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COMPENSATION  
FUND 1971

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## INCIDENTS INVOLVING THE 1971 FUND

### Nº1 YUNG JUNG

Note by the Korean Government

<b>Summary:</b>	This document sets out the official position of the Korean Government as to the issues discussed at the 61st Executive Committee, in respect of the incident of the <i>Nº1 Yung Jung</i> .
<b>Action to be taken:</b>	Information to be noted.

#### 1 Introduction

1.1 The 1971 Fund, in respect of the incident of the *Nº1 Yung Jung*, considered that there was a defect in the public facilities or structures owned or managed by the Government under the Korean law.

1.2 At the 61st session, the Executive Committee decided to continue to discuss the issues involved with the Korean Government, to present a claim for recovery of the amounts paid by the Fund and, if required, to pursue the claim before the competent Korean court to the extent needed to prevent the claim becoming time barred.

1.3 The Korean Government hereby submits its official position as to the issues involved in the incident of the *Nº1 Yung Jung*.

#### 2 The Incident

##### 2.1 The Facts

2.1.1 While the *Nº1 Yung Jung* took shelter from an approaching typhoon, Kirk, at a wharf in the Port of Pusan, Republic of Korea, the bottom of it touched the underwater protrusion and some oil spilled into the sea.

2.1.2 The *N<sup>o</sup>1 Yung Jung* was a Korean oil barge of 560 GRT, having length of 48 metres, breadth of 13.5 metres and depth of 4.5 metres, and, at the time of the incident, was loaded with 1 600 tonnes of Bunker C and 200 tonnes of MDO, with draft of 3.5 metres.

2.1.3 The wharf, to which the *N<sup>o</sup>1 Yung Jung* was berthed at the time of the incident, had been designated to the general cargo vessels only by the port authority, Pusan Regional Maritime Affairs and Fisheries Office, Republic of Korea. The length of the wharf is 375 metres and the depth is 3 to 4.3 metres. The wave height in front of the wharf is normally within 1 metre, but it was over 2 metres at the time of the incident.

2.1.4 Offshore the wharf of the incident, the typhoon warning, having wind velocity of 9.5 metres per second and wave height of 3 to 5 metres, was in force from 09:00 to 19:00 on 14 August 1996, and the swell warning, having wind velocity of 7.2 metres per second and wave height of 3 to 5 metres, was in force from 09:00 to 16:00 on 15 August 1996.

2.1.5 At first, the *N<sup>o</sup>1 Yung Jung* took shelter from an approaching typhoon at a position designated by the port authority on 13 August 1996. And it moved to another wharf and loaded there 1 800 tonnes of oil at around 22:10 on 14 August 1996. Just before the swell warning was in force, it moved and berthed to the wharf in question without any notice to or permission of the port authority at around 09:00 on 15 August 1996. The tug which had attended to the movement and berthing operation of the *N<sup>o</sup>1 Yung Jung* left the wharf after completion of berthing.

2.1.6 While the *N<sup>o</sup>1 Yung Jung* was berthed to the above mentioned wharf, the bottom of it touched the underwater protrusion at around 15:30 on 15 August 1996, and approximately 30 tonnes of oil spilled into the sea.

2.1.7 Afterwards, the underwater protrusion was found to be a rock with a height of 1.5 metres, a width of 2.0 metres and a length of 1.5 metres, and was presumed to be brought in there from somewhere.

## 2.2 The Closest Cause of the Incident

2.2.1 At the time of the incident, the bottom clearance was insufficient due to the severe movement of the *N<sup>o</sup>1 Yung Jung* in all directions, especially over 2 metres in vertical direction, due to the effect of the typhoon, at low tide. The time of the second lowest low tide at the incident area of that day was 14:49.

2.2.2 Under the circumstances mentioned in paragraphs 2.1.2 to 2.1.5, 2.1.7 and 2.2.1, the *N<sup>o</sup>1 Yung Jung* had grounded on the submerged rock at around 15:30 on 15 August 1996.

