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COMPENSATION
FUND 1971

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Agenda item 8

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INCIDENTS INVOLVING THE 1971 FUND

SEA PRINCE

Note by the Director

Summary:	Most claims arising out of this incident have been settled and paid in full but some fishery claims remain pending in court. In January 2002 the Court of first instance rendered its judgements in respect of these claims. The Court dismissed the majority of the daims, but awarded £752 000 to 31 claimants. The 1971 Fund has appealed against the judgements and has deposited with the Court the amount awarded plus interest in order to stay the enforcement of the judgements. The limitation proceedings have been discontinued with the agreement of all concerned parties.
Action to be taken:	To consider whether the 1971 Fund should pursue its appeal against the judgements.

1 Introduction

This document focuses on the developments in respect of the *Sea Prince* incident (Republic of Korea, 23 July 1995) that have taken place since the 6th session of the Administrative Council held in October 2001.

2 Claims for compensation

2.1 All claims relating to clean-up operations in the Republic of Korea have been settled for a total of Won 20 534 million (£11.7 million). The majority of these claims were paid in full by the shipowner and the shipowner's insurer, the United Kingdom Mutual Steam Ship Assurance Association (Bermuda) Ltd (UK Club), who presented subrogated claims to the 1971 Fund.

2.2 The Japanese Maritime Safety Agency presented a claim for its clean-up operations at sea in the vicinity of the Oki islands for a total of ¥360 000 (£2 160). This claim was accepted in full by the 1971 Fund.

2.3 All claims in the tourism sector have been settled for Won 538 million (£306 000) and paid in full.

2.4 Most of the claims in the fisheries sector have also been settled and paid in full for a total amount of Won 17 000 million (£9.4 million).

2.5 However, 207 claims submitted by 194 claimants totalling Won 5 321 million (£2.8 million) were the subject of legal actions against the 1971 Fund. The 1971 Fund, and the Court in charge of the limitation proceedings, rejected 196 claims of 183 of these claimants. The Court also agreed with the Fund's assessments of the claims of the remaining 11 claimants at a total of Won 95 million (£53 000).

2.6 In view of the considerable time that would elapse before the limitation amount applicable to the *Sea Prince* would be determined by the Court, as an exception the Administrative Council authorised the Director to agree with the shipowner/insurer on the exchange rate between the SDR and Won to be applied to establish the limitation amount and to determine the amount of indemnification payable by the Fund under Article 5.1 of the 1971 Fund Convention (document 71FUND/AC.1/EXC.63/11, paragraph 3.3.5).

2.7 In April 2001 the 1971 Fund and the shipowner/UK Club agreed that the limitation amount should be set at Won 18 308 275 906 (£10.2 million) and that the indemnification amount should be Won 7 410 928 540 (£4.1 million).

2.8 In view of the fact that the UK Club had reimbursed the shipowner for an amount in excess of the limitation amount the 1971 Fund agreed to pay the balance of the shipowner's claim in respect of clean-up costs. This claim was settled at Won 4 207 million (£2.4 million) including interest.

2.9 The 1971 Fund also reimbursed the UK Club a total of Won 6 487 million (£3.6 million), including interest, in respect of clean-up costs and preventive measures associated with salvage, and Won 7 411 million (£4.1 million) in respect of indemnification.

2.10 In April 2001 the 1971 Fund settled claims by the shipowner in respect of environmental studies and additional clean-up undertaken in the light of those studies for Won 724 million (£393 000) and Won 160 million (£91 000) respectively.

2.11 In May 2001 the 1971 Fund settled a claim by the National Park Management Public Corporation for Won 6.6 million (£3 630) in respect of clean-up costs and a claim by the Yosu Fishery Co-operative Union for Won 18.9 million (£152 000) plus interest of Won 5.6 million (£3 100) for costs associated with surveys of polluted areas.

