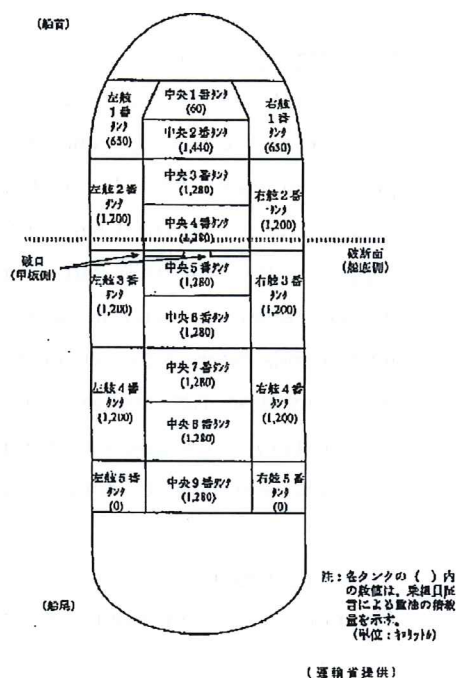


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BRIEF OF *NAKHODKA* CASE

Outline of incident

On January 2, 1997, *Nakhodka* (a Russian tanker, 13159 grt), during her voyage from Shanghai (China) to Petropavlovsk (Russian Federation) with a cargo of 19000 tons of heavy fuel oil, broke up in rough weather (with wind force 7 – 8) about 100km northeast of Oki Islands in the Sea of Japan. The tanker broke into two sections, resulting in a spill of 6200 tons of oil. The stern section sank in a depth of 2500m with 10000 tons of cargo oil on board, having small quantities of oil spill for several months. The bow section, with 2800 tons of cargo, drifted towards the coast, leaking oil. The contract salvor, Nippon Salvage, tried to secure a line to the bow section, but without success in spite of their best efforts. Marine experts predicted that the bow section would not reach to the coast,



while the local fishermen were afraid of it. The local fishermen were right. On January 7, the bow section grounded on rocks in a position 200m from the shore, near Mikuni town in Fukui Prefecture. A substantial quantity of oil was leaked from the grounded bow section, causing heavy pollution in the area nearby. Spilled oil was heavily emulsified and expanded, drifted and reached to wide areas of the coast from the Oki Islands (Shimane Prefecture) to Akita city (Akita Prefecture), a distance of more than 1,000km covering 10 prefectures.

Application of Convention

Japan already ratified the 1992 Protocols, which came into force on May 30, 1996, and thus, 1992 CLC/FC are applicable to this incident. *Nakhodka* was Russian registered, and Russia had not ratified 1992 Protocols but was a party to 69CLC/71FC. Thus, the ship owner's right of limitation should be governed by 69CLC, to which both Japan and Russia were parties. The total available compensation fund was 135mil SDR, consisting of abt. 1.6mil SDR from 69CLC, 58.4mil SDR from 71 Fund, and 75mil SDR from 92 Fund, which was to be converted to ¥23,165 mil (abt. US\$216 mil), using the rate of exchange on April 17, 1997 when the Assembly and the Executive Committee of IOPC Funds decided to make payments of claims possible

Claim Handling Office

IOPC Funds and the shipowner/UK Club, engaged General Marine Surveyors & Co Ltd (GMS), having expertise and experience of pollution incidents in Japan, who monitored the oil cleanup and prevention work. IOPC Funds/UK Club/the shipowner set up a Claims Handling Office in Kobe, managed by GMS. The Claim Handling Office retained about 10 surveyors with more than 10 support staff. Yoshida & Partners represented IOPC Funds and monitored the cleanup operations, the claim assessment, and the claim settlement. Though there were more than 40 incidents involving IOPC Funds before *Nakhodka* incident, there was no case, which involved the overseas P&I Clubs. Not to mention, *Nakhodka* incident is the case having the largest amount of the oil pollution and related claims. The assessment of the claims took long time, lasting the early part of 2002, due to their volume and variety, difficulty to obtain enough evidence, translation work, etc.

