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COMPENSATION
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1992

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INCIDENTS INVOLVING THE 1971/1992 FUNDS

NAKHODKA

Note by the Director

Summary:

A further claim has been settled since the June 2001 sessions of the governing bodies. Claims relating to the construction and removal of a causeway and some other claims are under examination. Discussions have been held as to the possibility of a global solution of all outstanding issues between the IOPC Funds and the UK Club.

Action to be taken:

Information to be noted.

1 Level of payments

- 1.1 As a result of developments and as authorised by the governing bodies the Director decided in January 2001 to increase the level of payments from 70% to 80% of the amount of the damage actually suffered by the individual claimants. The Director's decision was reported to the governing bodies at their sessions in January 2001 (documents 92FUND/EXC.11/6, paragraph 4.1.5 and 71FUND/AC.3/ES.6/7, paragraph 3.3.5).
- 1.2 As a result of the Director's decision to increase the level of payments, the 1992 Fund made additional payments totalling ¥1 970 million (£12 million) in February and March 2001.

2 Claims for compensation

2.1 General situation

- 2.1.1 As at 10 October 2001, 458 claims totalling ¥36 011 million (£198 million^{<1>}) had been received.

<1> In this document, conversion of amounts in Yen has been made on the basis of the rate of exchange as at 2 October 2001, ie £1=¥181.85, except in respect of amounts paid where conversion has been made at the rate of the date of payment.

- 2.1.2 The total payments made to claimants amounted to ¥16 738 million (£92 million) as at 10 October 2001, including the payments made by the shipowner and his insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club) totalling US\$5 million (£4 million).
- 2.1.3 The claim submitted by the Japan Nuclear Cycle Development Institute for ¥98 million (£0.5 million) has been settled at ¥88 million (£0.5 million) and 80% of the settlement amount was paid in July 2001.
- 2.1.4 The claims situation as at 10 October 2001 is shown in the tables set out below.

Settled claims		
Category of claims	Claimed amount (¥1 000)	Settled amount (¥1 000)
Japan Maritime Disaster Prevention Centre (JMDPC)	12 085 303	10 368 503
Prefectures and municipalities	4 592 938	3 666 910
Shipowner's contractors	1 129 322	734 195
Fishery	5 013 257	1 769 172
Tourism	2 840 858	1 344 157
Others	721 073	583 683
Total	26 382 751 (¥145 million)	18 466 620 (¥102 million)

Claims pending in court			
Category of claims	Number of pending claims	Claimed amount (¥1 000)	Provisional payments (¥1 000)
JMDPC (pending parts)	4	3 335 857	0
Government agencies	11	1 519 466	0
Prefectures and municipalities	4	2 549 628	694 197
Tourism	5 ^{<1>}	8 642	0
Others	4	2 027 318	1 077 400
Total	28	9 440 911 (¥52 million)	1 771 597 (¥10 million)

Note: ^{<1>} These five claims were assessed as nil by the IOPC Funds.

2.2 Pending claims

- 2.2.1 All claims submitted by Prefectures related to the cost of collection of oil on the shore and disposal of the oil. Toyama Prefecture submitted a claim for ¥120 million (£662 000). Ishikawa Prefecture submitted a claim for ¥1 581 million (£8.7 million). The Funds and the UK Club have assessed these claims at ¥100 million (£551 000) and ¥1 319 million (£7.3 million) respectively. The Prefecture Assemblies will consider in December 2001 whether to accept these assessments.
- 2.2.2 Kyoto Prefecture and Hyogo Prefecture submitted claims for ¥623 million (£3.4 million) and ¥226 million (£1.2 million), respectively. The assessment of these claims will be completed shortly.
- 2.2.3 Five electricity power companies submitted claims for clean-up costs. Tohoku Electricity Power Company submitted a claim for ¥97 million (£534 000). This claim has been assessed by the

Funds and the UK Club at ¥71 million (£393 122). Hokuriku Electricity Power Company and Kansai Electricity Power Company submitted claims for ¥401 million (£2.2 million) and ¥1516 million (£8.3 million) respectively. It is expected that the assessment of these claims will be completed by the end of October 2001.

- 2.2.4 In respect of six claims for a total of ¥181 million (£1 million) submitted by Ministries and government agencies, namely three district port construction bureaux and three regional construction bureaux, the Funds have offered payments of 80% of the assessed amounts. However, the claimants have not yet accepted the assessments.
- 2.2.5 The Ground Self Defence Force submitted claims for ¥134 million (£738 919). The Funds and the UK Club have approved this claim at the claimed amount with only a minor reduction. The assessment of two claims for a total of ¥529 million (£2.9 million) submitted by two other divisions of Self Defence Forces will be completed by the end of October.
- 2.2.6 As regards two claims for a total of ¥676 million (£3.7 million) submitted by two regional headquarters of the Japan Coast Guard, it is expected that the Claims Handling Office will complete the assessments by the end of December 2001.

