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INCIDENTS INVOLVING THE 1971 FUND

KEUMDONG N°5

Note by the Director

Summary:	The competent Korean Court rendered judgements in relation to claims by the Yosu Fishery Co-operative and an arkshell fishery co-operative, in both cases awarding for the most part apparently arbitrary amounts, since the Court considered it impossible, on the basis of the evidence presented by the claimants, to quantify the damage suffered. The 1971 Fund has appealed against these judgements. This document contains an analysis of the issues involved.
Action to be taken:	Decide whether to pursue the appeals against the Court's judgements.

1 Introduction

1.1 On 26 January 1999 the Seoul District Court rendered two judgements in respect of the claims submitted by the Yosu Fishery Co-operative and an arkshell fishery co-operative. When the judgements were considered at the Executive Committee's 60th session, they were not yet available in writing, but the Committee based its consideration on a summary provided by the 1971 Fund's Korean lawyers (document 71 FUND/EXC.60/5/Add.1).

1.2 The Executive Committee noted that in the case of the Yosu Fishery Co-operative the Court had found that the claimants had suffered damage due to oil pollution but had not been able to calculate the quantum of the loss, and that for this reason the Court had awarded compensation for "pain and suffering" (document 71FUND/EXC.60/17, paragraph 3.4.4).

1.3 In the case of the arkshell fishery co-operative the Committee noted the Court had awarded compensation, apparently on the assumption that if oil reached a certain area then marine life in that area would be affected, and that the burden of proof lay on the 1971 Fund to establish that this was not the case (document 71FUND/EXC.60/17, paragraph 3.4.5).

1.4 The Executive Committee instructed the Director to appeal against both judgements. He was also instructed to examine the written judgements and submit the claims to the Committee at its 61st session for renewed consideration in the light of the Court's reasoning (document 71FUND/EXC.60/17, paragraphs 3.4.7 and 3.4.8).

1.5 The judgements were issued in writing on 13 February 1999. The 1971 Fund's Korean lawyers have prepared translations of the judgements. The translations are available to delegations on request.

2 Claims by the Yosu Fishery Co-operative

The claims

2.1 The Yosu Fishery Co-operative took legal action against the 1971 Fund in May 1996 in the Seoul District Court. Claims were filed in court totalling Won 17 162 million (£8.8 million) for damage to common fishing grounds and intertidal culture farms (mainly used to grow short-necked clams), but the claimed amount was later reduced to Won 15 348 million (£7.9 million). The basis of the claims was that marine products either died or could not be harvested for about one year as a result of having come into contact with dispersed oil. Claims were also submitted by over 900 individual fishermen belonging to this co-operative, who are fishing boat owners, set net fishing licence holders or onshore fish culture/hatchery facility operators. These claims initially totalled Won 1 641 million (£841 000). The amounts in excess of Won 407 million (£209 000) were dismissed by a compulsory mediation judgement against which the claimants did not appeal.

The 1971 Fund's position

2.2 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 (£354 000). The reasons for the great difference between the amount claimed and the amount assessed are as follows. The experts did not accept the claim for alleged mortality of marine products on the grounds that the heavy fuel oil spilled from the *Keumdong N°5* could not have dispersed into the water even with the application of dispersant chemicals and could not therefore have reached marine life in the sea bed, and that oil and dispersants are not toxic to marine life. Accepting that the claimants had suffered losses resulting from business interruption of common fishing grounds and intertidal culture farms, for an amount of Won 527 million (£270 000), the experts considered that the alleged productivity of the common fishing grounds and intertidal culture farms was exaggerated by the claimants and inconsistent with official records and field observations. The experts also took the view that the loss of earnings claimed by the fishing boat and set net operators was too high in the light of an analysis of information provided by the claimants concerning their normal fishing activity, and because certain claims related to losses suffered outside the area affected by the oil. The operators of the fish culture facilities and onshore hatcheries did not provide any evidence that the alleged losses were caused by the oil spill.

2.3 In the court proceedings, the 1971 Fund concurred with the experts' opinions. The Fund also objected to the claims from a number of individual fishermen on the grounds that they did not hold proper licences. The 1971 Fund maintained that the income from unlicensed or unregistered fishing was illegal income and that claims in respect of such fishing were inadmissible.

The Court's judgement

2.4 The Court rejected the claimants' calculation of their losses due to the lack of information on the income of individual fishermen, the unreliability of the evidence presented by the claimants, 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.

2.5 Concerning the 1971 Fund's position as regards the effects of dispersed oil, the Court did not accept that the high viscosity oil spilled by the *Keumdong N°5* would not have been dispersed to some extent through the application of chemical dispersants. The Court held that there would have been no reason to use such large quantities of dispersants, had dispersants not been effective, and that more of the spilled oil would have been recovered had it not been dispersed. The Court concluded that some dispersed oil must have reached the common fishing grounds, intertidal culture farms, caged fish farms and onshore hatcheries, and rejected the argument made by the 1971 Fund that the oil and the dispersants would not have been harmful to marine life in those farms.

