



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ASSEMBLY
23rd session
Agenda item 17

71FUND/A.23/14/6
10 September 2000
Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

N°1 YUNG JUNG

Note by the Director

Summary:	The question has arisen whether the 1971 Fund is entitled to recover from the Republic of Korea the amounts paid by the Fund in compensation and indemnification as a result of the <i>N°1 Yung Jung</i> incident. A claim to this effect has been dismissed by the Korean Government Compensation Committee. An analysis is made of the legal situation in order to assess whether the 1971 Fund should pursue its claim in the Korean Courts.
Action to be taken:	Decide whether the 1971 Fund should take legal action against the Republic of Korea to recover the amounts paid by the Fund in compensation and indemnification.

1 Introduction

- 1.1 While the Korean sea-going barge *N°1 Yung Jung* (560 GRT) took shelter from an approaching typhoon at a wharf in the port of Pusan (Republic of Korea) on 15 August 1996, the barge grounded on a submerged rock which did not appear on the chart. As a result, approximately 28 tonnes of medium fuel oil spilled into the sea. Clean-up operations were carried out by contractors engaged by the shipowner.
- 1.2 The *N°1 Yung Jung* was not entered in any P & I Club, but had liability insurance of US\$1 million (£620 000) per incident.

- 1.3 At its 61st and 62nd sessions, the Executive Committee considered whether the 1971 Fund should present a claim to the Republic of Korea for recovery of the amounts paid by the Fund in compensation.
- 1.4 At its 61st session the Executive Committee instructed the Director to continue his investigations into the cause of the incident and to discuss the issues involved with the Korean Government. He was further instructed to present a claim for recovery to the Regional Government Compensation Committee and, if required, to pursue the claim before the competent Korean court to the extent needed to prevent the claim becoming time-barred (document 71FUND/EXC.61/14, paragraph 4.9.12).

2 Limitation proceedings

The shipowner commenced limitation proceedings in August 1997. The shipowner's insurer presented a letter of guarantee for the limitation amount to the Court. In May 1998 the Pusan District Court determined the limitation amount applicable to the *N^o1 Yung Jung* at Won 122 million (£60 000).

3 Claims for compensation

- 3.1 All claims for compensation arising out of this incident have been settled at a total amount of Won 747 million (£363 000).
- 3.2 Some of the claims referred to above were paid by the 1971 Fund, and some by the shipowner. In September 1998 the 1971 Fund paid to the insurer an amount of £262 373 (equivalent to Won 615 million) corresponding to the amount which the insurer had paid in excess of the limitation amount applicable to the *N^o1 Yung Jung* (including interest). The 1971 Fund also paid indemnification of the shipowner under Article 5.1 of the 1971 Fund Convention of Won 28 million (£12 000).
- 3.3 The 1971 Fund's payments of compensation and indemnification total Won 670 million (£286 000).

4 The incident

In the document submitted to the Executive Committee's 61st session (document 71FUND/EXC.61/10, paragraphs 6.1.1 and 6.1.2), the Director set out the facts of the incident as follows:

The *N^o1 Yung Jung*, which had a draft of 3.6 metres, grounded on a submerged granite rock when berthing at a wharf in the port of Pusan. This rock, which protruded some 1.5 metres from the seabed, did not appear on the chart. The shipowner engaged divers to inspect the seabed, and the divers' inspection concluded that the rock was not part of the seabed but had been placed on the seabed at some time. The divers also found that there was no seaweed on the rock, which indicates that it had been on the seabed for only a short period of time.

It appears that the marine police and the public prosecutor did not investigate why the rock was lying on the seabed. In the criminal proceedings brought against the master, the Court did not address the issue, but held that the lowest water depth near the berth was only 3 metres at low tide and that the master should have checked the depth to ensure that it was safe to moor the ship at the berth.

