INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

ASSEMBLY
2nd session
Agenda item 17

92FUND/A.2/15
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INCIDENTS INVOLVING THE 1992 FUND

Note by the Director

1 Introduction

There are three incidents which will or may involve the 1992 Fund, as set out below.

2 Incident in Germany

(Germany, 20 June 1996)

The incident

2.1 On 20 June 1996 crude oil was found to have polluted a number of German islands close to the border with Denmark in the North Sea. According to the German authorities, computer simulations of currents and wind movements indicated that the oil had been discharged between 12 and 18 June approximately 60 - 100 nautical miles north-west of the Isle of Sylt. The German authorities started clean-up operations at sea and on shore on 21 June 1996. Some 2 130 tonnes of oil and sand mixture were removed from the beaches. The cost of these operations has been indicated at some DM2.6 million (£900 000).

2.2 The 1992 Fund was notified of this incident by telephone on 3 July 1996, by which time the clean-up operations were almost completed, and on 17 July 1996 by letter from the German Federal Ministry of Transport.

2.3 The German Federal Maritime and Hydrographic Agency took samples of the oil that was washed ashore. Chemical analysis indicated that the oil was Libyan crude.

2.4 The German authorities informed the 1992 Fund that the incident might have resulted in losses for the fishing and tourism industries in the affected area.

Liability for pollution damage

2.5 Investigations by the German authorities revealed that the Russian tanker *Kuzbass* (88 692 GRT) had discharged Libyan crude in the port of Wilhelmshaven on 11 June 1996. Analysis of oil samples taken from the ship matched the results of the analysis of samples taken from the polluted coastline. Comparisons with chemical analytical data on North Sea crude oils showed that the pollution was not caused by crude oil from North Sea platforms.

2.6 The German authorities approached the owner of the *Kuzbass* and requested that he should accept responsibility for the oil pollution. They stated that, failing this, the authorities would take legal action against him.

2.7 The *Kuzbass* is entered in The West of England Ship Owners' Mutual Insurance Association (Luxembourg).

2.8 The German authorities' notification of 17 July 1996 was addressed to the 1992 Fund. It appears that the authorities maintain that the ship from which the oil originated was an unladen tanker. The definition of "ship" in Article I.1 of the 1992 Civil Liability Convention covers also unladen tankers, and so does by reference the definition of ship in the 1992 Fund Convention. Article I.1 of the 1992 Civil Liability Convention reads:

> 'Ship' means any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

2.9 As stated above, the German authorities intend to claim compensation from the owner of the *Kuzbass* for the cost of the clean-up operations. The limitation amount applicable to the *Kuzbass* is estimated at approximately 38 million Special Drawing Rights (SDR) (£33 million). The German authorities have stated, however, that if these attempts were to be unsuccessful, they would claim against the 1992 Fund.

2.10 If the German authorities were to pursue a claim against the 1992 Fund, the question arises of whether they have proved that the damage resulted from an incident involving one or more ships. This issue will have to be examined, on the basis of all evidence submitted, in the light of the definition of "ship" contained in the 1992 Civil Liability Convention.

2.11 The Director understands that the German authorities are taking steps to bring legal action against the owner of the *Kuzbass* and his insurer and that the German authorities intend to notify the 1992 Fund of this action.

3 *Nakhodka* incident
(Japan, 2 January 1997)

3.1 A document has been presented to the Executive Committee of the 1971 Fund containing a detailed presentation of the various aspects of the *Nakhodka* incident (document 71FUND/EXC.55/8). This document is reproduced at Annex I.

3.2 In the Director's view, the document presented to the 1971 Fund Executive Committee is sufficient to form a basis for the 1992 Fund Assembly's consideration of the incident with the additional points set out below.

Level of 1992 Fund's payments

3.3 It will be recalled that the 1971 Fund Executive Committee and the 1992 Fund Assembly decided to limit the payments to be made by the two Organisations to 60% of the amount of the damage actually suffered by the respective claimants as assessed by the experts employed by the Funds and the shipowner and his insurer at the time when the payment is made (documents 71FUND/EXC.54/10, paragraph 3.4.4 and 92FUND/A/ES.2/6, paragraph 3.1.16).

3.4 The 1971 Fund Executive Committee has been invited to review the level of compensation. The 1992 Fund Assembly is also invited to make such a review. In the light of the uncertainty as to the level of the total amount of the claims arising from the *Nakhodka* incident, the Director is unable to recommend an increase of the 60% limit fixed by the 1971 Fund Executive Committee and the 1992 Fund Assembly (cf document 71FUND/EXC.55/8, paragraph 10).

Maximum amount payable under the 1992 Fund Convention

3.5 Under Article 4.4(a) of the 1992 Fund Convention, the maximum amount of compensation payable in respect of the *Nakhodka* incident is 135 million SDR, including any amount paid by the shipowner and his insurer under the 1969 Civil Liability Convention and by the 1971 Fund under the 1971 Fund Convention.

3.6 The question arises as to how the amount of 135 million SDR should be converted into national currency, ie Japanese Yen. This issue is governed by Article 4.4(e) of the 1992 Fund Convention, which reads:

> The amounts mentioned in this Article shall be converted into national currency on the basis of the value of that currency by reference to the Special Drawing Right on the date of the decision of the Assembly of the Fund as to the first date of payment of compensation.

3.7 At its 2nd extraordinary session, held on 16 and 17 April 1997, the 1992 Fund Assembly authorised the Director to make payments on behalf of the 1992 Fund in respect of claims arising out of the *Nakhodka* incident within the 60% limit referred to above (document 92FUND/A/ES.2/6 paragraph 3.1.16). The Assembly noted a statement by the Director that, in his view, the 1971 Fund should pay 60% of the damage suffered by each claimant up to a total amount of 60 million SDR, before the 1992 Fund commenced payments of compensation (document 92FUND/A/ES.2/6, paragraph 3.1.13). There were no views expressed to the contrary.

