

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

INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

HEBEI SPIRIT

PROPOSAL TO INCREASE THE LEVEL OF PAYMENTS TO 100%

Submitted by the Republic of Korea

Summary:	This document contains a proposal to increase the level of the 1992 Fund's payments to established victims to 100% within the total amount available for compensation under the 1992 Civil Liability Convention (1992 CLC) and 1992 Fund Convention.
Action to be taken:	<p><u>1992 Fund Executive Committee</u></p> <p>The 1992 Fund Executive Committee is invited:</p> <p>(a) to authorise the Director to pay 100% of the assessed amounts by the Fund to claimants up to the total amount available for compensation under the 1992 CLC and Fund Convention subject to the Korean Government's undertakings and with a bank guarantee as described in paragraph 3.4; and</p> <p>(b) to decide that Suhyup Bank as well as Standard Chartered First Bank Korea Ltd can issue a guarantee (paragraph 4.2).</p>

1 Introduction

- 1.1 After the *Hebei Spirit* incident, which took place off the west coast of the Republic of Korea on 7 December 2007, the 1992 Fund Executive Committee, at its March 2008 session, decided that the level of payments should be limited to 60% of the established losses. In June 2008, the Executive Committee decided that payments made by the 1992 Fund should be limited to 35% in view of the uncertainty as to the total amount of the losses. The level of payments has remained at this level since that date.
- 1.2 In June 2010 the 1992 Fund Executive Committee endorsed the proposal by the Korean delegation to explore, together with the Director, the possibilities of increasing the level of payments to 100%. The proposal was made in order to assist the victims in regaining their livelihoods as quickly as possible and this proposal was welcomed and supported by a number of delegations.
- 1.3 At the October 2010 session of the 1992 Fund Executive Committee, the Korean delegation explained that the Korean Government was working in close cooperation with the 1992 Fund in relation to the matter of the level of payments. The Executive Committee decided to maintain the level of payments at 35% but also to review this percentage at its next session.
- 1.4 The Korean Government and the Acting Director have been in consultation regarding the conditions and measures required to increase the level of payments by the 1992 Fund to 100%. On the basis of

these consultations, the Korean Government submits this document to the Executive Committee and invites the Committee to endorse the proposal in paragraphs 3.4 and 4.2.

2 Necessity of increasing the level of payments to 100%

2.1 During the discussions between the Korean Government and the Acting Director, it was found that the increase of the level of payments to 100% would provide benefits and advantages to all parties, ie claimants, the 1992 Fund and the Korean Government, in terms of prompt and fair compensation. This section outlines the benefits to each party.

2.2 Benefits to victims

2.2.1 As the 1992 Fund Executive Committee is aware, under the Second Cooperation Agreement between the shipowner, his insurer (Skuld Club) and the Korean Government, the Club undertook to pay claimants 100% of the assessed amounts by the 1992 Fund up to the shipowner's limit of liability, ie 89.77 million SDR. Many victims welcomed such measures as the 100% payments by the Club would facilitate prompt compensation and reinstatement of their livelihoods.

2.2.2 However, unlike the Club, if the 1992 Fund pays claims on the basis of a pro-rata level of payment, ie 35%, not the full assessed amounts, such differences in the level of payments applied by the Club (100%) and the 1992 Fund (35%) would be inequitable. For example, after the Club's maximum amount for compensation has been exhausted, claimants would be compensated by the 1992 Fund on the basis of the pro-rated level of payments. Subsequently, claimants would receive additional payments if and when the level of payments was increased by the 1992 Fund. Although the unequal treatment between the levels of payments applied by the Club and the 1992 Fund was caused by the Club's decision to increase the level of payments to 100%, claimants would find it difficult to understand why, as soon as the 1992 Fund starts making payments, the level of payments is reduced.

2.2.3 If the 1992 Fund pays only on a pro-rata basis, it is deemed that the claimants may prefer to apply for the advance payment under the Korean Government's Special Law which allows payments of 100% of the amounts assessed by the 1992 Fund.