Clean up Operation

Enormous number of people and organizations were engaged in and contributed to the oil cleanup and prevention work.

The Maritime Disaster Prevention Centre (MDPC) is a quasi-governmental organization, organized under the Law concerning Prevention of Marine Pollution and Maritime Disaster. Under the said Law, MDPC will pursue oil pollution response operations under the order of the Commandant of the Japan Coast Guard (JCG) (so-called, no.1 operation) or under the contract with the ship owners (so-called, no.2 operation). Unlike the Korea Maritime Pollution Response Corporation (KMPRC), MDPC does not retain itself extensive crafts and equipment, but instead, MDPC has entered into the contracts with most of corporations in Japan who have expertise, facilities, equipment or crafts and are capable to provide MDPC with oil pollution response services or its part. Through its network of commercial clean-up contractors, MDPC could organize and pursue the oil clean-up and prevention operations. The shipowner engaged MDPC for its no. 2 operation. The Government of Japan has made funds available to MDPC in order to enable it to make loans to those who have participated in the clean-up operations, pending payments from the shipowner/UK Club/IOPC

Funds.

JCG, Japan Self Defence Force, the local governments and municipalities provided with their crafts for oil recovery operations, using manual and mechanical means. The local governments also mobilized their own vessels to collect oil from the sea. Helicopters from JCG and private companies were used to spray dispersants at sea, primarily to deal with floating oil escaping from the bow section.

In addition, several hundred fishing boats were mobilized to collect oil at sea. Major oil companies in Japan directly or through Petroleum Association of Japan provided oil pollution response equipment and consumables, portable storage tanks, drums and a number of trained operators. These work needed more than 500,000 man-days. Those who contributed to the oil cleanup work were fishermen, local residents, municipal workers, fire brigades, as well as volunteers from all over Japan. The collected oily waste was temporally stored in over 100,000 drums, but some stored in bulk. The total quantity of waste is 40,000 tons or more, which was transported to disposal facilities throughout Japan by ship, rail and road. About 14,000 tons of lightly oiled sand was buried at local industrial land sites.



Causeway

The removal of the remained oil in the bow section was very difficult. Nippon Salvage was engaged for such removal work. The bow section was stabilized, and the man-holes were made on its top. Pumping out the remained oil/water mixture did not work well due to many debris and high viscosity of oil/water mixture. Nippon Salvage's workers entered into the tanks, and the removal was done mostly by manual. Removed oil was shifted to oil barges or small tankers, but due to shallow water, those crafts were restricted in their operation. Not to mention the work was disturbed due to prevailing rough weather prevailing on the coast facing the Sea of Japan in the winter. JCG issued the order to MDPC (no. 1 operation) to remove the oil from the bow section on

January 14, 1997. MDPC ordered the construction of a temporary causeway to the grounded bow section, in order to remove the oil from the shore side in addition to the sea side, thereby facilitating the removal of the oil. The causeway extended 175m from the shore. A large crane was assembled at the seaward end of the causeway with a sufficient long arm to reach the bow section. The causeway and crane were not used in the removal of the majority of the oil from the bow section. The causeway was then dismantled and the construction material removed from the site. The operation to remove the oil from the bow section was completed on February 25, by which 2900m³ of oil/water mixture was removed. Later, the admissibility of the cost with respect to the construction and removal of the causeway became one of the difficult issues to be resolved for the settlement of the case.

The ship owner and Nippon Salvage/Fukada Salvage entered into a contract for the removal of the grounded bow section, and upon the completion of the oil removal, the bow section was removed and transported to Kure, where a scrap yard was located. At Kure, the bow section was examined by the experts, who were sent by Japanese and Russian governments, the club, the ship owner and IOPC Funds. A part of the bow section was kept preserved as evidence and for future examination at a place near to Tokyo until the last year.

