



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS

Agenda item: 3	IOPC/OCT11/3/9	
Original: ENGLISH	21 September 2011	
1992 Fund Assembly	92A16	
1992 Fund Executive Committee	92EC53	•
Supplementary Fund Assembly	SA7	
1971 Fund Administrative Council	71AC27	

INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

HEBEI SPIRIT

Note by the Secretariat

Objective of document:	To inform the 1992 Fund Executive Committee of the latest developments regarding this incident.
Summary of the incident so far:	<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&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) and potentially also the amount applicable under the 1992 Fund Convention, ie 89.8 million SDR or KRW 186 827 million (£108.6 million) and 203 million SDR or KRW 321 619 million respectively (<sup>1</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 total of 75 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>In March 2011, the Executive Committee authorised the Director to increase the level of payments to 100% of the established claims, subject to a number of safeguards being in place before the 1992 Fund commenced making payments.</p>

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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 6 September 2011, £1 = KRW 1 719.95 and 1 SDR = £1.0077.

The Executive Committee further decided that should the safeguards not be in place at the time the 1992 Fund started making payments, the level of payment should be maintained at 35% of the established losses to be reviewed at future sessions (section 10).

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 four hundred and fifty-seven claims totalling KRW 4 017 billion (£2.3 billion) have been submitted in the limitation proceedings (section 8.1).

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 (section 8.1).

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 towing tugs and of the crane barge, and set the limitation fund, together with legal interest, at an amount of KRW 5 600 million (£3.3 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 (section 8.2).

Legal proceedings

One clean-up company, one boat owner and a number of individuals have filed separate lawsuits for compensation of damages. The 1992 Fund's Korean lawyers are following the cases (sections 8.3-8.7).

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 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.

The 1992 Fund then 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's 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.

By September 2009, proceedings had been served on Samsung C&T and SHI, but both 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 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 (section 9).

In March 2011, the 1992 Fund and the owner and insurers of the *Hebei Spirit* submitted separate applications for retrial with the Supreme Court in Beijing. The Supreme Court agreed to hear the applications (section 9).

At the same time, the Court has ordered an adjournment of any application to set aside the attachment order pending the hearing of the application for a retrial.

Recent developments:

Claims situation

As at 21 September 2011, 28 576 claims totalling KRW 2 606 billion (£1 515 million) had been submitted, including 278 group claims on behalf of 99 508 individuals.

Eighteen thousand and thirty claims, more than 63% of the claims submitted, have been assessed. Of these 3 513 have been assessed at a total amount of KRW 158 105 million (£91.8 million) and 14 517 were rejected for various reasons, primarily due to lack of supporting documentation or evidence of loss.

The Skuld Club has made payments in respect of 2 385 claims totalling KRW 135 120 million (£78.6 million). Further payments are pending awaiting response from the claimants (section 7).

Legal Proceedings

In September 2011, the former owner of an abalone farm discontinued his action against the 1992 Fund (section 8.7).

Recourse action against Samsung C&T and SHI

In July 2011, the Supreme Court started a reconciliation process with the parties, with the aim of exploring a possible settlement of the dispute. The 1992 Fund participated in the first reconciliation meeting. The possibility of further reconciliation meetings is being considered by the Supreme Court.

Action to be taken:

1992 Fund Executive Committee:

Decide whether to maintain the level of payments at 35% (section 10.5).

1 **Summary of incident**

Ship	<i>Hebei Spirit</i>						
Date of incident	07.12.07						
Place of incident	Taean, 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 ^{<2>}						
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 (£187 million)						
Compensation	Claimed but not yet assessed		Assessed but not yet paid		Paid		Rejected
	Number of claims	Amount KRW million	Number of claims	Amount KRW million	Number of claims	Amount KRW million	Number of claims
TOTAL	10 546	1 403 084	1 128	22 985	2 358	135 120	14 517
TOTAL (£ million)		816		13.4		79	
Standing last in the queue:	In August 2011, the Korean Government confirmed with the Secretariat that a number of agencies and local authorities would stand last in the queue with regard to their claims totalling KRW 444.8 billion (£258.6 million)						
Legal proceedings:	<ol style="list-style-type: none"> 1. Limitation proceedings of the owners of the <i>Hebei Spirit</i> in the Republic of Korea. 2. Limitation proceedings of SHI (the operators of the Marine Spread) in the Republic of Korea. 3. Recourse action by the 1992 Fund against Samsung C&T and SHI (the owners/operators of the Marine Spread) in the People's Republic of China. 4. Recourse action by the ship's interests against Samsung C&T and SHI in the People's Republic of China. 5. Lawsuit by one clean-up company against the owners and insurers of the <i>Hebei Spirit</i> and against the 1992 Fund. 6. Lawsuit by a number of fishermen and fish sellers against the 1992 Fund and the Republic of Korea. 7. Lawsuit by one shipowner against the owners of the <i>Hebei Spirit</i> and the 1992 Fund. 						

