INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

ASSEMBLY
23rd session
Agenda item 6

71FUND/A.23/4
29 September 2000
Original ENGLISH

WINDING UP OF THE 1971 FUND

Note by the Director

Summary:	An examination is made of the consequences of the outcome of the Diplomatic Conference held from 25 to 27 September 2000 which adopted a Protocol to amend Article 43.1 of the 1971 Fund Convention to the effect that the Convention will be terminated when the number of Contracting States falls below 25. The possibility of the 1971 Fund's taking out insurance to cover its liability for future incidents is examined. The future role of the 1992 Fund in the operation of the 1971 Fund is discussed, as is the role of the joint 1971/1992 Fund Director.
Action to be taken:	Consider: (a) whether the 1971 Fund should purchase insurance to cover the Fund's liabilities arising from new incidents occurring by 31 December 2002; (b) the administration of the 1971 Fund in the future, in particular the position of the joint Secretariat and the Director; (c) whether to appoint a liquidator to take over the management of the 1971 Fund; and (d) whether to appoint an eminent person outside the 1971 Fund to oversee the winding up of the 1971 Fund.

1 The issues

1.1 As more States join the 1992 Fund and cease to be Members of the 1971 Fund, the 'old' regime based on the 1969 Civil Liability Convention and the 1971 Fund Convention is losing its importance, and the 1971 Fund will soon cease to be financially viable. With the departure from the 1971 Fund of a number of States, the total quantity of oil on which contributions are levied has been reduced from its maximum of 1 200 million tonnes to its present 250 million tonnes. By the end of 2000, this quantity will have fallen to some 110 million tonnes. By September 2001 the total quantity of contributing oil will have decreased to 48 million tonnes and may fall to as little as 8 million tonnes by the end of 2001. The effect of this reduction in the contribution base

is the considerably increased financial burden which might fall on the contributors in those States which remain Members of the 1971 Fund.

1.2 The 1971 Fund Convention (Article 43.1) provides that the Convention will remain in force until the date when the number of Contracting States falls below three. It is very unlikely that this will happen in the near future. Consideration has therefore been given to the possibility of accelerating the winding up of the 1971 Fund.

1.3 There is considerable concern that before the 1971 Fund Convention can be wound up, the 1971 Fund will face a situation in which an incident occurs and the 1971 Fund has an obligation to pay compensation to victims, but where there are no contributors in any of the remaining Member States.

2 Steps taken by the Secretariat

2.1 The Director has taken a number of steps to draw the attention of the Governments of the remaining 1971 Fund Member States to the significant problems which continuing membership of the 1971 Fund would cause and of the great urgency of acceding to the 1992 Protocols and of denouncing the 1969 Civil Liability Convention and the 1971 Fund Convention. These steps include contacts with the respective Embassies and High Commissions in London, participation in a meeting of States Parties to the United Nations Convention of the Law of the Sea, held in New York in May 1999, visits by Fund staff to the capitals of States concerned, presentations by Fund staff at seminars, conferences and workshops with participation of representatives of interested States, and assistance to States to prepare the necessary instruments of denunciation of the 1969 and 1971 Conventions and the legislation required to implement the 1992 Protocols.

2.2 On the occasion of the IMO Assembly in November 1999, the Director held meetings with representatives of 31 of the remaining 1971 Fund Member States for the purpose of emphasising the urgency of their respective States' denouncing the 1971 Fund Convention. During the Diplomatic Conference referred to in section 6, the Director discussed this issue with representatives of 12 States.

3 Consideration by the Executive Committee at its October 1999 session

3.1 A number of ways of accelerating the winding up of the 1971 Fund were considered at the October 1999 session of the 1971 Fund Executive Committee, acting on behalf of the Assembly.

3.2 During the Executive Committee's discussions it was generally accepted that no option for the early termination of the 1971 Fund Convention was entirely satisfactory.

