INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS 1971 AND
1992

EXECUTIVE COMMITTEE
16th session
Agenda item 3

92FUND/EXC.16/2
25 April 2002
Original: ENGLISH

ASSEMBLY
9th extraordinary session
Agenda item 8

71FUND/A/ES.9/9

# INCIDENTS INVOLVING THE 1971/1992 FUNDS

**NAKHODKA**

**Note by the Director**

| | |
|---|---|
| ***Summary:*** | Since the October 2001 sessions of the governing bodies a number of claims have been settled. The issue of the level of the IOPC Funds' payments (at present 80% of the established claims) is addressed.<br><br>Claims relating to the construction and removal of a causeway have been assessed. Settlement discussions have been held with the Japanese Coast Guard and the Japanese Maritime Disaster Prevention Centre. Discussions have also been held as to the possibility of a global solution of all outstanding issues. Information is given on the position of the parties in the recourse proceedings brought by the IOPC Funds and others against the owner of the *Nakhodka*, his insurer, the parent company of the shipowner and the Russian Register of Shipping. |
| ***Action to be taken:*** | To consider the level of the IOPC Funds' payments. |

## 1 Claims for compensation

1.1 General situation

1.1.1 As at 22 April 2002, 458 claims totalling ¥36 011 million (£185 million<1>) had been received.

1.1.2 The payments made to claimants by the Funds totalled ¥16 919 million (£87 million) as at 22 April 2002. The total payments made by the shipowner and his insurer, the United Kingdom Mutual Steamship Assurance Association (Bermuda) Ltd (UK Club), amounted to US$5 million (£4 million).

<1> In this document, conversion of amounts in Yen has been made on the basis of the rate of exchange as at 5 April 2002, £1=¥195.07, except in respect of amounts paid where conversion has been made at the rate of the date of payment.

1.1.3 A claim submitted by Ishikawa Prefecture and Municipalities for ¥1 581 million (£8.1 million) has been settled at ¥1 319 million (£6.8 million).

1.1.4 A claim submitted by Toyama Prefecture and Municipalities for ¥120 million (£615 000) has been settled at ¥100 million (£510 000).

1.1.5 A claim submitted by Kyoto Prefecture and Municipalities for ¥623 million (£3.2 million) has been settled at ¥397 million (£2.0 million).

1.1.6 A claim submitted by Hyogo Prefecture and Municipalities for ¥226 million (£1.2 million) has been settled at ¥155 million (£800 000).

1.1.7 A claim submitted by Tohoku Electricity Power Company for ¥97 million (£500 000) has been settled at ¥71 million (£365 000).

1.1.8 During the period October 2001 – April 2002 payments were made to the claimants referred to in paragraphs 1.1.3 – 1.1.7 of 80% of the respective settlement amounts minus previous provisional payments.

1.1.9 The claims situation as at 22 April 2002 is shown in the tables set out below.

| Settled claims | | |
|---|---|---|
| Category of claims | Claimed amount (¥1 000) | Settled amount (¥1 000) |
| Japanese Maritime Disaster Prevention Centre (JMDPC) | 12 085 303 | 10 368 503 |
| Local governments (prefectures and municipalities) | 7 142 567 | 5 637 552 |
| Shipowner's contractors | 1 129 322 | 734 195 |
| Fishery | 5 013 257 | 1 769 172 |
| Tourism | 2 840 858 | 1 344 157 |
| Others | 818 270 | 655 173 |
| Total | 29 029 577 (£149 million) | 20 508 752 (£105 million) |

| Claims pending in court | | | |
|---|---|---|---|
| Category of claims | Number of pending claims | Claimed amount (¥1 000) | Provisional payments (¥1 000) |
| JMDPC (causeway) | 4 | 3 335 857 | 0 |
| Government agencies | 11 | 1 519 466 | 0 |
| Tourism | 3 <1> | 5 123 | 0 |
| Others | 3 | 1 930 122 | 1 023 000 |
| Total | 21 | 6 790 568 (£35 million) | 1 023 000 (£5 million) |

<1> These three claims were assessed as nil by the IOPC Funds.

1.2 Pending claims

1.2.1 Hokuriku Electricity Power Company and Kansai Electricity Power Company submitted claims for clean-up costs for ¥401 million (£2.1 million) and ¥1 516 million (£7.8 million), respectively.