2.6 As regards the unlicensed fishermen, the Court took into consideration the original purpose of the law requiring licenses, the degree of blameworthiness of the claimant and the degree of illegality of the act, on a case by case basis. The Court held that because of the short period of the loss, the income from the unlicensed or unregistered fishing could not be considered illegal income. The Court made a distinction between a Supreme Court judgement cited by the 1971 Fund which rejected claims for compensation from unlicensed fishermen whose fishing grounds were affected by a land reclamation project, and the *Keumdong N°5* case which related to compensation for losses resulting from oil pollution.

2.7 In determining the amount of the damages, the 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, as set out in paragraphs 2.8 to 2.11 below.

2.8 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 (£280 000)) is very close to the amount assessed by the 1971 Fund's experts (Won 521 million (£270 000)).

2.9 In the case of unlicensed fishing vessels, the Court applied the same business models and profit per day per ton of vessel that the 1971 Fund's experts had used to assess claims in respect of licensed vessels.

2.10 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 awarded therefore compensation for pain and suffering.

2.11 In determining the compensation for pain and suffering, the Court again used the same annual productivity data as had been used by the 1971 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 damages, 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.

2.12 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 (£512) to Won 5 million (£2 560). No details are given in the judgement as to how these sums were determined.

2.13 The Court rejected 21 claims for unspecified damages totalling Won 3 051 250 (£1 560) on the grounds that they had no basis. No further details were provided in the judgement. The Court rejected a further claim for Won 5 054 260 (£2 600) for damage to a fishing boat which struck a reef after being used in the clean-up operation. The Court found that there was no causal relationship between the *Keumdong N°5* incident and the damage to the fishing boat.

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

Type of fishery	Claim amount (Won)	Court's award		
		Loss of earnings	Condolence money	Total
CFG 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)

2.15 In addition, the 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.

2.16 The Court decided that all but one of the claimants should bear 9/10 and the 1971 Fund 1/10 of the legal costs which were incurred by the plaintiffs and the 1971 Fund. The claimant whose claim for damage to his fishing boat was rejected was ordered to pay 3/4 and the 1971 Fund 1/4 of all of his and the 1971 Fund's legal costs.

2.17 It is understood that all the claimants belonging to the Yosu Fishery Co-operative, with the exception of one Village Fishery Association (VFA), have appealed against the judgement and that their total claim amount is set out in the appeal at Won 13 868 million (£7.1 million).

3 Arkshell fishery co-operative's claims

The claims

3.1 An arkshell fishery co-operative brought legal action against the 1971 Fund in respect of claims totalling Won 4 175 million (£2.1 million) for pollution damage to arkshell farms and hatcheries. These claims relate specifically to alleged mortalities and retarded growth of arkshells caused by dispersed oil.

The 1971 Fund's position

3.2 These claims had been rejected by the 1971 Fund because there was no evidence that the alleged damage was caused by oil pollution.

3.3 In the Court proceedings, the 1971 Fund submitted arguments similar to those presented in respect of the Yosu Fishery Co-operative claims, namely that the oil spilled from the *Keumdong N°5* was too viscous to be dispersed by dispersant chemicals and that the oil and the dispersants would not be

harmful to marine life. The 1971 Fund also maintained that the decrease in arkshell productivity was due to other factors unrelated to the oil spill, including overcrowding, decrease in the quality of the sediment and the water caused by continuous farming, and widespread predation by starfish.

The Court's judgement

3.4 The Court rejected the 1971 Fund's arguments concerning the effects of the dispersed oil on the same grounds as in the case of the Yosu Fishery Co-operative claims. The Court held that oil treated with dispersants moved with the currents and reached the arkshell culture farms and 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.

3.5 With regard to the arkshell farms the Court rejected the claimants' method of calculating damages 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.

3.6 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 mortalities and growth retardation.

3.7 The Court determined the amount of compensation for pain and suffering in respect of arkshell culture farms 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 farms and the incident site, with the amounts ranging between 5% and 10% of the average annual production. The two arkshell hatcheries were awarded Won 10 million (£5 120) each plus the clean-up costs admitted by the 1971 Fund, Won 6.3 million (£3 230).

3.8 The arkshell fishery co-operative claims and the amounts awarded by the Court are summarised below:

Type of fishery	Claim amount (Won)	Court's award (Won)
Hatcheries	375 200 000	16 375 000
Culture farms	3 799 960 000	456 900 000
Total	4 175 160 000 (£2 100 000)	473 275 000 (£253 000)

3.9 The Court also decided that the 1971 Fund should pay interest on the awarded amounts 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.