3.3 The main discussion related to the possibility of adopting a Protocol amending Article 43.1 of the 1971 Fund Convention to the effect that the Convention would be terminated well before the number of Member States fell below three. Normally such an amendment would be binding only on the States which had expressed their acceptance. In the light of the difficulties which would result if explicit acceptance of the amendments were required, the Director had suggested that it would be appropriate to consider whether the envisaged amendment to Article 43.1 could be brought into force by means of a simplified procedure under which the consent of a State to be bound would be given not by express indication but by tacit or implied consent, ie by States failing to object within a certain period of time. Some delegations considered that since the 1971 Fund Convention did not provide for a tacit acceptance procedure, it was not possible to follow such an approach.

3.4 The Executive Committee decided that IMO should be requested to convene urgently a Diplomatic Conference for the purpose of adopting a Protocol amending Article 43.1 of the 1971 Fund Convention. The Committee elaborated a draft Protocol containing two options, one based on a tacit acceptance procedure and the other requiring explicit acceptance by States. In

November 1999 the IMO Assembly approved the 1971 Fund's request. The Diplomatic Conference was held from 25 to 27 September 2000. The results of the Conference are outlined in section 6 below. A detailed report on the Conference is contained in document 71FUND/A.23/4/Add.1.

3.5 During the Executive Committee's discussion it was noted that the termination of the 1971 Fund Convention would not result in the liquidation of the 1971 Fund. Steps will therefore have to be taken to ensure that the 1971 Fund is liquidated in a proper manner.

4 Consideration by the 1971 Fund's Administrative Council in April 2000

4.1 At its 1st session, held in April 2000, the 1971 Fund Administrative Council was informed of the discussions at the 1992 Fund Assembly's 4th extraordinary session, held also in April 2000, on the future role of the 1992 Fund in the operation and activities of the 1971 Fund. During those discussions many delegations emphasised that the 1971 Fund and the 1992 Fund were two totally separate entities, that the 1992 Fund and its Member States had no legal or financial obligations *vis-à-vis* the 1971 Fund in respect of future incidents and that these obligations were limited to those laid down in Article 43.2 of the 1971 Fund Convention. Several delegations considered however that the credibility of the Fund regime as a whole was at stake, particularly as the two Organisations were often perceived as being one and the same. Several delegations questioned whether it would be appropriate for the 1992 Fund to continue to share a Secretariat with the 1971 Fund and for the 1992 Fund's Director to remain Director of the 1971 Fund also. The point was made that the 1992 Fund should consider whether at some point in the near future the roles of Director and Secretariat of the 1992 Fund should be separated from those of Director and Secretariat of the 1971 Fund. It was pointed out that it would nevertheless be necessary to find a mechanism to allow outstanding incidents to be handled in a manner which safeguarded the interests of both contributors and victims in former 1971 Fund Member States.

4.2 The Administrative Council recalled that its consideration of the winding up of the 1971 Fund fell within the context of Resolution N°13 of the 1971 Fund, adopted by the Assembly at its 4th extraordinary session, held in April/May 1998 (annexed to the Agenda of this session). It was further recalled that one aspect of the mandate of the Administrative Council created by the Assembly was 'to take all appropriate measures to complete the winding up of the 1971 Fund, including the distribution in an equitable manner of any remaining assets among those persons who have contributed to the 1971 Fund, at the earliest possible opportunity' (paragraph 4(e) of Resolution N°13).

4.3 The Administrative Council instructed the Director to study all aspects of the winding up and liquidation of the 1971 Fund, including:

(a) the role of the Secretariat and the Director, in particular the implications for the 1971 Fund if the 1992 Fund Director and 1992 Fund Secretariat should cease to fulfil also the roles of Director and Secretariat of the 1971 Fund;

(b) the budgetary implications which would arise, taking into consideration the interests of contributors in present and former 1971 Fund Member States;

(c) the need to appoint a person to oversee the winding up and liquidation processes; and

(d) the consequences for the winding up and liquidation process of the outcome of the Diplomatic Conference to be held in September 2000 to amend Article 43.1 of the 1971 Fund Convention (document 71FUND/AC.1/EXC.63/11, paragraph 4.7).

