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1992

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71FUND/AC.8/3

INCIDENTS INVOLVING THE 1971/1992 FUNDS

NAKHODKA

Note by the Director

Summary:

Since the April/May 2002 sessions of the governing bodies two further claims have been paid. The issue of the level of the IOPC Funds' payments (at present 80% of the established claims) is addressed.

The IOPC Funds and the UK Club have made offers for settlement of claims by 11 Japanese government agencies. Claims relating to the construction and removal of a causeway presented by the Japanese Maritime Disaster Prevention Centre (JMDPC) were approved by the governing bodies at their April/May 2002 sessions. The agencies and JMDPC have not yet given their formal acceptance of the approved settlement amounts.

Recourse proceedings have been 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. The governing bodies approved a proposal for a global settlement of all outstanding issues at their April/May 2002 sessions.

Consideration is given to the rate of exchange to be used for the conversion of Special Drawing Rights (SDR) into Japanese Yen to establish the maximum amount of compensation payable by the 1971 Fund. The distribution of the financial benefits of the global settlement between the 1971 Fund and the 1992 Fund is also discussed.

Action to be taken:

- (a) to consider the level of the IOPC Funds' payments
- (b) to decide on the rate of exchange to be used for the conversion of the maximum amount payable by the 1971 Fund into Japanese Yen; and
- (c) to decide on the distribution between the 1971 Fund and the 1992 Fund of the financial benefits of the global settlement.

1 Claims for compensation

1.1 General situation

1.1.1 As at 12 June 2002, 458 claims totalling ¥36 041 million (£195 million^{<1>}) had been received. Claims totalling ¥30 947 million (£167 million) had been settled for a total of ¥22 119 million (£119 million).

1.1.2 Payments made to claimants by the Funds totalled ¥17 184 million (£93 million) as at 12 June 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).

1.2 Pending claims

1.2.1 Claims by 11 Japanese Government agencies in respect of clean-up operations totalling ¥1 519 million (£8.2 million) have been assessed by the IOPC Funds at a total of ¥1 488 million (£8.0 million) and the Funds and the UK Club have offered settlements at this amount.

1.2.2 Claims by the Japanese Maritime Disaster Prevention Centre (JMDPC) totalling ¥3 354 million (£18 million) in respect of the construction and removal of a causeway to facilitate the removal of oil from the bow section of the *Nakhodka* were approved by the governing bodies at their April/May 2002 sessions for a total of ¥2 043 million (£11 million) (documents 92FUND/EXC/16/6, paragraph 3.1.26 and 71FUND/AC.7/A/ES.9/14, paragraph 8.4.26).

1.2.3 JMDPC has not yet given its formal acceptance of the settlement amount approved by the governing bodies.

2 Level of payments

2.1 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.

2.2 At their April/May 2002 sessions the governing bodies decided to authorise the Director to increase the level of payments, if and to the extent that he was satisfied that there was no risk that the Funds would face an overpayment situation (documents 92FUND/EXC.16/6, paragraph 3.1.12 and 71FUND/AC.7/A/ES.9/14, paragraph 8.4.12).

2.3 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 Special Drawing Rights (SDR), equals ¥23 164 515 000 (£125 million).

2.4 Although it is expected that a formal settlement will be reached in the near future in respect of the claims by the Japanese Government agencies and JMDPC, the Director takes the view that until formal settlements have been reached, it is the claimed amounts that have to be taken into account in order to assess the total exposure of the Funds. On that basis the total exposure of the IOPC Funds can be estimated at ¥22 118 559 000 + ¥4 903 137 000 = ¥27 021 696 000 (£146 million).

2.5 The present level of payments, ie 80% of the amount of damage actually suffered by the respective claimants, would give ¥21 617 356 800 (£117 million), which gives the IOPC Funds a certain margin against overpayment. An increase of the level to 90% would give

<1> In this document, conversion of amounts in Yen has been made on the basis of the rate of exchange as at 7 June 2002, £1=¥181.997, except in respect of amounts paid where conversion has been made at the rate of the date of payment.

¥24 319 526 400 (£131 million), which would exceed the maximum amount available for compensation. The Director has decided therefore that he is unable to increase the level of payments over 80% at this stage.