5 Procedure for claiming compensation from the Republic of Korea

- 5.1 Under the Korean State Compensation Act, any claim against the Republic of Korea should first be submitted to the competent Regional Compensation Committee. A court action against the Republic of Korea cannot be taken until the Committee has rendered its decision or three months have passed from the date when the claim was presented to the Committee.
- 5.2 The role of the Committee is to review the claim. The Committee examines the evidence presented, in the form of documents or hearing of witnesses. The procedure before the Committee is not public. The decision will either award a specific amount in compensation or reject the claim altogether.
- 5.3 If the claimant is satisfied with the Committee's decision as to the awarded amount, he may request in writing payment of that amount, and the amount will be paid by the Republic of Korea within a short period of time.
- 5.4 Should the claimant not be satisfied with the Committee's decision, he is entitled to bring legal action against the Republic of Korea. Alternatively, the claimant may appeal against the Regional Committee's decision to the Central Government Compensation Committee.
- 5.5 The Regional Committee is obliged to refer any case for which in its view the compensation amount is estimated to exceed Won 50 million (£26 000) to the Central Committee. The procedure for payment set out in paragraph 5.3 applies also to the Central Committee.

6 Action taken by the Director

- 6.1 The 1971 Fund's Korean lawyer advised the Director that, although it would be possible to agree with the Korean Government on an extension of the three-year time period within which a claim should be presented to the Regional Compensation Committee, such an agreement would not protect the 1971 Fund from its claim becoming time-barred if legal action against the Republic of Korea would be necessary.
- 6.2 In the light of this advice, the Director instructed the 1971 Fund's Korean lawyer to present a claim to the Regional Compensation Committee before the expiry of the three-year period. The claim was submitted on 9 August 1999.

7 Insurer's position

The shipowner's insurer informed the Director that he had decided not to pursue any recourse claim against the Republic of Korea because he believed that it was unlikely that a recourse action would be successful and the amount involved was relatively small.

8 The 1971 Fund's lawyer's opinion on the liability of the Republic of Korea under Korean law

- 8.1 At its 61st session, the Executive Committee was informed of the advice given by the 1971 Fund's Korean lawyer on the position of Korean law in respect of the potential liability of the Republic of Korea as follows (document 71FUND/EXC.61/10, paragraph 6.2):

If the maritime chart is defective in that the chart does not show a natural rock, the responsibility falls on the National Oceanographic Research Institute, which is a Korean governmental office. However, according to a judgement by the Korean Supreme Court (26 August 1997, 96 Da 33143) the Republic of Korea has no liability *vis-à-vis* third parties for any damage caused as a result of a defective chart.

However, if the rock was not a natural part of the seabed but had been placed on the seabed, the legal situation is different, as there would be considered to be a defect in "public facilities or structures".

If there is a defect in public facilities or structures owned or managed by the Republic of Korea, the Republic is, under Korean law, liable for any damage resulting therefrom (Article 5 of the Korean State Compensation Act). It is established by jurisprudence and doctrine that the Republic of Korea's liability is strict and thus independent of whether there is any fault or negligence on the part of the Republic. The only relevant issue is therefore whether the facility or structure was deficient. The Republic of Korea is liable, even if there was contributory negligence on the part of the victim (Korean Supreme Court judgement of 22 November 1994 in re Da 32 9 24). The Republic is not entitled to limitation of liability.

At the time of the incident, the berth was owned by the Republic of Korea and managed by the Pusan Regional Maritime Affairs and Fisheries Office, which is a Korean governmental office. For this reason the berth falls under the definition of "public facilities and structures" laid down in the Korean State Compensation Act.

Since the rock which was located on the floor of the berth did not appear on the charts, the 1971 Fund's Korean lawyer has expressed the view that - provided the rock was not natural - the berth was defective and that the defect was the cause of the incident. In his view, the Republic of Korea would then be liable *vis-à-vis* the shipowner's insurer and the 1971 Fund, who have acquired by subrogation the rights of the victims of oil pollution damage, for any payments made by the insurer and the Fund to these victims.

The 1971 Fund's Korean lawyer has also expressed the view that, on the basis of the above-mentioned Supreme Court judgement, the Republic of Korea's liability against the 1971 Fund would not be reduced due to the negligence of the master, whereas the Republic's liability against the shipowner/insurer might be reduced on the basis of the negligence of the master who was an employee of the shipowner.

