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COMPENSATION
FUND 1971

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INCIDENTS INVOLVING THE 1971 FUND

NAKHODKA

Note by the Director

Summary:

Unfortunately, the claims assessment has not progressed as fast as was anticipated. It is believed, however, that the assessment will progress more rapidly in the months to come, since several important questions of principle have now been resolved. Claims have been received totalling ¥34 247 million (£170 million). The 1971 Fund has so far paid ¥4 736 million (£21.7 million) in compensation. The IOPC Funds' experts have made a preliminary assessment of the conclusions set out in the report of the Japanese and Russian investigations into the cause of the incident.

Action to be taken:

Decide on the level of the 1971 Fund's payments.

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. 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, with an estimated 10 000 tonnes of cargo on board. The upturned bow section, which may have contained up to 2 800 tonnes of cargo, drifted towards the coast and 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.

1.2 The incident and the clean-up operations were described in some detail in document 71FUND/EXC.55/8.

2 Claims handling

2.1 The 1971 and 1992 Funds, the shipowner and his insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club), established jointly a Claims Handling Office in Kobe. At regular intervals the staff of the Claims Handling Office visit the affected area, so as to enable claimants and their representatives to discuss the claims.

2.2 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 the International Tanker Owners Pollution Federation Ltd (ITOPF). Experts are engaged for the assessment of claims in specialised fields, as required, for example in respect of tourism.

2.3 The Claims Handling Office has a staff of six surveyors and six support staff. Due to the enormous volume of claim documents, the Claims Handling Office is facing a very heavy workload. For this reason, the Director suggested in the spring of 1998 that further staff should be employed to speed up the claims handling, although recognising that there was a risk of lack of consistency in the claims assessment if too many surveyors were involved. Recently two additional surveyors and two further support staff have been employed.

2.4 Unfortunately, the claims assessment has not progressed as fast as was anticipated. This is due not only to the volume of the documentation but also to the fact that important questions of principle have arisen, eg the admissible rates of the ships and fishing boats involved in the clean-up operations, labour rates and general expenses. The Director believes, however, that these issues have been largely resolved and that the claims assessment should proceed more rapidly in the months to come.

3 Claims for compensation

3.1 Summary of claims situation

3.1.1 As at 12 October 1998, 450 claims totalling ¥34 247 million (£170 million)^{<1>} had been received by the Claims Handling Office in Kobe. The claims situation is summarised in the table reproduced in the Annex.

3.1.2 The total payments made by the 1971 Fund to claimants amounted to ¥4 736 million (£21.7 million) as at 12 October 1998.

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

3.2 Clean-up

3.2.1 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 ¥8 320 million (£41.4 million). These claims include costs for the disposal of oily waste. On the basis of preliminary assessments, the Director has made provisional payments totalling ¥2 414 million (£12.3 million), representing 60% of the minimum admissible amount assessed by the experts.

<1> In this document, conversion of amounts in Yen has been made on the basis of the rate of exchange as at 9 October 1998, ie £1=¥200.83, except in respect of amounts paid where conversion has been made at the rate on the date of payment.

3.2.2 The assessment of 30 of the 54 claims presented by JMDPC covering the participation of contractors was completed by September 1998. The assessment is being discussed with JMDPC. The assessment of a further seven claims is well advanced.

3.2.3 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 (£13.9 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 made provisional payments totalling ¥676 million (£3.2 million). The assessment of two of these claims has been completed, and it is expected that payments amounting to ¥623 million (£2.7 million) will be made in the near future. The assessment of a further two claims amounting to ¥728 million (£3.6 million) is well advanced.

3.2.4 JMDPC has claimed compensation for ¥2 332 million (£11.6 million) relating to the cost of constructing a causeway to the grounded bow section and subsequently removing it (item (k) in the annexed table) and for ¥1 312 million (£6.6 million) relating to the cost of removing oil from the bow section (item (l) in the annexed table).

3.2.5 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.

3.2.6 The Japanese Government has claimed for additional costs incurred (item (d) in the annexed table) 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 Ministry of Transport for the cost of clean-up operations. These claims total ¥1 519 million (£7.6 million).