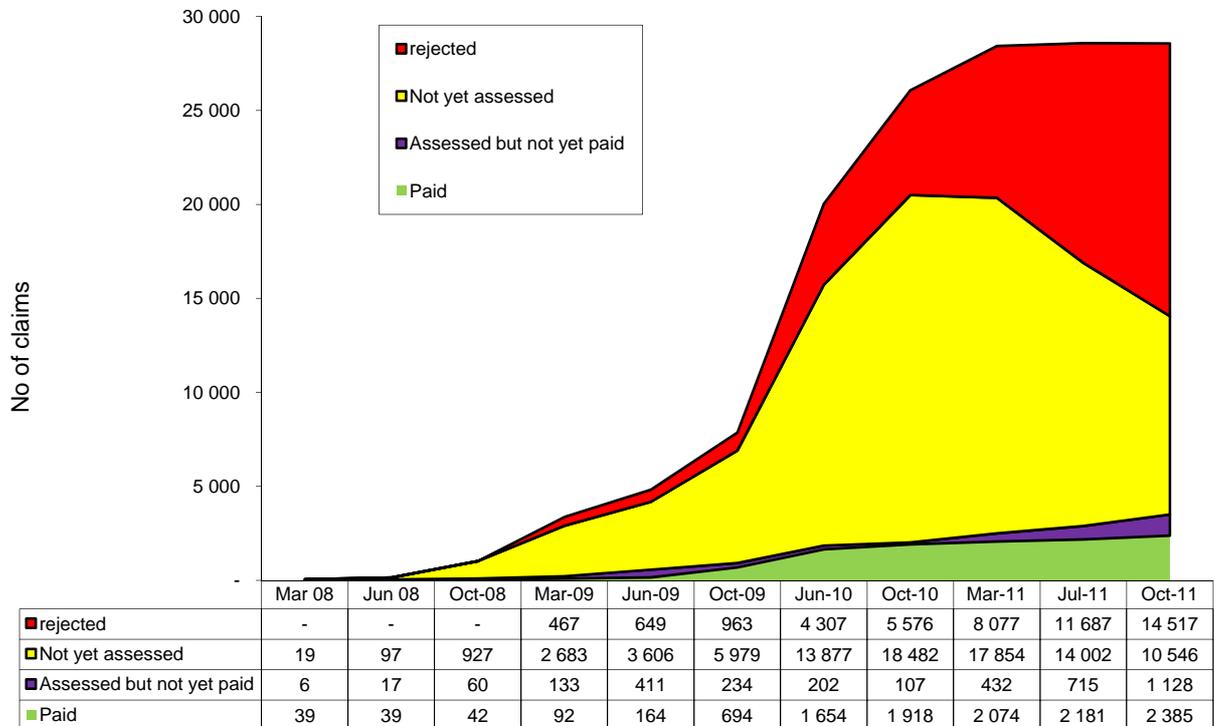
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The 1992 Fund Convention applies to the Hong Kong Special Administrative Region only.

2 Development of claims

The development of the incident in terms of volume 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^o1* while at anchor about five miles off Taean 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 publication *Incidents involving the IOPC Funds 2010*, pages 32-33.

4 The 1992 Civil Liability and Fund Conventions

- 4.1 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. 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.
- 4.2 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.
- 4.3 The amount available for compensation under the 1992 CLC and Fund Convention is 203 million SDR = KRW 321 618 990 000 (cf *Incidents involving the IOPC Funds 2010*, page 33).

5 Actions by the Korean Government

5.1 Hardship payments made by the Korean Government

The Korean Government has informed the 1992 Fund that payments totalling KRW 117.2 billion (£68 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 for pollution damage and would not fall within the scope of Article 9.3 of the 1992 Fund Convention.

5.2 Special Law for the support of the victims of the *Hebei Spirit* incident

5.2.1 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 publication *Incidents involving the IOPC Funds 2010*, page 34.

5.2.2 As at 21 September 2011, the Korean Government had made payments totalling KRW 34 220 million (£19.9 million) in respect of 479 claims in the clean-up, tourism and fisheries and aquaculture sectors based on assessments provided by the Skuld Club and the Fund. The Skuld Club has paid the Government KRW 28 855 million (£16.8 million) in respect of 434 of these claims.

5.2.3 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 14 June 2011, the Korean Government had granted 21 282 loans totalling KRW 50 661 million (£29.5 million).

5.3 Korean Government's decision to 'stand last in the queue'

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

5.3.2 In August 2011, the Secretariat requested the Korean Government to clarify the situation as regards the claims for which the Korean Government would stand last in the queue. The Korean Government advised the Secretariat that these claims were not centrally managed.

5.3.3 The Secretariat subsequently carried out an investigation into the claims submitted by the Korean authorities and identified 71 such claims submitted by 34 separate government agencies and local authorities totalling some KRW 444.8 billion (£258.6 million), an increase of about KRW 175 972 million from what was reported at the last Executive Committee meeting.

5.3.4 The claims corresponded to selected costs incurred by the government and local authorities in respect of clean up and preventive measures, environmental studies, restoration, marketing campaigns, tax relief and other expenses incurred to deal with the pollution.

5.3.5 The Korean Government informed the Secretariat that the amount of these claims was likely to increase. The Korean Government also advised the Secretariat that the agencies involved had yet to agree on the order of priority of these claims.

5.3.6 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.

