



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ADMINISTRATIVE COUNCIL
12th session
Agenda item 15

71FUND/AC.12/13/3
17 September 2003
Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

FOUR KOREAN INCIDENTS

Keumdong N°5, Sea Prince, Yeo Myung and Yuil N°1

Note by the Director

Summary:

Keumdong No.5: Claims totalling £1.4 million are the subject of appeal by the claimants to the Korean Supreme Court. All other claims have been settled and paid.

Sea Prince: In January 2002 the Court of first instance rendered its judgements in respect of the remaining claims. The Court dismissed the majority of the claims, but awarded £753 000 to 31 claimants. The 1971 Fund appealed against the judgements and deposited with the Court the amount awarded plus interest in order to stay the enforcement of the judgements. A fishery co-operative union appealed against the decision by the first instance Court to reject its claim for lost sales commission. In December 2002 the Appellate Court rendered a mediation decision in which it awarded the co-operative £38 000 in respect of lost sales commission. Following a number of mediation hearings the Court issued a 'Decision of Recommendation' regarding the other outstanding claims, which was based on proposals by the 1971 Fund. These claims were finally settled for £9 300.

Yeo Myung: The only outstanding claim has become time barred. The Fund has requested the Court in charge of the limitation proceedings to issue an Assessment Decision to enable the shipowner's limitation fund to be distributed.

Yuil N°1: All outstanding claims have been settled for a total of £742 000. In view of the fact that it will take some considerable time before the limitation amount applicable to the *Yuil N°1* is established by the Court, the Director proposes that he should be authorised to agree with the shipowner's insurer on an exchange rate between the SDR and Won to be applied to determine that amount.

Action to be taken:

Information to be noted. Decide whether to authorise the Director to agree with the shipowner's insurer an SDR/Won exchange rate with a view to establishing the limitation amount applicable to the *Yuil N°1*.

1 Keumdong N°5

(27 September 1993)

1.1 The incident

The Korean barge *Keumdong N°5* (481GRT) collided with another vessel near Yeosu resulting in the loss of an estimated 1 280 tonnes of heavy fuel oil.

1.2 Claims for compensation

1.2.1 Claims relating to the cost of clean-up operations were settled for a total of Won 5 430 (£2.8 million) and the majority of claims from the fishing and mariculture sectors were settled for a total of Won 6 575 million (£3.5 million).

1.2.2 The Yeosu Fishery Co-operative and some 900 of its members took legal action against the 1971 Fund in May 1996, the total amount claimed being Won 18 803 million (£9.5 million). The 1971 Fund's experts considered that the claims were exaggerated and poorly documented. A number of claims by owners of fishing boats were rejected by the 1971 Fund due to the fact that they were not in possession of valid fishing licenses at the time of the incident. The Fund maintained that the income from unlicensed or unregistered fishing was illegal income and that claims in respect of such fishing were inadmissible.

1.2.3 The Court of first instance rendered a judgement in January 1999 and found that the claimants, including those who were unregistered and unlicensed, had suffered damage due to the oil pollution, but rejected their calculations of their losses due to lack of information, the unreliability of the evidence they had presented and the lack of a direct causal relationship between the alleged losses of income and the incident. In determining the amount of the damages the Court awarded compensation for both loss of earnings and pain and suffering. The total amount awarded by the Court was Won 1 571 million (£797 000).

1.2.4 The 1971 Fund lodged an appeal against the decision to award compensation to unlicensed fishermen and to grant compensation for pain and suffering in lieu of economic losses. The Appellate Court overturned the judgement of the first instance Court. In considering whether claims for pain and suffering were admissible, the Appellate Court took the view that there should not be a difference in the application of the Conventions among Contracting States and that the Korean Act should include only losses in respect of economic losses and property damage. As regards the claims in respect of unregistered and unlicensed fishing activities, the Appellate Court also referred to the special position of the 1971 Fund and held that a restrictive interpretation of the concept of 'pollution damage' would be closer to international standards. It therefore decided that the incomes of claimants who did not have the licenses, permits or registrations required under the Korean Fisheries Act to carry out their activities should be regarded as illegal income, which could not be included in the calculation of compensation. The Appellate Court upheld the decision of the first instance Court in respect of loss of earnings due to business interruption caused by clean-up of licensed fishing grounds and culture farms and ordered the Fund to pay Won 143 million (£73 000).

