



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS

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| Agenda item: 3 | IOPC/OCT12/3/9 | |
| Original: ENGLISH | 30 August 2012 | |
| | | |
| 1992 Fund Assembly | 92A17 | |
| 1992 Fund Executive Committee | 92EC56 | • |
| Supplementary Fund Assembly | SA8 | |
| 1971 Fund Administrative Council | 71AC29 | |

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:

On 7 December 2007, 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. About 10 900 tonnes of crude oil escaped into the sea from the *Hebei Spirit*.

Level of payments

In June 2008, the 1992 Fund Executive Committee, in view of the uncertainty as to the total amount of the admissible claims, decided to set the level of payments to 35% of the established claims. This decision was maintained at subsequent meetings of the Executive Committee.

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.

Recourse action against Samsung C&T Corporation (Samsung C&T) and Samsung Heavy Industries (SHI)

In January 2009, the owner and insurers of the *Hebei Spirit* and the 1992 Fund each commenced recourse actions 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.

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

In January 2012 the Beijing Supreme Court dismissed the action brought by the 1992 Fund against Samsung C&T and SHI. The owner and the insurer of the *Hebei Spirit* concluded a settlement agreement with Samsung C&T and SHI under which Samsung C&T and SHI would pay the amount of US\$10 million to the owner and its insurers. In accordance with the agreement signed by the 1992 Fund and the ship's interests in January 2009, the 1992 Fund has recovered 50% of the sum paid and will share the legal costs incurred.

Recent developments:*Claims situation*

As at 30 August 2012, 28 885 claims totalling KRW 2 774 billion (£1 580 million)^{<1>} and comprising 128 398 individual claims have been submitted.

Twenty-eight thousand seven hundred and ninety-one claims, more than 99.7% of the claims submitted, have been assessed. Of these 4 701 have been assessed at a total amount of KRW 179 801 million (£102.4 million) and 24 090 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 4 110 claims, totalling KRW 167 175 million (£95.2 million). Further payments are pending awaiting response from the claimants.

Small-scale non-fisheries related claims

In October 2009 the Director presented to the 1992 Fund Executive Committee a methodology developed by the 1992 Fund's experts for assessing small non-fisheries claims in cases where the claimant is not able to prove his/her losses. The 1992 Fund Executive Committee endorsed the Director's intention to apply this methodology on a trial basis.

In April 2012 the Director presented the preliminary results of the trial as applied up to 26 March 2012.

Annex II presents the results of the completed trial.

Limitation proceedings by the owner of the Hebei Spirit

As of August 2012, 127 483 claims totalling KRW 4 023 billion (£2 291 million) have been submitted in the limitation proceedings. A hearing of the Limitation Court was held on 27 August 2012.

Legal proceedings

Developments in respect of a number of legal proceedings since April 2012 are reported in this document.

Level of payment

In view of the amounts claimed in the limitation proceedings (KRW 4 023 billion) and in the *Hebei Spirit* Centre (HSC) (KRW 2 774 billion), the Director proposes maintaining the level of payments at 35% so as to avoid an overpayment situation.

Action to be taken: 1992 Fund Executive Committee

Decide whether to maintain the level of payments at 35%.

<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, the exchange rate used in this document (as at 1 August 2012) is £1 = KRW 1756.24. The exchange rate used in Annex I, however, is the exchange rate as at 31 October 2011 (ie £1 = KRW 1792.11).

1 Summary of incident

| | | | | | | | |
|---|---|--------------------|---------------------------|--------------------|------------------|--------------------|------------------|
| Ship | <i>Hebei Spirit</i> | | | | | | |
| Date of incident | 07.12.2007 | | | | | | |
| 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 | 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 (£183.4 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 | 93* | 621 565 | 595 | 12 626 | 4 110 | 167 175 | 24 086 |
| TOTAL (£ million) | | 354 | | 7.2 | | 95.2 | |
| *Including 58 standing last in the queue (SLQ) claims | | | | | | | |
| Standing last in the queue | In August 2012, the Korean Government confirmed that a number of agencies and local authorities intended to stand last in the queue with regard to their claims totalling KRW 603.5 billion (£344 million), an increase of some KRW 199 billion (£113 million) from what was reported at the last Executive Committee meeting. | | | | | | |
| 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. Lawsuit by one clean up company against the Republic of Korea 3. Lawsuit by one clean-up company against the owners and insurers of the <i>Hebei Spirit</i> and against the 1992 Fund. 4. Lawsuit by a number of fishermen and fish sellers against the 1992 Fund and the Republic of Korea. 5. Lawsuit by one shipowner against the owners of the <i>Hebei Spirit</i> and the 1992 Fund. 6. Lawsuit by one aeroplane operating company against the Republic of Korea 7. Lawsuit by three clean up companies against the Republic of Korea | | | | | | |

2 Background information

The background information to this incident is summarised above and provided in more detail at Annex I.

3 Claims for compensation

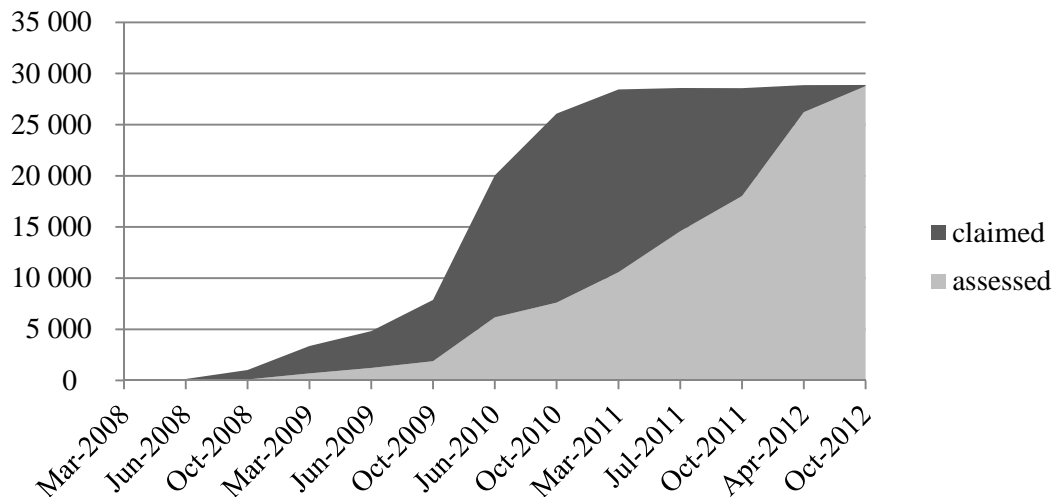
3.1 General

3.1.1 The development of the incident in terms of volume of claims submitted and assessed is reflected in Figure 1 below.

