



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
60th session
Agenda item 3

71FUND/EXC.60/9
18 January 1999

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INCIDENTS INVOLVING THE 1971 FUND

NAKHODKA

Note by the Director

Summary: The Claims Handling Office has employed additional staff. Some further payments have been made to claimants. A disagreement has arisen between the IOPC Funds and the shipowner/UK Club on the applicability of the 1992 Civil Liability Convention to this incident as regards the shipowner's right to limitation of liability.

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 (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 P & I insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club), established jointly a Claims Handling Office in Kobe.

2.2 Due to the enormous volume of claim documents, the Claims Handling Office is facing a very heavy workload. Recently one additional surveyor and two further support staff have been employed. The Claims Handling Office has at present a staff of eight surveyors and eight support staff. An accountant has been recruited and will join the staff during January 1999.

2.3 In the months to come, priority will be given to the following groups of claimants: contractors working under the Japan Marine Disaster Prevention Centre (JMDPC), fishery co-operative associations involved in clean-up, fishermen for loss of earnings, some Prefectures for the cost of clean-up operations, contractors for cost of disposal of oily waste and claimants in the tourism sector.

3 Claims for compensation

3.1 Summary of claims situation

3.1.1 As at 18 January 1999, 453 claims totalling ¥34 709 million (£185 million)^{<1>} had been received. The claims situation is summarised in the table reproduced in the Annex.

3.1.2 In paragraphs 3.2 - 3.5 information is given on those groups of claims where developments have taken place since the Executive Committee's 59th session. As regards the other groups of claims, reference is made to document 71FUND/EXC.59/9, paragraphs 3.1 - 3.7.

3.1.3 The total payments made by the 1971 Fund to claimants amounted to ¥5 389 million (£24 million) as at 31 December 1998. Further payments of ¥204 million (£1 million) were made in January 1999.

3.1.4 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 (£44.3 million). These claims include costs for the disposal of oily waste. On the basis of preliminary assessments, the Director made provisional payments during the period September to December 1997 totalling ¥2 464 million (£12.3 million), representing 60% of the minimum admissible amount assessed by the experts.

3.2.2 The Government of Japan 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. JMDPC made advance payments to some contractors who participated in the operations. In January 1999 the 1971 Fund made a further provisional payment of ¥203 million (£1 million) in respect of certain items which are still being examined by the experts engaged by the UK Club and the Funds.

<1> In this document, conversion of amounts in Yen has been made on the basis of the rate of exchange as at 31 December 1998, ie £1=¥187.671, except in respect of amounts paid where conversion has been made at the rate on the date of payment.

3.2.3 A claim has been received from JMDPC for the participation of members of the National Fishery Federation (who represent eight Prefecture fishery co-operative associations with some 68 000 members) in the clean-up operations (item (c) in the annexed table). The claim totals ¥2 794 million (£13.9 million) and relates to the fishermen's involvement in the clean-up operations. After a preliminary examination of this claim, the Director made provisional payments of ¥541 million (£2.8 million) on 30 April 1997, of ¥135 million (£0.6 million) on 19 December 1997 and of ¥623 million (£3.1 million) on 23 October 1998.

3.2.4 A claim by the Russian authorities for the cost of the participation in clean-up operations for the period up to 28 January 1997 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.

3.2.5 A claim for US\$2 959 322 (£1.7 million) relating to further participation of these two Russian ships and the participation of one other Russian ship was submitted to the IOPC Funds. This claim was rejected by the Director on the grounds that the claim related to operations which were not technically reasonable from an objective point of view. By the end of January 1997 most of the spilled oil had reached the shoreline. Consequently the quantity of oil remaining at sea and available for recovery had reduced to such an extent that the experts engaged by the UK Club and the IOPC Funds concluded that it was no longer reasonable to maintain the scale of the operation at sea.

3.3 Fishermen's claims for loss of income

3.3.1 Claims for loss of income suffered by fishermen have been presented for ¥5 239 million (£28 million) (item (j) in the annexed table).

3.3.2 On the basis of a preliminary assessment, in August 1998 the 1971 Fund offered to make a provisional payment of ¥107 million (£570 000) 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.

3.3.3 In December 1998 the IOPC Funds offered to settle a claim submitted by a Prefectural Federation of fishery associations at ¥645 million (£3.4 million), and offered to pay 60% of the settlement amount, ¥387 million (£2.1 million). The Federation did not accept this offer, since it did not want to be paid before the other Prefectural Federations.

3.4 Tourism

3.4.1 Claims have been received from 344 operators in the tourism sector (item (n) in the annexed table). These claims total ¥2 994 million (£16.0 million).

3.4.2 The assessment of the tourism claims has been carried out by a Japanese company 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 had visited all the claimants by the end of November 1998. It is expected that the settlement of the tourism claims will proceed speedily in the months to come.

