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COMPENSATION
FUND 1971

ASSEMBLY
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Agenda item 17

71FUND/A.23/14/3
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INCIDENTS INVOLVING THE 1971 FUND

KEUMDONG N°5

Note by the Director

Summary:

The 1971 Fund appealed against the first instance Court's decisions in respect of a number of fishery claims. The Court of Appeal rendered a mediation decision in respect of claims submitted by an arkshell fishery co-operative. The Director decided not to lodge an opposition to that decision. The only remaining claims are those submitted by claimants belonging to the Yosu Fishery Co-operative, which are pending in the Court of Appeal.

Action to be taken:

Information to be noted.

1 The incident

- 1.1 On 27 September 1993 the Korean barge *Keumdong N°5* (481 GRT) collided with another vessel near Yosu on the southern coast of the Republic of Korea. As a result an estimated 1 280 tonnes of heavy fuel oil was spilled from the *Keumdong N°5*. The oil quickly spread over a wide area due to strong tidal currents and affected mainly the north-west coast of Namhae island.
- 1.2 The *Keumdong N°5* was entered in the Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd (Standard Club).

2 Claims for compensation

- 2.1 Claims relating to the cost of clean-up operations were settled at an aggregate amount of Won 5 600 million (£2.5 million) and were paid by the Standard Club by September 1994. The total amount paid by the Standard Club by far exceeds the limitation amount applicable to the *Keumdong N°5*,

Won 77 million (£53 000). The 1971 Fund has made advance payments to the Standard Club totalling US\$6 million (£4 million) in respect of the Club's subrogated claims.

- 2.2 The incident affected fishing activities and the aquaculture industry in the area. Claims for compensation were submitted by the Kwang Yang Bay Oil Pollution Accident Compensation Federation, representing 11 fishery co-operatives with some 6000 members. The total amount of the claims presented was Won 93 132 million (£41 million).
- 2.3 During the period July 1995 - September 1996 agreements were reached on most of the claims presented by the Kwang Yang Bay Federation. The amounts agreed totalled Won 6 163 million (£4.2 million), compared with a total amount claimed of Won 48 047 million (£33 million). These claims have been paid in full for the agreed amounts.

3 Legal actions

Claims by Yosu Fishery Co-operative

- 3.1 The Yosu Fishery Co-operative left the Kwang Yang Bay Federation and took legal action against the 1971 Fund in May 1996 in the Seoul District Court. Claims were filed in court for damage to common fishing grounds totalling Won 17 162 million (£8.8 million). In addition, claims totalling Won 1 641 million (£842 000) were submitted by over 900 individual members of this co-operative (fishing boat owners, set net fishing licence holders and onshore fish culture facility operators).
- 3.2 The experts engaged by the 1971 Fund and the Standard Club assessed the losses allegedly suffered by all the claimants of the Yosu Fishery Co-operative at Won 810 million (£416 000). The experts considered that the alleged productivity of the common fishery grounds was exaggerated and inconsistent with official records and field observations, and that the interruption of business was significantly shorter than that maintained by the claimants. The loss of earnings claimed by the fishing boat and set net operators was considered too high in the light of an analysis of information provided by the claimants concerning their normal fishing activity, and certain claims related to losses suffered outside the area affected by the oil. The operators of the fish culture facilities did not provide any evidence that the alleged losses were caused by the oil spill.
- 3.3 A mediation hearing was held before the Seoul District Court in October 1998 to consider the individual fishing boat claims. The 1971 Fund explained the methods used by its experts for determining the loss of earnings in respect of different sizes of fishing vessels engaged in various fishing sectors. The claimants did not agree with the 1971 Fund's assessment methods.
- 3.4 The District Court rendered a compulsory mediation decision in December 1998. The Court accepted most of the 1971 Fund's arguments, but decided that the compensation for unregistered and unlicensed fishing boat claimants should be calculated in the same way as for registered and licensed claimants. Although the Court did not give a detailed explanation for its decision, it stated that income from business prohibited by law was not necessarily an illegal income which was inadmissible for compensation. The Court stated that when deciding on the admissibility of claims the Court should take into account, on a case by case basis, the original purpose of the law in question, the degree of blameworthiness of the claimant and the degree of illegality of the act. In the Court's view the income of unlicensed fishermen in this case did not appear to be illegal income. The Court awarded the unlicensed fishing boat claimants Won 65 million (£41 000).
- 3.5 The position taken by the Court in the mediation decision was at variance with the policy adopted by the 1971 Fund, ie that claims for loss of income by fishermen operating without a required licence were inadmissible. The 1971 Fund therefore lodged an opposition to the Court's mediation decision.
- 3.6 In a judgement rendered in January 1999 the Court found that the claimants had suffered damage due to the oil pollution, but rejected their calculation of their losses due to the lack of information on the income

of individual fishermen, the unreliability of the evidence they presented, the unreliability of part of the testimony of the Chairman of the Yosu Fishery Co-operative and the lack of a direct causal relationship between the alleged losses of income and the incident.