These claims have been assessed by the IOPC Funds and the UK Club at ¥341 million (£1.7 million) and ¥1 269 million (£6.5 million), respectively. It is expected that these claims will be settled at the assessed amounts in the near future.

1.2.2 Japanese Government agencies have submitted claims for clean-up operations totalling ¥1 519 million (£7.8 million). The assessment of these claims has been completed and the claimants have been informed in detail of the result of this assessment. The total assessed amount for these claims is ¥1 488 million (£7.6 million).

1.2.3 Claims by the Japanese Maritime Disaster Prevention Centre (JMDPC) are dealt with in section 3 below.

## 2 Level of payments

2.1 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).

2.2 In accordance with a decision by the Assembly of the 1992 Fund the total amount available under the 1971 and 1992 Fund Conventions, ie 135 million SDR, equals ¥23 164 515 000 (£119 million).

2.3 As a result of the developments, the total exposure of the IOPC Funds can be estimated at ¥20 508 752 000 + ¥6 790 568 000 = ¥27 299 320 000 (£140 million).

2.4 The present level of payments, ie 80% of the amount of damage actually suffered by the respective claimants, would give ¥21 839 456 000 (£112 million), which gives the IOPC Funds a certain margin against overpayment. An increase of the level to 90% would give ¥24 569 388 000 (£126 million), which would exceed the maximum amount available for compensation. The Director proposes therefore that the level of payments should be maintained at 80%.

## 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 $m^3$ 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. Some 380 $m^3$ 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 (£17 million) for the costs in respect of the causeway operation. 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, 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 and in January and March 2002 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.

3.9 Further discussions concerning these claims will be held during the week commencing 22 April 2002, and any developments will be reported to the Executive Committee.

## 4 Legal actions in the Japanese courts

4.1 Executive Committees' considerations in respect of recourse actions

4.1.1 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.

4.1.2 The Committee noted the conclusion of the IOPC Funds' experts that the *Nakhodka* was in a seriously dilapidated condition. It was noted that there was, in the experts' view, evidence of serious wastage of hull strength members and inadequate repairs, that it was clear that the hull strength was seriously reduced, but that while the actual loading of the ship was not in accordance with the loading manual which increased the stress in the ship, this would not in their view have affected a well-maintained ship. It was noted that the experts considered that there was no evidence of collision or near-collision with a low buoyancy object nor of any other contact or any explosion. It was further noted by the Committee that the fact that the ship had failed in these circumstances supported the experts' view that the ship was unseaworthy, that the *Nakhodka* did experience bad weather but such bad weather was not in their view exceptional in the Sea of Japan in January, but that the experts were of the opinion that the shipowner was or should have been aware of the actual condition of the hull structure.

4.1.3 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.

4.1.4 The Committee confirmed that it was the 1969 Civil Liability Convention and not the 1992 Civil Liability Convention that applied in this case.

4.1.5 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.

4.1.6 The Executive Committee noted that it would take considerable time to serve legal proceedings on Prisco in Russia. The Committee recognised that for a number of reasons a recovery action against the company might not result in any money being recovered. It was noted that the investigations carried out by the IOPC Funds indicated that it was unlikely that this company had any significant assets against which a judgement could be enforced. It was also noted that the company had disposed of its fleet and no longer appeared in the list of shipowners published by Lloyds' Register and that it was possible that steps were being taken to dissolve the company. The Executive Committee decided that the 1992 Fund should nevertheless take recovery action against the shipowner, Prisco.

4.1.7 The Committee decided that recourse action should be taken against Primorsk Shipping Corporation ('Primorsk'), the parent company of Prisco. The Committee noted that both companies shared the same office until 1996 and that 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. The Committee also noted that both companies had the same hull insurer and the same P & I Club and that Primorsk appeared to have a considerable involvement with Prisco in matters of shipping. It further 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. The Committee shared the Director's view that such control brought with it responsibility for the seaworthiness and safe operation of the fleet.

4.1.8 The Executive Committee considered the further question of whether recovery action should be brought against the UK Club. Although the Committee noted that under the 1969 Civil Liability Convention the shipowner was obliged to maintain insurance covering the limitation amount applicable to the ship under the Convention, in the case of the *Nakhodka* 1 588 000 SDR (approximately ¥229 million or £1.3 million), it was believed that the *Nakhodka* was covered for its legal liabilities for pollution damage up to an amount of US$500 million, as was normally the case for oil tankers.