6 Cooperation Agreements between the shipowner/Skuld Club, KMPRC and MOMAF

- 6.1 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 Incidents involving the IOPC Funds 2010, page 34-35.
- 6.2 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). Under this agreement the Skuld Club undertook to pay claimants 100% of the assessed amount up to their limit of liability under the 1992 CLC. Details of the Second Cooperation Agreement can be found in Incidents involving the IOPC Funds 2010, page 35.

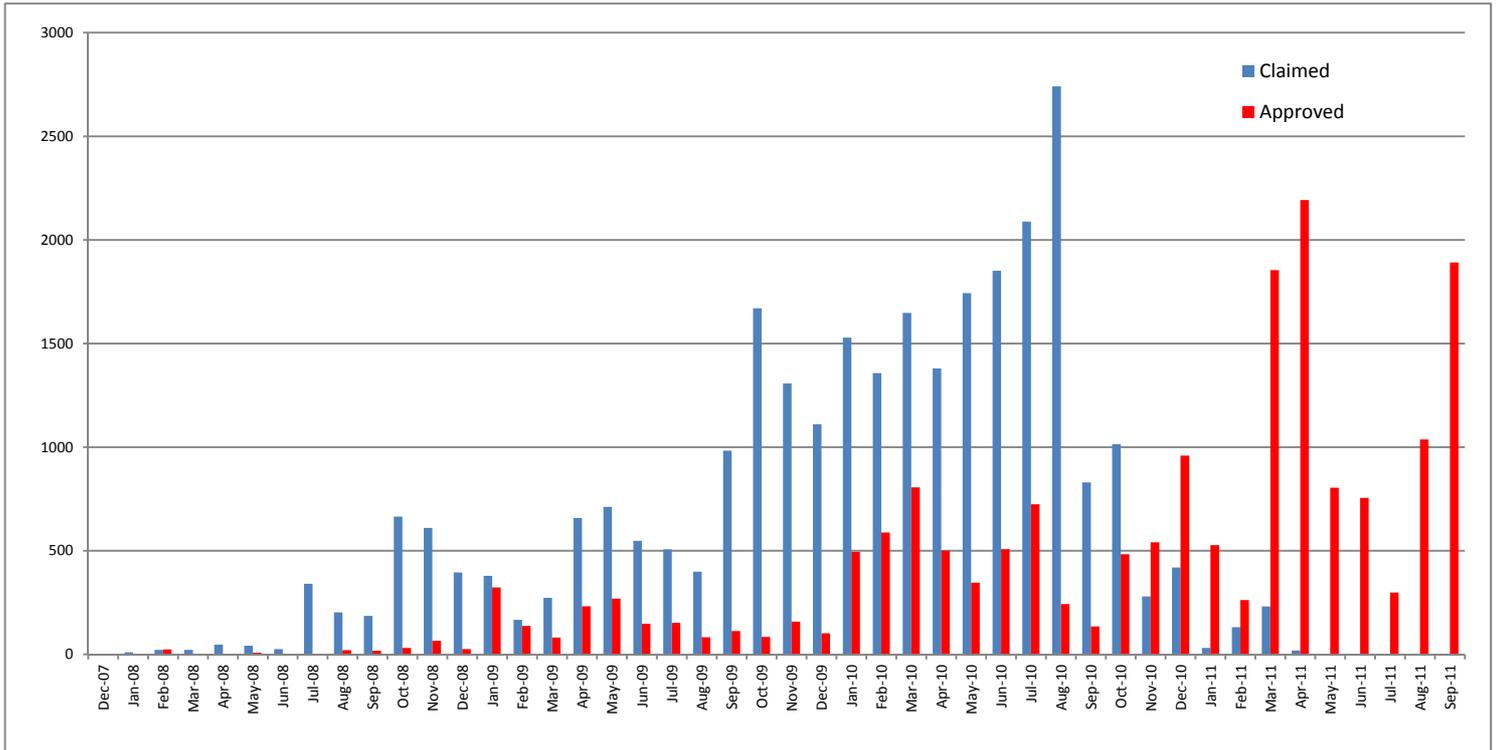
7 Claims for compensation

- 7.1 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.
- 7.2 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 office is currently composed of the Head of the Claims Office and four administrative staff.
- 7.3 The table below provides an update of the claims registered in the HSC as at 21 September 2011:

Category of claim	Number of claims	Claimed amount (KRW million)	Number of claims assessed > 0	Assessed amount (KRW million)	Number of claims paid	Paid amount (KRW million)	Number of claims rejected
Clean up and preventive measures	299	544 829	214	96 813	180	89 351	28
Property damage	19	2 104	15	446	8	401	2
Fisheries and mariculture	10 754	1 582 935	1 017	37 598	237	24 023	5 015
Tourism and other economic damage	17 503	479 709	2 267	23 248	1 960	21 345	9 472
Environmental damage	1	2 195					
Total	28 576	2 611 772	3 513	158 105	2 385	135 120	14 517
Total (£ million)		1 519		91.8		78.6	

- 7.4 As at 21 September 2011, 28 576 claims had been registered at the HSC. Of these claims, 278 had been submitted by fishery cooperatives or committees on behalf of 99 508 small-scale fishermen affected by the oil spill. The total number of individual claimants was 127 806.
- 7.5 Eighteen thousand and thirty claims comprising 73 911 individual claims had been assessed. Of these, 3 513 claims have been assessed at KRW 158 105 million (£91.8 million) and 14 517 had been rejected. A total of 2 385 claims, totalling KRW 135 120 million (£78.6 million) have been paid by the Skuld Club. These payments also include a number of subrogated claims submitted by the Korean Government (paragraph 5.2.2).
- 7.6 Figure 2 overleaf shows the number of claims registered and assessed each month since the incident occurred until 21 September 2011.