- 3.7 In determining the amount of the damage the District Court awarded compensation for both loss of earnings and pain and suffering (condolence money) in respect of common fishing grounds and intertidal culture farms, for loss of earnings only in respect of fishing vessels and for pain and suffering only in respect of cage culture farms, one onshore aquarium and one onshore hatchery. The total amount awarded by the Court was Won 1 571 million (£804 000).
- 3.8 In the case of common fishing grounds and intertidal culture farms, the Court awarded damages for loss of earnings as a result of business interruption caused by the clean-up operations and by the smell of oil. In calculating the losses the Court applied the same business models and used the same annual productivity data as the 1971 Fund's experts had applied in assessing the claims in respect of common fishing grounds and intertidal culture farms. Consequently, the amount assessed by the Court in respect of loss of earnings (Won 546 million (£350 000)) is very close to the amount assessed by the 1971 Fund's experts (Won 521 million (£330 000)).
- 3.9 In the case of the unlicensed fishing vessels the Court applied the same business models and profit per day per ton of vessels that the 1971 Fund's experts had used to assess claims in respect of licensed vessels.
- 3.10 The Court held that the common fishing grounds and intertidal culture farms must also have suffered damage due to mortality, growth retardation, migration of stock and decreased sales. However, due to insufficient evidence of the quantum of the damage, the Court was unable to assess the amount of the damage. The Court therefore awarded compensation for pain and suffering. In determining the compensation for pain and suffering the Court again used the same annual productivity data as had been used by the Fund's experts to determine business interruption losses in respect of common fishing grounds and intertidal culture farms. The Court took into account all the evidence presented, including the assessments of other claims made by the 1971 Fund, and the degree of evidence of the damage, although no details were given in the judgement of how these factors were taken into account. The Court specified amounts of compensation for pain and suffering (condolence money) which corresponded to about 10% of the annual production of common fishing grounds and about 8.4% of the annual production of intertidal culture farms.
- 3.11 The Court held that a number of caged culture farms, one onshore aquarium and one onshore hatchery must also have suffered damage due to mortality of stock, retardation in growth and decreased sales. In the absence of any supporting evidence or any fixed standard to determine such losses, the Court awarded compensation for pain and suffering varying from Won 1 million (£635) to Won 5 million (£3 100). No details were given in the judgement as to how these sums were determined.
- 3.12 In addition, the District Court decided that the 1971 Fund should pay interest on the awarded amounts, calculated at 5% per annum from 27 September 1993 to 26 January 1999 and at 25% per annum from 27 January 1999 to the date of payment. The Court decided that the claimants should bear 9/10 and the 1971 Fund 1/10 of the legal costs that were incurred by the plaintiffs and the 1971 Fund.

3.13 A summary of the Yosu Fishery Co-operative claims and the amounts awarded is given below:

Type of fishery	Claimed amount (Won)	Amount awarded by the Court		
		Loss of earnings	Condolence money	Total
Common fishing grounds and culture farms	15 347 678 899	546 301 459	936 400 000	1 482 701 459
Caged culture and hatcheries	286 966 667	---	22 000 000	22 000 000
Fishing boats	111 516 090	66 010 892	---	66 010 892
Unspecified	8 105 510	---	---	---
Total	15 754 267 166 (£8.1 million)	612 312 351 (£314 000)	958 400 000 (£490 000)	1 570 712 351 (£804 000)

3.14 All the claimants belonging to the Yosu Fishery Co-operative, with the exception of one village fishery association, appealed against the judgement. Their total claimed amount was indicated in the appeal at Won 13 868 million (£7.1 million).

3.15 At its 61st session the Executive Committee examined the reasoning in the judgement. The Director was instructed to pursue appeals in respect of the questions of fact, the decision to allow compensation for pain and suffering, the apparently arbitrary methods used to determine compensation and the decision to award compensation to fishermen operating without the licensing requirements (document 71FUND/EXC.61/14, paragraphs 4.4.3 - 4.4.6).

3.16 The 1971 Fund lodged appeals against the District Court's Judgement. The Court granted provisional enforcement of the judgement. In connection with its appeals the 1971 Fund requested a stay of the provisional enforcement. Under Korean law the Court has the discretion to grant such a stay, but in order for a request for stay to be granted, the defendant has to make a deposit with the Court of the amount awarded to the plaintiff. The 1971 Fund deposited Won 1 571 million (£795 000) with the Court. The Court subsequently granted a stay of the provisional enforcement.

3.17 Several hearings have been held in the Seoul Appellate Court. The Appellate Court granted a request by the 1971 Fund for claimants to produce various sales records in respect of the arkshell fishery co-operative.

3.18 The 1971 Fund has presented technical opinions on the District Court's judgement and further evidence in support of the Fund's opposition to the claims.

3.19 The Appellate Court decided to hold a mediation hearing relating to the claims submitted by the Yosu Fishery Co-operative on 5 October 2000.