^{<2>}

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

Figure 1: Development of claims submitted and assessed (number of claims)



3.1.2 The table below provides a detailed update of the claims submitted as at 30 August 2012 by category of claims:

| Category of claim | Number of claims | Claimed amount (KRW million) | Number of claims assessed | | Assessed amount (KRW million) | Number of claims paid | Paid amount (KRW million) |
|-----------------------------------|------------------|------------------------------|---------------------------|----------|-------------------------------|-----------------------|---------------------------|
| | | | More than 0 | Rejected | | | |
| Clean up and preventive measures | 254 | 155 465 | 216 | 26 | 93 146 | 184 | 93 070 |
| Property damage | 20 | 2 344 | 16 | 4 | 854 | 12 | 824 |
| Fisheries and mariculture | 10 819 | 1 604 288 | 1 531 | 9 285 | 47 684 | 1 290 | 43 414 |
| Tourism and other economic damage | 17 734 | 408 424 | 2 937 | 14 775 | 33 887 | 2 624 | 29 867 |
| SLQ claims | 58 | 603 519 | 1 | | 4 230 | | |
| Total | 28 885 | 2 774 040 | 4 701 | 24 090 | 179 801 | 4 110 | 167 175 |
| Total (£ million) | | 1 580 | | | 102.3 | | 95.2 |

3.1.3 As at 30 August 2012, twenty-eight thousand seven hundred and ninety one claims comprising 128 304 individual claims had been assessed. This represents an assessment ratio of 99.7% of the claims submitted or 99.9% of the individual claims submitted. Of these claims, 4 705 have been assessed at KRW 179 801 million and 24 090 had been rejected. Four thousand one hundred and ten claims, totalling KRW 167 175 million and including a number of subrogated claims submitted by the Korean Government, have been paid by the Skuld Club.

3.1.4 It is clear from the above that there is a significant difference between what has been claimed and what has been assessed, both in terms of admissible claims and the quantum determined in the assessments. It is not unusual for there to be a difference between the two amounts, especially in incidents, where claimants have included future losses, or have claimed amounts far higher than can subsequently be proved or substantiated.

3.1.5 The Secretariat has considered the current status of the assessments and tried to identify the reasons why in this incident a higher than usual proportion of claims have been rejected and the assessed amount of those found to be admissible has been significantly less than the amounts claimed. In particular the Secretariat has considered whether this was as a result of any unintended changes in the application of the assessment processes.

- 3.1.6 While the detailed reasons for the submission of each claim cannot be determined without individual discussion with the claimants, a number of factors were identified which differentiate patterns seen in the *Hebei Spirit* incident, from past incidents in Korea. The Secretariat believes these have had the effect of encouraging claims to be submitted, and for claimants to maximise their claims and to reject the assessments offered by the Skuld Club and Fund.
- 3.1.7 The Special Law enacted by the Korean Government in order to assist claimants by providing advance loans and by guaranteeing full payment over and above the amounts available under the 1992 Civil Liability Convention (1992 CLC) and 1992 Fund Convention, appears to have had the unintended effect of encouraging individuals and organisations which would not under normal circumstances submit a claim, to claim for losses. This is apparent by the high number and variety of claims which have been submitted.

Reasons for claims being found to be inadmissible

- 3.1.8 A high proportion of claims have been rejected as inadmissible. The reasons for the rejection of claims in this incident are the same as for other incidents:
- The claimants failed to prove any link of causation;
 - The claimants failed to provide any information in support of their losses or the information provided did not support the claim that he/she had suffered a loss;
 - The claimants were operating a business which did not comply with national regulations; and
 - The claimants had submitted several claims for the same losses through separate claimants' organisations. This was particularly noticeable in this incident in the capture fisheries and hand-gatherer sectors, where a number of claimants appear to have claimed through fisheries cooperatives or claimants' committees as well as individually.

Reasons for claims being assessed lower than the claimed amounts

- 3.1.9 The reasons for the claims being assessed lower than the claimed amounts were again similar to other incidents:
- Many claims included theoretical projected losses for a number of years;
 - Claims included costs for activities that, although admissible in principle, were continued for longer periods than technically reasonable;
 - The information provided by the claimants did not support the claimed loss;
 - Claims included losses due to events not related to the *Hebei Spirit* incident, eg subsequent spills, economic downturn, natural mortality/parasites in stocks; and
 - Claims, particularly in the fisheries industry, were based on the period of government fishing bans which were found to be technically unreasonable.
- 3.1.10 It is also noted that the number of claimants that have decided to accept the Club and Fund's offer of settlement as full and final, appears to be quite low. In past incidents in Korea, claimants had tended to claim for future losses, or for amounts much higher than the established losses. However, whilst in the past, claimants would have accepted the assessment by the Fund and settled their claim, in the case of the *Hebei Spirit* incident, the majority of the claimants who have received an offer of settlement by the Club and Fund have decided not to accept it.
- 3.1.11 This indicates that a number of claimants who would have otherwise settled the claim have, in this particular incident, decided not to do so and have instead chosen to continue pursuing their claim in the Limitation Court or in civil proceedings, in the hope of receiving an higher amount of compensation, either from the Fund or from the Korean Government through the Special Law, which could potentially provide an unlimited amount of compensation.
- 3.1.12 In summary, based on the considerations above, it appears that the higher than usual number of rejected claims and the lower levels of assessment for the established claims compared to previous

incidents is a result of two factors, namely:

- (i) the number of claimants who were encouraged to submit claims; and
- (ii) the claimants' inability to prove their losses,

rather than any changes in the application of the assessment criteria or processes.