## 3 Compensation and issue of recovery

3.1 In September 1998 the 1971 Fund paid to the insurer an amount of £262 373 corresponding to the amount which the insurer had paid in excess of the limitation amount applicable to the *N<sup>o</sup>1 Yung Jung* and also paid indemnification of the shipowner under Article 5.1 of the 1971 Fund Convention of £12 000.

3.2 The Fund is considering to present a claim against the Korean Government for the reimbursement of the amounts paid by the Fund in compensation or indemnification as mentioned above.

## 4 Contention of the parties

### 4.1 The 1971 Fund

4.1.1 The *N<sup>o</sup>1 Yung Jung* had grounded on an uncharted submerged rock, the bottom of it was damaged, and some oil spilled therefrom into the sea.

4.1.2 According to the diving inspection after the incident, the rock was found not to be a natural part of the seabed but to have been placed there at some time. And it is the liability of the Government to remove the rock or to install aids to navigation at the position of the rock to alert the seafarers, so that the port facilities have a normal safety to be used by the vessels.

4.1.3 Therefore, it is considered that the incident was caused by a defect in installing and/or maintaining the public facilities or structures under the Korean law, that the Republic of Korea is liable for the damage resulting therefrom, and that the Republic of Korea is under an obligation to reimburse the 1971 Fund for any amounts which the Fund had paid as mentioned in paragraph 3.1.

## 4.2 The Korean Government

### 4.2.1 *The viewpoint in relation to the Convention*

4.2.1.1 Where an incident is caused by a ship due to the fault of a third party, then, the victims are entitled to claim compensation both against the third party and against the shipowner/the Fund. Once the victims are compensated by the shipowner/the Fund, the shipowner/the Fund is subrogated to the right that the victims had against the third party.

Such subrogated claims are permitted to be brought by Art. 9(2) of the 1971 Fund Convention, but, the Art. 9(2) does not constitute a ground to create a new claim. The existence of such a right is determined by the law in that particular locality.

4.2.1.2 Incidents which are caused by the fault of victims are dealt with in Art. 4(3) of the 1971 Fund Convention. For incidents of this sort, the Fund may be exonerated wholly or partially by virtue of Art. 4(3), and compensation to victims may be partially reduced or totally excluded. There is one exception to this general rule on contributory negligence.

The exception is for preventive measures. Under Art. 4(3), there is no such reduction or exclusion with regard to the preventive measures. Victims are entitled to claim full compensation even if they were negligent in causing the damage.

It is quite obvious that the Fund, after having made payments to victims, may not subsequently turn to victims again for an indemnity even if they were at fault and negligent in causing the damage.

4.2.1.3 In the present case, the Fund seeks an indemnification from the Korean Government on the ground that the Port Authority, for whose action the Korean Government is responsible, failed to maintain the port safe. This argument is based on the assumption that the Port Authority was under a duty to maintain the port safe.

The spill took place in the port and the oil hampered the smooth operation of the port. The Port Authority, charged with the duty to maintain it safe, was under the obligation to clean it up. At this stage, the Port Authority was the only person who suffered damage, and there is no other person who suffered damage. Therefore, the Korean Government is the only victim.

In this case, most of claims relate to costs for preventive measures. According to the statistics shown in the 1998 Annual Report, up to 97% of claim amounts relate to costs for preventive measures. The Korean Government is, no doubt, entitled to claim compensation against the Fund for the damage including costs for preventive measures.

As far as costs for preventive measures are concerned, the Korean Government, as a victim, is entitled to claim full compensation from the Fund even if the Korean Government was negligent in causing the damage. No reduction or exclusion could be made in relation to costs for preventive measures even if the Korean Government was negligent.

4.2.1.4 In the present case, the Korean Government did not take preventive measures itself. The Korean Government could have taken all preventive measures itself. As a preventive measure, it could organize an operation, and, for such an operation, the Korean Government could employ servants and agents. Those who actually took preventive measures and made claims against the Fund, could have been employed as servants or agents. And then, there is no doubt that the costs spent by the Korean Government to employ such servants and agents are all recoverable from the Fund regardless of its negligence in causing the damage.