4.1.9 The Committee also noted that the UK Club's Rules contain a "pay to be paid" clause (ie that the Club is under an obligation to indemnify the shipowner only for compensation actually paid by him to third parties), and that this clause had been upheld by the United Kingdom courts. The Committee noted, however, that the legal advice given to the Director indicated that the "pay to be paid" clause might not be upheld in Japan. In the light of this advice, the Committee decided that the 1992 Fund should take recovery action against the UK Club.

4.1.10 The Executive Committee noted that the *Nakhodka* was subject to classification under the rules of the Russian Maritime Register of Shipping. The Committee recognised that litigation against classification societies was difficult due to the special role they play in international shipping. The Committee concluded, however, that the Russian Register had failed to ensure that the *Nakhodka* met its requirements and that this failure was causative to the incident, and therefore decided that the 1992 Fund should initiate recovery action against the Russian Register.

4.1.11 It was noted that significant repairs were carried out on the *Nakhodka* in 1993 at a shipyard in Singapore and that the IOPC Funds' technical experts were investigating the extent of these repairs.

4.2 Reactions by Prisco and the Russian Maritime Register

4.2.1 In a letter to the Director dated 12 November 1999 the shipowner, Prisco, expressed the view that there were a number of mistakes and misunderstandings in the documents submitted by the Director to the Committees at their October 1999 sessions (documents 71FUND/EXC.62/8/1 and 92FUND/EXC.4/4/1) which made the documents highly misleading. It was stated in the letter that the cargo had been loaded within the loading criteria, that the *Nakhodka* could hardly be described as dilapidated having undergone extensive repairs and being fully in class at the time of the incident, that there could not have been any privity on the part of the shipowner, that the 1992 Civil Liability Convention was applicable to the *Nakhodka* incident, that Prisco was not part of any group and that the Funds should have considered recourse action against the salvors.

4.2.2 In his reply the Director stated that in the view of the Funds' experts the *Nakhodka* had been loaded in an unconventional manner, that there was a fundamental disagreement between the shipowner and the Funds in respect of the condition of the ship and on the issue of fault or privity, and that the Funds took the firm view that the 1992 Civil Liability Convention did not apply in this case.

4.2.3 In a letter to the Director dated 18 November 1999 the Russian Maritime Register of Shipping expressed its regret that the Executive Committees had concluded that the Register had failed to ensure that the *Nakhodka* met its requirements and that this failure was causative of the incident. The Register proposed that a meeting should be held between the IOPC Funds' experts and those of the Register, so as to give the Register the possibility to defend its position.

4.2.4 The Funds' experts visited the Register in January 2000, expecting to obtain further documentation. The Register, however, maintained its position that it was not liable and the Funds' experts were not given access to the classification records and not provided with other documents which the Funds had understood would be made available at the meeting.

4.3 The legal actions

4.3.1 Pursuant to the Executive Committees' decisions, in November 1999 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 Funds in compensation.

4.3.2 The Japanese Government and JMDPC brought legal actions in the Tokyo District Court against Prisco and the UK Club in respect of those of their claims that had not yet been settled for the full amount claimed and in respect of the settled claims to recover the part of the settlement amounts which had not yet been paid.

4.3.3 Prisco and the UK Club brought legal actions in the Fukui District Court against the 1971 and 1992 Funds in December 1999 for ¥537 million (£2.8 million) in respect of their subrogated rights relating to the payments made by them.

4.3.4 Prisco 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 Prisco and the UK Club. He was also representing both Prisco and the UK Club in their actions against the 1971 and 1992 Funds.

4.3.5 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.

4.3.6 The lawyer of the UK Club informed the Fukui District Court that he was not authorised to receive service of writs on behalf of Prisco. The Director was informed that service on Prisco 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.

4.3.7 The powers of attorney issued by Prisco 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 Prisco and the UK Club in respect of the Funds' payments to three prefectures totalling ¥2 913 million (£17 million). The purpose of the Funds' bringing the counter claim was to speed up the proceedings against Prisco and the UK Club. 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 Prisco and the UK Club not covered by the counter claim.

4.3.8 The IOPC Funds also submitted defence pleadings to the Fukui District Court in January 2001 in respect of the actions taken by Prisco and the UK Club against the Funds. The Funds have argued that these actions should be rejected on the grounds that Prisco should not be entitled to limit its liability as the incident resulted from its personal fault or privity and that in any event Prisco had not commenced limitation proceedings.