9 Director's considerations as submitted to the Executive Committee's 61st session

The Director presented the following analysis for consideration by the Executive Committee at its 61st session:

The inspection carried out by divers engaged by the shipowner indicates that the rock on which the *N°1 Yung Jung* grounded was not a natural part of the seabed but had been placed there at some time. For this reason, it is likely in the Director's view that the incident was caused by a defect in what in Korean law is known as "a public facility or structure". In the light of the advice given by the 1971 Fund's Korean lawyer concerning the applicable provisions in the Korean State Compensation Act, it could in the Director's view be maintained that the incident was caused by a defect in a public facility or structure, that the Republic of Korea is liable for the damage resulting therefrom and that the Republic is under an obligation to reimburse the 1971 Fund for any amounts which the Fund has paid in compensation or indemnification.

10 The Executive Committee's considerations at its 61st session

The considerations at the Executive Committee's 61st session are reflected in the Record of Decisions as follows (document 71FUND/EXC.61/14, paragraphs 4.9.4 – 4.9.12):

The observer delegation of the Republic of Korea stated that it recognised that the Fund had a right to take recourse action, that no distinction should be made in this regard between Governments and individuals and that the applicable law was the domestic law.

That delegation observed that the Government of Korea must be given the opportunity to present its defence if a recourse action was taken.

Assuming that all that had been stated by the Director in document 71FUND/EXC.61/10 was correct and that there was a defect in public facilities or structures, the delegation of the Republic of Korea brought two points to the attention of the Committee, namely that 98% of the claims related to clean-up operations, some of which had been carried out by the Korean Government, and that the ship had entered the port without permission, with the result that the master had been given a prison sentence for entering an area where tankers were not allowed to berth.

The Korean delegation stated that the Korean Government considered itself to have been a victim of the incident and as such had been paid compensation. That delegation pointed out that most of those claiming compensation were not victims of the incident but were volunteers who had come to assist in the clean-up operations and that they had not suffered any damage as a result of any defect in public facilities or structures if such a defect existed.

The delegation of the Republic of Korea considered that the contributory negligence of the master would affect the Korean Government's liability to the 1971 Fund. That delegation made the point that, if the Korean Government had any liability, it would claim reimbursement from the Fund of any amount paid as a result of a recourse action and that the Fund would then be entitled to claim a reduction based on contributory negligence under Article 4.3.

The Korean delegation took the view that there were no grounds on which the Korean Government could be held solely liable and requested that it be allowed to present its case in writing, in order to facilitate a discussion at the next session of the Executive Committee.

A number of delegations recalled the policy of the 1971 Fund to take recourse action whenever appropriate and that the Fund should in each case consider whether it would be possible to recover any amounts paid by it to victims from the shipowner or from other parties on the basis of the applicable national law. It was also recalled that the Committee had stated that if matters of principle were involved, the question of costs should not be the decisive factor for the Fund when considering whether to take legal action. It was noted that the Committee had also stated that the 1971 Fund's decision on whether or not to take such action should be made on a case by case basis, in the light of the prospect of success within the legal system in question (document FUND/EXC.42/11, paragraph 3.1.4).

11 The Executive Committee's considerations at its 62nd session

- 11.1 At the 62nd session of the Executive Committee the Korean delegation submitted a document setting out the Korean Government's position (document 71FUND/EXC.62/10/1).
- 11.2 During the Committee's discussion, the Korean delegation made the point that the 1971 Fund did not have

a valid recourse claim against the Korean Government for two reasons. That delegation maintained firstly that the cause of the incident was not a defect in the installation or maintenance of a public facility or structure owned by the Government, but the gross negligence of the shipowner who had used those facilities illegally in an area where oil tankers were not allowed, without giving notice to, or obtaining the permission of the Port Authority, and without giving full consideration to the possible effects of the weather or the tide. The point was made that if the vessel had notified the Port Authority of its intentions, the Port Authority would have guided it to a safe berth. The Korean delegation maintained secondly that, since Article 4.3 of the 1971 Fund Convention precluded reduction of compensation to a claimant who had taken preventive measures on the grounds of contributory negligence, the 1971 Fund could not pursue a recourse claim against the Korean Government for any payments which the Fund had made in respect of preventive measures. The Korean delegation stated that it could itself have carried out the preventive measures, that other persons could have carried out such operations in the port only if permitted to do so by the Government and that therefore the operations should be regarded as taken by the Korean Government. In that delegation's view, a recourse action by the 1971 Fund in this case was contrary to the spirit of the 1971 Fund Convention.