3.2 Small-scale non-fisheries related claims

- 3.2.1 Many tourism claims submitted following the *Hebei Spirit* incident were poorly documented and would, in normal circumstances, have been rejected. Given the high number of small seasonally trading tourism businesses in the affected area, the Director instructed the 1992 Fund's tourism experts to develop an alternative assessment approach for assessing small-scale non-fisheries claims in case the claimant was not able to prove his/her losses. The methodology was used to assess a total of 1 472 small-scale businesses.
- 3.2.2 The application of this methodology has led to the positive assessment of claims from 605 businesses that would otherwise have been rejected, as they were not in possession of any documentation in support of their claim in accordance with local legislation which did not require trading information to be retained for businesses operating below a set income tax threshold.
- 3.2.3 The methodology however was found to be time-consuming. It was also found to be heavily dependent on direct observation of the business and on a sufficiently large pool of reliable information from comparable businesses in the areas upon which to base the assessments. Furthermore, because of the small size of the business surveyed and the scattered nature of the claims, a significant proportion of the man-hours used for the assessment of these claims was spent travelling to the location of the businesses to conduct interviews with the claimants.
- 3.2.4 The summary of the results of the trial are presented in Annex II to this document.

4 Legal issues

4.1 Limitation proceedings of the owners of the *Hebei Spirit*

- 4.1.1 As at 27 August 2012, 127 483 claims totalling KRW 4 023 billion had been submitted in the Limitation Court, representing an increase of nine claims and KRW 64 billion since April 2012.
- 4.1.2 On 27 August, the Limitation Court held a hearing. At the hearing, the Court listed the claims which had been submitted. As a matter of Korean law and practice, no further claims would be registered nor would changes to the amount claimed be accepted.
- 4.1.3 The Court is expected to issue its decision regarding the distribution of the *Hebei Spirit* limitation fund in December 2012. The Fund's lawyers are following the proceedings.

4.2 Civil proceedings

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

- 4.2.1 In January 2012, the Court of Appeal issued a judgement to the effect that, whilst the assessment made by the Club and the 1992 Fund was considered reasonable, the amount recognised by the Court was KRW 318 450 947. The amount assessed by the Club and the 1992 Fund totalled KRW 304 177 512, which was paid to the plaintiff in September 2011. The Court ordered the Korean Government to pay the clean-up company the difference plus interest, equivalent to KRW 24 429 768. Both parties appealed to the Supreme Court. The case is pending at the Supreme Court.

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

- 4.2.2 Another clean-up company commenced legal proceedings against the Club and the 1992 Fund.

- 4.2.3 In November 2011, the Court dismissed the company's lawsuit against the 1992 Fund. The Court ruled that the claim against the 1992 Fund was groundless since:
- (a) unless and until the total amount of oil pollution claims was confirmed, the claim against the 1992 Fund could not be specified and the 1992 Fund's liability could therefore not be determined; and
 - (b) in any event, the company's reasonable costs were KRW 233 158 549 and this amount had already been paid by the Club.
- 4.2.4 The clean up company appealed against the judgement to the Court of Appeal. The next hearing of the Court is scheduled for September 2012.
- 4.3 Lawsuit by an aeroplane operating company against the Republic of Korea and Korea Marine Environment Management Corporation (KOEM)
- 4.3.1 In June 2011, an aeroplane operating company initiated a lawsuit in the Seoul Central District Court (Court of First Instance) against the Republic of Korea and KOEM, the organisation responsible for off-shore clean-up operations, claiming costs for KRW 494 912 000. The company argued that it had entered into a service contract with the Republic of Korea and mobilised three aeroplanes to spray dispersants over the polluted areas and therefore was entitled to claim the costs of these operations from the Republic of Korea and KOEM. The company did not submit a claim against the Club and the 1992 Fund directly or in the Limitation Court, so if it were to do so now the claim would likely have to be considered time-barred. A claim for a similar amount had been submitted against the Club and the 1992 Fund by the Taean Coast Guard. This claim is however amongst those standing last in the queue and has not yet been assessed.
- 4.3.2 In November 2011, the Korean Government requested the Court to serve notice of the lawsuit upon the owner of the *Hebei Spirit*, the 1992 Fund and SHI, arguing that they would all be ultimately liable to pay for the costs being claimed and reserving their right to make a recourse claim against those three parties. In December 2011, the 1992 Fund intervened in the lawsuit.
- 4.3.3 In August 2012, the Court delivered its judgement. In its judgement, the Court did not consider issues of admissibility or technical reasonableness of the actions undertaken but only focused on whether a valid contract was concluded between the claimant and the Republic of Korea. As a result, the Court decided that a verbal contract was validly concluded between the company and the Republic of Korea by which the Republic of Korea agreed to pay to the company for each flight for clean-up activities made by the company's airplanes. The Court therefore ordered the Republic of Korea to pay the company KRW 236 500 000 together with interest of 5% per annum from 27 December 2007 until 16 August 2012 and 20% per annum until the company was paid in full. The Court dismissed the rest of the claim. No appeal has been filed so far.
- 4.4 Legal proceedings by three clean-up companies against the Republic of Korea
- 4.4.1 In October 2010, three clean-up companies which had been involved in clean-up operations at the instruction of the Korean Coast Guard, filed a lawsuit at the Busan District Court against the Republic of Korea, claiming costs for the aggregated amount of KRW 4 639 080 692, ie the difference between the amount assessed by the Fund and the amount originally claimed.
- 4.4.2 In May 2012, the Republic of Korea requested the Court to serve notice of the lawsuit upon the owner of the *Hebei Spirit*, the 1992 Fund and SHI, arguing that they would all be ultimately liable to pay for the costs being claimed and reserving the right to make a recourse claim against those three parties. In June 2012, the 1992 Fund intervened in the lawsuit. The Court has scheduled its next hearing for September 2012.

4.5 Recourse actions

- 4.5.1 A summary of the background information relation to the recourse action may be found at section 9.9 of Annex I.
- 4.5.2 In December 2011 the Supreme Court of the People's Republic of China, dismissed the 1992 Fund's application for retrial on the grounds of *forum non-conveniens*.
- 4.5.3 The owner and the insurer of the *Hebei Spirit* concluded a settlement agreement under which Samsung C&T and SHI would pay the amount of US\$10 million to the shipowner and its insurer.
- 4.5.4 As the 1992 Fund had concluded an agreement with the owner and the insurer of the *Hebei Spirit* under which the 1992 Fund and the ship's interests would share the legal costs of the recourse actions and the proceeds of any recovery under a court judgement or settlement on a 50/50 basis, the 1992 Fund has recovered US\$5 million from the Skuld Club in accordance with this agreement. In accordance with the agreement, the 1992 Fund will in due course reimburse the Skuld Club and the China P&I Club for their shares of the legal costs incurred in bringing the recourse action.