3.8 The limit of the 1971 Fund's involvement, ie 60 million SDR, is to be converted into national currency on the basis of the rate of exchange applicable on the date when the shipowner constitutes the limitation fund (Article 1.4 of the 1971 Fund Convention by reference to Article V.9 of the 1969 Civil Liability Convention). The limitation fund has not yet been established. It is not possible, therefore, to determine at this stage at what precise level the 1992 Fund will commence making payments.

3.9 As set out above, under Article 4.4(e) of the 1992 Fund Convention the conversion of 135 million SDR into Japanese Yen should be made at the rate of exchange applicable on the date of the decision of the 1992 Fund Assembly as to the first date of payment of compensation. The Assembly authorised the Director to make payments on behalf of the 1992 Fund, but it did not - and could not at that time - take any decision as to the date of the first payment. Since it is difficult for the Assembly to determine the date of the first payment, the Director proposes that the Assembly should decide that the conversion should be made on the basis of the value of the Yen vis-à-vis the SDR on the date when the Assembly authorised the Director to make the first payment of compensation on behalf of the 1992 Fund, namely 16 April 1997. The rate of exchange at that date (1 SDR = ¥172.442) would result in 135 million SDR = ¥23 279 670 000 (£114 million).

4 *Osung N°3* incident
(Republic of Korea, 1997)

4.1 The *Osung N°3* incident has been dealt with in detail in a document presented to the 1971 Fund Executive Committee (document 71FUND/EXC.55/10). This document, which is reproduced at Annex II, should form a sufficient basis for the Assembly's consideration of the incident, except on the points dealt with in paragraphs 4.2 to 4.7 below.

4.2 At the time of the *Osung N°3* incident, the Republic of Korea was not Party to the 1992 Civil Liability Convention or to the 1992 Fund Convention. The amount available for compensation for pollution damage in Korea is therefore to be determined pursuant to the 1969 Civil Liability Convention and the 1971 Fund Convention, ie 60 million SDR (approximately £50 million).

4.3 At the time of the incident, Japan was Party to the 1992 Conventions (as well as to the 1969 and 1971 Conventions) and the maximum amount available for damage in Japan is therefore to be determined in accordance with the 1992 Conventions, ie 135 million SDR (£112 million), including any payments made to Korean and Japanese claimants under the 1969 Civil Liability Convention and the 1971 Fund Convention. If the total amount of the claims arising out of the incident for damage in the Republic of Korea and Japan were to exceed 60 million SDR and payment under the 1971 Fund Convention had to be pro rated, the Japanese claimants would be entitled to additional compensation under the 1992 Fund Convention.

4.4 The level of payments for the 1971 Fund was considered by the 1971 Fund Executive Committee at its 54th session. In view of the great uncertainty resulting from the fact that a significant quantity of oil remained in the wreck, representing a serious pollution risk, the Committee shared the Director's view that it was not possible to make any reasonable estimate as to the total amount of the claims arising out of the *Osung N°3* incident. The Committee considered that it was necessary to strike a balance between the need to exercise caution in payment of claims and the importance of the 1971 Fund being able to make payments at an early stage, noting that the limitation amount applicable to the *Osung N°3* was very low. The Committee therefore decided that, for the time being, the Director was authorised to make payments of 25% of the damage or loss actually suffered by each claimant, as assessed by the experts of the 1971 Fund at the time the payment was made (document 71FUND/EXC.54/10, paragraph 3.5.7).

4.5 It is estimated that the claims for damage in Japan arising out of the incident will total ¥1 300 million (£6.7 million).

4.6 As set out above, the 1971 Fund Executive Committee has decided that the 1971 Fund's payments should for the time being be limited to 25% of the established damage suffered by each claimant. In this situation, the Assembly may wish to consider whether the 1992 Fund should pay claimants in Japan the balance of 75%, and then present subrogated claims against the 1971 Fund if and when the 1971 Fund's payments are increased beyond the 25% limit. The reason for the 1992 Fund intervening at this stage would be that a State for which the 1992 Fund has entered into force has thereby ensured that victims of oil pollution damage in that State have the benefit of a higher maximum amount of compensation than that provided by the 1971 Fund Convention.

4.7 It should be noted that the Assembly's decision on this issue will have consequences for the levying of contributions to the General Fund, as set out in the document on the assessment of contributions (document 92FUND/A.2/26, paragraphs 2.3.6 and 2.3.7).

5 Action to be taken by the Assembly

The Assembly is invited:

(a) to take note of the information contained in this document;

(b) as regards the *Nakhodka* incident:

(i) to review the level of the 1992 Fund's payment of claims (paragraph 3.4);

(ii) to consider the date to be used for the conversion into Japanese Yen of the maximum amount of compensation payable under the 1992 Fund Convention (paragraph 3.9);

(c) as regards the *Osung N°3* incident, to consider whether the 1992 Fund should pay the balance of the established claims relating to damage in Japan and then present subrogated claims against the 1971 Fund (paragraph 4.6); and

(d) to give the Director such instructions in respect of the handling of the incidents dealt with in this document and of claims arising therefrom as the Assembly may consider appropriate.

* * *

ANNEX I

EXECUTIVE COMMITTEE
55th session
Agenda item 3

71FUND/EXC.55/8
26 September 1997

Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

NAKHODKA

Note by the Director

1 Introduction

1.1 On 2 January 1997 the Russian tanker *Nakhodka* (13 159 GRT), proceeding from Shanghai (China) to Petropavlovsk (Russian Federation) with a cargo of 19 000 tonnes of medium fuel oil, broke up in heavy seas some 100 kilometres north-east of the Oki Islands in the Sea of Japan.

1.2 The tanker broke into two sections, resulting in a spill of some 6 200 tonnes of oil. The stern section sank soon after the incident and now lies at a depth of 2 500 metres with an estimated 10 000 tonnes of cargo on board.