3.2.7 Ten prefectures have submitted claims for costs incurred in the clean-up operations (item (e) in the annexed table) which together amount to some ¥6 939 million (£34.6 million). On the basis of a preliminary examination of these claims, the Director made provisional payments to four prefectures of ¥1 035 million (£5.1 million) in October 1997 and of ¥259 million (£1.3 million) in December 1997. Provisional payments to five other prefectures totalling ¥150 million (£700 000) were made in February 1998.

3.2.8 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. There are claims from six other entities totalling ¥168 million (£840 000).

3.2.9 A claim by 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.

3.2.10 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 claim for US\$2 959 322 (£1.7 million) relating to further participation of these ships and the participation of one other ship has been submitted to the IOPC Funds, and this claim is being examined.

3.3 Electricity companies

Claims have been received from six electricity companies totalling ¥2 629 million (£13.1 million) (item (f) in the annexed table). These claims relate to the cost of clean-up operations and to preventive measures in respect of their power stations.

3.4 Fishermen's claims for loss of income

3.4.1 Claims for loss of income suffered by fishermen have been presented for ¥5 212 million (£26 million) (item (j) in the annexed table).

3.4.2 On the basis of a preliminary assessment, in August 1998 the 1971 Fund offered to make a provisional payment of ¥107 million (£530 000) to four local fishery associations in one prefecture. The associations did not take up the offer, however, since they preferred to wait until payments could be made to all associations in the prefecture.

3.5 Tourism

3.5.1 Claims have been received from 344 operators in the tourism sector (item (n) in the annexed table). These claims total ¥2 994 million (£14.9 million).

3.5.2 The assessment of the tourism claims has been carried out by a Japanese company (Cornes & Co) in co-operation with the United Kingdom experts who assessed the tourism claims arising out of the *Braer* and *Sea Empress* incidents. A methodology for the assessment of these claims has been agreed. The Japanese experts have so far visited 280 claimants, and it is expected that all claimants will have been visited by the end of November 1998.

3.5.3 The assessment of the claims in the tourism sector is carried out on the basis of the principles laid down by the Executive Committee in respect of the *Haven* incident (document FUND/EXC.35/10, paragraphs 3.2.5 - 3.2.9) and more recently in respect of the *Sea Empress* incident (document 71FUND/EXC.53/12, paragraph 3.5.16).

3.5.4 The assessment of eleven claims has been completed, and it is expected that payments to these claimants of some ¥75 million (£373 000) will be made in the near future.

3.6 Miscellaneous

A claim for ¥6.7 million (£33 000) 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.

3.7 Further claims

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. 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.

4 Level of payments

4.1 Consideration by the 1971 Fund Executive Committee and Assembly

4.1.1 At its 57th 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 ¥10 030 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 (document 71FUND/EXC.52/11, paragraphs 3.7.9 and 3.7.10).

4.1.2 In view of the uncertainty as to the level of the total amount of the claims, the Executive 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). The Committee decided at later sessions, most recently at its 58th session, that the 60% limit should be maintained (document 71FUND/EXC.58/15, paragraph 3.7.4).

4.1.3 At its 3rd extraordinary session, the 1971 Fund 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).

4.2 Consideration by the 1992 Fund Assembly

4.2.1 At its 2nd extraordinary session, the Assembly of the 1992 Fund considered that the level of the 1992 Fund's payments should be determined by taking into account the amounts available under both the 1971 and 1992 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. The 1992 Fund 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). The 1992 Fund Assembly decided at later sessions, most recently at its 3rd extraordinary session, to maintain the 60% limit (document 92FUND/A/ES.3/21, paragraph 16.2.2).

4.2.2 At its 2nd ordinary session, the Assembly of the 1992 Fund 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 1992 Fund 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. As regards the *Nakhodka* incident, the Record of Decisions was adopted on 17 April 1997. Using the rate of exchange on that date (1 SDR = ¥171.589) would result in 135 million SDR equalling ¥23 164 515 000 (£115 million) (document 92FUND/A.2/29, paragraph 17.2.8). 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.