Claims and legal actions

The time bar for the claims against the ship owner, the club and the Funds is 3 years from the incident; on or shortly after January 2, 2000, and before that date, all relevant claims were brought before the courts. IOPC Funds made part payments for the assessed claims, upon having estimated the total exposure of the Funds and reviewed a sufficient margin against overpayment. The level of the payment on the beginning of 2000 was 70%, though it was decided to be up to 80% later. Thus, the amounts of the victim's claim in the legal actions represent the balance of outstanding claims after deduction of the amounts paid by IOPC Funds/UK Club up to 2 January 2000.

MDPC/Government agencies

The major portion of claims were occupied by MDPC's claims. They claimed ¥15,421 mil (US\$144 mil) in total. The Governmental Ministries and Agencies (Ministry of Construction, Ministry of Transport, Self Defence Forces and JCG) claimed ¥1,519 mil (US\$14 mil) for their cleanup cost as well. In the end of 1999, MDPC and the government agencies took legal actions before Tokyo District Court against the ship owner and the UK Club. The claim by MDPC included the costs relating to the construction and removal of the causeway.

As mentioned, the reasonableness of the cost with respect to the causeway was disputed. The Funds' criteria for admissibility were whether the operation to construct the causeway was reasonable from an objective technical point of view. Though no precedent in Japan, the Funds' compensation

could be made only if the claim matches the Funds' criteria for compensation, rather than whether the claim would be admissible in aspect of local tort law compensation. Under Japanese law, the claim in tort would be recoverable if the victims in the situations where they were put at that time reasonably thought that the causeway construction should be done in order to minimize the potential damage and loss.



The oil removal operations at sea could only take place in wave conditions of less than one meter, and during January/February such conditions could only be expected for about 3 days per month. The oil removal operations via the causeway could be carried out in wave conditions of less than two meters, and these conditions could be expected for about 20 days per month during January/February. The construction companies estimated that the causeway would require 15 working days to complete at a cost of ¥1,000 mil, though it actually took 27 days. JCG decided to construct the causeway after taking into consideration the unpredictable and severe weather conditions in the Sea of Japan in winter and other prospective difficulties. However, the causeway and crane gave a route for Nippon Salvage's workers to escape from the bow section when rough weather was coming, by which the period of time they could work in the bow section became longer. This effect was at the outset not received by the ship owner or their surveyor, and the ship owner was placed in a position where they misunderstood the effect of the causeway. Some asserted that it was important for 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 the future cases.



Prefectures and the other local governments

Their claims were in total ¥7,143 mil (US\$67 mil).

Fishery interests

There were various fishing activities in the area, including crab, fish, seaweed, which suffered loss and damage. Besides their loss of and damage to the fishing business, they contributed to the cleanup operation with their work force. Their claims totaled ¥5,013 mil (US\$47 mil).

Fisherman's right to fish is granted as proprietary right under Japanese Fishing Business Law. Fishing rights are mostly managed and controlled by fishery associations; the district fishery associations under each prefecture's fishery association, which is a member of Japan Federation of Fishery Associations. In the major cases, the prefectural fishery associations handle the case, collecting claims and evidence, and discussing the claim with the shipowner/club/IOPC Funds. The associations usually keep its strong tie among fishermen and its district fishery associations. There are several attorneys who have been well experienced in handling fishery claims, and prefectural associations almost always hire such attorneys in such major cases. It could be said that in Japan it is easier than in other place to discuss the matter with fishermen, who are always very important victims in oil pollution cases, since the shipowner could discuss the matter with only a few representatives of fishermen.

Tourism sectors

The area is one of the most popular sightseeing places in Japan. Several national parks are located within the affected area. Tourists visit this area throughout the year for its natural beauty, spas, temples, and food. About 318 claimants in the tourism sector claimed the total claim amount of ¥2,841 mil (US\$27 mil) for their loss and damage.