3 Limitation proceedings

3.1 As a consequence of having agreed the limitation amount applicable to the *Sea Prince* and having settled all outstanding disputed claims in the limitation proceedings, the shipowner/UK Club and the 1971 Fund requested the Court to render the limitation proceedings void with effect from the commencement of the proceedings, which is possible under Korean law if all parties agree.

3.2 The claims by the 194 claimants referred to in paragraph 2.5 were brought in the limitation proceedings. The claimants did not appeal against the decision of the Court in charge of those proceedings on the assessments of the claims, but instead filed a separate action against the 1971 Fund. These claimants agreed to join the 1971 Fund and the shipowner/UK Club in making an application before the Limitation Court for the discontinuance of the limitation proceedings, provided that the 1971 Fund made payments of the amounts assessed by that Court, and gave an undertaking that the claimants' rights to pursue their claims against the Fund would not be prejudiced and that the Fund would pay any sums awarded in a final judgement.

3.3 In May 2001 the 1971 Fund paid Won 95.5 million (£53 000) in respect of the 11 claims referred to in paragraph 2.5 and an additional claim that was not included in the separate legal action, in accordance with the Limitation Court's assessments.

3.4 The limitation proceedings were discontinued on 3 January 2002.

4 Legal action against the 1971 Fund

4.1 In December 2001 the Sunchon District Court rendered judgements in respect of the claims against the 1971 Fund referred to in paragraph 2.5. The Court awarded 31 claimants a total of Won 1 438 200 211 (£752 000) plus interest at the rate of 5% per annum from 23 July 1995 until 28 December 2001, and at a rate of 25% per annum from 29 December 2001 until full payment. The Court dismissed the claims of the remaining 163 claimants.

4.2 The amounts claimed, the amounts approved by the Fund and the Limitation Court and the amounts awarded in the judgements are summarised in the table below. In awarding the amounts indicated the Court took into account the fact that the claimants had not appealed against the assessment decisions of the Limitation Court, and therefore made deductions corresponding to the share of the limitation fund that the claimants would have received had they pursued their claims against the shipowner under the 1969 Civil Liability Convention in those proceedings.

Sector	Number of claims	Total claimed amount Won	Total amount approved by Fund/Limitation Court Won	Total amount awarded in judgements Won
Stow nets	158	911 501 272	0	0
Caged fish culture	15	832 083 901	92 359 195	325 299 216
Aquaculture	23	1 821 955 200	0	1 111 292 438
Inshore fishing vessels	4	10 183 746	2 652 000	1 608 557
Women divers	1	2 427 000	0	0
Tourism	1	49 259 000	0	0
Lost sales commission	1	1 425 653 975	0	0
Survey fees	4	268 394 800	0	0
Totals	207	5 321 458 894 (£2.8 million)	95 011 195 (£53 000)	1 438 200 211 (£752 000)

Stow nets, women divers, tourism, survey fees and lost sales commission

4.3 The Court concurred with the Fund's position regarding claims for alleged losses of a stow net fishing fleet, one woman diver, one tourism claimant and claims by Yosu Fishery Co-operative Union in respect of survey fees and lost sales commission. The Court therefore rejected these claims.

Caged fish culture

4.4 The Court awarded compensation to 15 claimants for losses due to mortality of fish as a direct result of contamination and for anticipated future losses in accordance with formulae used by the claimants' experts. The total amount awarded was Won 325 229 216 (£170 000). However, the claims of four of these claimants had been settled and paid in September 1997 for a total of Won 23 363 861 (£12 200) by the 1971 Fund, and the Yosu FCU had signed full and final settlement agreements on their behalf. The 1971 Fund had rejected the claims of a further two

claimants, since their cultivating facilities had suffered typhoon damage and not pollution damage.

4.5 The Court rejected claims by all 15 claimants in respect of alleged losses as a result of a decrease in prices of caged fish on the grounds that such losses could not be distinguished from those resulting from a typhoon and red tides, which occurred around the same time as the *Sea Prince* incident.

