



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1971

EXECUTIVE COMMITTEE  
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Agenda item 3

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## INCIDENTS INVOLVING THE 1971 FUND

### KEUMDONG N°5

Note by the Director

#### 1 The incident

On 27 September 1993, the Korean barge *Keumdong N°5* (481 GRT) collided with the Chinese freighter *Bi Jia Shan* near Yosu on the southern coast of the Republic of Korea. As a result an estimated 1 280 tonnes of heavy fuel oil were 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, where there are many fisheries and important mariculture resources.

#### 2 Claims situation

2.1 At its 37th session, the Executive Committee authorised the Director to make final settlements of all claims relating to clean-up operations and preventive measures as well as all claims in respect of losses suffered by fishermen, except to the extent that the latter claims related to future losses. The Committee instructed the Director that, if claims gave rise to questions of principle which had not previously been decided by the Committee, he should refer such questions to the Committee for decision (document FUND/EXC.37/3, paragraph 4.4.2).

2.2 The Executive Committee, at its 38th session, endorsed the Director's decision to limit the 1971 Fund's payments, at least for the time being, to 50% of the established damage suffered by each claimant. The Committee instructed him to consider whether this percentage should be adjusted, in the light of developments (document FUND/EXC.38/9, paragraph 3.6.5). At its 39th session, the Committee instructed the Director to exercise caution in making payments, in order to ensure equal treatment of claimants, in accordance with Article 4.5 of the 1971 Fund Convention (document FUND/EXC.39/8, paragraph 3.5.3).

2.3 Claims relating to the cost of clean-up operations were settled at an aggregate amount of Won 5 587 million (£4.6 million) and were paid by the shipowner's P & I insurer (the Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd, Standard Club) by September 1994. It is unlikely that there will be any further claims relating to clean-up operations. The 1971 Fund has made advance payments to the Standard Club totalling US\$6 million (£4 017 126) in respect of these subrogated claims.

2.4 In September 1994, a shipping company presented a claim for US\$25 970 (£16 620) for cleaning its contaminated vessel and for loss of hire during the cleaning operation. This claim was settled at Won 14 206 046 (£11 800) and was paid by the Standard Club in February 1996.

2.5 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 eleven fishery co-operatives with some 6 000 members in all. The total amount of the claims presented was Won 93 132 million (£73 million).

2.6 In July 1995 agreements were reached on the admissible amounts in respect of a number of items of the claims presented by the Kwang Yang Bay Federation. These items, which relate to damage to equipment and loss of earnings, were agreed for a total of Won 1 117 million (£872 320), compared with the claimed amount of Won 6 463 million (£5 million). The agreed amounts have been paid as part of the settlements referred to in paragraphs 2.7-2.9 below, except certain items claimed by the Yosu fishery co-operative, totalling Won 283 million (£221 000).

2.7 In December 1995 agreement was reached with the Namhae fishery co-operative which had presented the largest group of claims, totalling Won 17 795 million (£13.9 million). These claims were settled at Won 4 359 957 253 (£3.6 million). The agreed amounts relate to facility damage, loss of income due to interruption of fishing and damage to aquaculture products in the intertidal zones. The claims relating to alleged mass mortality of aquaculture products in the sub-tidal zones (such as cockle, abalone, oyster and crab) were rejected, because there was no evidence that any such damage had actually been caused by oil pollution. In February 1996 the 1971 Fund paid to these claimants Won 2 150 million (£1.8 million), representing 50% of the settlement amounts minus the amounts that the claimants had previously received from the shipowner's limitation fund (cf paragraph 3.1 below). The 1971 Fund paid the balance of the settlement amounts (Won 2 180 million or £1.7 million) in July 1996, after the conclusion of the agreement referred to in paragraph 2.17 below.

2.8 In July 1996 the claims of two other fishery co-operatives, namely the Hadong and Sachon co-operatives, which totalled Won 6 238 million (£4 871 330) and Won 959 million (£748 930), respectively, were settled at Won 2 054 094 864 (£1.6 million) and Won 239 824 167 (£191 940), respectively. These claims were similar to those of the Namhae fishery co-operative and were assessed in the same way. In particular, major parts of these claims relating to alleged mortality were rejected, since no such damage was proved. The settlement amounts minus the amounts that the claimants had previously received from the shipowner's limitation fund, Won 2 048 million (£1.6 million) and Won 238 million (£190 100), respectively, were paid by the 1971 Fund in July 1996.