4.3 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 of 60% fixed by the Executive Committee.

5 Investigation into the cause of the incident

5.1 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.

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

5.3 The Russian report states that the technical condition of the hull at the time of the incident was considered to be satisfactory. It is also stated that the *Nakhodka* must have broken due to the bow section having hit a half-submerged object, most probably a Russian trawler that had sunk in the vicinity shortly before the *Nakhodka* incident. The theory of the Russian investigators is that the ship was being subject to acceptable still water stresses, induced by cargo distribution, to which were added high dynamic loading stresses due to bad weather, particularly high seas. The bow section of the ship then came into close proximity of a large semi-submerged object, which it is alleged induced further high dynamic stresses. The report refers to still water bending moments and stresses in the structure of the ship, and states that these were within the limits in the classification rules for stresses in "still water". According to the Russian report the calculations show that the still water bending moments and stresses were within allowable limits when the ship sailed, but were towards the upper limits. It is maintained by the Russian investigators that the forces produced by the rough weather, the still water condition and contact with an alleged submerged object, when added together, caused overloading and failure of the ship's structure.

5.4 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. The Committee instructed the Director to examine the reports on the cause of the incident and to 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 (document 71FUND/EXC.55/19, paragraph 3.11.10).

5.5 The Director has studied the Japanese and Russian reports, with the assistance of legal and technical experts. The experts have made the following preliminary assessment of the conclusions set out in these reports:

The Russian report states that the condition of the hull at the time of the incident was satisfactory, with sufficient residual strength to withstand normal loading and dynamic forces exerted by bad weather, sea and swells. This is in direct contradiction to the Japanese investigators' findings, and takes no account of survey results and steel thickness measurements of the structure recorded in Japan after the bow section was salvaged. The survey and the thickness measurements clearly revealed significant corrosion of the steel structure and defects in the welding. Many parts of the structure, including frames and bulkhead stiffeners, had been improperly repaired by fitting doubler plates in such a manner that the resistance to buckling of the structure was not significantly improved.

The Russian report states that the hull of the *Nakhodka* must have broken due to the bow coming into contact with a semi-submerged object. It is suggested in the report that this object could have been the wreck of a Russian trawler, which sank in the same area shortly before the *Nakhodka* incident. However, no physical damage was found on the

bow section of the *Nakhodka* by either the Japanese or the Russian investigators to support the theory put forward in the Russian report.

The theory advanced in the Russian report requires the flat forward part of the bottom of the *Nakhodka* and the flat bottom of a capsized and semi-submerged object of some 500 to 1 000 tons weight to come very close together, without physical contact. Such a unique flat to flat encounter is necessary to explain why there were no marks of contact found by either the Japanese or the Russian investigators. This scenario is virtually impossible. Further, the dynamic bending moment caused by such an alleged close contact would have had to take place at exactly the same instant as when the maximum wave bending moment occurred in the ship's structure in order for failure to occur, which in the experts' view would be very unlikely. Even allowing for this theory to be plausible, careful consideration by the experts of the calculations put forward to support the Russian theory reveal that several major points remain to be explained in order for the Russian theory to be valid. The theory is based on assumptions which are not valid, the most important being that the motions of the forefoot of the tanker and of the semi-submerged object referred to in the Russian report are so similar that it would have been unlikely for the object to have come very close to contact with forepart of the tanker and to have caused the failure of the tanker hull. Even if the object had under-ridden the tanker, the difference in velocity between the object and the tanker would have been small and could not have generated forces of the magnitude which the Russian report assumes. In addition, due to differences in motion between the object and the tanker, the dynamic contact stress could not have occurred at the same instant as the maximum wave stress on the tanker hull, which would have been required to cause serious damage to and failure of the structure of the *Nakhodka*.

The experts engaged by the 1971 Fund have formed the opinion that the ship was improperly maintained and therefore unseaworthy.

5.6 The shipowner has made the following observations on the views expressed by the IOPC Funds' experts:

The Russian report cannot be totally discounted in the manner which has been suggested. If the forepart of the *Nakhodka* came close to, but did not come in contact with, the submerged object one would not expect to see signs of physical contact.

