



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
57th session
Agenda item 3

71FUND/EXC.57/7
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INCIDENTS INVOLVING THE 1971 FUND

NAKHODKA

Note by the Director

1 Introduction

This document sets out the developments in the *Nakhodka* incident since the Executive Committee's 55th session.

2 Clean-up operations

2.1 The clean-up operations were described in some detail in document 71FUND/EXC.55/8.

2.2 In December 1997, some oil which had been trapped within tetrapod sea defences was washed out by heavy weather. Some additional onshore clean-up was therefore carried out.

3 Claims for compensation

Summary of claims situation

3.1 As at 10 January 1998, 432 claims totalling ¥31 406 million (£147 million)^{<1>} had been received by the Claims Handling Office in Kobe. The claims situation is summarised in the table reproduced in the Annex.

<1> In this document, conversion of amounts in Yen has been made on the basis of the rate of exchange as at 31 December 1997, ie ¥213.937=£1, except in respect of amounts paid where conversion has been made at the rate on the date of payment.

3.2 The total payments made by the 1971 Fund to claimants amounted to ¥4 496 million (£22.6 million) as at 31 December 1997. It should be noted that the total amount of contributions levied for payment to the 1971 Fund by 1 September 1997 for the *Nakhodka* Major Claims Fund was £15 million.

3.3 The shipowner/UK Club has made payments totalling US\$867 593 (£525 000).

Details of claims submitted

3.4 Claims from the Japan Marine Disaster Prevention Centre (JMDPC) and 54 contractors engaged in clean-up operations under the JMDPC umbrella (items (a) and (b) in the annexed table) have been submitted for ¥8 058 million (£38 million). These claims include costs for the disposal of oily waste. On the basis of preliminary assessments, the Director has made provisional payments totalling ¥2 464 million (£12.3 million), representing 60% of the minimum admissible amount assessed by the experts.

3.5 A claim has been received from JMDPC for the participation of members of the National Fishery Federation (who represent nine Prefecture fishery co-operative associations with some 68 000 members) in the clean-up operations (item (c) in the annexed table). The claim totals ¥2 793 million (£13.1 million) and relates to the fishermen's involvement in the clean-up operations for the period up to 5 September 1997. After a preliminary examination of this claim, the Director has made provisional payments totalling ¥676 million (£3.4 million). A further claim by JMDPC totalling ¥2 078 million (£9.7 million) relating to the participation of fishermen in the clean-up operations is being examined.

3.6 JMDPC has claimed compensation for ¥1 126 million (£5.3 million) relating to the cost of constructing a causeway to the grounded bow section (item (k) in the annexed table) and for ¥1 194 million (£5.6 million) relating to the cost of removing oil from the bow section (item (i) in the annexed table).

3.7 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.

3.8 The Japanese Government has claimed (item (d) in the annexed table) for additional costs incurred by the Maritime Safety Agency (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 the removal of the oil from the shoreline, and by the Department of Transport for the cost of clean-up operations. These claims total ¥1 524 million (£7.1 million).

3.9 Ten prefectures have submitted claims (item (e) in the annexed table) for costs incurred in the clean-up operations which together amount to some ¥5 650 million (£26 million). On the basis of a preliminary examination of these claims, the Director made provisional payments to four prefectures of ¥1 035 million (£4.8 million) in October 1997 and of ¥259 million (£1.2 million) in December 1997. It is expected that provisional payments to five prefectures totalling ¥150 million (£700 000) will be made in the near future.

3.10 Six claims have been received from electricity companies, totalling ¥2 943 million (£13.8 million) (item (f) in the annexed table). These claims relate to the cost of clean-up operations and preventive measures in respect of their power stations.

3.11 A claim by a contractor participating in the clean-up operations (item (g) in the annexed table) was settled at ¥15 462 270 (£80 000). Payment of 60% of the settlement amount, ¥9 277 362 (£48 600), has been made by the 1971 Fund.

3.12 A claim by the East Asia Response Ltd (EARL) in Singapore for the provision of recovery systems (item (h) in the annexed table) was settled at US\$542 593 (£337 000). The settlement amount was paid in full by the shipowner.

3.13 A claim by the Russian authorities for the cost of the participation in clean-up operations of two of the vessels under contract with the shipowner (item (i) in the annexed table) was settled at US\$325 000 (£202 000). The settlement amount was paid in full by the shipowner. A further claim for US\$2 959 322 (£1.8 million) relating to the participation of these ships has been submitted to the IOPC Funds.

3.14 Claims for loss of income suffered by fishermen have been presented for ¥5 212 million (£24 million) (item (j) in the annexed table).

3.15 A claim for ¥6 661 879 (£34 300) has been submitted in respect of the contamination of an aquarium near Mikuni (item (m) in the annexed table). On the basis of a preliminary assessment, a provisional payment of ¥3.8 million (£18 000) was made in respect of this claim in November 1997.

3.16 Claims have been received from 336 operators in the tourism sector (item (n) in the annexed table). These claims total ¥2 881 million (£13.5 million).

3.17 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 incurred prior to and during the bow lifting operations. Claims may be submitted for 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.