3 Claims relating to construction and removal of a causeway

- 3.1 It will be recalled that the upturned bow section of the *Nakhodka*, which may have contained 2 800 tonnes of cargo, grounded on the rocks some 200 metres from the shore. A Japanese salvage company was contracted by the shipowner to remove the oil remaining in the bow section, but the operations were hampered by adverse swell and weather conditions. The Japanese authorities took over the operation, using the services of two salvage companies. Some 2 830 m³ of oil/water mixture was removed through these operations.
- 3.2 Due to concerns that the on-water operations might fail as a result of the adverse conditions, the Japanese authorities ordered the construction of a temporary causeway to the grounded bow section. The causeway was intended to allow road tankers to be brought close to the wreck, thereby facilitating the removal of the oil.
- 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. Despite the prevailing conditions, the on-water operations were successful and only the last 380m³ of oil/water mixture was removed via the causeway. The causeway was then dismantled and the construction material removed from the site.
- 3.4 JMDPC submitted claims totalling ¥3 336 million (£18 million) for the costs of the causeway. The majority of the costs related to the construction and removal of the causeway itself. These claims have been assessed against the criteria for admissibility laid down by the Assemblies, ie that the operation to construct the causeway was reasonable from an objective technical point of view.
- 3.5 At the June 2001 sessions of the IOPC Funds' governing bodies, the Japanese delegation stated that the claims relating to the causeway were being discussed between the IOPC Funds, the shipowner's insurer and the Japanese Government, and that whilst not wishing to go into any detail, pointed out that the Japanese Coast Guard had made the decision to construct the causeway after taking into consideration the unpredictable and severe weather conditions in the Sea of Japan in winter and other difficulties which were encountered at the time.
- 3.6 Several delegations stated that the shipowner's insurer and the IOPC Funds should make every effort to settle these claims and emphasised the importance of the IOPC Funds keeping an open mind about claims of this type. Some delegations also made the point that the high amount of the claims should not influence the way in which they were treated by the IOPC Funds, although the Funds should exercise great care in the assessment of such big claims.

- 3.7 Some delegations stated that it was important for the IOPC Funds not to consider the building of the causeway as unreasonable with the benefit of hindsight, since this could discourage national authorities from taking innovative preventive measures in future cases.
- 3.8 Meetings were held in September and October 2001 between the Japanese Government, on the one hand, and the IOPC Funds and the UK Club, on the other. At these meetings the technical aspects of the causeway claims were discussed in detail. The meetings also addressed the issue as to whether the claims fulfilled the criteria for admissibility laid down by the governing bodies of the IOPC Funds. Progress has been made and further discussions will be held.

4 Legal actions

- 4.1 At their October 1999 sessions the Executive Committees of the 1971 and 1992 Funds considered the results of the Director's investigations into the cause of the incident. The Committees shared the Director's opinion that the *Nakhodka* was unseaworthy at the time of the incident and that the defects which caused the ship to be unseaworthy were causative of the incident. The Committees also agreed with the Director that the shipowner was or at least should have been aware of the defects that caused the ship to be unseaworthy, that the incident was therefore caused by the fault or privity of the shipowner and that consequently, pursuant to Article V.2 of the 1969 Civil Liability Convention, the shipowner was not entitled to limit his liability.
- 4.2 The Executive Committees decided that if the shipowner, Prisco Traffic Limited ("Prisco"), initiated limitation proceedings, the 1971 and the 1992 Funds should oppose his right to limit his liability.
- 4.3 The Committees also decided that the Funds should take recourse action against Prisco and its parent company, Primorsk Shipping Corporation ('Primorsk'). Both companies shared the same office until 1996. Prisco appeared as a subsidiary of Primorsk in Lloyds Confidential Index until late in 1996 and as a separate entry after the incident in 1997. Both companies had the same hull insurer and the same P & I Clubs, and Primorsk appeared to have a considerable involvement with Prisco in matters of shipping. The Committees noted that the proximity of the two companies and the links between them suggested that the parent company exercised a considerable degree of control over Prisco and the fleet and that such control brought with it responsibility for the seaworthiness and safe operation of the fleet.
- 4.4 Pursuant to the Executive Committees' decisions, the IOPC Funds brought legal actions in the Fukui District Court against Prisco, Primorsk, the UK Club and the Russian Maritime Register of Shipping, to recover any amounts paid by the Fund in compensation.
- 4.5 The shipowner and the UK Club brought legal actions in the Tokyo District Court against the 1971 and 1992 Funds for ¥537 million (£3.2 million) in respect of their subrogated rights relating to the payments made by them.
- 4.6 The shipowner and the UK Club were from the outset represented by the same lawyer in Japan who signed all settlement agreements with claimants on behalf of both the shipowner and the UK Club. He was also representing both the shipowner and the UK Club in their actions against the 1971 and 1992 Funds.
- 4.7 The legal actions taken by the IOPC Funds against the UK Club were served on the Club at its Tokyo office and on the Club's Japanese lawyer.
- 4.8 The lawyer referred to in paragraph 4.7 above informed the Fukui District Court that he was not authorised to receive service of writs on behalf of the shipowner. The Director was informed that service of the shipowner in *Nakhodka* in the Russian Federation could take some 18 months. Similar problems relating to the service of writs were expected to arise in respect of Primorsk in *Nakhodka* and the Russian Maritime Register of Shipping in St Petersburg.