2.9 Agreements were reached in September 1996 with another four fishery co-operatives for a total amount of Won 355 190 850 (£277 390), compared with the total amount claimed of Won 16 545 million (£12 million). One of these claims totalling Won 13 879 million (£10.8 million) had been presented by an oyster fishery co-operative. This claim was agreed at Won 204 963 414 (£160 070). The major part of this claim (Won 13 674 million or £10.7 million) which related to loss of income caused by loss of seed, increased mortality, growth retardation and loss of consignment sales, was not accepted, since the alleged losses had not been substantiated. Most of the claims presented by two diving fisheries co-operatives totalling Won 2 062 million (£1.6 million) were rejected, since these claims related to an area unaffected by oil. The settlements, for a total of Won 67 546 233 (£52 750), only covered those claims in respect of which damage had been substantiated. The Kyung Nam Set Net fishery co-operative presented claims for a total amount of Won 604 million (£0.4 million). Some of these claims relating to locations unaffected by the oil were rejected. The remaining claims were settled at Won 82 681 203 (£64 570). The agreed amounts minus the amounts previously paid from the shipowner's limitation fund will be paid by the 1971 Fund in the very near future.

2.10 The Yosu fishery co-operative left the Kwang Yang Bay Federation and took legal action against the 1971 Fund in May 1996. Thirty-six branches belonging to this co-operative presented claims in court totalling Won 4 254 220 066 (£3.3 million) for damage to the common fishery grounds. These claims relate to similar types of damage as those of the Namhae co-operative. The claimants have indicated, however, that the damage actually suffered totalled Won 15 324 716 000 (£12.6 million), and have reserved their right to increase the amount claimed in court. In addition, claims have been submitted by over 900 individual fishermen belonging to this co-operative, who are owners of fishing boats or licence holders of set net fishing and the operators of two on-shore fish culture storage tanks. These claims total Won 455 975 843 (£356 090). The claimants belonging to this latter group have indicated that the damage suffered totalled Won 1 642 812 080 (£1.3 million) and have also reserved their right to increase the amount claimed in court.

2.11 The experts engaged by the 1971 Fund and the Standard Club have assessed the losses allegedly suffered by all the claimants belonging to the Yosu co-operative at Won 809 986 000 (£632 560). The reasons for the great differences between the amounts claimed and the amounts assessed are as follows. 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 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 claimants concerning their normal fishing activity, and certain claims related to losses suffered outside the area affected by the oil. The owners of the fish culture storage tanks have not provided evidence that the alleged losses were caused by the oil spill.

2.12 The first hearing concerning the Yosu fishery co-operative's claims was held at the Seoul District Court on 21 May 1996. The claimants did not present any evidence to support their claims, but undertook to present such evidence at a later hearing. Further hearings were held on 16 July and on 17 September 1996 at which the claimants submitted some documents, including a survey report prepared by their technical experts.

2.13 An arkshell fishery co-operative brought legal action against the 1971 Fund on 8 July 1996. The claim presented by this co-operative totals Won 4 160 million (£3.2 million) and relates to damage allegedly caused during 1993 to the arkshell cultivating farms belonging to its members. This co-operative has indicated that the losses suffered in 1994 due to the damage caused to the arkshell seeds amount to Won 5 966 million (£4.7 million). The co-operative has claimed Won 4 160 million (£3.2 million) for such damage, and has reserved its right to increase the amount later for damage not yet quantified which would allegedly be suffered after 1994. This claim has been rejected by the 1971 Fund because there was no evidence that the alleged damage was caused by oil pollution, except for an amount of Won 6 375 000 (£4 980) which related to costs of cleaning the facility. The first court hearing concerning this claim will be held on 8 October 1996.

2.14 Claims by two other co-operatives (Kwang Yang and Cholla Namdo), for Won 6 053 million (£4.7 million) and Won 411 million (£320 970), respectively, were rejected by the 1971 Fund, since it had not been shown that the alleged losses had occurred as a result of oil pollution. These claims have not been pursued in court.