1.3 The upturned bow section, which may have contained up to 2 800 tonnes of cargo, drifted towards the coast, leaking oil at a slow rate. Attempts to secure a line to the bow were unsuccessful, due to the severe weather conditions and the lack of suitable attachment points. On 7 January, the bow section grounded on rocks some 200 metres from the shore, near the town of Mikuni in Fukui Prefecture. Following the grounding of the bow section, a substantial quantity of oil was released, causing heavy contamination of the adjacent shoreline.

2 Stern section

2.1 The stern section is lying at a depth of 2 500 metres, some 140 kilometres from the nearest coast. It continues to leak at a low rate, estimated by MSA at between 1 and 5 m^3 per day. Observations at the surface show that under the current weather conditions the oil released dissipates within two kilometres of reaching the surface, and the released oil is not considered to be a significant threat to coastal resources.

2.2 An investigation by a deep-sea unmanned submarine has shown that the oil is leaking from two tanks which together contained some 2 480 m³. A committee set up by the Japanese Government to consider options available for preventing further release of oil from the sunken stern section has concluded that current technology does not offer any practicable methods to prevent such release. Since the release does not pose a significant threat of pollution, the Committee has not proposed any immediate action in respect of the stern section other than the continued monitoring of the oil reaching the surface.

3 Removal of oil from bow section

3.1 A Japanese salvage company was contracted by the shipowner to remove the remaining oil from the bow section prior to its being taken away, but the operations were hampered by adverse swell and weather conditions. The Japanese authorities took over this operation on 14 January 1997, using the services of two Japanese salvage companies, while simultaneously ordering the construction of a temporary causeway to the grounded bow section. This causeway was intended to allow road tankers to be brought close to the wreck, thereby facilitating the removal of the oil, if it should prove impossible to do so from the sea.

3.2 The operation to remove the oil from the bow section was completed on 25 February 1997. In total some 2 830m³ of oil/water mixture was removed.

3.3 The causeway extended 175 metres from the shore. A large crane was assembled at its seaward end with a sufficiently long arm to reach the bow section. The causeway and crane were not used in the removal of the majority of the oil from the bow section, but only to remove the last 380m³ of oil/water mixture. Since May 1997 the causeway has been progressively dismantled and the construction material removed from the site.

3.4 In May 1997, a Japanese salvage company engaged by the shipowner removed the bow section on to a barge and transported it to a shipyard in Hiroshima Prefecture for scrapping.

4 Clean-up operations

4.1 Although much of the oil which was lost when the ship broke up dispersed naturally at sea, patches of heavily emulsified oil, ranging in size from one to 100 metres in diameter, drifted towards the coast. Several hundred tonnes of emulsion stranded at various locations over a distance of more than 1 000 kilometres covering ten prefectures. The most severely affected shorelines were those in the immediate vicinity of the bow section, extending 20 kilometres to the north, and those along the north coast of the Noto peninsula. The coast of Hyogo, Kyoto and Niigata prefectures were also heavily contaminated.

4.2 The 1971 and 1992 Funds and the shipowner's P & I insurer, the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club), engaged the International Tanker Owners Pollution Federation Ltd (ITOPF) to monitor the clean-up operations. The Funds and the Club also engaged General Marine Surveyors & Co Ltd (GMS), a Japanese surveying company which had previously provided expertise for the 1971 Fund in Japanese oil spills and which has considerable experience of pollution incidents in Japan. The Japanese lawyer representing the 1971 and 1992 Funds monitored the operations.

4.3 A contract was signed on behalf of the shipowner with the Japan Marine Disaster Prevention Centre (JMDPC) to organise the clean-up operations by using commercial clean-up contractors. In addition, the Petroleum Association of Japan provided coastal booms, skimmers, portable storage tanks and a number of trained operators. The equipment provided was used to protect sensitive areas and to recover floating oil. Several ships and tugs were mobilised to collect viscous emulsions.

4.4 A considerable number of vessels, belonging to the Maritime Safety Agency of Japan (MSA) and the Japan Self Defence Force, were engaged in oil recovery operations, using manual and mechanical means. Prefecture governments within the affected area also mobilised their own vessels and chartered

others to collect oil from the sea. Helicopters from MSA and from private companies were used to spray dispersants at sea, primarily to deal with floating oil escaping from the bow section. In addition, several hundred fishing boats from eight prefectures were mobilised to collect oil at sea.

4.5 Since there was a risk that the bow section would break up before the oil could be removed, ITOPF recommended that the local offshore response capability should be supplemented with equipment from the East Asia Response Ltd (EARL) stockpile in Singapore. Two recovery systems were provided by EARL. One unit was installed on a salvage tug and the other on a supply vessel.

4.6 In response to a request for assistance by the Japanese Government, the Russian Ministry of Merchant Marine dispatched an offshore supply vessel, two tugs equipped with oil recovery systems and a barge. The vessels were used to supplement MSA's offshore clean-up response.

4.7 Onshore clean-up was carried out by manual and mechanical methods, and the bulk of the stranded oil had been removed from polluted beaches by mid February. Several large pits were excavated to provide temporary storage for the large volumes of oil, water and sand which were recovered as a result of these operations.

4.8 Some 500 000 man days were used in the onshore clean-up operations in the five prefectures which were most severely affected. About half of the work was carried out by volunteers from all over Japan. The remainder of the workforce comprised fishermen, local residents, municipal workers, fire brigades and the Self Defence Force.

4.9 By 30 May 1997 all prefectures affected by the spill had made public declarations that the clean-up operation in the respective prefecture had been completed.

4.10 Operations are now concentrated on final clean-up. In various locations, including the site of one fish farm, viscous oil emulsions are being removed from the base of tetrapods used along the affected shorelines as sea defences.

4.11 Clean-up operations both at sea and on the shoreline have generated considerable quantities of oily waste. Much of the collected waste was contained in over 100 000 drums, but some material was stored in bulk. The total quantity of waste is estimated at 40 000 tonnes. This waste has been transported to disposal facilities throughout Japan by ship, rail and road. Lightly oiled sand has been buried at local industrial land fill sites.

