



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1971

ASSEMBLY  
8th extraordinary session  
Agenda item 5

71FUND/A/ES.8/4  
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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. Recently the Court of Appeal rendered its judgement in respect of the remaining fishery claims. The Court accepted the 1971 Fund's position on matters of principle, ie that compensation is not granted for pain and suffering, nor for losses in respect of unlicensed and unregistered fishing activities.

**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.
- 2.4 In August 2000 a claim by an arkshell fishery co-operative which was the subject of a legal action against the 1971 Fund was paid in the amount of Won 412 million (£260 000) plus interest in accordance with a mediation decision by the Appellate Court (cf document 71FUND/A.23/14/3, paragraphs 3.20 – 3.30).

### **3 Legal action 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 alleged 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 The Seoul 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).
- 3.4 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.
- 3.5 In a judgement rendered in January 1999 the District 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.

- 3.6 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 (£864 000).
- 3.7 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.
- 3.8 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).
- 3.9 At its 61st session the Executive Committee examined the reasoning in the District Court's 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 in breach of the licensing requirements (document 71FUND/EXC.61/14, paragraphs 4.4.3 - 4.4.6).
- 3.10 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.
- 3.11 In May 2001 the Appellate Court rendered its judgement in respect of the claims by the Yosu Co-operative. The Appellate Court overturned the judgement of the District Court in respect of losses due to pain and suffering and losses in respect of unlicensed and unregistered fishing activities.
- 3.12 In its consideration of whether claims for pain and suffering were admissible, the Appellate Court examined first the definition of "pollution damage" in the Korean Oil Pollution Guarantee Act and the 1969 Civil Liability Convention. The Court stated that there were no concrete standards in the international conventions in relation to the definition of pollution damage and that therefore *lex fori* (the law of the State of the court seized) would apply. The Court then examined the legislation in various States. It noted that the legislation in the country accepting the broadest scope of liability, the United States (the Oil Pollution Act 1990), did not make reference to damage resulting from pain and suffering, neither did the Japanese legislation. The Court also noted that the Guidelines of Comité Maritime International (CMI) restricted compensation to proven economic loss or damage.
- 3.13 Referring to the fact that there were no generally accepted principles in the common law system and the continental law system as to compensation for pain and suffering and no internationally adopted standards on this point, the Court took the view that there should not be a difference in the application of the Conventions among Contracting States. In view of this and the special international nature of the 1971 Fund, the Court held that pollution damage under the Korean Act should include only the economic and property damages. For this reason the Court held that claims for pain and suffering were not admissible.
- 3.14 As regards the claims in respect of unregistered and unlicensed fishing activities, the Appellate Court noted that so-called "illegal income" earned through the continued carrying out of illegal activities

should not be used as a basis for the determination of compensation. However, the Court stated that a certain income should not be regarded as illegal income only because the law prohibited the activities in question. The Appellate Court referred to a judgement by the Korean Supreme Court, according to which the issue of whether a certain income was illegal should be determined on the basis of the original purpose of the legislation in question, the degree of blameworthiness of the activity, and in particular the degree of illegality of the activity, on a case-by-case basis. The Appellate Court held that in the light of the special position of the 1971 Fund and the 1971 Fund Convention and the fact that a restrictive interpretation of the concept of 'pollution damage' would be closer to international standards, the income of the plaintiffs 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 Court therefore rejected these claims. The Court also stated that there was no evidence that the claimants who did not have licenses, permits or registrations had suffered the alleged loss of income due to the incident and that there was no evidence of any link of causation between the incident and the alleged reduction in income.

- 3.15 The Appellate Court upheld the decision of the District Court in respect of loss of earnings due to business interruption caused by the clean-up of licensed common fishing grounds and intertidal culture farms.
- 3.16 In the judgement the Appellate Court ordered the Fund to pay Won 142 743 033 (£79 000) plus interest of 5% per annum from 27 September 1993 to 8 May 2001 and 25% per annum from 9 May 2001 until the date of payment.
- 3.17 The amounts awarded by the Seoul District Court and the Appellate Court are summarised in the table in the Annex to this document.
- 3.18 In view of the fact that the 1971 Fund's position on matters of principle had been accepted, ie that compensation should not be granted for pain and suffering and for losses in respect of unlicensed and unregistered fishing activities, the Director decided that the Fund should not appeal against the decision by the Appellate Court in respect of the claims by Yosu FCU.
- 3.19 However, the claimants have appealed to the Korean Supreme Court.

#### **4 Action to be taken by the Assembly**

The Assembly is invited to take note of the information contained in this document.

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ANNEX

Type of fishery	Claimed amount Won	Amount awarded by the Seoul District Court Won			Amount awarded by the Appellate Court Won		
		Loss of earnings	Condolence money	Total	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	142 743 033	0	142 743 033
Caged culture and hatcheries	286 966 667	-	22 000 000	22 000 000	-	0	0
Fishing boats	111 516 090	66 010 892	-	66 010 892	0	-	0
Unspecified	8 105 510	-	-	-	-	-	-
Total	15 754 267 166 (£8.7 million)	612 312 351 (£337 000)	958 400 000 (£527 000)	1 570 712 351 (£864 000)	142 743 033 (£79 000)	0	142 743 033 (£79 000)