5 Level of payments

- 5.1 The total amount available for compensation under the 1992 Civil Liability Convention (1992 CLC) and 1992 Fund Convention is 203 million SDR or KRW 321.6 billion (£183.4 million).
- 5.2 The total amount of assessed claims so far is KRW 179 801 202 626 (£102.3 million) which corresponds to an assessment rate of 99.9% of all the claims, not including the claims for which the Korean Government has declared its intention to stand last in the queue.
- 5.3 On the basis of the current level of assessed claims, and taking into consideration that the majority of the remaining claims are currently standing last in the queue, it would theoretically be possible for the 1992 Fund to raise the level of payment to 100% of the established claims.
- 5.4 There are however a number of additional considerations to take into account when determining a level of payment which would provide the 1992 Fund with reasonable protection against a possible overpayment situation.
- 5.5 The table below shows the amount available for compensation under the 1992 CLC and 1992 Fund Convention as a percentage of the amounts claimed in the limitation proceedings, claimed in the claims office, and claimed in the claims office but taking into account the claims for which the Korean authorities are 'standing last in the queue'.

| | Exposure (KRW billion) | Exposure (£ million) | Percentage of the Fund's limit (KRW 321.6 billion) |
|---|---------------------------|-------------------------|--|
| Amount claimed in the limitation proceedings | 4 023 | 2 291 | 8% |
| Amount claimed in the claims office | 2 774 | 1 580 | 11.6% |
| Amount claimed in the claims office (excluding SLQ claims) | 2 171 | 1 236 | 14.8% |

- 5.6 The total amount claimed in the limitation proceedings is KRW 4 023 billion (£2 291 million). The amount available under the 1992 Conventions therefore corresponds to 8% of this amount.
- 5.7 The total amount of the claims submitted in the claims office is KRW 2 774 billion (£1 580 million). Currently, the amount available under the 1992 Conventions corresponds to 11.6% of the total amount claimed.
- 5.8 A number of agencies and local authorities have stated their intention to 'stand last in the queue' for a total amount of KRW 603.5 billion (£344 million). These claims have only a limited impact on the

1992 Fund's total exposure, since by their 'standing last in the queue' the ratio between the amount available under the 1992 Conventions and the total amount claimed would only increase by 3.2% to a total of 14.8%. A significant proportion of these claims also appear to be for future losses, so they may not be admissible for compensation.

- 5.9 Furthermore, the majority of the claimants who have received interim compensation from the Club have decided not to agree the quantum of their claims and have therefore maintained their action in the limitation proceedings or in Court. This represents a major departure from the 1992 Fund's experience in previous incidents in Korea, where claims were normally settled out of court and only a minority of claimants would continue legal proceedings.
- 5.10 The 1992 Fund's previous experience of incidents in Korea indicates that the Korean courts have tended to uphold the assessment of losses based on the Fund's criteria for admissibility of claims. However, 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 1992 Fund's exposure and on future court cases.
- 5.11 In view of the amounts claimed in the limitation proceedings (KRW 4 023 billion (£2 291 million)) and in the HSC (KRW 2 774 billion (£1 580 million)) and the fact that it is not yet known what 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.
- 5.12 The Director therefore proposes that the 1992 Fund Executive Committee maintain the level of payments at 35% of the amount of the loss or damage as assessed by the Club's and 1992 Fund's experts, and that this percentage should be reviewed at the 1992 Fund Executive Committee's next session.

6 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%; and
- (c) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.

* * *

ANNEX I

BACKGROUND INFORMATION – HEBEI SPIRIT

1 The incident

- 1.1 The Hong Kong registered tanker *Hebei Spirit* (146 848 GT) was struck by the crane barge *Samsung N°1* while at anchor about five nautical miles off Taean on the west coast of the Republic of Korea. The crane barge was being towed by two tugs (*Samsung N°5* and *Samho T3*) when the tow line broke. Weather conditions were poor and it was reported that the crane barge had drifted into the tanker, puncturing three of its port cargo tanks.
- 1.2 The *Hebei Spirit* was laden with about 209 000 tonnes of four different crude oils. Due to inclement weather conditions, repairs of the punctured tanks took four days to complete. In the meantime, the crew of the *Hebei Spirit* tried to limit the quantity of cargo spilled through holes in the damaged tanks by making it list and transferring cargo between tanks. However, as the tanker was almost fully laden, the possibilities for such actions were limited. As a result of the collision a total of 10 900 tonnes of oil (a mix of Iranian Heavy, Upper Zakum and Kuwait Export) escaped into the sea.
- 1.3 The *Hebei Spirit* is owned by Hebei Spirit Shipping Company Limited. It is insured by China Shipowners Mutual Insurance Association (China P&I) and Assurancéföreningen Skuld (Gjensidig) (Skuld Club) and managed by V-Ships Limited. The crane barge and the two tugs are owned and/or operated by Samsung Corporation and its subsidiary Samsung Heavy Industries (SHI) which belong to the Samsung Group, the Republic of Korea's largest industrial conglomerate.

2 Impact

- 2.1 Large parts of the Republic of Korea's western coast were affected to varying degrees. The shoreline composed of rocks, boulders and pebbles, as well as long sand amenity beaches and port installations in the Taean peninsula and in the nearby islands, was polluted. Over a period of several weeks, mainland shorelines and islands further south also became contaminated by emulsified oil and tar balls. A total of some 375 kilometres of shoreline were affected along the west coast of the Republic of Korea. A considerable number of commercial vessels were also contaminated.
- 2.2 The west coast of the Republic of Korea hosts a large number of mariculture facilities, including several thousand hectares of seaweed cultivation. It is also an important area for shellfish cultivation and for large-scale hatchery production facilities. The area is also exploited by small and large-scale fisheries. The oil affected a large number of these mariculture facilities, as it passed through the supporting structures, contaminating buoys, ropes, nets and the produce. The Korean Government financed the removal operations of the most affected oyster farms in two bays in the Taean peninsula. The removal operations were completed in early August 2008.
- 2.3 The oil also impacted amenity beaches and other areas of the Taean National Park.

3 Response operations

- 3.1 The Korea National Coast Guard Agency, a department of the Ministry of Maritime Affairs and Fisheries (MOMAF), has overall responsibility for marine pollution response in the waters under the jurisdiction of the Republic of Korea. By the first quarter of 2008, responsibility for overseeing onshore clean up had been passed on to the affected local governments.
- 3.2 The government-led response at sea was completed within two weeks although a large number of fishing vessels were still deployed in the following weeks to tow sorbent booms and collect tar balls. Some were used to transport manpower and materials to offshore islands in support of clean-up operations until later in the year.