5 Impact on fishing, tourism and other industries

5.1 Several national parks are located within the affected area, and tourism is an important industry. Tourists visit this coast throughout the year, not only for its natural beauty, spas and temples, but also to eat crabs which are caught in deep water off-shore.

5.2 There are important mariculture activities in the affected area, including oyster, fish and seaweed cultivation in sheltered bays and inlets. Throughout the affected area there are many large complex set nets, some of which have been contaminated. Where practicable, booms were used extensively throughout the affected area to protect mariculture facilities and nets, and their deployment was largely successful. However, one fish farm with indoor tanks for rearing flatfish has been severely affected by oil entering sea water suction pipes.

5.3 On rocky shores throughout the affected area naturally occurring seaweed is harvested for human consumption, both commercially and for domestic use. One such seaweed, *iwa nori*, grows on concrete platforms constructed amongst rocky outcrops and is usually harvested from December to February. Following the spill, harvesting of this seaweed was abandoned for the season.

5.4 The sea water used to supply an aquarium near Mikuni was contaminated. The owner of the aquarium therefore moved 14 dolphins to other locations in Japan. The dolphins were later returned to the aquarium.

5.5 In the affected area there are seven nuclear power stations and several oil fired stations which depend on sea water for their cooling systems. The sea water intakes of these installations were successfully protected by booms.

6 Claims handling

6.1 The 1971 and 1992 Funds, the shipowner and the UK Club have established jointly a Claims Handling Office in Kobe, managed by GMS. At present, the office has a staff of six surveyors and six secretaries. The claims handling is being monitored by the Funds' Japanese lawyer.

6.2 At regular intervals the staff of the Claims Handling Office visit the ten prefectures which comprise the affected area, so as to enable claimants and their representatives to discuss the claims with the staff.

6.3 The technical examination of the claims is being carried out by the staff of the Claims Handling Office in close co-operation with the staff of ITOPF. Experts are engaged for the assessment of claims in certain specialised fields, as required.

7 Claims for compensation

7.1 As at 26 September 1997, claims totalling ¥31 564 million (£162 million)<1> had been received by the Claims Handling Office.

7.2 Claims for loss of income suffered by fishermen have been presented for ¥5 168 million (£27 million).

7.3 A claim by a contractor participating in the clean-up operation was settled at ¥15 462 270 (£80 000). A payment of 60% of the settlement amount, ¥9 277 362 (£48 600), was made by the 1971 Fund in May 1997.

7.4 Claims from contractors engaged in clean-up operations under the JMDPC umbrella have been submitted for ¥8 755 940 446 (£45 million). These claims include the costs of the disposal of oily waste. Claims by four of these contractors, totalling ¥773 722 514 (£4.0 million), have been subject to a preliminary assessment. On the basis of this assessment, the Director made a provisional payment on 26 September 1997 of ¥395 400 000 (£2.0 million), representing 60% of the minimum admissible amount assessed by the experts. Further claims from contractors for ¥7 982 217 932 (£41 million) are being examined.

7.5 A claim has been received from JMDPC for the participation in clean-up operations of members of the National Fishery Federation, representing nine Prefecture fishery co-operative associations with some 68 000 members. The claim totals ¥2 312 043 456 (£11.9 million) and relates to the fishermen's involvement in the clean-up operations for the period up to the end of February 1997. After a preliminary examination of this claim, the Director made a provisional payment on 30 April 1997 of ¥541 018 169 (£2.8 million). JMDPC has presented a further claim for ¥22 328 410 (£115 000) relating to participation of fishermen in clean-up operations, and this claim is being examined.

7.6 JMDP has claimed compensation for ¥1 131 million (£5.8 million) relating to the costs of the construction of the causeway referred to in paragraph 3.1 and for ¥1 190 million (£6 million) relating to the costs of the removal of oil from the bow section.

<1> In this document, conversion of the Yen has been made on the basis of the rate of exchange as at 12 September 1997, ie ¥194.343:£1.

7.7 The Government of Japan has made funds available to JMDPC enabling the latter to pay those who participated in the clean-up operations, pending payments from the shipowner/UK Club and the 1971/1992 Funds.

7.8 The Japanese Government has claimed for additional costs incurred by MSA for aerial surveillance and off-shore clean-up operations, by the Self Defence Force for aerial surveillance, off-shore clean-up operations and assistance in removal of the oil from the shoreline, and by the Department of Transport for the costs of clean-up operations. These claims total ¥1 524 million (£7.9 million).

7.9 Ten prefectures have submitted claims for costs incurred in the clean-up operations which together amount to some ¥5 621 million (£29 million).

7.10 A claim for ¥6 661 879 (£34 300) has been submitted in respect of contamination of the aquarium referred to in paragraph 5.4.

7.11 Claims have been received from 335 operators in the tourism sector. These claims total ¥2 874 million (£14.8 million).

7.12 Six claims have been received from electricity companies, totalling ¥2 943 million (£15.2 million). These claims relate to the costs of clean-up and preventive measures in respect of their power stations.

7.13 A claim by EARL for the provision of the recovery systems referred to in paragraph 4.5 was settled at US$542 593 (£337 000). The settled amount was paid in full by the shipowner.

7.14 A claim by the Russian authorities for the cost of the participation of two of the vessels referred to in paragraph 4.6 under contract with the shipowner was settled at US$ 325 000 (£202 000). The settled amount was paid in full by the shipowner.

7.15 Further claims are expected. The shipowner is expected to claim for the cost of contracting a salvor to attempt to tow the bow section before it grounded. Claims will also be presented by the shipowner for costs prior to and during the bow lifting operations. Claims may be submitted for the costs incurred by the Japanese authorities for the removal of the causeway. Further claims will be presented for loss of income in the fishing and aquaculture industries. There may also be some further claims by businesses in the tourism industry in the area.