The vessel was built to Russian class standard, with scantlings which greatly exceeded the present internationally accepted classification standards, and indeed the *Nakhodka* was built with greater scantlings than minimum Russian Class standards. The vessel was classed by the Russian register. The Russian register is a State body which has long held responsibility to survey Russian vessels entered with it. The vessel was fully in class without any outstanding recommendations at the time of the casualty.

Reference is made to the fact that the corrosion emphasised by the Japanese report was of shell plating near the forward end of the hull. It is not correct to use ultrasonic readings taken well forward to assess the strength of the hull amidships. The Japanese team based their calculation on the gauging of samples taken from pieces of deck plating that had been torn from the ship and found near the bow section and which had been severely beaten by waves against the rocky sea bottom, and also from scrap.

The elasticity in the forward deck plating, as a result of it having parted in that part of the ship, is another factor which has not been taken into account in the Japanese report. No proper account has been taken of the fact that the deck plating and under deck longitudinal girders in the area of the break were missing from the bow section.

The Japanese report implies that the ship was loaded in an unsatisfactory manner with an unusual distribution of cargo. Although not loaded in one of the conditions given by way of example in the stability book, the vessel was loaded in a manner which was well within the loading criteria therein.

As the Japanese report does mention, the weather at the time of the incident was the worst that can be expected in the Sea of Japan, and this was critical.

Slamming is another factor not properly considered in the Japanese report and would have occurred with wave heights of twelve metres or more. This generates large forces on the bottom plate, which in turn generates significant sagging bending moments, additional to the normal wave bending moments.

The shipowner's own researches show that there are other relevant factors which should have been considered by the Japanese and Russian inquiries.

Whatever caused the loss of the vessel, it was not with the actual fault or privity of the shipowner, even if the 1969 Civil Liability Convention test were to be relevant.

5.7 In May 1997 the Director requested from the shipowner and the UK Club access to all classification records, repair and maintenance records, statutory certificates, port state surveys and reports, P & I condition survey reports and all documents concerning the voyage when the incident occurred, including crew statements and communications between the ship and the office. So far the IOPC Funds have been given access to only general arrangement drawings and stability information. No structural plans have been provided.

5.8 The Director continues his consideration of the technical and legal issues involved and will report his findings to the Executive Committee in due course.

6 Purchase of Japanese Yen

6.1 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. 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).

6.2 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	619 800 000
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

6.3 As at 12 October 1998 the 1971 Fund held ¥3 074 552 983 (£15.3 million).

7 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 as it may deem appropriate in respect of the handling of claims arising from this incident and on issues relating to limitation of liability and recourse.

Claims situation as at 12 October 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	2		267	1	<2> 50	
	(b)	- Contractors under JMDPC	54		8 053	49	<2> 2 514	
	(c)	- Fishery Co-operative Associations	1		2 793	1	<2> 676	
	(d)	- Japanese Government Agencies	11		1 519	0	0	
	(e)	- Prefectures and Municipalities	10		6 939	9	<2> 1 443	
	(f)	Electricity companies	6		2 629	0	0	
	(g)	Other entities	7		191	1	9	
	(h)	EARL	1	542 593	73	1	542 593 <2> 73	
	(i)	Russian authorities	2	3 284 322	445	1	325 000 <2> 44	
	Sub-total		94		22 909	63	4 809	
Loss of income: fishery	(j)		9		5 212	1	<2> 49	
Causeway construction and removal	(k)	JMDPC	1		2 332	0	0	
Removal of oil from ship	(l)	JMDPC and three contractors	4		1 312	0	0	
Aquarium	(m)		1		7	1	<2> 4	
Tourism	(n)		344		2 994	0	0	
TOTAL			453		34 766	65	4 862	
					£173 million		£24 million	

- <1> Amounts in US\$ converted into Yen on the basis of the rate of exchange at 9 October 1998
 <2> Includes provisional payments
 <3> Payments made by the shipowner/UK Club