- 3.3 The Korean Coast Guard tasked a total of 21 licensed clean-up contractors, supported by local authorities and fisheries cooperatives to undertake shoreline clean-up operations. Onshore clean-up operations were carried out at numerous locations along the western coast of the Republic of Korea. Local villagers, army and navy cadets and volunteers from all over the Republic of Korea also participated in the clean-up operations.
- 3.4 The removal of the bulk oil was completed by the end of March 2008. The major part of secondary clean-up operations, involving, among other techniques, surf washing, flushing and hot water high-pressure treatment, were completed by the end of June 2008. Some clean-up operations in remote areas continued until October 2008.
- 3.5 The 1992 Fund and the Skuld Club opened a Claims Handling Office (*Hebei Spirit* Centre) in Seoul to assist claimants in the presentation of their claims for compensation and appointed a team 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.

4 Applicability of the Conventions

- 4.1 The Republic of Korea is a Party to the 1992 Civil Liability Convention (1992 CLC) and the 1992 Fund Convention but, at the time of the spill, had not ratified the Supplementary Fund Protocol.
- 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 89.77 million SDR. The total amount available for compensation under the 1992 CLC and the 1992 Fund Convention is 203 million SDR.
- 4.3 Level of payments
- 4.3.1 At its March 2008 session, the 1992 Fund Executive Committee authorised the Director to settle and pay claims arising from this incident to the extent that they did not give rise to questions of principle not previously decided by the Executive Committee. The Executive Committee also decided that the conversion of 203 million SDR into Korean Won would be made on the basis of the value of that currency *vis-à-vis* the SDR on the date of the adoption of the Executive Committee's Record of Decisions of its 40th session, ie 13 March 2008, at the rate of 1 SDR = KRW 1 584.330, giving a total amount available for compensation of KRW 321 618 990 000.
- 4.3.2 At the same session, the 1992 Fund Executive Committee noted that, based on a preliminary estimation by the Fund's experts, the total amount of the losses arising as a result of the *Hebei Spirit* incident was likely to exceed the amount available under the 1992 Civil Liability and Fund Conventions. In view of the uncertainty as to the total amount of the losses, the 1992 Fund Executive Committee decided that payments should for the time being be limited to 60% of the established damages.
- 4.3.3 In June 2008, the Executive Committee took note of new information which indicated that the extent of the damage was likely to be greater than initially estimated in March 2008. At that session, the 1992 Fund Executive Committee decided that, in view of the increased uncertainty as to the total amount of the potential claims and the need to ensure equal treatment to all claimants, payments made by the 1992 Fund should, for the time being, be limited to 35% of the established damages.
- 4.3.4 The 1992 Fund Executive Committee decided to maintain the level of payments at 35% of the established damages at its subsequent sessions in October 2008, as well as in March, June and October 2009, June and October 2010.
- 4.3.5 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 a number of safeguards being in place before the 1992 Fund commenced making payments, and if these safeguards were not provided, the level of payments should be maintained at 35% of the established losses and that this should be reviewed at its next session.

- 4.3.6 In August 2011, the Korean Government informed the Acting Director that, in view of the significant administrative burden that the safeguards determined by the Executive Committee at 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 payments to 100% of the established claims.
- 4.3.7 In October 2011, the 1992 Fund Executive Committee decided to maintain the level of payments at 35% and that the level of payments should be reviewed at its next session.

5 Actions by the Korean Government

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

- 5.1.1 At the June 2008 session of the 1992 Fund Executive Committee, the Korean Government informed the 1992 Fund that a special law for the 'Support of Affected Inhabitants and the Restoration of the Marine Environment in Respect of the *Hebei Spirit* Oil Pollution Incident' was approved by the National Assembly in March 2008. Under the provisions of the Special Law, the Korean Government was authorised to make payments in full to claimants based on the assessments made by the Skuld Club and the 1992 Fund within 14 days of the date they submitted proof of assessment to the Government.
- 5.1.2 The Korean Government also informed the 1992 Fund that under the Special Law, if the Fund and the Skuld Club paid claimants compensation on a *pro-rata* basis, the Korean Government would pay the claimants the remaining percentage so that all claimants would receive 100% of the assessment. The Special Law entered into force on 15 June 2008.
- 5.1.3 As at 21 September 2011, the Korean Government had made payments totalling KRW 34 220 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 1992 Fund, and submitted subrogated claims against the Skuld Club and the Fund. The Skuld Club had paid the Government KRW 28 855 million in respect of 434 of these claims.
- 5.1.4 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 21 September 2011, the Korean Government had granted 21 282 loans totalling KRW 50 661 million.

5.2 Decision of the Korean Government to 'stand last in the queue'

- 5.2.1 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 clean-up costs and other expenses incurred by the central and local governments.
- 5.2.2 In August 2011, the Secretariat 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. 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 in dealing with the pollution.
- 5.2.3 The 1992 Fund and the Skuld Club are in frequent contact with the Korean Government to maintain a coordinated system for the exchange of information regarding compensation in order to avoid duplication of payments.

6 Cooperation Agreements between the Korean Government, the shipowner and the Skuld Club

6.1 First Cooperation Agreement

6.1.1 In January 2008, discussions took place on compensation issues which resulted in the First Cooperation Agreement concluded between the shipowner, Skuld Club, the Korean Government and Korea Marine Pollution Response Corporation (KMPRC). The 1992 Fund was consulted during the negotiations but was not a party to the Agreement. By the Agreement, in exchange for the Club's expedited payment to large numbers of individuals engaged by clean-up contractors as labour in shoreline response operations, the Korean Government undertook to facilitate cooperation with the experts appointed by the Club and the 1992 Fund, and KMPRC undertook to request the release of the *Hebei Spirit* from arrest.

6.1.2 The Skuld Club also entered into discussions with the Korean Government in order to resolve its concern that Korean courts dealing with the limitation proceedings might not fully take into account payments made by the Skuld Club and that the Club would therefore run the risk of paying compensation in excess of the limitation amount.

6.2 Second Cooperation Agreement

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 amounts up to the shipowner's limit of liability under the 1992 CLC, namely 89.77 million SDR. In return, to ensure that all claimants would receive compensation in full, the Korean Government undertook to pay in full all claims as assessed by the Club and Fund once the 1992 CLC and 1992 Fund Convention limits were reached as well as all amounts awarded by judgements under the 1992 CLC and 1992 Fund Convention in excess of the limit. The Korean Government further undertook to deposit the amount already paid out by the Skuld Club to claimants into court should the Limitation Court order a deposit of the limitation fund.