Unlike fishery interests, the claimants of tourism sectors did not have a united organization, and its

claim nature is very much varied; from the claim for cleanup the windows of seaside hotel/aquarium stained due to splashed oil/water mixture to the claim for business loss of an inn on the mountain side distant more than 100km from the site, asserting guest decrease due to the press percussions. The assessment of these claims needed somewhat different approach, and the Claim Handling Office hired a group of surveyors belonged to a particular survey corporation to let them concentrate into this sort of the claims.

Other victims

Seven nuclear power stations and the other interests claimed ¥2,748 mil (US\$26 mil). Except MDPC and the government agencies, all victims took legal actions before Fukui District Court.

Ship owner and UK Club

The ship owner/UK Club took legal action at the Fukui District Court against IOPC Funds. The claim amount was in total ¥1,129 mil (US\$10.6 mil)

Though it took long, the Claim Handling Office finally assessed the total claims to be ¥25,449 mil (US\$238 mil), which exceed the total available compensation fund of ¥23,165 mil (abt. US\$216 mil).

Recourse actions taken by the IOPC Funds

Cause of the incident

Japanese and Russian governments made investigation into the cause of the incident. In Japan, a special committee, which was set up for this purpose, concluded in summary that, if *Nakhodka* had been properly maintained she would have been capable of withstanding the weather at the time of the incident. Due to the extensive corrosion weakening her internal structure, 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.

On the other hand, the Russian investigation 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 conclusions of the Japanese report suggested that the incident had occurred as a result of the actual fault and privity of the ship owner, a ground to challenge the ship owner's right to limit its liability under 69CLC. The survey and the thickness measurements clearly revealed significant corrosion of the steel structure and defects in the welding. The experts engaged by the Funds have

formed the opinion that the ship was improperly maintained and therefore unseaworthy.

Procedures

IOPC Funds decided to take recourse action against the shipowner, the ship owner Prisco Traffic Ltd, its parent company Primorsk Shipping Corporation, UK Club and Russian Maritime Register of Shipping, and before the beginning of 2000, IOPC Funds brought actions against them before Fukui District Court for the maximum amount payable by the Funds less the amounts covered the ship owner's limitation amount. The Funds' claims were based on direct action under CLC/FC and indirect action. The latter was the creditor's rights to exercise Prisco's right against UK Club in accordance with its P&I policy, which the maximum coverage was US\$500 mil as usual among oil tankers, of course subject to the terms of the policy.

From the beginning of the case, the same lawyer represented UK Club and the ship owner, and signed all settlement agreements with claimants on their behalf. He also represented both the ship owner and UK Club in their actions against IOPC Funds. UK Club at its Tokyo Office received the service of the proceedings initiated by the above victims and IOPC Funds. The same lawyer as for the ship owner however rejected to receive the service on the ground that he was not authorized to receive service of writs on behalf of the shipowner. It was clear that the service to the ship owner in Russia would take long, otherwise it would later be found impossible. This procedure of the overseas service delayed discussions between UK Club/shipowner and IOPC Funds, and was considered to disturb earlier payment to the victims.

However, the power of attorney issued by the shipowner and UK Club in respect of the action against IOPC Funds included authority for that Japanese lawyer to receive service of counter claims. In order to speed up the procedure, 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, though this counter claim was doubled with the Funds' recourse action. The writ of counter-claim was served on the same lawyer in February 2001.

On the other hand, the overseas service of the legal proceedings under Japanese law takes long, especially to Russia, which could be made only through diplomatic channel, while the accuracy of the address (a location where the representative director could receive the post) of Prisco was uncertain. If the address of the defendant to be served could not be found in spite of the plaintiff's best attempt, Japanese court will make a public notice (by posting a notice on the board in front of the court building for a few week), by which the service is deemed completed. We sent to Russia a person who knows well about Russian business with an assistant, and he found that the office of Prisco was changed and that it was nearly impossible to find their new office. Upon having his report, Fukui District Court declared to make a public notice for the service of writ to Prisco. Then, Prisco and

Primorsk appointed their own lawyers to represent them in legal actions brought against them by IOPC Funds and victims.