3 Legal actions in the Japanese courts

- 3.1 Pursuant to the governing bodies' decisions, in November 1999 the IOPC Funds brought legal actions in the Fukui District Court against the owner of the *Nakhodka* (Prisco Traffic Limited), Prisco's parent company (Primorsk Shipping Corporation), the UK Club and the Russian Maritime Register of Shipping, to recover any amounts paid by the Funds in compensation.
- 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.
- 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 (£2.9 million) in respect of their subrogated rights relating to the payments made by them.
- 3.4 For procedural reasons the IOPC Funds 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 (£16 million).
- 3.5 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.
- 3.6 The developments in respect of the legal proceedings were reported to the governing bodies at their April/May 2002 sessions as set out in paragraphs 4.1.1 – 4.3.22 of document 92FUND/EXC.16/2 and 71FUND/AC.7/A/ES.9/9 and the positions of the parties in the proceedings were reported as set out in paragraphs 5.1.1 – 5.4.5 of that document.
- 3.7 At a hearing on 13 May 2002, in response to the decisions made by the Funds' governing bodies at their April/May 2002 session which are dealt with in section 4 below, the Tokyo District Court proposed that all parties should hold an informal meeting on 24 May 2002 in order to enable the Court to propose a settlement.
- 3.8 At an informal meeting in the Tokyo District Court on 24 May 2002, the shipowner and the UK Club submitted a proposal, which had been agreed with the IOPC Funds, setting out the admissible amount of each government agency's claim and of those of JMDPC (cf paragraphs 1.2.1 and 1.2.2 above). The Court invited the Japanese Government and JMDPC to give positive consideration to the proposal.
- 3.9 At an informal meeting on 10 June 2002, the Tokyo District Court did not make a formal recommendation for a settlement, but strongly urged the parties to conclude a settlement based on the proposal of the shipowner and the UK Club by 8 July 2002. The next informal meeting will be held on 1 July 2002.
- 3.10 The Fukui District Court had scheduled a hearing for 29 May 2002 to render an opinion on a substantive issue. However, in response to the decisions made by the Funds' governing bodies at their April/May 2002 sessions which are dealt with in section 4 below, that Court postponed the hearing in order to wait for the position to be taken by the Japanese agencies and JMDPC on the Tokyo District Court's settlement proposal.

4 Global solution

- 4.1 At their April/May 2002 sessions, the governing bodies considered whether it would be possible to reach a global solution of all outstanding issues in the legal proceedings.
- 4.2 The Director submitted for consideration by the governing bodies the following proposal for a global settlement made by the UK Club.
- 1 The compensation payments would be shared between the UK Club and the IOPC Funds on a 42:58 basis in respect of all settled claims.
 - 2 The IOPC Funds would continue to make payments at a level of 80% in respect of all settled claims.
 - 3 The UK Club would pay the 20% balance due to all claimants.
 - 4 The UK Club would reimburse the IOPC Funds approximately ¥5 200 million (£26.7 million), this being the amount payable by the Club to the Funds after payment by the Club of the 20% balance due to claimants.
 - 5 The joint costs incurred by the UK Club and the IOPC Funds would also be apportioned between them on a 42:58 basis.
 - 6 All legal actions arising from the incident would cease.
 - 7 The IOPC Funds, Prisco Traffic Limited, Primorsk Shipping Corporation and the UK Club should each bear their own legal costs.
- 4.3 The governing bodies noted that the proposed global settlement would result in the IOPC Funds recovering approximately ¥5 203 million (£26.7 million) and making a saving of around ¥2 500 million (£13.1 million) as a result of not having to increase their payments over 80% of the settlement amounts, and that the Funds would get a contribution to joint costs of some £3.9 million.
- 4.4 All members of the governing bodies present and a large number of observer delegations unanimously supported the Director's proposal for a global settlement. It was considered that the proposed global settlement represented a balanced compromise with the main advantages that all claimants would be paid in full, that the IOPC Funds would not have to be involved in protracted legal proceedings and that the Funds would recover a significant portion of the amounts paid in compensation which would benefit the contributors to the Funds. The point was also made that the proposed settlement would facilitate the winding up of the 1971 Fund.
- 4.5 A number of delegations expressed their satisfaction that the Japanese delegation, representing the State affected by the incident, endorsed the Director's proposal.
- 4.6 The governing bodies approved the proposed global settlement and authorised the Director to conclude a settlement agreement provided it contained the elements set out in paragraph 4.2. It also authorised the Director to agree with the other parties on the details of such an agreement (documents 92FUND/EXC.16/6, paragraph 3.1.36 and 71FUND/AC.7/A/ES.9/14, paragraph 8.4.36).
- 4.7 The governing bodies emphasised that the acceptance of the proposed settlement should not be interpreted to mean that the IOPC Funds had any doubts as to the strength of their position in the proceedings.
- 4.8 The governing bodies further decided that the IOPC Funds should withdraw their actions against the Russian Register of Shipping.