1.2.5 Since the Fund's position on matters of principle had been accepted the Director decided that the Fund should not appeal against the decision of the Appellate Court. Although the individual members of the co-operative did not appeal against the decision, 36 village fishery associations have appealed to the Supreme Court, claiming Won 2 756 million (£1.4 million). It is not known when the Supreme Court will render its judgement.

2 Sea Prince

(23 July 1995)

2.1 The incident

The Cypriot tanker *Sea Prince* (144 567 GRT) grounded near Yeosu resulting in a spill of around 5 000 tonnes of crude oil.

2.2 Claims for compensation

2.2.1 The majority of claims for compensation were settled for a total of Won 50 000 million (£27 million) of which the 1971 Fund paid Won 31 700 million (£17 million) and the shipowner's insurer paid Won 8 300 million (£10 million). The amount paid by the insurer corresponds to the limitation amount applicable to the *Sea Prince*, as agreed between the 1971 Fund and the insurer.

2.2.2 The 1971 Fund has indemnified the shipowner's insurer for Won 7 411 million (£4.1 million) in accordance with Article 5.1 of the 1971 Fund Convention.

2.2.3 A total of 207 claims submitted by 194 claimants belonging to the Yeosu Fishery Co-operative Union (Yeosu FCU) totalling Won 5 321 million (£2.8 million) were the subject of legal actions against the 1971 Fund. In December 2001 the Court of first instance rendered judgements in respect of the above claims, awarding 31 claimants a total of Won 1 438 200 211 (£730 000) plus interest. The Court dismissed the claims of the remaining 163 claimants.

2.2.4 At its April/May 2002 session the Administrative Council endorsed the decision by the Director to appeal against the judgements awarding compensation in respect of alleged mortality of caged fish and cultivated shellfish and in respect of unlicensed aquaculture farms and an unlicensed fishing boat owner (document 71FUND/AC.7/A/ES.9/14, paragraphs 8.3.4 – 8.3.6).

2.2.5 In order to stay the provisional enforcement of the judgement, in February 2002 the 1971 Fund deposited Won 2 060 million (£1.1 million), representing the amount awarded in the judgements plus interest. The Court subsequently rendered a decision to stay the enforcement of the judgements.

2.2.6 The Yeosu FCU appealed against the judgement in respect of its claim for lost sales commission but not in respect of its other claims. None of the other claimants appealed against the judgements.

2.2.7 In July 2002 the judge in charge of the appeal, whilst reserving the Court's final position, expressed his preliminary opinion concerning a number of legal and factual issues. As regards the claims in respect of unlicensed fishing and aquaculture, the judge indicated that these claims should be dismissed. In respect of the claims for alleged mortality of caged fish and cultivated shellfish the judge indicated that he was not inclined to accept the Fund's argument that the mortality was most likely due to the combined effects of a typhoon and a red tide that occurred at the time of the *Sea Prince* incident. As regards the claim for lost sales commission, the judge expressed the opinion that the claim was admissible in principle, since the Korean courts had established precedents in this respect. He further indicated that even if the payments made by the 1971 Fund to fishermen had included the sales commission, this would not exonerate the Fund from its debt payable to the co-operative, since the former payments did not have the effect of payment to the co-operative. The judge also indicated that he did not believe that the levels of the losses suffered by the FCU were anything like those claimed.

2.2.8 In September 2002 the 1971 Fund submitted further scientific evidence in support of its contention that the alleged mortality of caged fish was unlikely to have been due to oil contamination.