2.15 As regards the claims of the Kwang Yang co-operative, the short necked clam and oyster farms in respect of which damage was alleged, were never affected by the oil. Following investigations by the Club's and the Fund's experts, there was no evidence that the observed mortality of the cockles farmed by the members of this co-operative was caused by the oil which escaped from the *Keumdong N°5*.

2.16 The claims presented by the Cholla Namdo co-operative for loss of income due to interruption of set net fishing and reduction in catches and for contaminated fishing gear were rejected, because the areas in which the set nets were located were not affected by the oil from the *Keumdong N°5*.

2.17 A table showing the present situation in respect of the claims is set out overleaf.

**(i) Claims settled out of court:**

<u>Claimant</u>	<u>Amount Claimed</u> (Won)	<u>Amount Agreed</u> (Won)
Namhae FC	17 794 830 000	4 359 957 253
Hadong FC	6 283 450 000	2 054 094 864
Sachon	959 279 000	239 824 167
Kyungsang Namdo set net FC	603 944 000	82 681 203
1st & 2nd Divers FC	383 509 000	11 908 137
3rd & 4th Divers FC	1 678 547 735	55 638 096
Oyster FC	<u>13 878 920 250</u>	<u>204 963 414</u>
Total	41 582 479 985 (£32.5 million)	7 009 067 134 (£5.5 million)

**(ii) Claims rejected by the 1971 Fund and not pursued in court:**

<u>Claimant</u>	<u>Amount Claimed</u> (Won)
Kwang Yang FC	6 053 932 000
Cholla Namdo set net FC	<u>410 555 000</u>
	6 464 487 000 (£5 million)

**(iii) Claims pending in court:**

<u>Claimant</u>	<u>Originally claimed amounts</u> (Won)	<u>Amounts claimed in court</u> (Won)
Yosu FC	18 430 233 000	4 710 195 909
Arkshell FC	<u>25 197 000 000</u>	<u>4 160 000 000</u>
Total	43 627 233 000 (34.1 million)	8 870 195 909 (£6.9 million)

2.18 In order to make it possible for the 1971 Fund to pay agreed claims in full, an agreement in principle was reached in the summer of 1995 between the Fund and the Kwang Yang Bay Federation that the admissible amount of the claims of the members of all the eleven fishery co-operatives forming part of the Federation would not exceed Won 60 000 million (£46.9 million). This sum was determined by reducing the amount of 60 million Special Drawing Rights (SDR) (Won 68 994 million) by the total amount paid to claimants up to July 1995 (Won 5 588 million) and by making a further reduction to give the 1971 Fund a certain safety margin. This agreement was to be signed by the chairmen of the above-mentioned eleven co-operatives, on the basis of powers of attorney issued by all the individual members, some 2 500 fishermen.

2.19 At its 44th session, the Executive Committee shared the Director's view that, once the agreement referred to in paragraph 2.18 had been properly signed to the satisfaction of the Fund's Korean lawyer, the 1971 Fund would be in a position to pay any established claims in full (document FUND/EXC.44/17, paragraph 3.5.4).

2.20 At its 47th session, a number of delegations stated that the 1971 Fund should exercise caution in agreeing to make full payments against guarantees of this type. The Committee noted that, although it had accepted this procedure in respect of the *Keumdong N°5* incident, procedures of this type should be used only in very particular situations and on condition that any guarantee provided would give the Fund security against overpayments (document FUND/EXC.47/14, paragraph 3.4.6).

2.21 In July 1996, the agreement referred to in paragraph 2.18 above was signed by the chairmen of ten fishery co-operatives, but not by the Chairman of the Namhae fishery co-operative which had already agreed to a final settlement of its claim. In the final text of the agreement the maximum total amount admissible for compensation was reduced by Won 5 000 million (£3.9 million) to Won 55 000 million (£43 million), to reflect the settlement of the Namhae fishery co-operative's claim.