4.4 At the 1992 Fund Assembly's April 2000 session, the Director was instructed to study the possibilities open to the 1992 Fund in respect of the future role of the 1992 Fund, its Secretariat

and its Director in the operation and activities of the 1971 Fund, setting out the requirements as well as the legal, practical and organisational consequences of the various options.

5 Consultations made by the Director

5.1 Consultation with the External Auditor

The Director has discussed the situation with the 1971 Fund's External Auditor, the Auditor and Comptroller General of the United Kingdom, who in turn had consulted an outside accounting firm with experience in liquidation matters. The External Auditor informed the Director that he was unable to propose any solution to the problems facing the 1971 Fund.

5.2 Consultation with the liquidation department of a firm of London solicitors

5.2.1 The Director engaged a lawyer in the liquidation department of Clifford Chance, a major firm of London solicitors, to consider the problems involved. The lawyer concentrated on domestic corporate law solutions. This part of the opinion reads:

> *Liquidation of the 1971 Fund under English companies legislation*
>
> Under the United Kingdom Insolvency Act 1986 ('1986 Act'), the English High Court may order that a company (which need not necessarily be an English-incorporated company) be wound up. The statutory liquidation procedure enshrined in the 1986 Act provides a legally binding mechanism by which the assets of the company are liquidated, the company's liabilities are finally determined and the assets of the company are distributed to those entitled thereto. Upon the liquidation terminating, the company is dissolved and is effectively released from any further liabilities. Thus, the 1986 Act offers the reality of finality for any entity which can be brought within its scope.
>
> The key issue, therefore, is whether the 1971 Fund is an entity which is capable of being wound-up by the English courts. Unfortunately, the answer appears to be 'no'. This precise issue was considered by the English Court of Appeal in *Re International Tin Council [1988] 3 WLR 1159*. In that case the English Court of Appeal was asked to consider making a winding-up order (under domestic English insolvency legislation) in respect of the Tin Council, which was an international organisation set up by treaty. The Court of Appeal refused to make a winding-up order, holding that neither the United Kingdom nor indeed any other member state could properly assume responsibility for the administration and winding-up of an international organisation established by treaty such as the Tin Council.
>
> Even if it were possible – which we consider would be very difficult – to distinguish the *Tin Council* decision and thus persuade the English High Court to make an order winding-up the 1971 Fund, the persons responsible for administering the liquidation of the 1971 Fund would soon encounter the practical difficulty that, whilst the English Courts might recognise the effect of the winding-up order, it is highly likely that the courts of other Contracting States would refuse to recognise the validity of the English winding-up order and would regard the 1971 Fund as an entity which was still in existence and which was still incurring liabilities under the 1971 Convention. For this reason alone, it is probable that, even in the unlikely circumstance that the English High Court could be persuaded to make a winding-up order in relation to the 1971 Fund, such a winding-up would not provide the sought-after finality.

Transfer of the 1971 Fund's assets and liabilities to an English company, followed by liquidation of the latter under English insolvency legislation

Under this route, the 1971 Fund would transfer its assets and liabilities to a newly established English company (set up specifically for the purpose). This English company would then be put into liquidation under United Kingdom insolvency law.

The principal difficulty for this approach is finding a legal basis upon which the 1971 Fund could transfer its assets and liabilities to a new company. The 1971 Fund derives its legal capacity and powers from the 1971 Convention pursuant to which it was created. The 1971 Convention does not appear to contain any provisions which would permit such a transfer of assets and liabilities to another entity. Thus, such a transfer would, in turn, first require an amendment to be made to the terms of the Convention to permit such a transfer. We anticipate that obtaining such an amendment would necessarily involve precisely the same difficulties and obstacles which are identified above.