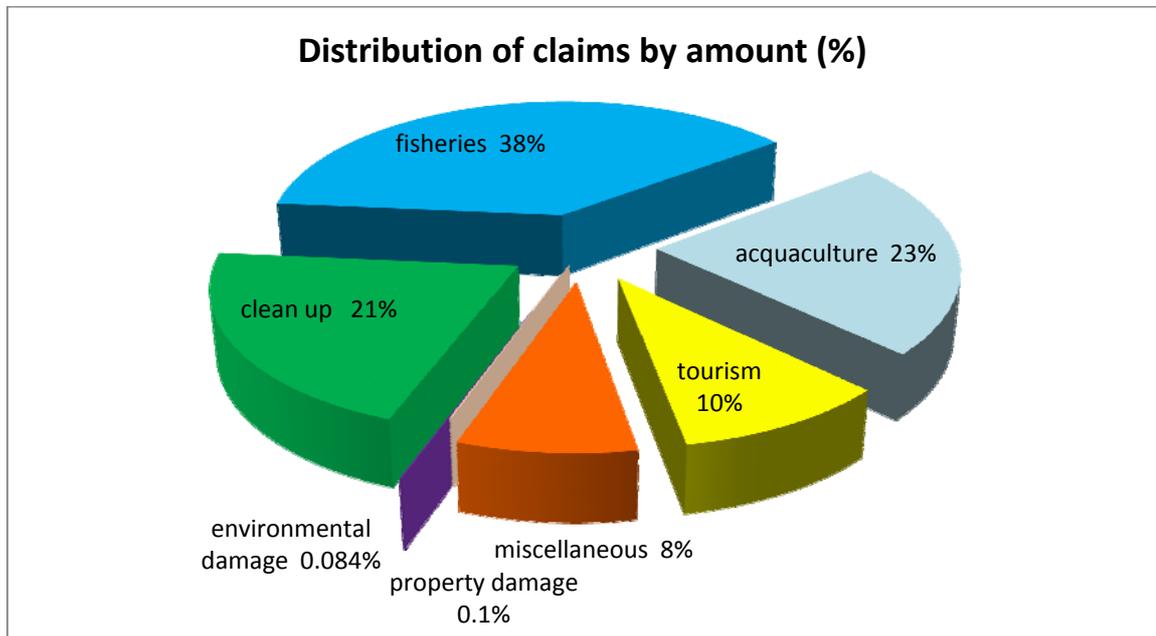
Figure 2: Claims Handling Process



7.7 It can be seen from the graph above that the rate at which claims have been assessed has been kept in step with the rate at which claims were received and has been steadily increasing whilst the number of new claims has been steadily decreasing. While the number of people employed to carry out the assessments remain constant, the monthly fluctuation in the numbers of claims assessed is a result of the nature and complexity of the claims being assessed. The peaks in March, April and September 2011 include the rejection of great numbers of similar claims on the ground that they had not provided any proof of loss or link of causation.

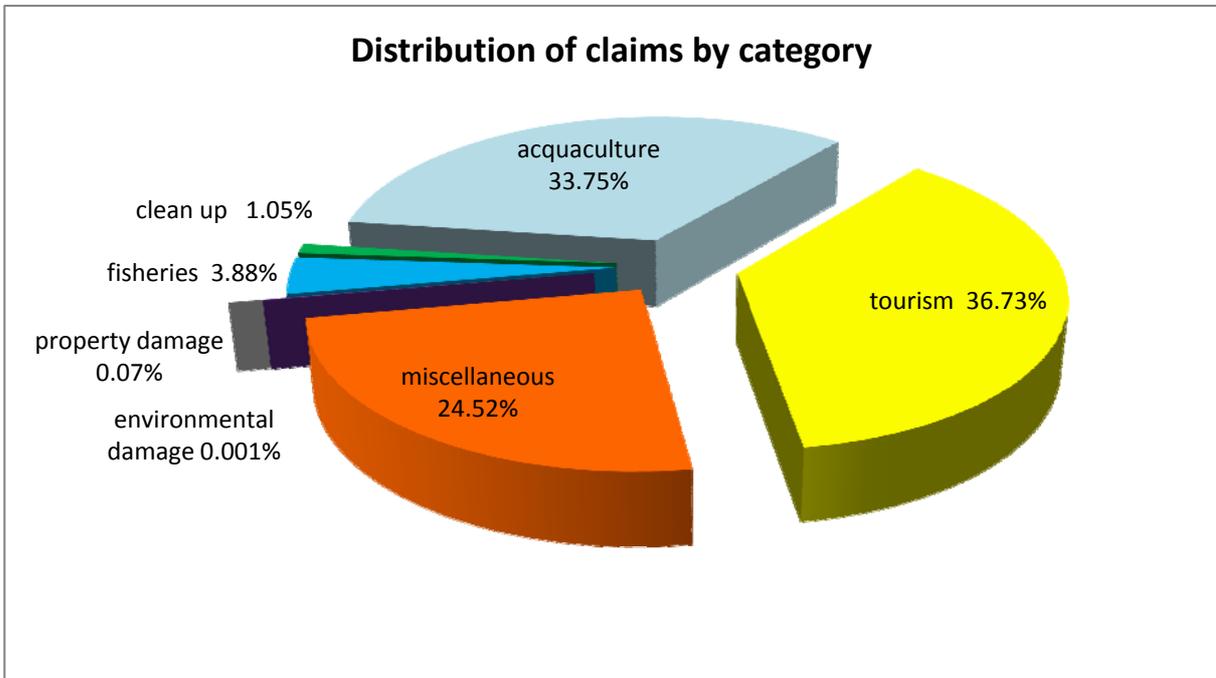
7.8 Figure 3 below shows the distribution of claims between the various categories in terms of amount claimed, as at 21 September 2011.