- 11.3 The Committee noted that in the Director's view the Korean Government could not have been a claimant since the Government did not incur the costs of the clean-up and preventive measures (except as regards the operations carried out by the Pusan Marine Police), that if the Korean Government had carried out the operations itself it would have been entitled to claim compensation, and that the same would have applied if the Government had engaged contractors to carry out the operations and paid these contractors. The Committee observed, however, that this was not the case in respect of the *N^o1 Yung Jung* incident.
- 11.4 The Committee also noted the Korean Government's position as regards the facts of the incident but also noted that the 1971 Fund's technical experts had disagreed with that position on several points.
- 11.5 The Committee recognised that the use of the berth in question was restricted to dry cargo vessels of less than 1 000 DWT and that these restrictions had been published in the regulations for operation of the berth facilities of the port of Pusan. The Committee noted, however, that no restriction had been published in respect of the draught of dry cargo vessels at the berth and that therefore, in the Director's view, the assumption was that the maximum permitted draught for such vessels was 4.3 metres at low tide. The Committee also noted that a dry cargo vessel with the same draught as the *N^o1 Yung Jung* (ie. 3.6 metres) would have grounded on the rock in question and that the use of the berth was restricted to dry cargo vessels because there were no fire fighting facilities at the berth.

12 Government Compensation Committee's decision

In a decision rendered on 26 June 2000 the Government Compensation Committee dismissed the 1971 Fund's claim. The Committee gave the following reasons for its decision:

The claimant alleges that the accident occurred because the vessel grounded by coming into contact with a rock which was near the wall of the berth. The Korean Government who is responsible for managing the public facility including the berth must, therefore, compensate for the damages arising from this accident.

However, the berth in question is a berth only for general cargo vessels with water depth (draft) less than 4.3 meters and DWT less than 1 000 tons for the safety of these vessels. It is thus sufficient that the berth has the normal safety features of a berth for general cargo vessels, for example, the berth does not cause any problems to the berthing and navigation of general cargo vessels that have low drafts. There is no obligation on the part of the Korean Government to keep the berth safe for oil barges or other vessels with high drafts, expecting these oil barges or other vessels to illegally berth there.

The cause of the accident was that the master of the vessel illegally berthed the vessel which was laden with 1 800 tons of oil cargo at the berth in question without obtaining the approval for use of a port facility from the Port Authority or making any report.

Therefore, the submission of the claim for state compensation is hereby dismissed.

13 The Director's analysis of the situation

- 13.1 As mentioned in paragraph 5.4 above, the 1971 Fund is entitled to pursue its claim for recovery against the Republic of Korea by legal action. Such an action should be filed by 20 December 2000.
- 13.2 The 1971 Fund's Korean lawyer has advised the Director that in his view the berth was defective and that the Korean Government which is responsible for the public facility in question should under Korean law be held liable. However, he has drawn attention to the two arguments raised by the Korean Government, ie that the berth was to be used only by general cargo vessels and the interpretation of Article 4.3 of the 1971 Fund Convention (paragraph 11.2 above). He has expressed the view that the Korean Courts would be inclined to accept these arguments, in view of the fact that the Courts have been rather reluctant to find the Republic of Korea liable under the State Compensation Act. In his view, therefore, a legal action by the 1971 Fund against the Korean Government was not likely to succeed.
- 13.3 In view of the advice given by the 1971 Fund's Korean lawyer the Director takes the view that there is a considerable risk that a legal action against the Korean Government would not succeed. For this reason and taking into account the relatively low amount involved, the Director proposes that the 1971 Fund should not pursue this issue further by taking legal action against the Republic of Korea.

14 Action to be taken by the Assembly

The Assembly is invited:

- (a) to take note of the information contained in this document; and
- (b) to decide whether the 1971 Fund should bring legal action against the Republic of Korea for recovery of the amounts paid by the Fund in compensation and indemnification.
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