4.3.9 Prisco and Primorsk appointed their own lawyers in April 2001 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 2001 through diplomatic channels in the Russian Federation.

4.3.10 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.

4.3.11 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.

4.3.12 Prisco denied liability under the Oil Pollution Damage Compensation Law (OPDCL) 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.

4.3.13 Hearings have been held monthly in the Tokyo District Court since September 2001. As a result of these hearings, it seems unlikely that the Tokyo District court will transfer the Japanese Government's actions against Prisco and the UK Club to the Fukui District Court. For this reason the Director decided in December 2001 to intervene in the proceedings in the Tokyo District Court to protect the Funds' interest.

4.3.14 The Japanese Government and JMDPC submitted their first pleadings to the Tokyo District Court in December 2001 in response to the pleadings presented by Prisco in September. They shared the Funds' experts' views concerning the structural strength and seaworthiness of the *Nakhodka*. As regards the weather conditions in the Sea of Japan encountered by the *Nakhodka*, their position was largely the same as that of the Funds, namely that the weather conditions at the time of the incident were foreseeable and could not be regarded as an "extraordinary natural phenomenon" as specified in Article 3 (1) -2 of the OPDCL.

4.3.15 In accordance with the request of the Tokyo District Court the IOPC Funds submitted pleadings in February 2002 setting out their assessment of each item of the Japanese Government's and JMDPC's claims. The Funds maintained 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. The Funds further maintained that the London arbitration clause in the Club Rules could not be applied.

4.3.16 The Japanese Government and JMDPC submitted further pleadings to the Tokyo District Court in February 2002. In these pleadings they argued that the London arbitration clause could not be applied because the Club Rules could not be regarded as a written agreement for arbitration under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

4.3.17 The Japanese Government submitted additional pleadings to the Tokyo District Court in March 2002 giving further information in respect of a claim concerning the oil recovery operations carried out at sea.

4.3.18 Prisco submitted further pleadings to the Tokyo District Court in March 2002 in which it stated that it agreed with the Funds concerning the assessments of each item of the Japanese Government's and JMDPC's claims. The Court requested the UK Club to set out its position concerning these claims by the end of April 2002.

4.3.19 A hearing was held in the Fukui District Court 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 IOPC 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 had already submitted pleadings in relation to the counter claims, the Funds could not withdraw these claims, and the Funds therefore withdrew parts of their original claims.

4.3.20 The Russian Maritime Register has requested the Fukui District Court to dismiss the actions against it on the grounds that the Register enjoys sovereign immunity.

4.3.21 The IOPC Funds submitted the extensive pleading to the Fukui District Court in January 2002 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. The Funds also responded to the pleadings submitted by the UK Club, Primorsk and the Russian Register. The Funds opposed the application of the London arbitration clause in the Club Rules and maintained that the Russian Register was not entitled to sovereign immunity concerning its activity of the class inspection. The Funds also maintained that Primorsk should be regarded as the *de facto* owner of the *Nakhodka*.

4.3.22 At a hearing in the Fukui District Court in January 2002, the judge requested the defendants, except the Funds, to submit pleadings concerning the weather conditions at the time of the incident. The judge indicated that the Court would, before the next hearing, scheduled for 29 May 2002, render an opinion as to whether the weather conditions could be regarded as an "extraordinary natural phenomenon", taking into account the pleadings submitted by the defendants.

## 5 The position of the parties in the proceedings

5.1 Actions against Prisco

5.1.1 The legal basis of the IOPC Funds' actions against Prisco is strict liability under Oil Pollution Damage Compensation Law (OPDCL) which implements the 1969 Civil Liability Convention. The Funds have maintained that Prisco is not entitled to limit its liability, since the incident resulted from the unseaworthiness of the *Nakhodka* and that Prisco knew or should have known that the ship was unseaworthy.