Figure 3: Distribution of claims by amount



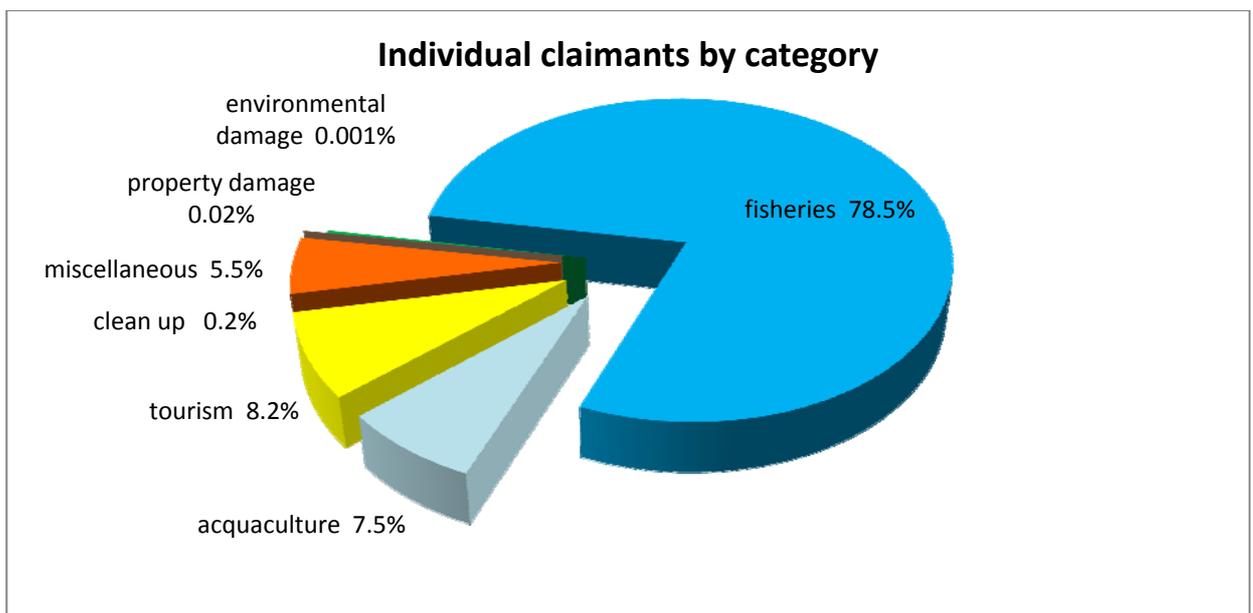
- 7.9 The pie chart above highlights a significant shift in the distribution of claims by amount compared with the pie chart presented in July 2011 (cf document IOPC/JUL11/3/2, paragraph 8.5, figure 3). This difference is due to a 65% increase in the amounts claimed by the Korean Authorities for some of the claims for which they stand last in the queue (cf paragraph 5.3.2).
- 7.10 The distribution of claims by category has not changed significantly from the distribution shown during the July meeting and is shown in Figure 4.

Figure 4: Distribution of claims by category



- 7.11 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

- 7.12 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 the 1992 Fund's experts for assessing small non-fisheries claims in cases where 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.
- 7.13 As at 21 September 2011, about 92% of the small-scale business claims submitted had been assessed using the methodology described above. The remaining claims are being assessed. Further claims from small-scale businesses are expected.
- 7.14 The Director intends to present the results of the application of this methodology at the spring 2012 session of the 1992 Fund Executive Committee.

8 Legal proceedings**8.1 Limitation proceedings by the owner of the *Hebei Spirit***

- 8.1.1 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). A number of claimants appealed the decision to the Court of Appeal and subsequently to the Supreme Court.
- 8.1.2 On 26 November 2009 the Supreme Court dismissed an appeal made by a number of claimants against the decision of the Limitation Court. Consequently, the Limitation Court's decision for the commencement of the limitation proceedings for the owner of the *Hebei Spirit* became final.
- 8.1.3 One hundred and twenty-seven thousand four hundred and fifty seven claims totalling KRW 4 017 billion (approximately £2.3 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 administrator appointed by the Limitation Court completes the assessment of the claims.
- 8.1.4 In February 2011, the Court appointed a court expert to review the evidence filed by both sides with the intention of issuing a decision by the end of 2011. The Court scheduled its next hearing for November 2011. The court expert has not yet started to review the evidence.
- 8.1.5 The 1992 Fund's Korean lawyer is following the developments in the limitation proceedings.