Aquaculture

4.6 The Court dismissed two claims by one claimant due to lack of supporting evidence.

4.7 The Court awarded compensation in respect of 21 claims by 15 claimants for losses due to mortality and reduced rate of growth of cultivated shellfish allegedly caused by oil and dispersant. The total amount awarded to these claimants was Won 1 111 million (£581 000).

4.8 The Court dismissed the Fund's argument that the claims of five of the above 15 claimants who did not have licences to cultivate penshells and arkshells should be rejected because, in the Court's view, licensing requirements were an administrative matter unrelated to compensation issues.

Inshore fishing vessels

4.9 The Court dismissed two claims by fishing boat owners due to lack of supporting evidence and concurred with the 1971 Fund's assessment of a third claim, which had already been settled and paid by the Fund.

4.10 In the case of the fourth claimant, the Court decided that the 20 days' fishing interruption period used by the Fund to determine the losses of all fishing vessels, which corresponded to the number of days that oil was present on the sea surface, had no merit. The Court accepted the assessment of the claim by the claimant's expert, by which the losses were said to have been determined on the basis of the actual days of interruption plus the subsequent decrease in catch realistically suffered by each village fishery association (VFA), although no explanation was provided by the Court as to how the latter was determined. The total amount awarded by the Court to this claimant was Won 1 608 557 (£840). The Court dismissed the Fund's argument that the claim should be rejected since this claimant did not have a valid licence.

5 Consideration of the judgements by the Director

Mortality of caged fish and cultivated shellfish stocks

5.1 In the case of claims in respect of caged fish culture and aquaculture the Court held that the oil and/or the dispersant used to treat the oil resulted in mortality of fish and shellfish, whereas the 1971 Fund had argued that the only losses suffered were property damage to fish cages and additional operating costs due to business interruption in respect of both caged fish culture and aquaculture.

5.2 The Court appears to have rejected, or failed to take into account, the evidence submitted by the Fund, which showed that petroleum hydrocarbon concentrations found in fish taken from heavily oiled cages were very low and comparable to those found in control fish taken from outside the polluted area. The Fund had maintained therefore that fish mortality as a result of the incident was extremely unlikely.

5.3 The Court also appears to have rejected, or failed to take into account, the evidence submitted by the Fund demonstrating that near surface shellfish (abalone, clams and mussels) samples taken from polluted areas contained very low concentrations of petroleum hydrocarbons (some of which

did not originate from the *Sea Prince)*, comparable to those found in control samples taken from outside the polluted area.

5.4 The Court dismissed claims for alleged price reduction of caged fish stocks on the grounds that such losses could not be distinguished from those resulting from a concurrent typhoon and red tide. The Court appears not to have given any consideration to the effects that these other events would have had on the survival of fish and shellfish stocks. In the Director's view the typhoon and the red tides were more likely to have resulted in mortality of cultivated fish and shellfish stocks than the oil spill.

5.5 The claims of two of the claimants awarded compensation by the Court had been rejected by the 1971 Fund since their facilities had been destroyed as a result of the typhoon that occurred at the time of the *Sea Prince* incident.

5.6 Following the *Keumdong N°5* incident (Republic of Korea, 1993), claims for alleged damage to arkshells (aquaculture) became the subject of legal proceedings. The District Court rejected the 1971 Fund's arguments and held that oil treated with dispersants moved with the currents and reached arkshell farms and 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. The Court rejected the claimants' methods of calculating damages and held that the property losses, including losses due to mortalities and growth retardation, could not be quantified, and instead awarded compensation for pain and suffering (document 71FUND/EXC.61/5, paragraphs 3.4 – 3.7).

5.7 The 1971 Fund appealed against the judgement in the *Keumdong N°5* case, and in a compulsory mediation decision in June 2000, the Appellate Court accepted the Fund's position that compensation should not be awarded for pain and suffering, but upheld the decision of the first instance Court that all claimants had suffered property damage, including those in the area where there had been no oil on the sea surface, since the Court took the view that chemical dispersants and dispersed oil had affected this area (document 71FUND/A.23/14/3, paragraph 3.2.8). The 1971 Fund's Korean lawyer advised the Director that 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. For this reason the 1971 Fund did not appeal against the judgement (document 71FUND/A.23/14/3, paragraph 3.29).