8 Previous consideration by the Executive Committee at its 52nd, 53rd and 54th sessions and by the 1971 Fund Assembly

8.1 Applicability of the Conventions

8.1.1 The 1992 Protocols entered into force in respect of Japan on 30 May 1996. The 1992 Civil Liability Convention and the 1992 Fund Convention are therefore in principle applicable to this incident.

8.1.2 The *Nakhodka* was registered in the Russian Federation which is Party to the 1969 Civil Liability Convention and the 1971 Fund Convention but not to the 1992 Protocols. At its 52nd session, the Executive Committee endorsed the Director's view that, as a result, the shipowner's right of limitation should be governed by the 1969 Civil Liability Convention, to which both Japan and the Russian Federation were Parties on the date of the incident. The Committee confirmed that, in the event that the total amount of the accepted claims were to exceed the maximum amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention (60 million SDR), compensation would be available as follows (document 71FUND/EXC.52/11, paragraph 3.7.5):

	SDR
Shipowner under the 1969 Civil Liability Convention	1 588 000
1971 Fund	58 412 000
Shipowner under the 1992 Civil Liability Convention	0
1992 Fund, in excess of 60 million SDR	75 000 000
Total compensation available	135 000 000

8.2 Director's authority to settle claims

8.2.1 At its 52nd session, the Executive Committee authorised the Director to make final settlements on behalf of the 1971 Fund of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee (document 71FUND/EXC.52/11, paragraph 3.7.7).

8.2.2 The Committee expressed the view that the 1971 Fund and the 1992 Fund should endeavour to ensure consistency in respect of the admissibility of claims for compensation, in accordance with 1971 Fund Resolution N°9 and 1992 Fund Resolution N°3 (document 71FUND/EXC.52/11, paragraph 3.7.8).

8.3 Level of payments

8.3.1 At its 53rd session, the Executive Committee noted that the total amount of the claims arising out of the *Nakhodka* incident would exceed the amount available under the 1969 Civil Liability Convention and the 1971 Fund Convention, ie 60 million SDR (approximately ¥10 100 million or £51 million). Since the 1992 Fund Convention also applied in the *Nakhodka* case, the Committee considered that the level of the 1971 Fund's payments should be determined by taking into account the amounts available under both the 1971 and the 1992 Fund Conventions, ie a total of 135 million SDR (approximately ¥22 700 million or £116 million).

8.3.2 It was emphasised by a number of delegations that the 1971 Fund and 1992 Fund should endeavour to ensure consistency in respect of not only the admissibility of claims but also the handling of a case involving both Organisations. Many delegations, including seven delegations of States which were also Members of the 1992 Fund, were of the view that the level of payments should be the same for the 1971 Fund as for the 1992 Fund.

8.3.3 The Executive Committee recalled that, in previous cases, it had taken the position that it was necessary to exercise caution in the payment of claims if there was a risk that the total amount of the claims arising out of the particular incident would exceed the total amount of compensation available under the 1969 Civil Liability Convention and the 1971 Fund Convention, since under Article 4.5 of the 1971 Fund Convention all claimants had to be given equal treatment. It was also recalled that the Committee had expressed the view that it was necessary to strike a balance between the importance of the 1971 Fund's paying compensation as promptly as possible to victims of oil pollution damage and the need to avoid an over-payment situation arising.

8.3.4 At its 52nd session, the Executive Committee authorised the Director to make payments on behalf of the 1971 Fund in respect of claims arising from the *Nakhodka* incident. However, in view of the uncertainty as to the level of the total amount of the claims, the Committee decided that the payments to be made by the 1971 Fund should, for the time being, be limited to 60% of the amount of the damage actually suffered by the respective claimants as assessed by the experts engaged by the Funds and the shipowner/UK Club at the time when the payment was made (document 71FUND/EXC.52/11,

paragraph 3.7.14). In the light of the remaining uncertainty as to the level of the total amount of the claims arising from the *Nakhodka* incident, the Executive Committee decided, at its 53rd session, to maintain the percentage fixed by the Committee at its 52nd session (document 71FUND/EXC.53/12, paragraph 3.6.5).

8.3.5 At its 3rd extraordinary session, held in April 1997, the Assembly endorsed the Director's view that the 1971 Fund should pay 60% of the damage suffered by each claimant up to a total amount of 60 million SDR, before the 1992 Fund commenced payments of compensation (document 71FUND/A/ES.3/7, paragraph 4.5).

8.3.6 In the light of the continuing uncertainty as to the level of the total amount of the claims arising from the *Nakhodka* incident, the Executive Committee decided at its 54th session to maintain the percentage fixed by the Committee at its 52nd session. The Director was instructed to obtain as much additional information as possible on the estimated total amount of the claims, so that the percentage could be reviewed at the Committee's next session (document 71FUND/EXC.54/10, paragraph 3.4.4).

9 Consideration by the 1992 Fund Assembly at its 2nd extraordinary session

9.1 At its 2nd extraordinary session, the Assembly of the 1992 Fund authorised the Director to make final settlements on behalf of the 1992 Fund of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Assembly (document 92FUND/A/ES.2/6, paragraph 3.1.8).

9.2 Since both the 1971 and 1992 Fund Conventions applied in the *Nakhodka* case, the Assembly considered that the level of the 1992 Fund's payments should be determined by taking into account the amounts available under both Fund Conventions. It was considered that, in order to avoid an over-payment situation arising for either the 1971 Fund or the 1992 Fund (or for both), a co-ordinated approach should be taken in respect of the payments by the two Organisations.

9.3 The Assembly of the 1992 Fund authorised the Director to make payments on behalf of the 1992 Fund in respect of claims arising from the *Nakhodka* incident. However, in view of the uncertainty as to the level of the total amount of the claims, the Assembly decided that the payments to be made by the 1992 Fund should, for the time being, be limited to 60% of the amount of the damage actually suffered by the respective claimants as assessed by the experts engaged by the Funds and the shipowner/his insurer at the time when the payment was made (document 92FUND/A/ES.2/6, paragraph 3.1.16).