7 Claims for compensation

As of October 2011, 28 882 claims, representing 128 343 claimants and totalling KRW 2 611 billion, had been registered. Some 20 053 claims had been assessed at a total of KRW 166.6 billion, out of which 16 549 claims had been rejected. The Skuld Club had made payments totalling KRW 142 billion in respect of 2 639 claims, and the remaining claims were being assessed or additional information was being requested from the claimants.

| Category of claim | Claims submitted | Claimed amount (KRW million) | Claims assessed | Assessed amount (KRW million) | Claims paid | Paid amount (KRW million) | Claims rejected |
|-----------------------------------|------------------|---|-----------------|--|--------------|--|-----------------|
| Clean up and preventive measures | 299 | 544 829 | 216 | 97820 | 181 | 89 656 | 28 |
| Property damage | 19 | 2 104 | 14 | 446 | 8 | 401 | 2 |
| Fisheries and mariculture | 10 800 | 1 582 825 | 1 125 | 44695 | 414 | 29 477 | 5 187 |
| Tourism and other economic damage | 17 763 | 478 983 | 2 147 | 23631 | 2 036 | 22 237 | 11 332 |
| Environmental damage | 1 | 2 195 | - | - | - | - | - |
| Total | 28 882 | 2 610 935 (£1 456.9 million) | 3 504 | 166 592 (£93 million) | 2 639 | 141 771 (£79.1 million) | 16 549 |

8 Investigation into the cause of the incident

8.1 Investigation in the Republic of Korea

8.1.1 An investigation into the cause of the incident was initiated soon after the incident by the Incheon District Maritime Safety Tribunal in the Republic of Korea.

8.1.2 In September 2008, in a decision rendered by the Incheon Tribunal, both the two tugs and the *Hebei Spirit* were considered at fault for causing the collision. The Tribunal found that the master and the duty officer of the *Hebei Spirit* were also partly liable for the collision between the crane barge and the *Hebei Spirit*. A number of defendants, including SHI, the masters of the tugboats and the master and duty officer of the *Hebei Spirit* appealed against the decision to the Central Maritime Safety Tribunal.

8.1.3 In December 2008 the Central Maritime Safety Tribunal delivered its decision. The decision of the Central Tribunal was similar to that of the Incheon Tribunal in that the two tugs were found mainly responsible and the master and the duty officer of the *Hebei Spirit* were also found partly liable for the collision between the crane barge and the *Hebei Spirit*.

8.1.4 The owners of the two tugs and the owner of the *Hebei Spirit* appealed to the Supreme Court against the decision of the Central Maritime Safety Tribunal. As of October 2011, the decision of the Supreme Court was still pending.

8.2 Investigation in China

An investigation into the cause of the incident was also carried out by the ship's Flag State administration in China. The investigation found that the decision by the operator of the tugboats and of the crane barge (the Marine Spread), to undertake 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 all 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.

9 Legal proceedings

9.1 Criminal proceedings

9.1.1 In January 2008, the Public Prosecutor of the Seosan Branch of the Daejeon District Court (Seosan Court) brought criminal charges against the masters of the crane barge and the two tugs. The masters of the two tugs were arrested. Criminal proceedings were also brought against the master and chief officer of the *Hebei Spirit* who were not arrested, but were not permitted to leave the Republic of Korea.

9.1.2 In June 2008, the Seosan Court delivered its judgement to the effect that (i) the master of one of the tugboats was sentenced to three years imprisonment and a fine of KRW 2 million; (ii) the master of the other tugboat was sentenced to one year imprisonment; (iii) the owners of the two tugboats (SHI), were sentenced to a fine of KRW 30 million; (iv) the master of the crane barge was found not guilty; and (v) the master and chief officer of the *Hebei Spirit* were also found not guilty.

9.1.3 The Public Prosecutor and the owners of the tugboats appealed against the judgement.

9.1.4 In December 2008, the Criminal Court of Appeal (Daejeon Court) rendered its judgement. In its judgement, the Court reduced the sentence against the masters of the two tugboats. The judgement overturned the non-guilty judgements for the master of the crane barge and the master and chief officer of the *Hebei Spirit*. The owner of the *Hebei Spirit* was also given a fine of KRW 30 million and the master and chief officer of the *Hebei Spirit* were arrested. The *Hebei Spirit* interests appealed to the Supreme Court.

- 9.1.5 In April 2009, the Korean Supreme Court annulled the Court of Appeal's decision to arrest the crew members of the *Hebei Spirit* and they were allowed to leave the Republic of Korea. The Supreme Court, however, upheld the decision to arrest the masters of one of the towing tugs and of the crane barge and confirmed the fines imposed by the Court of Appeal.
- 9.1.6 In June 2009, the master and chief officer of the *Hebei Spirit* were released from arrest and left the Republic of Korea.
- 9.2 Limitation proceedings by the owner of the *Hebei Spirit*
- 9.2.1 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).
- 9.2.2 In February 2009, the Limitation Court rendered an order for the commencement of the limitation proceedings. According to the Limitation Order, the persons who had claims against the owner of the *Hebei Spirit* had to register their claims by 8 May 2009, failing which the claimants would lose their rights against the limitation fund.
- 9.2.3 Also in February 2009 a number of claimants appealed to the Daejeon Court of Appeal against the decision of the Limitation Court to commence limitation proceedings. In July 2009 the appeal was dismissed. A number of claimants appealed to the Supreme Court.
- 9.2.4 In 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.
- 9.2.5 One hundred and twenty-seven thousand four hundred and fifty-nine claims totalling KRW 4 091 billion were submitted to the Limitation Court. In 2009, the Limitation Court indicated that it would not accept further claims. The claimants would, however, still have time to modify the amount of their claim until such time as the Limitation Court would complete the assessment of the claims.
- 9.2.6 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 has scheduled its next hearing for August 2012. The court expert has not yet started to review the evidence.
- 9.3 Limitation proceedings by the bareboat charterer of the *Marine Spread*
- 9.3.1 In December 2008, the bareboat charterer of the *Marine Spread*, SHI, filed a petition requesting the Seoul Central District Court to issue an order granting the right to limit its liability in the amount of 2.2 million SDR.
- 9.3.2 In March 2009, the Limitation Court rendered the order for the commencement of the limitation proceedings. The Court decided to grant SHI the right to limit its liability and set the limitation fund at KRW 5 600 million including legal interest. SHI deposited this amount in court. The Limitation Court also decided that claims against the limitation fund should be registered with the Court by 19 June 2009.
- 9.3.3 In June 2009 a number of claimants appealed to the Seoul Court of Appeal against the decision of the Limitation Court to grant to the bareboat charterer the right to limit its liability. On 20 January 2010, the Court of Appeal dismissed the appeal and confirmed the Limitation Court's decision. The claimants appealed to the Supreme Court. As of October 2011, the appeal was still pending.
- 9.4 Civil proceedings by a clean-up company against the Republic of Korea
- 9.4.1 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, took action 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.

