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ABSTRACT

This paper provides an update on the *Hebei Spirit* incident which took place in 2007 in the Republic of Korea and which has continued to provide one of the biggest challenges yet faced by the 1992 Fund. A total of some 375 kilometres of shoreline in the Taean peninsula and in the nearby islands, were polluted when, as a result of a collision, 10 900 tonnes of oil escaped into the sea. As of October 2011, claims for losses suffered by some 128 000 individuals had been submitted, mainly from the Korean fishing sector. The paper also provides an update on the situation in respect of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as amended by the 2010 HNS Protocol (2010 HNS Protocol). Although this Convention has not yet entered into force, the Secretariat of the International Oil Pollution Compensation Fund, 1992 (1992 Fund) is carrying out tasks necessary for the setting up of the HNS Fund. Information is also provided in relation to the intersessional Working Group on large number of claims for small amounts and funding of interim payments which will hold its third meeting in April 2012 and on the intersessional Working Group on the definition of 'ship' which will meet for the first time in April 2012.

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HEBEI SPIRIT INCIDENT

Background

The *Hebei Spirit* incident of 2007 in the Republic of Korea has continued to provide one of the biggest challenges yet faced by the 1992 Fund. The Hong Kong flag tanker *Hebei Spirit* (146 848 GT) was struck by the crane barge Samsung Nº1 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 Nº5 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. The *Hebei Spirit* was laden with about 209 000 tonnes of four different crude oils... As a result of the collision a total of 10 900 tonnes of oil escaped into the sea.

A total of some 375 kilometres of 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, were polluted. This coast hosts a large number of mariculture facilities, including several thousand hectares of seaweed cultivation and it is also an important area for shellfish cultivation and for large-scale hatchery production facilities. 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 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. The total amount available for compensation under the 1992 CLC and the 1992 Fund Convention is 203 million SDR or some US$ 315million at today's exchange rate.

The 1992 Fund and the insurer of the ship (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.

As of October 2011, claims for losses suffered by some 128 000 individuals had been submitted, mainly from the Korean fishing sector. Compensation totalling US$ 133 million has been paid to date.

In June 2008 the Korean Government decided to 'stand last in the queue' in respect of compensation for clean-up costs and other expenses incurred by the central and local governments. The claims corresponded to some 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.

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.

A number of civil proceedings are in court.

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

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

Samsung C&T and SHI 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 Ningbo Maritime Court rejected the objections of Samsung C&T and SHI to its jurisdiction in both actions. However, Samsung C&T and SHI appealed against the decision and in February 2011, the Court of Appeal held that the Ningbo Maritime Court was a *'forum non-conveniens'* and that a Korean court would be the appropriate jurisdiction to consider the case.

In March 2011 the 1992 Fund lodged an application for a retrial with the Supreme Court in Beijing and the Supreme Court agreed to hear the applications and ordered an adjournment of any application to set aside the attachment order, pending the hearing of the application for a retrial.

The Supreme Court started a reconciliation process with the parties, with the aim of exploring a possible settlement of the dispute and the 1992 Fund Secretariat participated in the first reconciliation meeting.

In a judgement rendered in late 2011 the Supreme Court held that, although Chinese Courts had jurisdiction in respect of the recourse action brought by the 1992 Fund, they had decided not to exercise jurisdiction in respect of this action.

In December 2011, the owner and insurer of the Hebei Spirit and Samsung C&T and SHI reached an agreement and the recourse action brought in the People's Republic of China and other legal actions between the parties were discontinued. Details of the agreement are confidential.

THE HNS CONVENTION

The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as amended by the 2010 HNS Protocol (2010 HNS Protocol), aims to provide compensation for damage to persons and property, costs of clean up and reinstatement measures and economic losses resulting from the maritime transport of hazardous and noxious substances, such as chemicals. The 2010 HNS Protocol will enter into force 18 months after the date on which it is ratified by at least twelve States, including four States each with not less than 2 million units of gross tonnage, and having received during the preceding calendar year a total quantity of at least 40 million tonnes of cargo that would be contributing to the general account. To date,

eight States have signed the 2010 HNS Protocol, subject to ratification (Canada, Denmark, France, Germany, Greece, the Netherlands, Norway and Turkey). These eight States alone have the necessary tonnage for the entry into force of the Convention.

The Director of the IOPC Funds has been requested to carry out the tasks necessary for the setting up of the HNS Fund and to make preparations for the first session of the HNS Assembly. To this end, the 1992 Fund Secretariat has established a website to facilitate the implementation of the Convention (www.hnsconvention.org) as well as a list of all hazardous and noxious substances as defined by the 2010 HNS Protocol (the HNS Finder). The HNS Finder provides information on HNS classification criteria and whether or not a substance qualifies as contributing cargo.

INTERSESSIONAL WORKING GROUP ON LARGE NUMBER OF CLAIMS FOR SMALL AMOUNTS AND FUNDING OF INTERIM PAYMENTS

In October 2009 the 1992 Fund 6th intersessional Working Group was established to consider the procedures for the assessment of large numbers of claims for relatively small amounts, in particular where claimants could not prove their losses, and also the question of the funding of interim payments to claimants. This Working Group, which has met three times, is continuing its work and will hold its next meeting in April 2012.

On the question of interim payments specifically, the Working Group has established a Consultation Group to consider two main questions: firstly, whether the insurer when making payments is doing so on behalf of both parties, itself and the IOPC Funds; and, secondly, whether Member States should be asked to ensure that their national law gives full effect to subrogation rights acquired by the insurer when it makes interim payments in order to avoid double payment. The Consultation Group will return to the Working Group with a proposal at its next meeting in April 2012 and it will be for the Working Group to consider the matter further and make any relevant decisions.

INTERSESSIONAL WORKING GROUP ON DEFINITION OF 'SHIP'

In October 2010 the Director was instructed by the 1992 Fund Assembly to provide a legal analysis of the extent to which the interpretation of the definition of 'ship' within Article I.1 of the 1992 Civil Liability Convention might include floating storage units.

Following discussions on the issue at its October 2011 session, the 1992 Fund Assembly decided to establish a Working Group to consider the following issues:

(a) whether floating storage and offloading units (FSOs) and FSUs fall within the definition of 'ship' under Article I.1 of the 1992 CLC;

(b) whether one year is a reasonable time period to allow for a vessel to remain at anchor prior to resuming its carrying voyage and still qualify as a 'ship' under

Article I.1 of the 1992 CLC and whether the decision should be made in the light of the particular circumstances of the case;

(c) whether the 1992 Fund Assembly should confirm its decision, taken in October 2006, that oil discharged into 'permanently or semi-permanently' anchored vessels engaged in STS oil transfer operations should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention;

(d) whether the 1992 Fund Assembly should decide that, since the 'mother' vessels described in the paper submitted by Denmark to the October 2010 session of the Assembly were not 'permanently or semi-permanently' at anchor, the oil onboard them qualified as 'received' contributory oil for the purposes of Article 10 of the 1992 Fund Convention; and

(e) whether one year is a reasonable time period beyond which a vessel should be considered 'permanently or semi-permanently' at anchor, and therefore whether oil received in such vessels should qualify as contributing oil for the purposes of Article 10.1 of the 1992 Fund Convention and whether the decision should be made in the light of the particular circumstances of the case.

The Working Group will meet for the first time in April 2012.