- 4.9 The governing bodies also stated that the acceptance of the proposed settlement and the withdrawal of the action against the Russian Register should not be interpreted in any way as a change in the IOPC Funds' policy in respect of recourse actions, namely that the Funds should take recourse action whenever appropriate to recover any amounts paid by it from shipowners or other parties on the basis of the applicable national law.
- 4.10 The details of the global settlement are being discussed between the IOPC Funds and the UK Club.

5 Conversion of the maximum amount payable by the 1971 Fund from SDR to Yen

- 5.1 The maximum amount payable by the 1971 Fund in compensation in respect of the *Nakhodka* incident under the 1971 Fund Convention is 60 million SDR minus the limitation amount applicable to the shipowner, ie 1588 000 SDR, which gives 58 412 000 SDR. Under the 1971 Fund Convention, the conversion of the SDR into national currency should be made on the basis of the rate of exchange applicable on the date when the shipowner establishes his limitation fund (Article 1.4 of the 1971 Fund Convention as amended by the 1976 Protocol thereto read in conjunction with Article V.9 of the 1969 Civil Liability Convention as amended by the 1976 Protocol thereto). As a result of the global settlement approved by the governing bodies at their April/May 2002 sessions, the shipowner's limitation fund will not be constituted in the *Nakhodka* case. The governing bodies will in that situation have to decide on the date to be used for the conversion of the amount payable by the 1971 Fund into Japanese Yen.
- 5.2 In the Director's view the most appropriate and equitable method for the conversion of the amount payable by the 1971 Fund would be to use the same rate as that used for the conversion of the maximum amount payable under the 1992 Conventions, ie 135 million SDR. At its 2nd session, held in October 1997, the 1992 Fund Assembly decided to use for that purpose the rate of exchange applicable on 17 April 1997, ^{<2>} 1 SDR = ¥171.589, resulting in 135 million SDR equalling ¥23 164 515 000 (document 92FUND/A.2/29, paragraph 17.2.7).
- 5.3 If the Executive Committee were to approve the Director's proposal as to the rate of conversion to be used, ie the rate on 17 April 1997, 60 million SDR would equal ¥10 295 340 000 and 58 412 000 SDR would equal ¥10 022 856 668.
- 5.4 The 1971 Fund discontinued making compensation payments on 31 December 1999, since on the basis of the rate of exchange of the SDR and the Yen on that date, the 1971 Fund's payments of ¥8 695 408 430 exceeded the 1971 Fund limit of ¥8 177 184 311.
- 5.5 If the Director's proposal as to the rate to be used for conversion were to be approved, the 1971 Fund would have to pay an additional ¥1 327 448 238 (£8 261 000)^{<3>} in order to reach the 1971 Fund limit.
- 5.6 As a result of the global settlement referred to paragraph 4.2 above it is likely that payments by the 1992 Fund to claimants will not reach the maximum amount payable by the Fund under the 1992 Fund Convention, and for the purpose of apportionment of the liabilities between the 1971 and 1992 Funds an adjustment would have to be made to take this into account.

<2> The date of the 1992 Fund Assembly's adoption of the Record of Decisions of the session at which the Assembly took the decisions which made payments possible.

<3> If the rate as at 7 June 2002 (1 SDR = ¥160.689) were used, the 1971 Fund limit would be ¥9 386 165 868 and the 1971 Fund would have to pay an additional ¥690 757 438 (£3 795 400).

6 Distribution between the 1971 and 1992 Funds of any amount recovered on the basis of the global settlement

As a result of the global settlement approved by the governing bodies at their April/May 2002 sessions, the question arises as to the basis on which the amount recovered from the shipowner and the UK Club should be apportioned between the 1992 Fund and the 1971 Fund. The Director proposes that the financial benefits of the global settlement should be shared between the 1992 Fund and the 1971 Fund in proportion to their respective maximum liabilities under the 1992 Fund Convention and the 1971 Fund Convention, which are 58 412 000 SDR and 75 million SDR respectively, ie the 1971 Fund would be liable for 43.783% and the 1992 Fund for 55.217%.

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 give the Director instructions in respect of the court proceedings in Japan;
 - (c) to decide on the rate of exchange to be used for the conversion of the maximum amount payable by the 1971 Fund into Japanese Yen;
 - (d) to decide on the distribution between the 1971 Fund and the 1992 Fund of the financial benefits of the global settlement; and
 - (e) to give the Director such other instructions in respect of this incident as they may deem appropriate.
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