The first hearings in Tokyo District Court and Fukui District Court were held in September 2001. Tokyo District Court indicated that the case would be transferred to Fukui District Court if the main issues of this case were nearly the same as those of the cases in Fukui District Court. This transfer and consolidation of the proceedings in two courts was not made before the global settlement.

In these proceedings, Prisco/UK Club denied liability on the grounds that the incident was caused by "an extraordinary natural phenomenon", the wordings of Japanese law incorporating CLC/FC, the same meaning as the expression "a natural phenomenon of an exceptional, inevitable and irresistible character" under Article III.2 (a) of 69CLC. In Japan, it is submitted that "an extraordinary natural phenomenon" means only cases such as a sudden eruption of a submarine volcano. The rough weather in the winter in the Sea of Japan encountered by *Nakhodka* in this case was foreseeable, and she should have withstood such weather conditions. It was clear that Prisco could not prove that the rough weather at the time of the incident was of such a level of "an extraordinary natural phenomenon".

UK Club referred to the London arbitration clause in the Club Rules, as well as the "pay to be paid" clause, the validity of which had been upheld by the House of Lord. However, the "pay to be paid" clause might not be upheld in Japan, though there was no precedent in Japan. 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.

Settlement

In the above situations, in the early part of 2001, IOPC Funds and UK Club agreed in general that they should try to reach to a global settlement, in order to have a result that all admissible claims (though exceeding the total available funds under CLC/FC) are paid in full and that IOPC Funds recover a reasonable amount of the compensation paid by them.

At around that time, the assessment of the claims was progressed, leaving minor parts of claims. However, the issue of the admissibility of the claims regarding the causeway was not settled. It was the premises for the global settlement to settle the issue about the causeway, since Japanese Government and MDPC could not easily make concessions with respect to their claims due to strict restriction under Japanese Government Credit Control Law. Meetings were held from the mid-2001 to the early part of 2002 between Japanese Government and IOPC Funds/UK Club, where the technical aspects of the causeway claims and their admissibility were discussed in detail, and finally

they agreed to ¥2,048 mil (US\$19.1 mil), roughly 2/3, of the claims to be admissible.

In May 2002, UK Club/the ship owner and IOPC Funds agreed as follows, though the formal settlement agreement was executed on October 28, 2002: -

1. The compensation payments would be shared between UK Club and IOPC Funds on a 42:58 basis in respect of all settled claims.
2. IOPC Funds would continue to make payments at a level of 80% in respect of all settled claims.
3. UK Club would pay the 20% balance due to all claimants.
4. UK Club would reimburse IOPC Funds approx ¥5,200 mil (US\$48.6), this being the amount payable by UK Club to IOPC Funds after payments by UK Club of 20% balance due to claimants.
5. The joint costs incurred by UK Club and IOPC Funds would also be apportioned between them on a 42 : 58 basis.
6. All legal actions arising from the incident would cease.
7. IOPC Funds, Prisco, Primorsk and UK Club should each bear their own legal costs.

Upon having the payment from IOPC Funds/UK Club, all the claimants withdrew their legal actions. The final compensation to the claimants was as follows: -

Government agencies	¥1,887 mil	US\$17.6 mil
MDPC	¥12,450 mil	US\$116.4 mil
Local governments	¥5,638 mil	US\$52.7 mil
Fishery interests	¥1,769 mil	US\$16.5 mil
Tourism sectors	¥1,344 mil	US\$12.6 mil
Others	¥2,265 mil	US\$21.2 mil
Owners (assessed only)	¥774 mil	US\$7.2 mil
Total	¥26,100 mil	US\$244 mil

[End]