3.4.3 In December 1998, eight claims in the tourism sector were settled at a total of ¥122 million (£652 000) and 60% of the settlement amounts, ¥73 million (£320 000), was paid to claimants.

3.5 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 In view of the uncertainty as to the level of the total amount of the claims, the Executive Committee at its 52nd session 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 59th session, that the 60% limit should be maintained (document 71FUND/EXC.59/17, paragraph 3.8.5).

4.1.2 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 and Executive Committee

At its 2nd extraordinary session the Assembly of the 1992 Fund 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 Executive Committee decided at its 1st session to maintain the 60% limit (document 92FUND/EXC.1/9, paragraph 4.3.5).

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 in 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. A summary of the reports on these investigations was given in document 71FUND/EXC.59/9, paragraphs 5.2 and 5.3.

5.2 The Director studied the Japanese and Russian reports, with the assistance of legal and technical experts. The preliminary assessment of the conclusions set out in these reports made by the IOPC Funds' experts and the observations by the shipowner on the views expressed by these experts were set out in document 71FUND/EXC.59/9, paragraphs 5.5 and 5.6.

5.3 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 classification records, repair or maintenance records have been provided.

5.4 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 Applicability of the Conventions

6.1 The shipowner and the UK Club have raised the issue of the applicability of the 1992 Civil Liability Convention to the *Nakhodka* incident.

6.2 This issue was considered by the Executive Committee at its 52nd session when the Committee noted that the 1992 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention had entered into force in respect of Japan on 30 May 1996 and that the 1992 Civil Liability Convention and the 1992 Fund Convention were therefore in principle applicable to this incident. It was noted that the *Nakhodka* was registered in the Russian Federation, which had not ratified the 1992 Protocols but which was Party to the 1969 Civil Liability Convention and the 1971 Fund Convention. The Committee endorsed the Director's view that 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.

6.3 Until October 1998, compensation payments were made by the 1971 Fund, after the payments had been agreed with the shipowner and the UK Club, against a receipt stating that the claim was made under the 1969 Civil Liability Convention and the 1971 Fund Convention and the 1992 Protocol to the 1971 Fund Convention. The text of these documents had been approved by the shipowner and the Club.

6.4 In October 1998 the shipowner and the UK Club requested that the documents should be amended to the effect that it would be stated that the claims were made under the 1969 and 1971 Conventions and the 1992 Protocols to both these Conventions, since in their view it was not clear that the 1992 Civil Liability Convention did not apply. They maintained that it was not for the IOPC Funds to decide the issue but for the Japanese courts.

6.5 The Director did not agree to make the requested amendment to the documents. He referred to the position taken by the Executive Committee. In his view it was clear that the 1992 Civil Liability Convention did not apply to the *Nakhodka* case in the light of Article 30.4(b) of the Vienna Convention on the Law of Treaties^{<2>} and Article XII of the 1992 Civil Liability Convention^{<3>}. He pointed out that for the transitional period when both the 1969/1971 Conventions and the 1992 Conventions applied, the issues relating to limitation of liability were dealt with differently in the Japanese legislation implementing the Conventions dependent on whether the ship flew the flag of a State which had ratified the 1969 Civil Liability Convention but not the 1992 Civil Liability Convention or whether the ship flew the flag of another State.

<2> Article 30.4 of the Vienna Convention reads:

"When the parties to the later treaty do not include all the parties to the earlier one:

(a) As between States parties to both treaties the same rule applies as in paragraph 3;

(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

<3> Article XII of the 1992 Civil Liability Convention reads:

"This Convention shall supersede any International Conventions in force or open for signature, ratification or accession at the date on which the Convention is opened for signature, but only to the extent that such Conventions would be in conflict with it; however, nothing in this Article shall affect the obligations of Contracting States to non-Contracting States arising under such International Conventions."

6.6 It was agreed to leave the text of the document unchanged and to add a footnote reading as follows:

"The shipowner reserves the right to contend that his liability and/or his right to limit such liability is or may be governed by the International Convention on Civil Liability for Oil Pollution Damage, 1992 as implemented into Japanese law. The IOPC Funds consider that the International Convention on Civil Liability for Oil Pollution Damage, 1992 does not apply in this case."

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 18 January 1999

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	48		<2> 2 618
	(c)	- Fishery Co-operative Associations	1		2 794	1		<2> 1 299
	(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		192	2		57
	(h)	EARL	1	542 593	61	1	542 593	<3> 61
	(i)	Russian authorities	2	3 284 322	370	1	325 000	<3> 37
	Sub-total		94		22 824	63		5 565
Loss of income: fishery	(j)		9		5 239	1		<2> 49
Causeway construction and removal	(k)	JMDPC	1		2 333	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	8		73
TOTAL			453		34 709	73		5 691
					£185 million			£25 million

ANNEX

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<1> Amounts in US\$ converted into Yen on the basis of the rate of exchange at 31 December 1998

<2> Includes provisional payments

<3> Payments made by the shipowner/UK Club