### **3 Limitation proceedings**

3.1 In March 1994, the shipowner made an application to the Seoul District Court that limitation proceedings should be opened. The Standard Club paid the limitation amount plus interest, corresponding to Won 77 million (£60 130), in cash to the Court in December 1994. The Court established a table setting out the distribution of the limitation fund to the various claimants in proportion to their respective claimed amounts. The limitation fund was distributed to the claimants, and the limitation proceedings were completed on 25 August 1995.

3.2 The 1971 Fund had intended to intervene in the legal proceedings brought against the shipowner and his insurer, in accordance with Article 7.4 of the 1971 Fund Convention. Under this Article, each Contracting State should ensure that the 1971 Fund has the right to intervene in such proceedings. Under the Korean Statute implementing the 1969 Civil Liability Convention and the 1971 Fund Convention, the 1971 Fund may intervene in limitation proceedings in accordance with Supreme Court Regulations. However, the Supreme Court had not at that time issued any Regulations concerning the Fund's right to intervene. The Fund's Korean lawyer informed the Director that, in these circumstances, the 1971 Fund was not entitled to intervene in the limitation proceedings. The Supreme Court issued the necessary Regulations in October 1995.

3.3 The 1971 Fund was not notified of the limitation proceedings. The Fund's lawyer has advised the Director that any decision made by the Court in these proceedings is therefore not binding on the 1971 Fund (cf Article 7.5 of the Fund Convention).

### **4 Deposit to the Court**

4.1 As mentioned above, the claims of the Yosu fishery co-operative and Arkshell fishery co-operative have been pursued in court. It is expected that the judgement by the Court of first instance will be rendered in the beginning of 1997 at the earliest. If appeals were to be lodged against that judgement, the judgement of the appellate court would not be expected until late in 1997.

4.2 The Fund's Korean lawyer has given the 1971 Fund the following advice concerning certain aspects of Korean law relevant to the on-going court proceedings:

If a judgement is rendered by the Court of first instance in favour of the plaintiff, the Court will grant a provisional enforcement of the judgement against the defendant's assets. Such a provisional enforcement will be granted even if the defendant appeals against the judgement. The defendant may apply to the Court of first instance or the Court of appeal for a stay of the provisional enforcement. The decision whether or not to stay the provisional enforcement will be made by the Court at its discretion. If such a stay is granted, it would be conditional on the defendant's making a deposit with the Court of the amount awarded to the plaintiff. The Court would not accept a bank guarantee; the defendant would have to pay the amount in cash or deposit negotiable instruments which have a market value in Korea.

If the defendant deposits the above-mentioned amount with the Court, the deposited amount would not be paid to the plaintiff until the Court of appeal has rendered its judgement. If the Court of appeal renders a judgement in favour of the plaintiff, a provisional enforcement of this judgement would always be granted. The deposited amount would then be paid to the plaintiff to the extent awarded by the Court of appeal. The defendant would have no right to require that the plaintiff provides security for repayment of this amount if the Supreme Court were to amend the Court of appeal's judgement. The defendant may apply for a stay of the provisional enforcement of this judgement, but it is rare that the Court of appeal grants such a stay.

The amount awarded by the Court would carry interest at the rate of 6% per annum from the date of the incident to the date on which the judgement is rendered by the Court of first instance and at 25% per annum thereafter, whereas the plaintiff's deposit would only carry 2% interest per annum. If an appeal is made and if the Court of appeal renders a judgment in favour of the plaintiff by upholding the judgement of the first instance Court, the interest would accrue as decided by the Court of first instance. If the Court of appeal accepts part of the appeal of the defendant and amends the amount awarded by the Court of first instance, the interest would normally be calculated at 6% per annum from the date of the incident to the date of the Court of appeal's judgement and at 25% per annum thereafter.

4.3 The procedural rules and practice set out in paragraph 4.2 above are of great importance for the 1971 Fund. The Director considers that, if a judgement were to be rendered against the 1971 Fund and the Court were to grant provisional enforcement, the Fund would have to deposit the amount awarded by the Court.

## 5 Action to be taken by the Executive Committee

The Executive Committee is invited to:

- (a) take note of the information contained in this document; and
  - (b) give the Director such other instructions as it may deem appropriate in respect of the *Keumdong N°5* incident, in particular in respect of the procedural issues set out in paragraph 4 above.
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