In fact, the Korean Government, instead, permitted other persons to take preventive measures in the port which was under its control and management, and the other persons were allowed to make claims directly

against the Fund. For this reason, the Fund seek from the Korean Government an indemnity which could not have been sought had the preventive measures been taken by the Korean Government.

The Korean Government is of the view that, as far as the Convention is concerned, such measures must be regarded to be taken by the victims, that is in this case, the Korean Government, and other people were allowed to make claims directly against the Fund for the sake of convenience. It therefore, believes that the word "persons" referred to in Art. 9(2) of the Fund Convention as must be construed not to include victims, and on the true construction of the Convention, the victim is not qualified to be a third party against whom a recourse action is brought.

4.2.1.5 As a matter of policy, it is not correct to make a distinction in victim's position between cases where the victim takes preventive measures himself or organizes such operation himself by employing other people, and cases where the victim asks or allows other people to take preventive measures then letting them to make claims against the Fund direct. Preventive measures must be allowed to be taken in the most efficient way without considering other elements by the persons concerned.

A fortuitous but opportune decision should not harm the victim's position. The victims should not be forced to take the measure all the time himself. Otherwise, victims would always try to take preventive measures himself. In particular, where an incident occurs in the premises under its management, victims would always insist on taking preventive measures himself. This is, however, not a correct approach. The net result is repugnant to the policy and objective the Convention aims to achieve.

4.2.1.6 In conclusion, the Korean Government argues that it, as a victim, is not qualified to be a third party against whom a recourse action is brought, and the Fund has no right to be subrogated to. Under the Convention, no distinction should be made between the measures taken by the claimants who came as volunteers and the measures taken by the victim.

#### 4.2.2 *The cause of the incident and the liability for the damage*

4.2.2.1 The oil barge *N<sup>o</sup>1 Yung Jung* moved and berthed to the wharf of incident which was installed and maintained for the use of the general cargo vessels only, without any notice to or permission of the Port Authority, required under the Korean Law, including port regulations, despite it was apparently predicted that the depth of the water would be lowered severely by the effect of the typhoon and the low tide. Furthermore, no tug which could assist the *N<sup>o</sup>1 Yung Jung*, having no self-propelling capability, in case of emergency, attended at the wharf at the time of the incident.

4.2.2.2 Although the rock in question had existed on the position where the *N<sup>o</sup>1 Yung Jung* was berthed, it is believed that the wharf of the incident, to which 3 vessels with the tonnage of 1 000 DWT could be berthed concurrently, is safe enough for the operation of the general cargo vessels, under the control of the Port Authority.

4.2.2.3 The *N<sup>o</sup>1 Yung Jung* was grounded on and damaged by the rock, but it is not considered to be the liability of the Government to remove the rock or to install aids to navigation at the position of the rock, by which no operation of the general cargo vessels is threatened.

4.2.2.4 From the above facts, it is considered that the incident was caused by the negligence on the part of the *N<sup>o</sup>1 Yung Jung*. Even in the case of an incident occurred in the public facilities or structures, if the incident is caused by the unreasonable act of the user who does not follow the normal usage of them, there is no liability for the Government to cover the result of such an act.

4.2.2.5 In conclusion, the cause of the incident is not the defect in installing and/or maintaining the public facilities or structures of the Government, but the negligence on the part of the *N<sup>o</sup>1 Yung Jung* who used the public facilities or structures improperly against their intended usage, without notice to or permission of the Port Authority, and furthermore, without any consideration of the effect of the typhoon and the low tide which resulted in insufficient bottom clearance of the *N<sup>o</sup>1 Yung Jung*.

Therefore, the Korean Government is not liable for the incident and the reimbursement of the amounts the 1971 Fund had paid.

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