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COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
62nd session
Agenda item 3

71FUND/EXC.62/10
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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 in the light of the information contained in the note submitted by the Korean Government (document 71FUND/EXC.62/10/1). The position of Korean law as regards the liability of the Republic of Korea for the incident is analysed in the light of the views expressed by the Korean Government in that document.
Action to be taken:	Decide whether the 1971 Fund should pursue an action against the Republic of Korea to recover the amounts paid by the Fund in compensation or 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 at about 1530 hours, 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.

1.2 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.

1.3 At its 61st session, the Executive Committee considered, on the basis of a document submitted by the Director (document 71FUND/EXC.61/10), 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 The 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).

1.5 The Korean Government has submitted a note setting out the Government's official position on the issues discussed at the Committee's 61st session (document 71FUND/EXC.62/10/1).

1.6 The present document contains a further analysis by the Director of the issues involved.

2 Claims for compensation

2.1 All claims for compensation arising out of this incident have been settled at a total amount of Won 747 million (£363 000).

2.2 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).

3 Limitation proceedings

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

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

4 Investigation into the cause of the incident

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

4.2 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.

5 The incident

5.1 In the document submitted to the Executive Committee's 61st session, the Director set out the facts of the incident as follows:

> 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 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. The Director became aware of this inspection only recently.

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.

5.2 The Korean Government has made a presentation of the facts of the incident in paragraphs 2.1.1 – 2.1.7 of document 71FUND/EXC.62/10/1.

6 Procedure for claiming compensation

6.1 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.

6.2 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 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.

6.4 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.

6.5 The Regional Committee is obliged to refer any claim for an amount exceeding Won 50 million (£26 000) 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 5.3 applies also to the Central Committee.

6.6 A claim by the 1971 Fund against the Republic of Korea had to 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.

7 The 1971 Fund’s position on the liability of the Republic of Korea under Korean law

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:

> 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.
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> 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".
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> 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.

8 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.

9 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).

The question was raised of whether it would be possible to obtain an extension of the period for presenting a claim against the Republic of Korea so as to enable the Executive Committee to consider the issues at its 62nd session. The Committee noted the advice of the 1971 Fund's Korean lawyer that it would be possible to extend this period by six months by giving notice to the Korean Government of the Fund's claim.

The Executive Committee took the view that if there was any doubt as to the validity of an extension of the period within which a claim had to be presented, then legal action should be taken in order to protect the interests of the 1971 Fund while discussions continued with the Korean Government.

The 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.

10 Action taken by the Director

10.1 The 1971 Fund's Korean lawyer has 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.

10.2 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.

11 The Director's renewed analysis of the legal situation

11.1 The Director has examined, together with the 1971 Fund's Korean lawyer, the note presented by the Korean Government (document 71FUND/EXC.61/10/1). The document gives rise to the following observations by the Director.

11.2 The Korean Government has expressed the view that, since Article 4.3 of the 1971 Fund Convention precludes reduction of compensation to a claimant who has taken preventive measures on the grounds of contributory negligence, the 1971 Fund cannot pursue a recourse claim against the Korean Government for any payments which the Fund has made in respect of preventive measures.

11.3 It should first be noted that the Fund has paid claims which do not relate to preventive measures totalling Won 23 million, in particular a fishing claim and a claim from restaurants for loss of income.

11.4 The Korean Government has 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 must be regarded as taken by the Korean Government.

11.5 It should be noted that the provisions of the Conventions do not use the word "victim" but the expressions "person" or "person suffering pollution damage". The person who is entitled to claim compensation is therefore the person who has actually suffered pollution damage, including costs of preventive measures. For this reason, it is not correct in the Director's view to make a distinction between "victim" and "person" as regards Article 4.3 or any other provision of the Conventions, as maintained by the Korean Government.

11.6 The Korean Government could not, in the Director's view, 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). The Director agrees 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. However, this was not the case in respect of the *N°1 Yung Jung* incident.

11.7 It is also correct that under Article 4.3, as interpreted by the 1971 Fund Assembly and Executive Committee, the 1971 Fund is not entitled to invoke as a ground for exoneration, wholly or partially, the contributory negligence of a claimant as regards preventive measures. However, in this case, the preventive measures were not undertaken by the Government nor were these measures, in the Director's view, carried out on the Government's behalf.

11.8 As the Director understands it, the authorities ordered the shipowner to carry out the clean-up and he engaged contractors to undertake these operations. The shipowner would therefore have not only a liability to pay the contractors under the 1969 Civil Liability Convention but also a contractual obligation to pay them. On the other hand the clean-up contractors would not have had a claim against the Korean Government under the Convention or in contract. In the Director's view, it is difficult to see in this situation how the contractors could be considered as the servants or agents of the Government, as apparently maintained by the Korean Government.

11.9 The Korean Government has also made the point that the *N°1 Yung Jung* was moved to and berthed at the wharf which was destined for the use of general cargo vessels only without any notice or permission of the Port Authority, as required under Korean law. The Government has maintained that the position where the *N°1 Yung Jung* berthed is safe for the operation of general cargo vessels under the control of the port authority. For this reason, the Government considers that it is not liable for damage caused by its not having removed the rock since the rock did not threaten operations of general cargo vessels. The Government considers that the incident was caused by negligence on the part of *N°1 Yung Jung*.

11.10 As for the Government's statement on the facts, the 1971 Fund's technical advisers have disagreed on the following points:

The typhoon warning was lifted on 14 August 1996 at 2200 hours, ie well before the incident. The quay in question is protected by a breakwater. It is not possible, therefore, that the wave height reached over 2 metres at the time of the incident. The shipper who stayed on board allowed all crew members to leave the ship at 12 noon on 15 August 1999 which showed that the ship was safe and in a stable condition at the berth at that time. It is not correct that "the bottom clearance was insufficient due to the severe movement of *N°1 Yung Jung* in all directions, especially over 2 metres in vertical direction, due to the effect of the typhoon at low tide". According to the official weather report a high wave alert was issued in the "open sea region" at 1800 hours on 12 August and the alert was lifted at 2100 hours on 13 August. The Port of Pusan is sheltered by breakwaters and was very calm.

11.11 It is recognised that the use of the berth in question was restricted to dry cargo vessels of less than 1 000 tons dwt. These restrictions had been published in the regulations for operation of the berth facilities of the port of Pusan. However, no restriction had been published in respect of the draught of dry cargo vessels at the berth. It is assumed therefore that the maximum permitted draught for such vessels was 4.3 metres at low tide. A dry cargo vessel with the same draught as the *N°1 Yung Jung* (ie. 3.6 metres) would have grounded on the rock in question. The use of the berth was being restricted to dry cargo vessels because there were no fire fighting facilities at the berth. For this reason, the Director takes the view that the Korean Government is liable for the pollution damage (including the cost of preventive measures) resulting from the *N°1 Yung Jung* incident, in spite of the *N°1 Yung Jung* having approached a berth which was not to be used by oil tankers or barges. The Director considers therefore that the 1971 Fund should pursue its claim against the Republic of Korea.

12 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 pursue its claim to the Republic of Korea for recovery of the amounts paid by the Fund in compensation or indemnification.