5.8 Because the arkshell claims arising from the *Keumdong N°5* incident had not been anticipated by the 1971 Fund at the time of the incident, no contemporaneous evidence was gathered to ascertain whether or not dispersed oil reached the cultivating areas and if so whether the concentrations were sufficient to have any impact on the arkshells. The Fund's counter evidence was therefore based largely on laboratory experiments demonstrating that oil of the type spilled by the *Keumdong N°5* was not amenable to dispersant and that chemically dispersed oil could not therefore have impacted the arkshells.

5.9 However, in contrast, the potential impact of the oil spilled from the *Sea Prince* on caged fish culture and aquaculture had been anticipated by the experts appointed by the UK Club and the 1971 Fund at a very early stage. Arrangements were therefore made for a comprehensive sampling and analytical programme involving the collection of fish and shellfish from polluted and unpolluted areas. The sampling programme was undertaken jointly with the claimants' experts. Analyses of these samples showed that the petroleum hydrocarbon concentrations found in fish and shellfish taken from polluted areas were comparable to those taken from control sites and that in some cases the fingerprints of the hydrocarbons did not match those of the oils spilled by the *Sea Prince*. The Director therefore considers that the 1971 Fund's position is stronger in the *Sea Prince* case than it was in the *Keumdong N°5* case.

5.10 The Director notes that some 769 individual fishermen submitted claims in respect of some 7 750 fish cages for a total of Won 81 900 million (£43 million). The majority (754), including the four claimants referred to in paragraph 4.4 awarded additional compensation by the Court, had settled their claims for a total of Won 8 407 million (£4.4 million) on the basis of the Fund's assessments of property damage (cleaning and or replacement of oiled nets, buoys and ropes etc) and additional fish management and feeding costs during a four-month business interruption period corresponding to the time taken to reinstate fish cages and to complete the analyses of fish and disseminate the data demonstrating that the fish were free of contamination.

5.11 The Director therefore decided that the 1971 Fund should appeal against the judgement awarding compensation for mortality of caged fish and cultivated shellfish stocks.

Compensation awarded in respect of unlicensed aquaculture farms

5.12 Five of the claimants engaged in aquaculture were awarded compensation by the Court despite not having the requisite licences. The 1971 Fund Executive Committee considered the issue of the admissibility of claims presented by unlicensed fishermen at its 60th session. The Committee's conclusions were as follows (document 71FUND/EXC.60/17, paragraphs 5.3 and 5.4):

> In noting the 1971 Fund's current policy of not paying compensation in respect of claims from commercial fishermen who carried out their activities in breach of applicable licensing requirements, some delegations felt that it was necessary to take a flexible approach and to consider claims on a case-by-case basis taking into account national legal systems. It was suggested that guidelines might be required on the scope for flexibility. One delegation made the point, however, that it would be very difficult to quantify the damage suffered by unlicensed fishermen.
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> The Committee decided to maintain the general policy of not accepting claims from commercial fishermen who carried out their activities in breach of licensing requirements laid down in or based on national legislation. However, the Committee considered that certain flexibility should be exercised in respect of such claims and that the scope for such flexibility would have to be considered further.

5.13 In the *Sea Prince* case, claims were received from six VFAs whose members had been fishing in common fishery grounds without holding valid licences, although such licences were required under the applicable Korean statute. The Executive Committee noted that five of the VFAs were involved in border disputes and were unable to obtain licences while these disputes were pending. Since it was clear that licences would be granted once these disputes were resolved, the Committee decided that the claims of the members of these five VFAs should be considered as admissible in principle. In respect of the sixth VFA, the Committee considered that the lack of a valid licence was due to an oversight by the chief of the VFA. Since it was clear that a licence would have been granted if an application had been made, the Committee also decided that the claims by members of this VFA should be considered admissible in principle (document 71FUND/EXC.58/15, paragraphs 3.3.14 and 3.3.15).

