartered First Bank Korea's ratings are slightly below that of the parent Bank, mainly due to local market conditions, it was the advice of the IAB to use the Standard Chartered First Bank Korea in preference to Suhyup Bank. The long term credit rating for the Standard Chartered First Bank Korea meets the IOPC Funds' investment criteria and also meets the short term criteria with one of the credit agencies and just below the required ratings from other two rating agencies.
- 13.7.3 The Korean Government's preferred option Suhyup Bank does not meet the IOPC Funds' long term rating and its short term rating is only met by one of the three credit rating agencies with no ratings from one of the agency and a short term rating well below that of the criteria from the other agency. The Acting Director maintains that the guarantee should be provided by Standard Chartered First Bank Korea for the reasons set out above.

13.8 Amount of the guarantee

- 13.8.1 The Korean Government has calculated the amount of the guarantee as the balance between the October 2010 estimates of the losses and the amount available for this incident under the 1992 Civil Liability and Fund Conventions plus a 10% increase to cover a possible adjustment of the total amount of established losses. The Korean Government has proposed to establish a bank guarantee for the amount of KRW 130 000 million (£72 million).
- 13.8.2 The Acting Director has reviewed the proposal from the Korean Government and has considered that a bank guarantee should be sufficiently large in order for the 1992 Fund to rely on it if a Korean Court were one day to issue a judgement requesting the 1992 Fund to pay compensation to a victim of the spill.

- 13.8.3 Under the circumstances of this incident the proposed amount would not be sufficient to protect the 1992 Fund against an overpayment situation in case national courts were to award to claimants the total amounts claimed in the Limitation proceedings or indeed the amounts claimed in the HSC as detailed in paragraph 13.6.3.
- 13.8.4 However, the Acting Director has also considered that the levels at which claims have been assessed so far are significantly lower than the amounts claimed. This is in line with the fact that in past incidents in the Republic of Korea, the total amount of the claims as settled has generally been significantly lower than the amount originally claimed and the Korean courts have tended to uphold the assessment of losses based on the 1992 Fund's criteria for admissibility of claims. The Acting Director therefore considers that there is a strong likelihood that the total amount of established losses arising out of the incident will be significantly lower than the amounts currently claimed.
- 13.8.5 The Acting Director also considers that the proposal of the Korean Government to bring the amount of the bank guarantee to the 1992 Fund Executive Committee for review on a triennial basis is reasonable and that the decision to modify the amount of the guarantee should be made on the basis of the known amount of established losses at the time of the review, including if necessary those losses as established by the national courts.
- 13.8.6 Furthermore, the Acting Director has also considered that, in accordance with the Special Law, the Korean Government undertook to pay all established claims in full, over and above the limits of the 1992 Civil Liability and Fund Conventions and that the Korean Government will undertake to hold the 1992 Fund harmless in case the Korean courts were to render judgements ordering the 1992 Fund to pay compensation over and above the 1992 Fund's limit, which would further protect the 1992 Fund from an overpayment situation.
- 13.8.7 The Acting Director therefore proposes that the 1992 Fund Executive Committee endorse the proposal by the Korean Government to increase the level of payments to 100% of the amount of the loss or damage as assessed by the 1992 Fund, subject to the above safeguards being in place before the 1992 Fund begins to make payments.
- 13.8.8 The Acting Director proposes however that, in case any of the safeguards above are not in place before the time when the 1992 Fund will be called upon to start making payments, the level of payment is maintained at 35% of the amount of the established losses and further reviewed at the next meeting of the 1992 Fund Executive Committee.

#### **14 Action to be taken**

##### 1992 Fund Executive Committee

The 1992 Fund Executive Committee is invited:

- (a) to take note of the information contained in this document;
  - (b) to decide whether to increase the level of payment to 100% subject to a number of conditions (cf paragraph 13.8.7)
- or
- (c) to decide whether to maintain the level of payments at 35% subject to the review at the next 1992 Fund Executive Committee if the above conditions are not met (cf paragraph 13.8.8); and
  - (d) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.
-