8.2 Limitation proceedings by SHI

- 8.2.1 In December 2008, SHI, the bareboat charterer of the 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.
- 8.2.2 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 (£3.3 million). The Limitation Court also decided that claims against the limitation fund should be registered with the Court by 19 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.
- 8.2.3 In 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.

8.3 Legal proceedings by a clean-up company against the Republic of Korea

- 8.3.1 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 argued that it had entered into a service contract with the Republic of Korea. It argued that even if the Court held that no such service contract existed, the clean-up company should nevertheless be compensated by the State, 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.
- 8.3.2 In early 2010, the Court of First Instance decided that there was no service contract between the company and the Republic of Korea but accepted that the latter was still liable to compensate the company for the clean-up costs. The Court ordered the Republic of Korea to pay a sum of KRW 674 683 401 (£392 000) as reasonable compensation. Both parties appealed against the decision of the Court.
- 8.3.3 In July 2010, after two preliminary hearings, the Court of Appeal ordered a mediation session to explore a possibility of settlement between the parties. The 1992 Fund intervened in this lawsuit as an interested party and participated in 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 submitted a claim to the Club and 1992 Fund in September 2010. The Club and 1992 Fund assessed the claim at KRW 344 177 512 (£200 000) and offered settlement to the claimant in April 2011.
- 8.3.4 The Court held a number of hearings in summer 2011 where an amicable settlement was discussed between the Government and the plaintiffs without success.
- 8.3.5 In September 2011, the Court suggested that the plaintiff receive the amount assessed by the Club and Fund and decided that once the assessed amount had been paid, it would consider whether to continue the mediation for the remainder of their claim for clean-up costs.
- 8.3.6 The next hearing of the Court has not yet been scheduled. The 1992 Fund's Korean lawyers are following the case.

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

- 8.4.1 In November 2010, a 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.
- 8.4.2 The contractor had submitted a claim totalling KRW 889 427 355 for costs incurred in clean-up operations from January to June 2008. The Club and the Fund assessed the claim for the period January to March 2008 at KRW 233 158 549 (£136 000). The Club and the Fund rejected the claim for costs for part of March 2008 and the remaining period, since the area in which the claimant operated was cleaned by mid-March 2008 and therefore further clean-up operations were considered not technically reasonable.
- 8.4.3 The contractor has claimed in Court for the balance between the amount claimed and assessed, ie KRW 656 268 806 (£382 000).
- 8.4.4 In January 2011, the 1992 Fund's lawyers filed an answer in court on behalf of the 1992 Fund stating the 1992 Fund's position that it would not be liable unless, and until, it was proved that the amount of the shipowner's liability was insufficient to fully cover the loss arising from the *Hebei Spirit* incident.
- 8.4.5 Court hearings were held in summer 2011 where the Court considered primarily whether to proceed with or stay the current proceedings until the limitation proceedings at Seosan Court were finalised.

- 8.4.6 The contractor argued that the work carried out after March 2008 was technically reasonable.
- 8.4.7 The 1992 Fund filed a submission to rebut the contractor's attempt to challenge the Club and the 1992 Fund's assessment. In its submission, the Fund stressed that its experts visited the affected area several times from early February to late March 2008 and found that further clean-up work was technically not required. The contractor was at the time recommended not to continue further work and also reminded that no compensation would be available from the international compensation regime for technically unreasonable work.
- 8.4.8 The next hearing is scheduled for the end of October 2011.
- 8.5 Lawsuit by a group of fishermen and sellers of marine products
- 8.5.1 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 Republic of Korea. The 50 claimants, all engaged in fishery activities or selling marine products, requested compensation totalling KRW 150 000 000 (£87 000). At present it is unclear on what basis this claim has been presented.
- 8.5.2 At its first hearing in March 2011, the Court decided to adjourn the proceedings until the limitation proceedings by the owners of the *Hebei Spirit* are finalised.
- 8.6 Lawsuit by the owner of a vessel
- 8.6.1 In February 2011, a vessel owner filed a lawsuit against the owners of the *Hebei Spirit* and the 1992 Fund. At the time the vessel owner had not submitted a claim to the Fund although a claim was presented in the *Hebei Spirit* limitation proceedings. The vessel owner argued that their vessel was polluted by the oil leaked by the *Hebei Spirit* and that they had incurred cleaning costs. The vessel owner claimed KRW 99 878 861 (£58 000) 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. The 1992 Fund argued that it would not be liable unless, and until, it was proved that the amount of the owner's liability was insufficient to fully cover the loss arising from the *Hebei Spirit* incident.
- 8.6.2 The vessel owner has since submitted the claim to the Club and the 1992 Fund for assessment. The Court decided to stay the proceedings until the Club and the Fund have assessed the claim.
- 8.7 Lawsuit by the owner of an abalone farm
- 8.7.1 In March 2011, the former owner of an abalone farm filed a lawsuit against the 1992 Fund in court. He alleged in his claim that he had sold his farm in August 2007 and that the buyer had agreed to pay the purchase price with the proceeds from the sale of the first crop of abalone, which he failed to do allegedly due to the *Hebei Spirit* incident. The new owner had claimed compensation for the lost crop from the Club and the 1992 Fund, and to secure his claim for the outstanding price of the farm, the former owner obtained a Court Order in 2010 to transfer the compensation obtained by the new owner to him. The former owner requested the Court to order the 1992 Fund to pay KRW 121 000 000 together with interest.
- 8.7.2 In May 2011, the 1992 Fund submitted an answer in Court stating that the 1992 Fund's position was that it would not be liable unless, and until, it was proved that the amount of the owner's liability was insufficient to fully cover the loss arising from the *Hebei Spirit* incident.
- 8.7.3 In September 2011, the former farm owner discontinued his lawsuit against the 1992 Fund, reserving his right to file a lawsuit again against the Fund once the current limitation proceedings are finalised.