5.14 In the *Keumdong N°5* case the Court of first instance awarded compensation to local fishermen who had operated without the required licence or registration. In that case the Committee decided that since there were no extenuating circumstances in respect of the claims under consideration, the claims from commercial fishermen who carried out their activities without meeting the licensing requirements laid down in or based on Korean law were not admissible and that an appeal should be therefore be pursued on this point (document 71FUND/EXC.61/14, paragraph 4.4.6).

5.15 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 question 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 licences, 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 (document 71FUND/A/ES.8/4, paragraph 3.14).

5.16 In view of the decision taken by the Appellate Court in the *Keumdong N°5* incident, the Director decided to appeal against the judgement by the District Court to award compensation to unlicensed fishermen for pollution damage resulting from the *Sea Prince* incident.

Inshore fishing vessels

5.17 The District Court rejected two claims by owners of inshore fishing vessels due to lack of evidence.

5.18 The Court upheld the 1971 Fund's assessment of an economic loss claim of one owner of an inshore fishing vessel. This claim had been assessed on the basis of a business interruption period of 20 days; corresponding to the time that oil remained at sea.

5.19 However, in its consideration of another claim for economic loss in respect of an inshore fishing vessel the Court held that the Fund's approach had no merit. In the latter case the Court awarded losses on the basis of the actual interrupted days plus the subsequent decrease in catch realistically suffered by each VFA. This claim had been rejected by the 1971 Fund on the ground that the claimant did not have a valid licence, but the Court did not accept the Fund's argument for the reasons set out in paragraph 4.8.

5.20 A total of 333 owners of inshore fishing vessels settled their claims for economic losses on the basis of the business interruption of 20 days proposed by the 1971 Fund.

5.21 In view of the contradictory nature of the Court's judgement as regards the method to be used to assess the economic losses of owners of inshore vessels, and in view of the 1971 Fund's policy regarding the payment of compensation to unlicensed fishermen, the Director decided to appeal against the judgement by the District Court.

6 Appeals by the 1971 Fund

6.1 Appeals against the District Court's judgements had to be lodged by 28 January 2002. The 1971 Fund lodged appeals as set out above by that date.

6.2 The Court had granted provisional enforcement of the judgement. In connection with the appeal, the 1971 Fund requested a stay of the provisional enforcement. Under Korean law, the decision whether to grant such a stay is at the discretion of the Court. Such a stay is usually conditional on the defendant's making a deposit with the Court of the amount awarded to the plaintiff. It is also at the Court's discretion whether to accept a bank guarantee instead of a cash deposit.

6.3 When the 1971 Fund lodged its appeal against the Court of first instance's decision in respect of the *Keumdong N°5* incident, it requested that the Fund, as an intergovernmental organisation,

should be allowed to dispense with the requirement to deposit the amounts awarded and that, if this were to be rejected, the Fund should be allowed to present a bank guarantee instead of making a cash deposit. However, this request was rejected.

6.4 In view of the decision in the *Keumdong N°5* case the 1971 Fund did not request any dispensation in connection with the current appeal. The Court accordingly ordered the 1971 Fund to deposit a total sum of Won 2 060 million (£1.1 million) representing the amount awarded in the judgements plus interest. The deposit was made in February 2002. The Court subsequently rendered its decision to stay the enforcement of the judgements.

6.5 The Yosu FCU has appealed against the judgement in respect of its claim for lost sales commission, but not in respect of its other claims. None of the other claimants appealed against the judgements.

7 Action to be taken by the Assembly

The Assembly is invited:

(a) to take note of the information contained in this document;

(b) to decide whether the 1971 Fund should pursue the appeals against the judgements of the Court of first instance; and

(c) to give the Director such other instructions as the Assembly may deem appropriate in respect of this incident.