10 Review of the level of payments

In the light of the continuing uncertainty as to the level of the total amount of the claims arising from the *Nakhodka* incident, the Director is unable to recommend an increase of the percentage fixed by the Executive Committee at its 52nd session and confirmed by the Committee at its 54th session.

11 Investigation into the cause of the incident

11.1 The Japanese and Russian authorities decided to co-operate in the investigation into the cause of the incident. The Japanese investigation was carried out by the Japanese Marine Accident Investigation Agency.

11.2 The Japanese investigation report was published in July 1997. It is expected that an English translation will be available shortly.

11.3 The conclusions of the Japanese investigation can be summarised as follows:

If the *Nakhodka* had been properly maintained she would have been capable of withstanding the wind and wave conditions prevailing at the time of the incident. Due to the extensive corrosion weakening the internal structure of the ship, the stresses on the hull as a result of the heavy weather caused the ship to break in two.

The weather conditions in the Sea of Japan at the time of the incident were among the worst reported.

Also, the unusual distribution of the cargo would have increased the stresses in the ship's hull.

11.4 It is understood that the Russian report states that the *Nakhodka* must have broken due to the bow section hitting some half-submerged object, most likely a Russian trawler that sank in the vicinity shortly before the *Nakhodka* incident.

11.5 The 1971 and 1992 Funds have been following the investigations through their Japanese lawyer, with the assistance of technical experts, and the reports are being studied by them.

12 Purchase of Japanese Yen

12.1 At its 52nd session, the Executive Committee considered whether, in view of the estimated level of claims arising out of the *Nakhodka* incident, the 1971 Fund should at that stage purchase Japanese Yen to be used for the payment of these claims. It was recalled that Financial Regulation 10.4 allowed the Director to hold assets in the currencies required to meet claims arising out of a specific incident which have been settled or are likely to be settled in the near future.

12.2 Noting that the Pound was at that time very strong in the currency market, whereas the Yen was comparatively weak, the Executive Committee agreed with the Director that it was appropriate for the 1971 Fund to purchase Yen in the following few weeks, in order to protect the 1971 Fund against a strengthening of the Yen vis-à-vis the Pound. It was stressed, however, that since the 1971 Fund was neither a financial institution nor an investment bank, Yen should be purchased only to provide funds for the payment of claims in the *Nakhodka* case, and not for general investment purposes. It was recommended that the Director should seek appropriate expert advice on the matter (document 71FUND/EXC.52/11, paragraph 3.7.21).

12.3 After having consulted the 1971 Fund's Investment Advisory Body and the Organisation's bankers, the 1971 Fund purchased Yen as follows:

Amount in Yen (¥)	Cost	Rate ¥:£	Date
1 962 700 000	£10 million	¥196.27	5 March 1997
1 015 000 000	£5 million	¥203.00	2 April 1997
619 800 000	£3 million	¥206.60	1 May 1997
980 000 000	£5 million	¥196.00	22 September 1997
4 577 500 000	£23 million		

13 Action to be taken by the Executive Committee

The Executive Committee is invited:

(a) to take note of the information contained in this document;

(b) to review the level of the 1971 Fund's payment of claims; and

(c) to give the Director such instructions in respect of the handling of this incident and of claims arising therefrom as it may deem appropriate.

* * *

ANNEX II

EXECUTIVE COMMITTEE
55th session
Agenda item 3

71FUND/EXC.55/10
24 September 1997

Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

OSUNG N°3

Note by the Director

1 The incident

1.1 The tanker *Osung N°3* (786 GRT), registered in the Republic of Korea, ran aground on the island of Tunggado, just south of the island of Kojedo in the Pusan area (Republic of Korea), on 3 April 1997 and sank to a depth of 70 metres. The vessel was carrying about 1 700 tonnes of heavy fuel oil. Oil was spilled immediately, but it has not been possible to assess the quantity spilt or the quantity remaining on board.

1.2 The combination of northerly winds, tidal streams and currents spread the spilt oil in a south-westerly direction. Rain, fog and overcast weather conditions prevented any aerial surveillance until 6 April 1997. Extensive areas of silver oily sheens, together with broken streaks and patches of brown oil, were found over about 15 km² of sea surface around the grounding location. The oil in this area was estimated at between 50 and 200 tonnes. Small but diminishing quantities of oil continued to leak from the sunken vessel, and by 9 April 1997 only faint traces of sheen were coming to the surface.

1.3 The Korean Marine Police, assisted by local authorities and clean-up contractors appointed by the shipowner, organised and carried out clean-up operations at sea. Some 100 vessels were employed in dispersant spraying, skimming and the manual removal of oil using sorbent pads. The clean-up at sea was terminated on 13 April 1997.

1.4 Although the shore of small islands close to the grounding location were oiled, there have been no reports of mainland coast having been polluted.

1.5 Oil which may have originated from the *Osung N°3* reached the sea adjacent to Tsushima Island in Japan on 7 April 1997. The Japan Maritime Safety Agency deployed about 150 vessels to combat the oil at sea during the period 7-13 April. The oil also affected the shorelines of the northwest corner of Tsushima Island. The onshore clean-up was carried out by fishermen, members of the Self Defence Force and the fire brigades, municipal officials and volunteers. The 1971 Fund's Japanese surveyor has been monitoring the operations.

1.6 Samples of the oil in Japan were taken for comparison with the oil coming from the *Osung N°3*. These samples were sent for chemical analysis. In the view of the 1971 Fund's experts, the results of the analyses are fully consistent with the oil in Japan having been spilled from the *Osung N°3*.

1.7 The *Osung N°3* was not entered in any P & I Club, but had liability insurance up to a limit of US$1 million (£600 000) per incident.

1.8 The limitation amount applicable to the vessel under the 1969 Civil Liability Convention is estimated at 104 500 SDR (£90 000).

2 Impact on fisheries

Republic of Korea

2.1 On the south Korean coast, traditional fishery and intensive aquaculture are carried out throughout the area. Important fisheries are the common fishing grounds, coastal set-net fisheries and an extensive mariculture industry. Oil reached only a few small islands close to the site of the incident where limited fishing takes place, and the impact is believed to have been minimal.