2.2.4 However, if the 1992 Fund increased the level of payments to 100% of the assessed amounts and makes payments in full to the individual claimants up to the maximum limit for compensation under the 1992 Fund Convention, claimants would benefit from a simpler method of receiving compensation.

2.2.5 Considering that the number of claimants now exceeds 120 000 and the fact that many claimants are of elderly age and not familiar with the administrative procedures, there is a strong need for the Korean Government and the 1992 Fund to set up payment procedures involved in a simpler and easier way, thus reducing additional burden on claimants.

2.2.6 Furthermore, full payment of the assessed amounts by the 1992 Fund in the particular circumstances of the *Hebei Spirit* incident would make legal issues between an individual claimant and the 1992 Fund clearer and simpler, thus avoiding the involvement of the Korean Government.

2.3 Benefits to the 1992 Fund

2.3.1 If the 1992 Fund makes pro-rated payments, the Secretariat has to make several interim payments whenever the level of payments is changed until the final level of payment is reached. Such a process works against prompt compensation to victims. Moreover, if the Korean Government makes advance payments to the claimants, in turn, it is inevitable that a more complicated process will follow due to the subrogation and reimbursement between the Korean Government and the 1992 Fund.

2.3.2 On the contrary, the 1992 Fund would be seen in a better light by claimants if it established a procedure that facilitated prompt and full compensation to them.

2.3.3 In short, on condition that a safeguard is provided by the Korean Government to protect the 1992 Fund against an overpayment, the increase in the level of payments to 100% would enable the

1992 Fund to simplify its compensation payment process and to minimise related costs as well.

2.4 Advantages to the Korean Government

- 2.4.1 As the 1992 Fund Executive Committee is well aware, the Korean Government has already decided to make advance payments in full based on the assessed amounts by the 1992 Fund under the Special Law. This means that even if the Fund makes compensation on a pro-rata basis, the Korean Government will pay 100% of the assessed amounts to ensure that all claimants would be compensated in full while the Korean Government subrogates the claimants' rights to the Fund.
- 2.4.2 It should also be noted that the Korean Government has declared its decision to 'stand last in the queue' in respect of its clean-up costs and other expenses to facilitate prompt and full compensation to victims.
- 2.4.3 Therefore, 100% payment by the 1992 Fund would decrease the demand for advance payments from the Korean Government and subsequent subrogation to the 1992 Fund at the same time. Also it would help to strengthen the public confidence in the effectiveness of the international oil pollution liability and compensation regime.

3 Measures to be taken by the Korean Government so that the 1992 Fund Executive Committee can decide to increase the level of payments to 100%

3.1 Basic conditions

- 3.1.1 In accordance with the views expressed by many delegations at the 1992 Fund's Executive Committee session in October 2010, the Korean Government recognises the necessity of increasing the level of payments of the Fund to 100%, and accepts that the following conditions should be met:
- (a) The principle of equal treatment of victims should be upheld;
 - (b) The payment of compensation should be made on the basis of assessments of claims by the 1992 Fund; and
 - (c) The 1992 Fund should be adequately protected against an overpayment situation.

3.2 Measures established by the Special Law and the Korean Government

- 3.2.1 Based on Article 8.1 of the Special Law and the decision of the Special Committee on the *Hebei Spirit* incident chaired by the Prime Minister on 19 June 2008, the Korean Government will pay all claims in full exceeding the compensation limit under the 1992 CLC and Fund Convention, ie KRW 321 619 million. The payment will be made on the basis of the assessment of the 1992 Fund. Therefore, any claimant entitled to compensation from the Club and the 1992 Fund will be paid in full no matter what the level of payments set by the 1992 Fund Executive Committee is. In this respect, the principle of equal treatment of victims will be upheld, which satisfies condition (a) in paragraph 3.1.1.
- 3.2.2 Condition (b) in paragraph 3.1.1 will also be met as Article 8.2 of the Special Law clearly prescribes that the payments by the Korean Government should be made based on the assessed amounts by the 1992 Fund.
- 3.2.3 In addition, the 1992 Fund would be fully protected against an overpayment situation because the Korean Government will pay all amounts exceeding the total amount available for compensation under the 1992 CLC and Fund Convention. If the 1992 Fund encounters any unexpected circumstances to pay over its compensation limit, the Korean Government will repay and settle the overpayment to the 1992 Fund. In this regard, condition (c) in paragraph 3.1.1 will be satisfied as well.