- 9.4.2 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 as reasonable compensation. Both parties appealed against the decision of the Court.
- 9.4.3 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 the proceedings as an interested party and participated in the mediation. At the mediation hearing, the Appeal Court Mediator requested the plaintiff 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 and offered settlement to the claimant in April 2011.
- 9.4.4 The Court held a number of hearings in summer 2011 where an amicable settlement was discussed between the Government and the plaintiff without success.
- 9.4.5 In September 2011, the Court suggested that the plaintiff should receive the amount assessed by the Club and 1992 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.
- 9.5 Civil proceedings by a clean-up company against the Club and the 1992 Fund
- 9.5.1 In November 2010, a contractor who was engaged in clean-up operations after the *Hebei Spirit* incident filed a claim against the owners and insurers of the *Hebei Spirit* and the 1992 Fund in the Seoul Central District Court.
- 9.5.2 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 1992 Fund assessed the claim for the period January to March 2008 at KRW 233 158 549. The Club and the 1992 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.
- 9.5.3 The contractor has claimed in Court for the balance between the amount claimed and assessed, ie KRW 656 268 806. 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.
- 9.5.4 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.
- 9.5.5 The contractor argued that the work carried out after March 2008 was technically reasonable. 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 had 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.

9.6 Civil proceedings by a group of fishermen and sellers of marine products

9.6.1 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 million. It is unclear on what basis this claim has been presented.

9.6.2 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* have been finalised.

9.7 Civil proceedings by the owner of a vessel

9.7.1 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 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.

9.7.2 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.

9.8 Civil proceedings by the owner of an abalone farm

9.8.1 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 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 million, together with interest.

9.8.2 In May 2011, the 1992 Fund's position in Court 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.

9.8.3 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 have been finalised.

9.9 Recourse action against Samsung C&T Corporation (Samsung C&T) and SHI

9.9.1 The owner and insurer of the *Hebei Spirit* commenced a recourse action in January 2009 against Samsung C&T and SHI, the owner and operator/bareboat charterer of the *Marine Spread*, in the Court of Ningbo in the People's Republic of China, combined with an attachment of SHI's shares in shipyards in the People's Republic of China as security.

9.9.2 In January 2009, the Director decided that in order to protect the interests of the 1992 Fund, the Fund should also commence its own recourse action against Samsung C&T and SHI in the Court of Ningbo in the People's Republic of China, combined with an attachment of SHI's shares in the shipyards in the People's Republic of China as security.

- 9.9.3 In January 2009, the Ningbo Maritime Court accepted the two recourse actions filed by the owner/Skuld Club and the 1992 Fund. The total amount claimed in each action is RMB 1 367 million or US\$200 million. The Court also accepted the two applications for attachment of SHI's shares in the shipyards and issued orders accordingly.
- 9.9.4 In relation to the attachment of SHI's shares, the 1992 Fund arranged for the deposit of the required countersecurity, corresponding to 10% of the amount claimed by a letter of undertaking issued by the Skuld Club.
- 9.9.5 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 China at the same time as the owner and the insurer of the *Hebei Spirit*. The Executive Committee also decided that the 1992 Fund should continue the recourse action.
- 9.9.6 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, sharing the costs of the recourse actions and the proceeds of any recovery by court judgement or settlement on a 50/50 basis.
- 9.9.7 Service of proceedings on both Samsung C&T and SHI was effected in September 2009 but 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.
- 9.9.8 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.
- 9.9.9 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.
- 9.9.10 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.
- 9.9.11 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. As of October 2011, the 1992 Fund was awaiting the Court's decision as to whether to hold another reconciliation hearing.

* * *

ANNEX II

RESULTS OF THE TRIAL METHODOLOGY TO ASSESS SMALL-SCALE NON-FISHERIES RELATED CLAIMANTS

1 Introduction

- 1.1 The current policy of the 1992 Fund is that a claimant is entitled to compensation only to the extent that he or she has suffered a quantifiable economic loss and there is a sufficiently close link of causation between the loss and the contamination resulting from the spill, provided that the claimant proves the amount of his or her expense, loss or damage by producing appropriate documents or other evidence (see Claims Manual, December 2008 edition, section 1.5).
- 1.2 During the claim review process following the *Hebei Spirit* incident, it became evident that many tourism and miscellaneous business operators did not record trading levels or any other information required to support their claims for economic loss and would, in normal circumstances, be rejected. Given the high number of small, seasonally trading tourism businesses in the affected area, in October 2009 the Director presented to the 1992 Fund Executive Committee an alternative assessment approach for assessing small-scale non-fisheries claims in case the claimant was not able to prove his/her losses. The Executive Committee endorsed the Director's intention to apply this approach on a trial basis. The results of the trial are described below.

2 Background

- 2.1 Most of the small-scale businesses assessed through the trial methodology were 'minbaks', which are owner-occupied buildings with rooms let to guests on demand. In some cases this would include the owner's own accommodation when necessary. Much, but not all, of this accommodation would be available all year round, but the business tends to be highly seasonal, peaking during the summer season and at specific weekends during the year. An analysis of claims arising from this incident showed that, on average, 'minbaks' generate more than half of their annual revenue during the peak holiday season. In addition, the owners could concentrate on other activities for much of their time. Because this type of accommodation was fairly basic, its upkeep did not require significant efforts. These patterns of seasonality both limited the revenues available and made the business attractive to people seeking a second or even third income.
- 2.2 In the Republic of Korea small businesses generating less than KRW 24 million per annum are not required to file any returns for VAT purposes or to keep accounts and as a result, most keep either very limited or no records of revenues and/or costs. The Club's and the 1992 Fund's experts considered various ways to assess such claims where information was very poor or non-existent, however their efforts have been slowed significantly by the extremely limited number of claimants who have so far submitted sufficient supporting information.
- 2.3 It was noted that the claims by hand gatherers, another group of low revenue producing, individually operated businesses, were being assessed through the application of an interview process and this became the basis for developing a tourism and miscellaneous business review equivalent process.
- 2.4 The review of claims in the tourism sector allowed the experts to create a pool of claims with reliable information. This pool, which at the beginning of the trial included 274 accommodation claims, contained information generated from the analysis of individual, verifiable business log books and was continually updated and expanded as further claims were reviewed. The information included 241 'minbak' rooms.

