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OIL POLLUTION
COMPENSATION
FUND 1971

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Agenda item 4

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INCIDENTS INVOLVING THE 1971 FUND

N°1 YUNG JUNG

Note by the Director

Summary:	The cause of the incident is examined and an analysis is made of the position of Korean law as regards the liability of the Republic of Korea for incidents of the type in question.
Action to be taken:	Decide whether the 1971 Fund should present a claim to the Republic of Korea for recovery of the amounts paid by the Fund in compensation and indemnification.

1 Introduction

The question has arisen whether the 1971 Fund should consider taking recourse action against the Republic of Korea for the purpose of recovering the amounts of compensation which the Fund has paid to the claimants.

2 The incident

2.1 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 three contractors engaged by the shipowner. The wreck of the *N°1 Yung Jung* was removed and the remaining oil was transhipped to another vessel.

2.2 The *N°1 Yung Jung* was not entered in any P & I Club, but had liability insurance of US\$1 million (£585 000) per incident.

3 Claims for compensation

3.1 All claims for compensation arising out of this incident have been settled at a total amount of Won 743 million (£317 000).

3.2 Some of the claims referred to above were paid by the 1971 Fund, whereas the shipowner's insurer had paid the other claims. 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°1 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).

4 Limitation proceedings

4.1 The shipowner commenced limitation proceedings in August 1997. The shipowner's insurer presented a letter of guarantee for the limitation amount to the Court.

4.2 In May 1998 the Pusan District Court determined the limitation amount applicable to the *N°1 Yung Jung* at Won 122 million (£60 000).

5 Investigation into the cause of the incident

5.1 In the case of barges of this type, the Korean authorities do not carry out an investigation into the cause of the incident.

5.2 In criminal proceedings, the master of the *N°1 Yung Jung* was sentenced to prison for six months for having caused oil pollution by negligence. The sentence was suspended for one year.

6 Issue of recovery

6.1 The facts

6.1.1 As set out above, the *N°1 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 sea bed, 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 sea bed 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. The Director became aware of this inspection only recently.

6.1.2 It appears that the marine police and the public prosecutor did not investigate why the rock was lying on the sea bed. 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.

6.2 The liability of the Republic of Korea under Korean law

6.2.1 The 1971 Fund's Korean lawyer has given the Director advice on the position of Korean law in respect of the potential liability of the Republic of Korea as set out below.

6.2.2 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.

6.2.3 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".

6.2.4 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.

6.2.5 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.

6.2.6 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.

6.2.7 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.

6.3 Procedure for claiming compensation

6.3.1 Under the Korean State Compensation Act, any claim against the Korean Government 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.

6.3.2 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, which will normally be rendered within four weeks, will either award a specific amount in compensation or reject the claim altogether.

6.3.3 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.

6.3.4 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.

6.3.5 The Regional Committee is obliged to refer any claim for an amount exceeding Won 60 million (£30 000) to the Central Committee. Since the 1971 Fund's payments exceed that amount, any claim by the Fund will be referred to the Central Committee which should reach its decision within four weeks. The procedure for payment set out in paragraph 6.3.3 applies also to the Central Committee.

6.3.6 A claim by the 1971 Fund against the Republic of Korea must be presented within three years of the date of the incident, ie by 15 August 1999. Submission of a claim to the Regional Compensation Committee has the effect of preventing the claim from becoming time-barred.

6.4 Director's consideration

6.4.1 It should be recalled that the Executive Committee has taken the view that the policy of the 1971 Fund is 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. The Committee has stated that if matters of principle are involved, the question of costs should not be the decisive factor for the Fund when considering whether to take legal action. The Committee has 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).

6.4.2 As stated above, 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.

6.4.3 The Executive Committee may wish to consider therefore whether to instruct the Director to present a claim for recovery to the Regional Government Compensation Committee and, if required, to pursue the claim before the competent Korean court.

6.4.4 The shipowner's insurer is considering whether to pursue a recourse claim against the Korean Government.

7 Action to be taken by the Executive Committee

The Executive Committee is invited:

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