- 4.9 The powers of attorney issued by the shipowner and the UK Club in respect of the action against the IOPC Funds included authority for their Japanese lawyer to receive service of counter claims. The IOPC Funds therefore submitted a counter claim in the Fukui District Court against the shipowner and the UK Club in respect of the Funds' payments to three prefectures totalling ¥2 913 million (£17 million). The counter claim was served on the shipowner's and UK Club's lawyer on 5 February 2001. The purpose of the Funds' bringing the counter claim was to speed up the proceedings against the shipowner and the UK Club.
- 4.10 The actions against Primorsk and the Russian Maritime Register of Shipping are not affected by the counter claim, nor are the parts of the actions against the shipowner and the UK Club not covered by the counter claim.
- 4.11 The IOPC Funds also submitted defence pleadings against the actions taken by the shipowner and the UK Club against the Funds. The Funds have argued that these actions should be rejected on the grounds that the shipowner should not be entitled to limit his liability as the incident resulted from his personal fault or privity and that in any event the shipowner had not commenced limitation proceedings.
- 4.12 The shipowner and Primorsk have appointed their own lawyers to represent them in legal actions brought against them by the IOPC Funds. The writs were served on their respective lawyers in June 2001. The writs against the Russian Maritime Register were served in June through diplomatic channels in the Russian Federation.
- 4.13 In order to speed up the proceedings, the Japanese Government requested on 7 August 2001 the Tokyo District Court to transfer the Government's action against Prisco and the UK Club to the Fukui District Court.
- 4.14 The first hearing in the Tokyo District Court was held on 5 September 2001. The court requested the parties to clarify the main issues of the case. The Court indicated that the case would be transferred to the Fukui District Court if the main issues of this case were nearly the same as those of the cases in the Fukui District Court.
- 4.15 Prisco denied liability under the Oil Pollution Damage Compensation Law on the grounds that the incident was caused mainly by an extraordinary natural phenomenon. The UK Club took the same position as Prisco as regards the liability issue. In addition, the Club referred to the arbitration clause in the Club Rules which provided for disputes to be decided by arbitration in London.
- 4.16 The first formal hearing in the Fukui District Court was held on 19 September 2001. The Court invited the parties to endeavour to reach out-of-court settlements. In order to avoid duplication of actions, the court recommended the Funds to withdraw either the Funds' counter claims against Prisco and the UK Club or parts of the Funds' original claims against them. As the Funds have already submitted pleadings in relation to the counter claims, the Funds cannot withdraw these claims. The Funds therefore agreed to withdraw parts of their original claims.
- 4.17 The Funds have submitted pleadings to the Fukui District Court maintaining that the incident was caused by the *Nakhodka* being unseaworthy and that the unseaworthiness was due to the actual fault or privity of the shipowner.
- 4.18 The Russian Maritime Register has requested the Court to dismiss the actions against it on the grounds that the Register enjoys sovereign immunity.

5 Global solution

- 5.1 At their June 2001 sessions, the governing bodies noted the developments in the legal proceedings.

- 5.2 Some delegations expressed the view that the IOPC Funds should pursue vigorously the recourse action against the shipowner, the UK Club, the parent company of the shipowner and the Russian Maritime Register of Shipping. It was also suggested that the Funds should consider the possibilities of recourse action in countries other than Japan and should also consider problems relating to 'piercing the corporate veil' and the practical problems of arresting a ship of the parent company in Japan.
- 5.3 The Executive Committee instructed the Director to pursue discussions with the Japanese Government, the shipowner and the UK Club on outstanding claims and issues and to explore the possibilities of reaching a global settlement of all outstanding issues.
- 5.4 The Japanese delegation stated that if the outstanding issues could be resolved to the satisfaction of all parties concerned this could lead to an early global settlement.
- 5.5 Discussions have been held between the UK Club and the IOPC Funds on the possibilities of reaching such a global solution. These discussions continue.
- 5.6 The Director and the UK Club agree that the objective of any global settlement should be that all admissible claims are paid in full, that the IOPC Funds recover a reasonable amount of the compensation paid by them and that all litigation will cease.

6 Action to be taken by the governing bodies

The governing bodies are invited:

- (a) to take note of the information contained in this document; and
- (b) to give the Director such instructions in respect of this incident as they may deem appropriate.
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