Claim by an arkshell fishery co-operative

3.20 An arkshell fishery co-operative brought legal action against the 1971 Fund in respect of claims for Won 4 175 million (£2.1 million). The claim related to damage allegedly caused during 1994 to the arkshell cultivation farms of its members. The claim was rejected by the 1971 Fund because there was no evidence that the alleged damage was caused by oil pollution.

3.21 The Seoul District Court rendered its judgement also in respect of these claims in January 1999 rejecting the 1971 Fund's argument. The Court held that oil treated with dispersants moved with the currents and reached the arkshell culture farms and the arkshell hatcheries which were located in a shallow and enclosed body of water and that this had led to mortalities and retarded growth of arkshells. Although the Court considered it possible that other environmental factors could have caused the death of arkshells, it

held that it could not be said that there was no causal link between the oil spill and the damage suffered by the claimants.

- 3.22 With regard to the arkshell farms the Court rejected the claimants' method of calculating damage on the ground that the sales records used by them were incomplete and unreliable. The Court held therefore that the property losses could not be assessed, but that where it was recognised that there had been a property loss, compensation for pain and suffering should be awarded.
- 3.23 As for the arkshell hatcheries, the Court accepted that the oil spill had a negative effect on seedlings but rejected the claims as presented due to lack of supporting evidence. The Court held that the clean-up costs accepted by the 1971 Fund for these facilities should be regarded as property losses and that compensation for pain and suffering should be awarded instead of compensation for unquantifiable losses due to mortality and growth retardation.
- 3.24 The District Court determined the amount of compensation for pain and suffering in respect of arkshell culture and hatcheries on the basis of statistics provided to the Court by the 1971 Fund on the national average arkshell production between 1988 and 1992 and the average price of arkshell between April and June 1994. The amounts of compensation for pain and suffering were calculated on the basis of the distance between the culture farm and the incident site ranging between 5% and 10% of the average annual production. The total amount awarded to the culture farms in respect of pain and suffering was Won 453 million (£290 000). The two arkshell hatcheries were awarded Won 10 million (£6 300) each plus the clean-up costs admitted by the 1971 Fund, Won 6.3 million (£4 000) for the two hatcheries together. The Court made the corresponding decision in respect of interest and costs as for the claims by the Yosu fishery co-operative (paragraph 3.12 above).
- 3.25 At its 61st session Executive Committee instructed the Director to pursue appeals in respect of the questions of fact and the decision to allow compensation for pain and suffering (document 71FUND/EXC.61/14, paragraphs 4.4.4 and 4.4.5).
- 3.26 Although all the owners of the arkshell culture farms accepted the judgement, the owners of two arkshell hatcheries appealed against it. The total amount claimed in the appeal is Won 359 million (£228 000).
- 3.27 The 1971 Fund lodged appeals against the judgement. For the reasons set out in paragraph 3.16 above, the Fund deposited Won 474 million (£240 000) with the District Court corresponding to the amounts awarded by the Court.
- 3.28 On 19 July 2000 the Appellate Court rendered a compulsory mediation decision in respect of the arkshell fishery co-operative claims. At the final hearing held on that day, the Court stated that it would accept the 1971 Fund's position that compensation should not be granted for pain and suffering. The Court expressed the opinion that all claimants had suffered property damage (also those in the area where there had been no oil on the surface since the Court took the view that chemical dispersants used and dispersed oil had affected this area). The Court stated that it would not accept the amounts claimed. It indicated that it would grant compensation for property damage in the arkshell cultivation farms for Won 337 million (£214 000) and that it would award Won 75 million (£48 000) in respect of damage to arkshell hatcheries. In the mediation decision the Court stated that the Fund should pay Won 412 million (£260 000) plus interest at 5% per annum from 27 September 1993 until 31 August 2000 and at 25% per annum from 1 September 2000 until the date of full payment.
- 3.29 The 1971 Fund would have been able to lodge opposition to the mediation decision and, if necessary, to appeal to the Supreme Court against the Appellate Court's ensuing judgement. However, the 1971 Fund's Korean lawyer advised the Director that it was likely that the judgement to be rendered by the Appellate Court would not be substantially different from the mediation decision and that it was unlikely that an appeal to the Supreme Court would succeed, since the question to be decided was one of fact. In view of the fact that the 1971 Fund's position on the matter of principle had been accepted, ie that compensation should not be granted for pain and suffering, the Director decided that the Fund should

accept the decision in respect of the arkshell fishery co-operative claims, on the condition that the claimants did not lodge opposition.

- 3.30 The arkshell fishery co-operative did not lodge opposition to the mediation decision of the Appellate Court. In August 2000 the 1971 Fund paid the amount determined by the Court, Won 412 million (£260 000) plus interest from the deposit referred in paragraph 3.27.

4 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 give the Director such instructions as it may deem appropriate in respect of the claims submitted by the claimants belonging to the Yosu Fishery Co-operative.
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