3.10 The Court decided that the claimants should bear 8/9 and the 1971 Fund 1/9 of the legal costs which were incurred by them and the 1971 Fund.

3.11 It is understood that the two arkshell hatchery claimants have appealed against the judgement and that their total claim amount is set out in the appeal at Won 359 million (£184 000).

4 Appeals by the 1971 Fund

4.1 In accordance with the Executive Committee's instructions, the 1971 Fund lodged appeals against both judgements.

4.2 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 normally conditional on the defendant's making a deposit with the Court of the amount awarded to the plaintiff. It is at the Court's discretion whether to accept a bank guarantee instead of a cash deposit.

4.3 In accordance with the instructions given by the Executive Committee at its 50th session, the 1971 Fund 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, that the Fund should be allowed to present a bank guarantee instead of making a cash deposit. This request was rejected. In this situation the Director decided, in accordance with the Executive Committee's instructions (document 71FUND/EXC.50/17, paragraph 3.5.9), that the 1971 Fund should make cash deposits in the amounts fixed by the Court, namely Won 1 571 million (£795 000) in respect of the Yosu Fishery Co-operative claims and Won 474 million (£240 000) in respect of the arkshell fishery co-operative claims. These amounts were deposited with the Court on 23 March 1999.

5 Director's legal analysis of the situation

5.1 The Court of first instance has held that damage was in fact caused in respect of both groups of claims, whereas the 1971 Fund's experts had expressed the view that apart from business interruptions in respect of common fishery grounds, intertidal culture farms and fishing vessels, there was no evidence that the oil had in fact caused any damage.

5.2 The Court has in this regard made a finding as to the facts. Under Korean procedural law, the Court of Appeal does address questions of fact. It is difficult to predict whether the Court of Appeal will overrule the findings of the Court of first instance that the oil actually caused damage.

5.3 However, the Director intends to examine further, with the assistance of the 1971 Fund's technical experts, the reasons given in the judgement in the light of all the evidence available, in order to establish whether the appeals should be maintained in respect of the question of facts.

5.4 In 1984, in a case involving the death of a medical student in a car accident, the Korean Supreme Court held that, in principle, if it was established that the plaintiff had also suffered property losses, but it was impossible to determine the quantum, alternative methods might be used to increase the amount awarded for pain and suffering. However, the Supreme Court held in that case that the option of awarding increased compensation for pain and suffering instead of compensation for property losses should be used only as a supplementary method when the assessment of property losses was not possible. In that case, which related to a claim by the bereaved family for loss of future income sustained by the deceased medical student, the Supreme Court reversed a judgement by a lower court based upon increased pain and suffering, stating that the lower court should have assessed the loss of earnings based on an alternative income (ie income which could have been earned by the medical student as an assistant to a medical doctor or a lecturer at a nursing school).

5.5 The 1971 Fund's Korean lawyer has expressed the view that as regards the claims under consideration in the *Keumdong N°5* case, it is likely that a higher court (the Appellate Court and/or the Supreme Court) would hold that the Court of first instance should have ordered the plaintiff to submit a reasonable method of calculating the property losses, or that the Court of first instance should itself have established a reasonable method of calculating such losses, since it is not impossible (although it may be difficult) to assess the property losses suffered by the plaintiffs.

5.6 Another issue is that of the claims presented by the local fishermen who had operated without the required licence or registration.

5.7 This issue was considered most recently by the Executive Committee at its 60th session. The Committee's conclusions are reflected in the Record of Decisions 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.
>
> 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 a certain flexibility should be exercised in respect of such claims and that the scope for such flexibility would have to be considered further.

5.8 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 the members of this VFA should be considered admissible in principle (document 71FUND/EXC.58/15, paragraphs 3.3.14 and 3.3.15).

5.9 As far as the Director is aware, there were no alleviating circumstances in respect of the claims under consideration in the *Keumdong N°5* case.

5.10 The Director takes the view that the 1971 Fund should in this case maintain its position that claims from commercial fishermen who carried out their activities in breach of licensing requirements laid down in or based on national law are not admissible. For this reason, the Director proposes that the appeal should be pursued also on this point.

5.11 The 1971 Fund has consistently taken the position that compensation is payable only for economic losses actually suffered. For this reason the Director considers that the 1971 Fund should not accept that compensation under the 1969 Civil Liability Convention and the 1971 Fund Convention is awarded in the form of compensation for pain and suffering. He proposes therefore that the appeals should be maintained also in this regard.

6 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 to pursue the appeals against the Court's judgements in respect of the Yosu Fishery Co-operative and the arkshell claims.