5.1.2 Prisco has referred to Article 3(1)-2 of the OPDCL under which the shipowner is exonerated from liability if the incident was caused by an extraordinary natural phenomenon. Prisco has maintained that it should be exonerated from liability since the *Nakhodka* encountered such extraordinary sea conditions which must be considered as an extraordinary natural phenomenon. Prisco's position can be summarised as follows:

> The vessel was in every respect seaworthy and there were no defects which might affect her structural strength. The vessel was constructed in accordance with the requirements of the Russian Register and built with scantlings greater than the international classification standards. The vessel had been granted a full class certificate by the Russian Register in 1993, and had maintained the class thereafter. According to the British Metrological Office, the significant wave height was 9.3m with wave periods of 9 to 12 seconds, and the predicted greatest wave in a 3 hour-period was calculated to be 17.4m with the possibility that a wave in excess of 20m could be encountered under certain circumstances. At the time of the incident the vessel was subject to other forces, such as slamming and green sea impact. These extraordinary phenomena occur about once a decade in this area in winter.

5.1.3 The IOPC Funds' position can be summarised as follows:

> In order to be exonerated from its liability, Prisco has to prove that the incident was caused by an "extraordinary natural phenomenon" as set out in Article 3 (1)-2 of the OPDCL. This term was construed by the Japanese legislators to have the same meaning as the expression "a natural phenomenon of an exceptional, inevitable and irresistible character" under Article III.2 (a) of the 1969 Civil Liability Convention. Prisco has not proved that the rough weather at the time of the incident was of such an extraordinary level as the Law envisages. The rough weather in the winter in the Sea of Japan encountered by the *Nakhodka* in this case is foreseeable for every vessel sailing there. The condition of any ship should be such as to enable the ship to withstand these weather conditions. The fact that the vessel had a Russian Register certificate and was approved by the Russian Register is not relevant for the issue of whether the ship was seaworthy and whether the shipowner is exempted from liability.

5.1.4 The Director understands that Prisco will submit legal opinions on the issue of exoneration from liability. He also understands that Prisco will submit evidence concerning the weather conditions. Once these opinions and such evidence have been submitted to the courts, the Director will consider whether the Funds should seek legal opinions or provide counter-evidence on these issues.

5.1.5 The position of the Japanese Government and JMDPC is largely the same as that of the IOPC Funds.

5.2 Actions against the UK Club

5.2.1 The IOPC Funds' actions against the UK Club are of two types: (a) a compensation claim under the OPDCL (a direct action) and (b) an insurance claim under the insurance policy (an indirect action). The direct compensation claim is expressly provided for in Article 15 (1) of the OPDCL. As for the indirect action, the Funds may claim compensation from the UK Club under Article 15 (1) of the OPDCL, but the UK Club has a right to limit its liability up to the limitation amount pursuant to Article 15 (3) and Article 5 of that law (cf Article VII.8 of the 1969 Civil Liability Convention).

5.2.2 If it is proved that Prisco does not have sufficient assets to compensate the Funds in full, the Funds are entitled to exercise Prisco's rights against the UK Club for the entire claimed amount under Article 423 of the Japanese Civil Code. The Funds' indirect action against the UK Club is an insurance claim on behalf of Prisco under the insurance policy.

5.2.3 In respect of the direct action, the UK Club has invoked the same defences as Prisco, namely that the shipowner is exonerated from liability under Article 3 (1)-2 of the OPDCL. As for the defence of exoneration from liability and limitation of liability, the IOPC Funds have reiterated the position taken *vis-à-vis* Prisco.

5.2.4 As regards the indirect action, the UK Club has further argued that since the Funds' claim is an insurance claim under the insurance policy, the provisions of the policy apply, *inter alia* that disputes should be referred to arbitration in London. The UK Club has argued that the Funds' actions should therefore be dismissed pursuant to Article 2-3 of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

5.2.5 The IOPC Funds have stated that there is no arbitration agreement between the UK Club and the Funds and that the arbitration clause under the policy cannot be extended to the Funds which are acting on behalf of the claimants. The Funds have also maintained that even if it were correct that the Funds are theoretically bound by the arbitration clause, the UK Club's right to invoke the arbitration clause should be considered as having been waived or that exercising of that defence should be deemed as abusive for the following reasons:

- The UK Club has acted in Japan in the investigation of and negotiations concerning the compensation claims.

- The UK Club has brought actions against the IOPC Funds before the Fukui District Court for its own claim, which has a close relationship with the Funds' claim.

- All the claimants have already attended the Japanese proceedings.

- It is unlikely that the Japanese Government would accept London arbitration.

- A large number of victims will suffer if the proceedings are dismissed because of the arbitration clause.

The Japanese Government and JMDPC have taken the same position as the IOPC Funds. They have in addition pointed out that the UK Club had agreed to the exclusive jurisdiction of the Tokyo District Court in respect of possible disputes arising out of settlement agreements relating to the claims by JMDPC for the costs of certain clean-up operations.