- 2.2.9 In November 2002 the 1971 Fund held without prejudice discussions with the Yeosu FCU with a view to agreeing the quantum of the losses of sales commission. The Fund calculated the lost sales commission on the basis of the assessed losses of the individual fishery sectors under the jurisdiction of the co-operative and after deducting losses in respect of sales that would have been made through private channels. On the basis of these discussions the Yeosu FCU agreed with the Fund on the quantum of the losses at Won 72.3 million (£38 000) subject to the decision by the Court regarding the admissibility of the claim.
- 2.2.10 On 10 December 2002 the Appellate Court rendered a mediation decision in which it accepted the claim for lost sales commission in the amount of Won 72.3 million (£38 000). Having studied the mediation decision of the Appellate Court the Director considered that whilst it might be argued that the co-operative had waived its claim by allowing the Fund to make full compensation to its members, he nevertheless recognised that the judge's opinion had merit from a legal point of view. The Director therefore decided not to lodge objection against the mediation decision. The Yeosu FCU also decided not to object to the mediation decision. The 1971 Fund subsequently paid the Yeosu FCU a total of Won 99.2 million (£52 000), including interest.
- 2.2.11 In March and April 2003 the Appellate Court conducted mediation hearings at which the Court requested the 1971 Fund to reconsider its position regarding the claims in respect of caged fish culture and abalone culture. At a subsequent hearing the Fund proposed that in recognition of the fact that the caged fish farms in question had been more severely oiled than the others affected by the pollution, the claimants should be allowed additional cleaning costs to include the floating pontoons supporting the fish cages. The Fund also proposed allowing an extra 15 days, ie a total of 4.5 months business interruption to allow for the time taken to complete the cleaning work. As regards the abalone culture claims, the Fund proposed allowing compensation in respect of management and labour costs resulting from business interruption caused by the presence of oil in the vicinity of the culture farms.
- 2.2.12 In May 2003 the Appellate Court issued a Settlement Recommendation Decision based upon the Fund's proposals. The Court did not admit the mortality of caged fish as requested by the claimants. The amounts originally claimed, the amounts awarded by the first instance Court and the amounts recommended by the Appellate Court are summarised in the table below.

Sector	Total claimed amount Won	Amount awarded by the first instance Court Won	Amount recommended by the Appellate Court Won
Caged fish culture	832 083 901	325 299 216	15 822 114
Aquaculture	1 821 955 200	1 111 292 438	2 223 963
Inshore fishing vessels	10 183 746	1 608 557	140 000
Lost sales commission	1 425 653 975	0	72 650 621
Totals	4 089 876 822 (£2.1 million)	1 438 200 211 (£730 000)	90 836 698 (£47 000)

- 2.2.13 The claimants did not lodge an objection. In June 2003 the Court's Settlement Recommendation Decision therefore became final. Following payment of the above amounts the Fund retrieved the Won 2 108 million (£1.1 million) that it had deposited with the Court. There are no outstanding claims arising from the *Sea Prince* incident and the 1971 Fund will not be required to make any further payments.

3 *Yeo Myung*

(3 August 1995)

3.1 The incident

The Korean tanker *Yeo Myung* (138 GRT) collided with a sand barge near Geoje island resulting in a spill of about 40 tonnes of heavy fuel oil.

3.2 Claims for compensation

3.2.1 Claims relating to clean-up costs and losses in the fishery and tourism sectors were settled for a total of Won 1 554 million (£990 000).

3.2.2 The only outstanding claim, which was for Won 335 million (£175 000), has become time barred since the claimant failed to take legal action against the 1971 Fund within six years of the date of the incident.

3.2.3 In March 2002 the 1971 Fund requested the Court in charge of the limitation proceedings to issue an Assessment Decision to enable the limitation fund to be distributed. Unfortunately, there has been a change of judge in the meantime and the newly appointed judge is therefore not familiar with the case. However, it is hoped that the Court will issue an Assessment Decision in the near future and that this will be based on the Fund's assessment of the claims. The Fund's lawyers in Korea have indicated that in view of the expiry of the six-year time bar period the 1971 Fund will not be required to pay any further compensation in Korea.

3.2.4 Once the limitation proceedings have been terminated the 1971 Fund will be required to pay indemnification to the shipowner's insurer in accordance with Article 5.1 of the 1971 Fund Convention.

4 *Yuil N°1*

(21 September 1995)

4.1 The incident

4.1.1 The Korean coastal tanker *Yuil N°1* (1 591 GRT) ran aground on an island near Busan. The tanker was refloated, but while being towed towards the port of Busan it sank in 70 metres of water.

4.1.2 Some 670 m³ of oil was recovered from the sunken wreck in 1998.

4.2 Claims for compensation

4.2.1 All clean-up claims arising from the incident were settled for a total of Won 12 393 million (£8.5 million). The shipowner's insurer paid some of these claims in full, and the 1971 Fund reimbursed 60% of these payments to the insurer. The 1971 Fund will reimburse the insurer the balance (40%) of these payments minus the limitation amount after that amount has been established in Won.

4.2.2 Claims were settled and paid by the 1971 Fund for a total of Won 6 824 million (£3.2 million) for the cost of the operations to remove the remaining cargo on board the wreck of the *Yuil N°1*.