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

4.1 Applicability of the Conventions

At its 52nd session, the Executive Committee endorsed the Director's view that, if the total amount of the accepted claims in the *Nakhodka* case 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):

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

4.2 Director's authority to settle claims

4.2.1 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).

4.2.2 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).

4.3 Level of payments

4.3.1 At its 52nd 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).

4.3.2 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).

4.3.3 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).

4.3.4 In the light of the continuing uncertainty as to the level of the total amount of the claims, the Executive Committee decided at its 55th session to maintain the limit of the 1971 Fund payments at 60% of the damage actually suffered by the respective claimants. 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.55/19, paragraph 3.11.5).

5 Consideration by the 1992 Fund Assembly

5.1 At its 2nd extraordinary session, held in April 1997, 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).

5.2 Since both the 1971 and 1992 Fund Conventions applied in the *Nakhodka* case, the 1992 Fund 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.

5.3 At its 2nd extraordinary session, 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). At its 2nd ordinary session, the 1992 Fund Assembly decided to maintain the 60% limit (document 92FUND/A.2/29, paragraph 17.2.3).

5.4 At its 2nd ordinary session, held in October 1997, the Assembly decided that the conversion of 135 million SDR into national currency should be made on the basis of the value of that currency vis-à-vis the SDR on the date of the Assembly's (or the Executive Committee's) adoption of the Record of Decisions of the session at which the Assembly (or the Executive Committee) took the decision which made payments of claims possible. It was noted that as regards the *Nakhodka* incident, this date

was 17 April 1997 and that the rate of exchange at that date (1 SDR = ¥171.589) would result in 135 million SDR equalling ¥23 164 515 000 (£114 million). It was further decided that, if the Record of Decisions was not adopted during the session, the date for conversion should be that of the last day of session (document 92FUND/A.2/29, paragraph 17.2.8).

6 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 55th session (ie 60%).

7 Investigation into the cause of the incident

7.1 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 a special committee set up for this purpose.

7.2 The Japanese investigation report was published in 1997. An English translation of the Report has been made available to the Director.

7.3 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.

7.4 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.

7.5 At the 55th session of the Executive Committee, several delegations noted that the conclusions of the Japanese report suggested that the incident had occurred as a result of the actual fault and privity of the shipowner, and that therefore all steps should be taken to preserve the 1971 Fund's right to take recourse action against the shipowner. It was suggested that a decision on whether the 1971 Fund should challenge the shipowner's right to limit his liability or to take recourse action should be taken by the Executive Committee at an early stage.

7.6 The Executive Committee instructed the Director to examine the reports on the cause of the incident and submit his findings to the Committee as soon as possible, so as to enable it to take a decision on issues relating to limitation of liability and recourse.

7.7 The Director is studying the Japanese and Russian reports, with the assistance of legal and technical experts, and will report his findings to the Committee at the earliest opportunity.

8 Purchase of Japanese Yen

8.1 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.

8.2 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).

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

Purchase date	Cost in £	Rate ¥:£1	Amount in Yen
5 March 1997	10 million	196.27	1 962 700 000
2 April 1997	5 million	203.00	1 015 000 000
1 May 1997	3 million	206.60	61 980 000
22 September 1997	5 million	196.00	980 000 000
29 October 1997	5 million	201.00	1 005 000 000
12 November 1997	5 million	211.00	1 055 000 000
22 December 1997	5 million	215.00	1 075 000 000
Total	£38 million		¥7 712 500 000

8.4 As at 31 December 1997 the 1971 Fund held ¥3 223 861 948 (£15 million).

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 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.

Claims situation as at 10 January 1998

Claim			Claims submitted			Claims paid		
			Number	Amount		Number	Amount	
				US\$ ^{<1>}	Yen (million)		US\$ ^{<1>}	Yen (million)
Clean-up costs	(a)	JMDPC - Operations carried out by JMDPC	1		123	1	<2> 50	
	(b)	- Contractors under JMDPC	54		7 935	48	<2> 2 414	
	(c)	- Fishery Co-operative Associations	1		2 793	1	<2> 676	
	(d)	- Japanese Government Agencies	8		1 524	0	0	
	(e)	- Prefectures and Municipalities	10		5 650	4	<2> 1 293	
	(f)	Electricity companies	6		2 943	0	0	
	(g)	Other entities	2		18	1	9	
	(h)	EARL	1	542 593	71	1	542 593 <3> 71	
	(i)	Russian authorities	2	3 284 322	427	1	325 000 <3> 42	
		Sub-total		85		21 484	57	4 555
Loss of income: fishery	(j)		9		5 212	1	<2> 49	
Causeway construction	(k)	JMDPC	1		1 126	0	0	
Removal of oil from ship	(l)	JMDPC	3		1 194	0	0	
Aquarium	(m)		1		7	1	<2> 4	
Tourism	(n)		336		2 881	0	0	
TOTAL			435		31 904	59	4 608	
					£149.1 million		£23.1 million	

- <1> Amounts in US\$ converted into Yen on the basis of the rate of exchange at 31 December 1997
 <2> includes provisional payments
 <3> Payments made by the shipowner/UK Club