9 Recourse action against Samsung C&T and SHI

- 9.1 At its session in March 2009, the 1992 Fund Executive Committee endorsed the decision taken by the Director in January 2009 to commence 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.
- 9.2 The 1992 Fund then 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 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 to the agreement can be found in document 92FUND/EXC.44/7, paragraph 13.3.31.
- 9.3 By September 2009, proceedings had been served on both Samsung C&T and SHI. Both 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.
- 9.4 In September 2010, the Ningbo Maritime Court dismissed the applications. In October 2010, Samsung C&T and SHI lodged an appeal against the decision of the Ningbo Maritime Court.
- 9.5 In February 2011, the Court of Appeal issued its decision. In the decision the Court of Appeal 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.
- 9.6 In March 2011, both the 1992 Fund and the owner and insurers of the *Hebei Spirit* lodged separate applications for retrial with the Supreme Court in Beijing. The Supreme Court agreed to hear the applications and the Court documents were served on Samsung C&T and SHI. The Court ordered an adjournment of any application to set aside the attachment order pending the hearing of the application for a retrial.
- 9.7 In July 2011, the Supreme Court held a reconciliation hearing with the parties, with the aim of exploring a possible settlement of their dispute. The 1992 Fund took part in the hearing. The 1992 Fund is awaiting the Court's decision as to whether to hold another reconciliation hearing.

10 Level of payments

10.1 Considerations of the Executive Committee in June 2008

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. The Executive Committee decided to maintain the level of payments at 35% of the amount of the established damages, and to review the situation at its next session in October 2008. The same decision was made by the Executive Committee in March, June and October 2009 and June and October 2010 (Incidents involving the IOPC Funds 2010, page 33).

10.2 Considerations of the Executive Committee in March 2011

10.2.1 In March 2011, the 1992 Fund Executive Committee authorised the Director to increase the level of payments to 100% of the established claims, subject to the following safeguards being in place before the 1992 Fund commenced making payments:

- (i) an undertaking by the Korean Government to pay all established claims in full, in excess of the limits of the 1992 Civil Liability and Fund Conventions;

- (ii) an undertaking by the Korean Government to hold the 1992 Fund harmless in case a Korean court were to render a judgement ordering the 1992 Fund to pay compensation in excess of the 1992 Fund's limit; and
- (iii) a bank guarantee in the amount of KRW 130 billion to be provided by the Korean Government and issued by a bank which satisfied the long-term credit rating criteria established by the Funds' Investment Guidelines.

10.2.2 The 1992 Fund Executive Committee also decided that a bank guarantee issued by Standard Chartered First Bank of Korea would be acceptable to the 1992 Fund since it satisfied the long-term credit rating criteria established by the Fund's Investment Guidelines, whereas a bank guarantee issued by Suhyup Bank would not be acceptable. The 1992 Fund Executive Committee further decided that the amount of the guarantee would be reviewed annually by the Executive Committee. The 1992 Fund Executive Committee further decided that, if these safeguards were not put in place satisfactorily, the level of payment should be maintained at 35% of the established losses and that it should be reviewed at the next session of the 1992 Fund Executive Committee (cf document IOPC/MAR11/9/1, paragraphs 3.7.40-3.7.42). At its July 2011 session, the Executive Committee noted that no progress had been made on this issue (cf document IOPC/JUL11/8/1, paragraphs 3.2.11-3.2.14).

10.3 Developments since the Executive Committee in July 2011

In August 2011, the Korean Government informed the Director that, in view of the significant administrative burden that the safeguards determined by the Executive Committee in its March 2011 session would place on the Korean Government, it did not intend to set up the guarantee as determined by the Executive Committee with the understanding that this would likely result in the 1992 Fund not increasing the level of payment to 100% of the established claims.

10.4 Estimates of losses

10.4.1 The Secretariat has continued to collect the most up-to-date information on the estimated total exposure of the 1992 Fund. The revised estimated figures for the total amount of losses arising out of the *Hebei Spirit* incident are detailed in the paragraphs below.