As a matter of English domestic corporate law, it is possible for a legal entity to transfer its assets and liabilities to another legal entity by means of a scheme of arrangement under Section 425 of the United Kingdom Companies Act 1985. Such an arrangement becomes binding if it is approved by the entity's creditors at a meeting convened for the purpose and is then sanctioned by the English High Court. Unfortunately, only those entities which the English High Court has jurisdiction to wind-up under the 1986 Act are entitled to implement schemes of arrangement of this type. Thus, it would not be possible to implement a scheme of arrangement for the 1971 Fund for the same reason as it would not be possible to obtain a winding-up order in relation to the 1971 Fund. An additional difficulty would be that many of the 1971 Fund's liabilities would not even have arisen as at the date of transfer (since the relevant incident would not yet have occurred), so it would be conceptually extremely difficult to transfer such a future liability at a time when it has not yet arisen.

5.2.2 The Director shares the view that it is highly unlikely that an English Court would be prepared to issue a winding up order in relation to the 1971 Fund. He also agrees that in the unlikely event that the English Court were to accept jurisdiction, there is a considerable risk that courts in other 1971 Fund Member States would refuse to accept the validity of such a winding up order. For these reasons, the Director believes that it would not be possible to arrange for liquidation of the 1971 Fund under United Kingdom company law.

5.2.3 The Director also takes the view that it would not be possible to use the other option referred to in the lawyer's opinion, namely the transfer of the 1971 Fund's assets and liabilities to an English company, followed by the liquidation of the latter under English insolvency legislation. The Director considers that neither the Assembly nor the Administrative Council would have the power to decide on such a transfer.

5.2.4 The lawyer from Clifford Chance has not been able to propose any other solutions to the problems facing the 1971 Fund as regards its administration and winding up.

6 Diplomatic Conference to consider amending Article 43.1 of the 1971 Fund Convention

6.1 A Diplomatic Conference was held from 25 to 27 September 2000 and adopted a Protocol to amend Article 43.1. Under the amended text, the 1971 Fund will cease to be in force on the date on which the number of 1971 Fund Member States falls below 25 **or** 12 months following the date on which the Assembly (or any other body acting on its behalf) notes that the total quantity

of contributing oil received in the remaining Member States falls below 100 million tonnes, whichever is the earlier.

6.2 As for the entry into force of the Protocol, the Diplomatic Conference adopted the option of a tacit acceptance procedure. The Protocol will enter into force on 27 June 2001, unless one third of the remaining Member States have informed the Secretary-General of IMO by 27 March 2001 of their objection to the Protocol.

6.3 As at 28 September 2000, the 1971 Fund has 40 Member States. Twelve States have deposited instruments of denunciation, so that the number of Member States will have fallen to 28 by the end of September 2001. It is expected that at least another four States will denounce the 1971 Fund Convention during the autumn of 2000 and that consequently the number of Member States will have decreased to 24 by late 2001, which would result in the Convention ceasing to be in force. In any event the total quantity of contributing oil will have fallen below 100 million tonnes by 21 June 2001 (when the denunciation by India takes effect), and the Convention would therefore cease to be in force during the summer of 2002 at the latest. This prediction is based on the assumption that objections will not be lodged by at least one third of the remaining Member States.

6.4 As a result of the adoption of the Protocol, the problems facing the 1971 Fund have been reduced considerably, unless a sufficient number of objections are lodged. The issue will now be how to ensure the operation of the 1971 Fund and its viability in respect of incidents occurring before the date when the Convention ceases to be in force, ie the latter half of 2001, or the summer of 2002 at the latest.

7 Insurance of the 1971 Fund's liabilities for new incidents

7.1 The Director would like to submit for consideration whether a solution could be achieved by way of the 1971 Fund's buying insurance cover for its future liabilities.

Previous consideration of the issue

7.2 At is 4th session, held in 1981, the Assembly considered whether the 1971 Fund should take out insurance to cover its liabilities. It was considered by the majority of – but not all – delegations that the 1971 Fund should not do so and that it should be left to individual contributors to decide whether they wished to insure their obligations towards the 1971 Fund (document FUND/A.4/16, paragraph 5(c)).