Japan

2.2 Tsushima Island supports seaweed cultivation, set-net fishing and a boat fishing community. Damage to these fisheries has been alleged, but so far there has been no clear indication of the scale of impact.

3 Inspection of the wreck and removal of the oil and related issues

3.1 At its 53rd session, the Executive Committee noted that it was likely that a significant quantity of oil remained on board the sunken ship, that if this oil were to be released there would be a risk of the oil affecting a large number of aquaculture facilities located some seven kilometres north of the site of the sunken ship and that such a release could give rise to substantial claims for compensation.

3.2 The Director stated that, subject to any instructions which the Executive Committee might give him, he intended to hold discussions with the Korean authorities concerning the most appropriate way of dealing with the oil remaining in the sunken ship, whilst not involving the 1971 Fund in carrying out such operations. He emphasised that he would make it clear that the 1971 Fund could assist the Korean authorities only with expert advice and could not become involved in the operations to inspect the ship, make repairs to prevent further escape of oil or remove any oil from the ship. He stated that he would also make it clear that the 1971 Fund could not guarantee to pay the costs of any such operations, but that these costs would have to be presented as a claim for compensation which would be subject to an assessment as to admissibility on the basis of the criteria laid down by the Assembly and Executive Committee.

3.3 The Executive Committee endorsed the course of action proposed by the Director as set out in paragraph 3.2 above (document 71FUND/EXC.53/12, paragraph 3.8.5).

3.4 The 1971 Fund employed an expert from a London firm of marine surveyors (Murray Fenton & Associates Ltd) to monitor operations and to liaise with the Korean authorities which were considering taking measures to inspect the wreck and to remove the oil from the wreck. The expert has visited the Republic of Korea twice and held discussions with the Korean Marine Police on these matters.

3.5 The Korean authorities carried out inspections of the wreck using a remotely operated vehicle (ROV). The surveys, some of which encountered technical problems, were conducted on 11 and 12 April, and during the periods 20-30 April and 19-24 May 1997. The surveys established that the wreck was in an upright position, that there was damage to a number of tanks forward on the port side, and that traces of oil were leaking from n°4 port cargo tank.

3.6 The 1971 Fund's expert conveyed to the Korean Marine Police the Director's view that the oil remaining in the wreck constituted a serious pollution risk and that it was important that appropriate measures were taken to prevent further escape of the oil. The expert indicated that in his view only very limited information could be obtained through inspections by ROV. He stated that he considered it necessary to use experienced divers to determine the condition of the ship. Various methods for recovering the oil were also discussed at the meeting.

3.7 The Korean Marine Police issued an order to the shipowner to remove the oil and the wreck. It is understood that the cargo owner was instructed to remove the oil.

3.8 The 1971 Fund received requests from the Korean authorities, from the shipowner and from the owner of the cargo that the 1971 Fund should take measures to remove the wreck or the oil or guarantee the payment of such measures. The 1971 Fund also received enquiries from salvage companies about the 1971 Fund's position as regards the payment of the cost of oil removal operations. In reply to these requests, the Director explained the role of the 1971 Fund and the criteria for the admissibility of claims for compensation along the lines set out in paragraph 3.2 above.

3.9 In a communication to the Director, the Ministry of Maritime Affairs and Fisheries referred to Articles 4.7 and 4.8 of the 1971 Fund Convention which deal with credit facilities. These provisions read:

> 4.7 The Fund shall, at the request of a Contracting State, use its good offices as necessary to assist that State to secure promptly such personnel, material and services as are necessary to enable the State to take measures to prevent or mitigate pollution damage arising from an incident in respect of which the Fund may be called upon to pay compensation under this Convention.
>
> 4.8 The Fund may on conditions to be laid down in the Internal Regulations provide credit facilities with a view to the taking of preventive measures against pollution damage arising from a particular incident in respect of which the Fund may be called upon to pay compensation under this Convention.

3.10 The criteria for the extension of credit facilities are laid down in Internal Regulations 10.1 and 10.2 which read:

> 10.1 On the application of a Member State which is in imminent danger of substantial pollution damage arising from a particular incident, the Director may, if he estimates that the 1971 Fund will be called upon to pay compensation under the 1971 Fund Convention in respect of that incident, provide that State with reasonable credit facilities to enable it to initiate or continue with the taking of adequate preventive measures.
>
> 10.2 Subject to conditions specified by the Assembly regarding, *inter alia*, the data and supporting justifications to be provided by a State requesting credit facilities, the Director shall determine whether in the light of all the circumstances of the case the provision of credit facilities by the 1971 Fund in respect of a particular incident is justified.

3.11 In his reply to the Ministry of Maritime Affairs and Fisheries, the Director stated that the dispatch of the 1971 Fund's expert to Korea had *inter alia* the purpose of assisting the Korean authorities. He also stated that if the Korean authorities were to request suggestions of appropriate contractors to carry out any operations suggested by the Korean authorities, the 1971 Fund would be prepared to respond to this request. As for the reference to Article 4.8, the Director stated that it was clear from the legislative history of this provision that it was inserted in the Convention for the purpose of assisting developing countries. He mentioned that this was also clearly understood by the Assembly of the 1971 Fund, which had adopted the Internal Regulations in question. The Director stated that, for this reason, he did not feel authorised to grant credit facilities to the Government of the Republic of Korea or to any other Korean authority in respect of the *Osung N°3* case.

3.12 At its 54th session, the Executive Committee endorsed the position taken by the Director with regard to the granting of credit facilities to the Korean Government or to any other authority in respect of this case (document 71FUND/EXC.54/10, paragraph 3.5.12).

3.13 It is understood that the Korean authorities are considering carrying out an operation to determine the quantity of oil in the tanks of the wreck by drilling holes in the hull. It is also understood that several salvage companies have been in contact with the Korean authorities and the shipowner, and expressed interest in carrying out operations to remove the oil and the wreck.