- 3.2.4 However, the Korean Government and the Acting Director have agreed that the Korean Government should provide sufficient safeguards including a bank guarantee to protect the 1992 Fund from overpayment. This issue is addressed in more detail in the following section.
- 3.3 Safeguards proposed by the Korean Government to guarantee the 1992 Fund against a risk of overpayment
- 3.3.1 As explained in paragraph 3.2, the basic conditions to increase the Fund's level of payments to 100%, including the safeguards to protect the 1992 Fund against any overpayment situation, could be fulfilled in principle under the Korean Special Law and subsequent decisions of the Korean Government. However, the Korean Government and the Acting Director both recognise that the following undertakings by the Minister for Land, Transport and Maritime Affairs (MLTM) on behalf of the Korean Government, including a bank guarantee, should be provided to the 1992 Fund to ensure that the 1992 Fund will not be exposed to any risk of overpayment.
- 3.3.2 The objective of the bank guarantee is to protect the 1992 Fund against the risk of overpayment if the level of payments were to be increased to 100%.
- 3.3.3 The Korean Government has examined three possible amounts for a bank guarantee:
- (a) A bank guarantee for the difference between the amount claimed in the Limitation proceedings (KRW 3 931 854 million) and the amount available for compensation under the 1992 Civil Liability and Fund Conventions (KRW 321 619 million). This would mean a bank guarantee of some KRW 3 610 235 million (£2 000 million).
 - (b) A bank guarantee for the difference between the amount claimed in the *Hebei Spirit* Centre (KRW 2 400 049 million) and the amount available for compensation under the 1992 Civil Liability and Fund Conventions (KRW 321 619 million). This would mean a bank guarantee of some KRW 2 080 393 million (£1 340 million).
 - (c) A bank guarantee for the difference between the estimated losses by the 1992 Fund experts (KRW 438 600 million) and the amount available for compensation under the 1992 Civil Liability and Fund Conventions (KRW 321 619 million). This would mean a bank guarantee of some KRW 116 900 million (£65 million).
- 3.3.4 Of the three possible amounts, the first would protect the 1992 Fund from any possible risk of overpayment. This would mean protection in case the Korean Courts accepted all claims presented in limitation proceedings as valid claims. The second amount would protect the 1992 Fund from a risk of overpayment in case all claims submitted to the 1992 Fund were to be awarded by the Korean Courts as claimed.
- 3.3.5 Based on past experience in the Republic of Korea and on the current rate of settlement of claims arising out of the incident, the Korean Government considers that it is highly unlikely that the Korean Court would award the amounts claimed in limitation proceedings or the amounts claimed against the 1992 Fund. Furthermore, the costs of a bank guarantee for such high amounts would make it impossible for the Korean Government to provide it.
- 3.3.6 The Korean Government, after consulting the Acting Director, considers that since the amount of losses caused by the *Hebei Spirit* incident is very likely to remain in the region of the figures estimated by the 1992 Fund's experts, the amount of the bank guarantee should be calculated on the basis of the losses as estimated by the 1992 Fund experts.
- 3.4 Proposal by the Korean Government
- 3.4.1 Therefore, taking into account the exceptional circumstances of the *Hebei Spirit* incident, the Korean Government, after having had discussions with the Acting Director, would like to request the Executive Committee of the 1992 Fund to increase the level of payments of the *Hebei Spirit* incident to 100% subject to the following undertakings:

1. The Korean Government will compensate all remaining claimants in full once the 1992 Fund has paid the total amount available for compensation, ie KRW 321 619 million, under the 1992 Fund Convention.
2. The Korean Government will make the payments of compensation on the basis of assessment of individual claims by the 1992 Fund.
3. The Korean Government will pay any amount in excess of the Fund's limit for compensation of KRW 321 619 million and will hold the 1992 Fund harmless in the event a judgement rendered by a Korean Court, or any other competent Court, were to hold the 1992 Fund liable for losses or damages suffered by victims of this incident in excess of the 1992 Fund's compensation limit.
4. The Korean Government will provide the 1992 Fund with a bank guarantee, not from the Government:
 - (a) The bank guarantee will cover the difference between the latest total estimated amount of losses set by the Director and the total amount available for compensation under the 1992 CLC and Fund Convention. The difference between the latest estimate (KRW 438.6 billion) and the total amount available for compensation under the 1992 CLC and Fund Convention (KRW 321.6 billion) is currently about KRW 117 billion, increased by some 10% since the estimated total losses could change. The bank guarantee will therefore be for a sum of KRW 130 billion.
 - (b) With respect to a bank that will issue the guarantee, the Acting Director proposes Standard Chartered First Bank Korea Ltd (SC First Bank) which is a fully owned subsidiary of Standard Chartered Bank which meets the investment guidelines of the IOPC Funds.
 - (c) However, the Korean Government prefers Suhyup Bank which is a Korean bank established by Korean Law (the Fisheries Cooperative Act), and specialises in financial business for coastal communities and ocean industries including fisheries. There are a number of reasons why the Korean Government believes that the bank is eligible for the guarantee:
 - As the bank was established by the Fisheries Cooperatives Act rather than the Bank Act, the Korean Government provides special protection against its financial difficulties. In fact, public funds were injected into the bank in 2001 right after the Asian financial crisis to help the bank overcome its short-term liquidity problems.
 - Special consideration should be given in determining a bank although the Suhyup Bank does not fully meet the investment guidelines of the Funds.
 - Furthermore, Suhyup Bank has been working closely with the Korean Government in helping victims of the *Hebei Spirit* incident based on a Memorandum of Understanding between two institutions. Also, it should be noted that Korean Government has deposited an amount of KRW 127 billion in order to pay claims exceeding the total amount available for compensation under the 1992 CLC and Fund Convention. Therefore, in any event that the 1992 Fund should pay over its compensation limit due to judgements of Korean courts, the Bank will be able to repay the amount to the 1992 Fund by instruction of the Korean Government.
 - (d) Specific terms and conditions of the bank guarantee will be discussed with the Acting Director.

4 Request from the Korean Government

- 4.1 The Korean Government requests the 1992 Fund Executive Committee to take note of the proposal outlined in paragraph 3.4. It further requests the Executive Committee to endorse the proposal and to authorise the Director to pay 100% of the assessed amounts by the Fund to claimants up to the total amount available for compensation under the 1992 Civil Liability and Fund Conventions subject to the Korean Government providing the undertakings and a bank guarantee as described in section 3.4.

- 4.2 The Korean Government also requests the 1992 Fund Executive Committee to decide that Suhyup Bank as well as Standard Chartered First Bank Korea Ltd can issue a guarantee.
- 4.3 The Korean Government also requests that the 1992 Fund should review the amount of the bank guarantee every three years and that, based on the results of such review, the Director may, if appropriate make a proposal for approval by a future session of the Executive Committee.

5 Action to be taken

1992 Fund Executive Committee

The 1992 Fund Executive Committee is invited:

- (a) to authorise the Director to pay 100% of the assessed amounts by the Fund to claimants up to the total amount available for compensation under the 1992 CLC and Fund Convention subject to the Korean Government's undertakings as described in section 3.4; and
- (b) to decide that Suhyup Bank as well as Standard Chartered First Bank Korea Ltd can issue a guarantee (paragraph 4.2).
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