5.3 Actions against Primorsk

5.3.1 The IOPC Funds' actions against Primorsk are in tort under the Japanese Civil Code. The Funds have maintained that since Primorsk substantially controlled Prisco, Primorsk is liable *vis-à-vis* the Funds and other claimants for not having exercised due diligence in maintaining the *Nakhodka* in a seaworthy condition.

5.3.2 Primorsk has simply opposed the IOPC Funds' actions, requesting further explanation of the basis of the claim. No substantial defences have been presented.

5.3.3 In support of their allegation that Primorsk did not exercise due diligence regarding the vessel's seaworthiness, the IOPC Funds have set out the facts on the basis of which the Funds maintain that there was a close relationship between Prisco and Primorsk as follows:

- Primorsk actually manned, managed and operated the vessels owned by Prisco, monitored their maintenance and was responsible for their seaworthiness and safe operation.

- Primorsk controlled the crew of the *Nakhodka*.

- Primorsk controlled the maintenance of the hull of the *Nakhodka*.

5.4 Actions against the Russian Maritime Register of Shipping

5.4.1 The IOPC Funds' actions against the Russian Maritime Register of Shipping are in tort under the Japanese Civil Code. The Funds have maintained that the Russian Register is liable *vis-à-vis* the

Funds and other claimants for not having exercised the due diligence required of a classification society when giving class approval of the *Nakhodka*.

5.4.2 The Russian Register has argued that the actions should be dismissed since, under the principle of sovereign immunity, the jurisdiction of the Japanese courts cannot extend to a foreign state or its governmental organisations unless such organisations voluntarily appear before the court and pursue the proceedings. The Russian Register has maintained that it is a governmental organisation, that the Register has a right to sovereign immunity, and that even if it has rendered some public services, including survey and ship registration, the Register should nevertheless enjoy sovereign immunity.

5.4.3 The IOPC Funds have maintained that the Russian Register is separate and independent from the Russian Government and not part of a State institution and that therefore the Register does not have sovereign immunity even if it were to be part of the State organisation. The Funds have stated that the Register's activities relate to commercial acts and cannot be considered as pure sovereign acts and that consequently there is no right to sovereign immunity. The Funds have also argued that sovereign immunity cannot be admitted in respect of claims in tort.

5.4.4 The Russian Register has submitted a legal opinion by Professor Yasuhei Taniguchi, Professor of Tokyo Keizai University, supporting the Register's position.

5.4.5 The IOPC Funds have submitted a legal opinion by Dr Thomas A Mensah, former Assistant-Secretary-General of IMO and judge on the International Tribunal for the Law of the Sea, supporting the Funds' position on the issue of sovereign immunity.

## 6 Global solution

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

6.2 Some delegations expressed the view that the IOPC Funds should pursue vigorously the recourse action against Prisco, the UK Club, Primorsk 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.

6.3 The Executive Committee instructed the Director to pursue discussions with the Japanese Government, Prisco and the UK Club on outstanding claims and issues and to explore the possibilities of reaching a global settlement of all outstanding issues.

6.4 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.

6.5 The governing bodies again addressed the issue of a global settlement at their October 2001 sessions. They noted that discussions had been held between the UK Club and the IOPC Funds on the possibilities of reaching a global solution and that these discussions would continue. It was further noted that the Director and the UK Club had agreed that the objectives of any global settlement should be that all admissible claims were paid in full, that the IOPC Funds recovered a reasonable amount of the compensation paid by them and that all litigation would cease.

6.6 A number of delegations supported the idea of reaching a global solution and stressed the need for flexibility, pragmatism and transparency. Those delegations agreed that it was premature to authorise the Director to conclude any agreement in this regard or for the governing bodies to discuss any settlement amounts.

6.7 The Director was instructed to continue to explore the possibilities of reaching a settlement of all outstanding issues, including those relating to the various recourse actions.

6.8 Discussions have been held between the UK Club and the IOPC Funds on the possibilities of reaching such a global solution. These discussions continue.

## 7 Action to be taken by the governing bodies

The governing bodies are invited:

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

(b) to consider the level of payments;

(c) to give the Director instructions in respect of the court proceedings in Japan; and

(d) to give the Director such other instructions in respect of this incident as they may deem appropriate.