Clean up

10.4.2 The most recent estimates in the clean-up sector take into account the number of adjusted claims, assessments and payments so far. However, as with the previous estimations, there have been a number of new and adjusted claims, for which the Korean authorities are standing last in the queue, that have not been included in these estimates as 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 were considered admissible.

10.4.3 The revised estimate of the expected admissible clean-up costs now totals some KRW 172 600 million.

Fisheries and aquaculture

10.4.4 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 compared the results with the available official statistics. 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.

10.4.5 The total estimated losses in the fisheries, aquaculture and ancillary industries sector have been decreased to around KRW 66 200 million.

Tourism and other economic losses

10.4.6 The Fund's experts have calculated the estimated losses in the tourism and other economic sectors by applying actual ratios of assessed claim value to un-assessed claims by geographic region by claim category. Where there were insufficient assessed claims to be used as a basis for estimation, a reasonable average was applied based on similar areas and claim categories.

10.4.7 The experts have revised the total estimated loss in the tourism sector and this is expected not to exceed KRW 43 800 million.

10.5 Directors considerations

10.5.1 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)	October 2010 (KRW billion)	March 2011 (KRW billion)	October 2011 (KRW billion)	October 2011 (£ million)
Clean up	186.9	180.1	176.2	172.6	100.3
Fisheries and mariculture	166.2	186	118	66.2	38.5
Tourism	100	72.4	60	43.8	25.5
Total	453.1	438.5	354.2	282.6	164.3

10.5.2 The total amount available for compensation under the 1992 CLC and Fund Convention is 203 million SDR or KRW 321.6 billion (£187 million) (cf section 4).

10.5.3 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 limitation proceedings in the Claims Office, and in the Claims Office excluding the claims for which the Korean authorities are 'standing last in the queue', as well as the estimated losses.

	Exposure (KRW billion)	Exposure (£ million)	Percentage of the Fund's limit (KRW 321.6 billion)
Amount claimed in the limitation proceedings	4 017	2 335	8%
Amount claimed in the Claims Office	2 606	1 515	12%
Amount claimed in the Claims Office (excluding ROK SLQ claims)	2 161	1 256	15%
Level of losses based on recent estimates	283	164	100%

10.5.4 On the basis of the current level of estimated losses described in section 10.5.1 above, it would be possible for the 1992 Fund to raise the level of payment to 100% of the established claims. However, it should be noted that the estimates shown in the paragraph above only indicate, in broad terms, the amount of losses that the 1992 Fund expects were caused by the *Hebei Spirit* incident on the basis of an overview of the amounts assessed so far as well as a general overview of the economic situation in the area affected by the incident.

10.5.5 In respect of Fund's actual exposure in this incident however, the amounts claimed both directly to the 1992 Fund and the Club and in the *Hebei Spirit* limitation proceedings exceed the current estimates by an order of magnitude.

- 10.5.6 The amount available under the 1992 Conventions corresponds to 8% of the total amount claimed in the limitation proceedings, ie KRW 4 017 billion (£2 335 million).
- 10.5.7 The total amount of the claims submitted in the Claims Office so far is KRW 2 606 billion (£1 515 million). Currently, the amount available under the 1992 Conventions corresponds to 12% of the total amount claimed.
- 10.5.8 A number of agencies and local authorities have stated their intention to 'stand last in the queue'. However, the amount of KRW 444.8 billion (£258.6 million), which corresponds to some 17% of the total amount claimed so far, would have only a limited impact on the Fund's total exposure, reducing the total amount to KRW 2 161 billion (£1 256 million). Currently, the amount available under the 1992 Conventions corresponds to 15% of the total amount claimed excluding the claims for which the Korean authorities are standing last in the queue.

Conclusions

- 10.5.9 The levels at which claims have been assessed so far are significantly lower than the amounts claimed, which seems to indicate that the assessed losses may still be appreciably below the level that was originally estimated. This is consistent with the Fund's experience in past incidents in the Republic of Korea, where 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 Fund's criteria for admissibility of claims.
- 10.5.10 The majority of the claimants who have received interim compensation have however decided not to settle their claims and to maintain their action in the limitation proceedings or in Court. This is not in line with the Fund's experience in past incidents in Korea, where claims were normally settled out of court and only a minority of claimants would continue legal proceedings. The assessment of claims by the Limitation Court has not yet begun and it is difficult to predict how that assessment may impact on the Fund's exposure.
- 10.5.11 In view of the fact that the 1992 Fund's exposure in this incident is vastly higher than the estimated losses and in view of the fact that it is not yet known which position the national courts will take with regard to the assessment of claims, the Director considers that it would be premature to raise the level of payments.
- 10.5.12 Taking into account the remaining uncertainties surrounding the claims situation in this incident, the Director takes the view that maintaining the level of payments at 35% may continue to provide the 1992 Fund with reasonable protection against a possible overpayment situation.
- 10.5.13 The Director therefore proposes to the 1992 Fund Executive Committee to maintain the level of payments at 35% of the amount of the loss or damage as assessed by the Club's and Fund's experts and that this percentage should be reviewed at the 1992 Fund Executive Committee's next session.

11 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 maintain the level of payments at 35% subject to the review at the next 1992 Fund Executive Committee; and
 - (c) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.
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