4.2.3 Fishery claims totalling Won 22 490 million (£14.3 million) were settled for Won 5 222 million (£2.8 million).

4.3 Court proceedings

- 4.3.1 The shipowner commenced limitation proceedings in April 1996. The limitation amount applicable to the *Yuil N°1* is estimated at Won 250 million (£130 000).
- 4.3.2 Fishery claims totalling Won 60 000 million (£31 million) were presented to the Court in charge of the limitation proceedings. In October 1996 an administrator appointed by the limitation Court presented an opinion to the effect that there was not sufficient evidence to enable him to make an assessment of the fishery losses but proposed that the Court should accept one third of the claimed amounts as reasonable. In November 1997 the Court decided to accept the administrator's proposal. The 1971 Fund and the shipowner's insurer lodged opposition to the Court's decision.
- 4.3.3 Most of the claimants who had filed their claims in the limitation proceedings also filed claims against the 1971 Fund in separate actions, although for lower amounts in most cases. The total amount claimed in these actions was Won 14 399 million (£7.5 million). Between November 2002 and July 2003 the majority of claimants with outstanding claims agreed to out-of-court settlements. As a result claims totalling Won 13 466 million (£7.0 million) have been settled for a total of Won 1 428 million (£742 000), including interest. The 1971 Fund also contributed Won 24 million (£12 500) towards the costs incurred by a fishery co-operative that had assisted in the presentation of claims. Claims totalling Won 973 million (£506 000), which had been rejected by the 1971 Fund, were deemed by the Court to be conclusively withdrawn, since the claimants failed to file a motion to the Court within the prescribed time limit.
- 4.3.4 As regards the objection filed by the 1971 Fund and the shipowner's insurer against the assessment decision by the Court in charge of the limitation proceedings, the Court made a 'Settlement Recommendation Decision' in August 2003 whereby the assessed sums in respect of the settled claims should be amended to be the same as the settlement sums and the assessed sums for the unsettled claims should be amended to zero. Since the claimants' lawyer did not raise any objections to the Court's Settlement Recommendation Decision within the prescribed period the Decision has become final.
- 4.3.5 The 1971 Fund and the shipowner's insurer have now been subrogated to all the claims that were filed in the limitation proceedings. However, the limitation fund has not been constituted and the limitation amount in Won has therefore not yet been fixed.
- 4.3.6 Under Article V.9 of the 1969 Civil Liability Convention (as amended by the 1976 Protocol thereto), the limitation amount applicable to the *Yuil N°1* should be converted into the national currency by reference to the SDR on the date of the constitution of the shipowner's limitation fund. In view of the considerable time that could elapse before the limitation amount is determined by the Court, the Administrative Council may wish to consider whether it would be appropriate to fix the limitation amount by means of an agreement between the 1971 Fund and the insurer. A similar situation arose in connection with the *Sea Prince* incident. In order to avoid any unnecessary delay the Administrative Council decided at its April 2000 session, as an exception, to authorise the Director to agree with the shipowner/insurer on the exchange rate between the SDR and Won to be applied to establish the limitation amount in respect of the *Sea Prince* and to determine the amount of indemnification payable by the Fund under Article 5.1 of the 1971 Fund Convention (document 71FUND/AC.1/EXC.63/11, paragraph 3.3.5). The Director proposes that for the same reason he should be authorised to agree with the shipowner's insurer on an exchange rate between the SDR and Won to be applied to establish the limitation amount in respect of the *Yuil N°1*.
- 4.3.7 In 1996, when the Fund's payments were limited to 60% of the settlement amounts and the insurer was paying 100% of the settlement amounts on some claims the average exchange rate was 1 SDR = Won 1 150. In September 1998, when the Fund increased the level of payments to 100% the exchange rate was 1 SDR = Won 1 875. The considerable devaluation of the Won

during the period from the date of the incident resulted in a significant reduction in the amount that the 1971 Fund had to pay in pounds sterling. The exchange rate at 10 September 2003 was 1SDR=Won 2 133. On the basis of the range of these exchange rates the limitation amount applicable to the *Yuil N°1* would lie somewhere between Won 176 million (£95 000) to Won 286 million (£154 000).

5 Action to be taken by the Administrative Council

The Administrative Council is invited:

- (a) to take note of the information contained in this document;
 - (b) to decide whether to authorise the Director to agree with the shipowner's insurer an SDR/Won exchange rate with a view to establishing the limitation amount applicable to the *Yuil N°1*; and
 - (c) to give the Director such other instructions as the Council may deem appropriate in respect of the above incidents.
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