4 Claims for compensation

4.1 As regards Korea, claims for compensation have been presented by the Korean Marine Police, some local authorities, the charterer of the *Osung N°3* and a number of contractors for participation in the clean-up operations and the inspection of the sunken vessel, and by two fishery co-operative associations for loss of income. These claims, totalling Won 1 300 million (£890 000), are being examined by the 1971 Fund's experts.

4.2 It is possible that there will be further claims from the Korean fishery and mariculture sectors.

4.3 Claims will be submitted for clean-up operations carried out in Japan. Claims will also be presented by a number of Japanese fishery co-operative associations for loss of income caused by the oil spill. The 1971 Fund's Japanese experts estimate that the Japanese claims may total ¥1 300 million (£6.7 million).

5 Level of the 1971 Fund's payments

5.1 At its 53rd session, the Executive Committee authorised the Director to make final settlements of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee (document 71FUND/EXC.53/12, paragraph 3.8.7).

5.2 At its 54th session, the Executive Committee noted that there was only limited information available as to the cost of the clean-up operations in the Republic of Korea, and that claims might be submitted by the Korean fishery and mariculture sectors. It was noted that it was not possible to make an estimate of the cost of operations which might be undertaken to prevent further release of oil or for wreck removal. The Committee also noted that there was no information as to the cost of the clean-up operations in Japan, nor as to potential fishery claims in Japan.

5.3 In view of the great uncertainty resulting from the fact that a significant quantity of oil remained in the wreck, representing a serious pollution risk, the Executive Committee shared the Director's view that it was not possible to make any reasonable estimate as to the total amount of the claims arising out of the *Osung N°3* incident. The Committee considered that it was necessary to strike a balance between the need to exercise caution in the payment of claims and the importance of the 1971 Fund's being able to make payments at an early stage, noting that the limitation amount applicable to the *Osung N°3* was very low. The Committee therefore decided that, for the time being, the Director was authorised to make payments of 25% of the damage or loss actually suffered by each claimant, as assessed by the experts of the 1971 Fund at the time the payment was made (document 71FUND/EXC.54/10, paragraph 3.5.7).

5.4 The Director was instructed to obtain as much additional information as possible on the estimated total amount of the claims, so that the percentage could be reviewed at the Committee's next session (document 71FUND/EXC.54/10, paragraph 3.5.8).

5.5 There is still only limited information available as to the cost of the clean-up operations in Korea. As mentioned above, it is possible that claims will be submitted by the Korean fishery and mariculture sectors. It is not possible to make an estimate of the cost of operations which might be undertaken to prevent further release of oil or for removal of the oil remaining in the wreck. There is only limited information as to the cost of the clean-up operations in Japan and the potential fishery claims in Japan.

5.6 In view of the great uncertainty resulting from the fact that there is a significant quantity of oil remaining in the wreck which represents a serious pollution risk, the Director feels that it is still not possible to make any reasonable estimate as to the total amount of the claims arising out of the *Osung N°3* incident. He is therefore not able to recommend increasing the level of the 1971 Fund's payments.

6 Limitation proceedings

The shipowner has applied to the competent court for the commencement of limitation proceedings.

7 Investigation into the cause of the incident

7.1 In a judgement of 24 June 1997, the competent Korean criminal court imposed a prison sentence of one year on the master of the *Osung N°3*. The court held as follows:

i) Tankers are prohibited from navigating in the area where the incident occurred, since many vessels in the past have grounded or sunk due to many submerged rocks being scattered in that area. The master navigated the vessel through the prohibited area in order to save time, believing that no incident would occur since he had navigated in that area without any problems many times.

ii) Since there were north-easterly winds of 17.7 meters/sec (corresponding to gale force 8), waves of three metres height and poor visibility, the master should have navigated the vessel carefully by closely monitoring the radar, supplementing the look-outs and frequently checking the vessel's position. However, the master failed to exercise due care in the navigation of the ship and mistook an island which appeared on the radar for a vessel which was navigating ahead of the *Osung N°3*.

7.2 In view of the findings of the criminal court, the Director considers that there are no grounds for the 1971 Fund's opposing the shipowner's right to limit his liability, nor to refuse indemnification under Article 5.1 of the 1971 Fund Convention.

8 Applicability of the Conventions

8.1 At the time of the *Osung N°3* incident, the Republic of Korea was not Party to the 1992 Civil Liability Convention and the 1992 Fund Convention. The amount available for compensation for damage caused in Korea is therefore to be determined pursuant to the 1969 Civil Liability Convention and the 1971 Fund Convention, ie 60 million SDR (approximately £50 million).

8.2 As regards damage in Japan, the situation is different. At the time of the incident, Japan was Party to the 1992 Conventions, and the maximum amount available for damage in Japan is therefore to be determined in accordance with these Conventions, ie 135 million SDR (£112 million), including any payments made to Korean and Japanese claimants under the 1969 Civil Liability Convention and the 1971 Fund Convention. If the total amount of the claims arising out of the incident for damage in Korea and Japan were to exceed 60 million SDR and payment under the 1971 Fund Convention had to be pro rated, the Japanese claimants would be entitled to additional compensation under the 1992 Fund Convention. Since the *Osung N°3* was registered in the Republic of Korea, the limit of the shipowner's liability would be that laid down in the 1969 Civil Liability Convention.

8.3 The Director will submit to the Assembly of the 1992 Fund for consideration whether, pending payments by the 1971 Fund of the balance of the Japanese claims (ie beyond the 25% payment limit fixed

by the Executive Committee), the 1992 Fund should pay this balance and subrogate these claims against the 1971 Fund (document 92FUND/A.2/15).

9 Action to be taken by the Executive Committee

The Executive Committee is invited:

(a) to take note of the information contained in this document;

(b) to make a decision on the level of the 1971 Fund's payments (paragraph 5); and

(c) to give the Director such instructions in respect of the handling of this incident and of claims arising therefrom as it may deem appropriate.