2.5 As a result of visiting a series of small businesses and the need to discuss their markets and businesses in detail with operators who have been running their businesses for some years, the experts gained additional knowledge of micro-niches and social trends which enabled a better understanding of some market issues. The direct contact with tourism business operators, rather than their professional representatives, also enhanced this improved understanding of the impact of the incident and trading trends over time in the affected area. The market intelligence gathered from these contacts was also applied to the reviews of larger businesses in the affected area.

3 Assessment methodology

3.1 The review process for businesses with revenue of less than KRW 24 million was based on the following methodology:

- **Pre-visit review:** An outline trading pattern was established through the review of data from a pool of similar businesses that did record monthly revenue levels both before and during the claim period. This pattern showed the trading seasonality of tourism businesses and indicated an optimum level of revenue for an average room.
- **Visit review process:** Each claimant business which was considered to have annual revenue below the KRW 24 million threshold was then visited and the claimants were interviewed to ensure the admissibility of the claim and to gain sufficient information to enable a review of the likely level of economic loss. That included, *inter alia*, questions on and direct observations of the location of the business relative to the affected resource and its accessibility/visibility to tourism-related resources, the available trading capacity, quality of the product offered and tariff levels. Once this information had been gathered the claimant was asked to estimate their revenue during the previous year and their response was measured against an initial assessment based on the above information.
- **Estimate of economic loss:** The claimant was then asked to estimate the level of revenue earned during the claim period or the ratio of loss. Their statement was then tested against the 'standard' trading pattern and the answers received in response to earlier questions. Where the response indicated a level either lower or higher than that expected, further enquiry was made to better understand the true position. Other factors considered or queried at this stage included
 - The type of business operated by the claimant and the impact of any external factors on that type of business. For example, in the course of the investigations on the business trading patterns, it was found that old style 'minbaks' were suffering a general trading decline caused by changing social trends in Republic of Korea;
 - Changes in the local competitive market caused by substantial development of new accommodation businesses in some areas;
 - The location of the claimant's business relative to the coast or other main demand generators. It was noted that losses were higher in businesses that could be regarded as having a peripheral location;
 - Tariff changes and the use of discounting;
 - Changes in marketing and promotional activity;
 - Visitor stay motivations; and
 - Previous trading trends.
- An assessment was then carried out based on the visit and the information obtained during the interview.

3.2 A total of 1 472 claimant businesses were visited under this element of the claim review process. A summary of the claim visit outcomes is shown in the table below.

| Claim visit summary | | |
|--|---------------|---------------|
| Business revenue less than KRW 24 million | Claims | Ratio |
| Claims assessed at more than 0 | 605 | 41.10% |
| Lack of licence | 302 | 20.52% |
| Documentation available | 30 | 2.04% |
| Inadmissible | 87 | 5.91% |
| Total under KRW 24 million claims | 1 024 | 69.57% |
| Found to trade over KRW 24 million | 448 | 30.43% |
| Total claims visited | 1 472 | 100% |

- 3.3 In the table above, 'inadmissible' claims include businesses that did not suffer losses and others that could not prove they had traded during the claim period. The category 'documentation available' relates to businesses where sufficient trading data was found to be available and which were therefore assessed with the normal assessment process. The claims found to be trading at over KRW 24 million were also assessed based on the normal assessment process.
- 3.4 As shown above, just over one third of business visits led to a positive claim assessment. The table below shows an analysis of the claims with a positive assessment:

| Summary of positively assessed claims | | | |
|--|---------------|-----------------------------|------------------------------|
| Sector | Claims | Claimed amount (KRW) | Assessed amount (KRW) |
| Accommodation | 566 | 4 110 993 812 | 2 206 537 332 |
| Restaurant | 3 | 41 536 163 | 18 120 443 |
| Retail | 14 | 105 616 619 | 16 552 559 |
| Other | 22 | 113 333 423 | 80 049 703 |
| Total | 605 | 4 371 480 017 | 2 321 260 037 |

- 3.5 A total of 93.6% of all admissible claims under KRW 24 million which were assessed positively were presented by accommodation businesses. The main, although not only, reason for this is that restaurants and retail operations trade on high levels of variable costs. As a result, an annual revenue of less than KRW 24 million generates low levels of profit for non-accommodation businesses, resulting in few such enterprises meeting the under KRW 24 million trading criteria.

4 Conclusions

- 4.1 The assessment methodology is based on the assumption that, unlike the normal admissibility criteria, the claimants are not in a position to prove their losses and it therefore is heavily dependent on direct observation of the business, and on a sufficiently large pool of reliable information against which to assess the results of the direct observation. It is therefore important that the methodology includes ways to identify situations when claimants under-report their revenues in the belief that it would exonerate them from the duty to provide proof in support of their claim.
- 4.2 So far, the adoption of this methodology led to the assessment of claims from 605 businesses that would otherwise have been rejected due the non-requirement of trading information by the local tax system. The existence of a minimum trading level prior to the payment of business tax is not confined to the Republic of Korea and therefore this methodology may be used in other cases.
- 4.3 The success of this approach is also dependent on the availability of tourism professionals who understand how small tourism businesses work, have a background in tourism financial assessment and are able to interpret the comments made by operators into financial estimates.

- 4.4 Because of the small size of the businesses surveyed and the scattered nature of the claims, this methodology itself proved also to be fairly time-consuming, with an estimated 2 500 man hours in total spent on preparing the assessments for the businesses covered by the trial. A fair proportion of this time was spent travelling to the location of the businesses, which meant that, on islands and in other areas where there was a cluster of similar businesses, the cost per review was considerably lower.
- 4.5 Therefore, the applicability of such a practice in future incidents would be dependent upon a number of considerations, including but not limited to, the location of the claimants, the availability of expert professionals to conduct the assessments and the cost and duration of the assessment process.
-