7.3 In 1995, at its 18th session, the Assembly considered whether the 1971 Fund should take out insurance to cover the levying of contributions. The discussions were based on a study made by the Director (document FUND/A.18.24). It was mentioned in the study that the Director had been approached by a broker who had reviewed the possibility of providing insurance cover for the 1971 Fund vis-à-vis major claims funds.

7.4 In the document submitted to the Assembly the Director considered that it would be difficult to find an equitable formula for passing on premiums paid by the 1971 Fund for insurance of the types discussed above to contributors, since the contributions to each major claims fund differed. A further complication arose in his view from the fact that in some years there might be no levy of contributions to any major claims fund, and it appeared that in such a case the contributors to the general fund would have to bear the burden of major claims funds insurance for that year. He referred to the fact that this would result in contributors in certain States having to share the cost of premiums in respect of a major claims fund relating to a given incident to which those contributors were not liable to contribute, since those States were not Members of the 1971 Fund at the time of that incident. The Director was of the view that such a result would not be acceptable. In any event, the Director was of the opinion that there was no legal basis in the Fund Convention on which premiums paid by the 1971 Fund for insurance of the types referred to

above could be passed on to contributors, since they would fall outside the scope of Article 12.1(i) in that they would neither be 'costs and expenses of the administration of the Fund' nor payments 'for the satisfaction of claims'. For this reason, the Director took the view that it would not be possible for the 1971 Fund to take out such insurance.

7.5 The Assembly agreed with the Director that there was no legal basis in the 1971 Fund Convention on which premiums paid by the 1971 Fund for insurance of the types referred to above could be passed on to contributors (document FUND/A.18/26, paragraph 27.2).

Reconsideration by the Director of the insurance issue

7.6 In the light of the difficult situation in which the 1971 Fund finds itself, the Director has reconsidered whether it would be possible to take out insurance covering the 1971 Fund's liability to pay compensation in respect of incidents occurring before the date on which the 1971 Fund Convention ceases to be in force, so as to ensure the financial viability of the Organisation during that period.

7.7 The Director has held exploratory talks with representatives of the insurance industry. The discussions have focused on the possibility for the 1971 Fund of purchasing insurance covering any liabilities of the 1971 Fund for compensation and indemnification up to 60 million SDR (£55 million) per incident minus the amount actually paid by the shipowner or his insurer under the 1969 Civil Liability Convention, as well as legal and other expert fees in respect of incidents occurring during a given period, with the Fund itself having to cover a deductible for each incident up to a fairly low amount. The premium would be at a fixed amount, payable at the beginning of the insurance period. The insurance should cover the 1971 Fund's liability for incidents occurring up to 31 December 2001. It is envisaged that there would be a possibility to agree on an extension up to the summer of 2002, if that were to be when the 1971 Fund Convention ceased to be in force. The Director is confident that adequate insurance cover can be obtained at a reasonable cost. The discussion with the insurance industry continues and details of the possible insurance arrangements will be given at the Assembly's 23rd session.

7.8 It should be noted that the handling of claims would follow the procedures applied by the 1971 Fund over the years. Any decisions as to the admissibility of claims would be taken by the 1971 Fund alone, ie by the governing bodies or the Director.

7.9 In the Director's view a solution along these lines would offer considerable advantages. It would protect the potential victims in the present Member States which have already denounced the 1971 Fund Convention in respect of incidents occurring during the period up to the date when the denunciation of the 1971 Fund Convention takes effect for the State in question. It would give the other remaining 1971 Fund Member States the benefit of financial protection during the period up to the date when the Convention ceases to be in force. It would also ensure that the contributors in the remaining Member States will not be exposed to a heavy financial burden as a result of new incidents.

7.10 When the insurance issue was previously considered by the Assembly, the question was raised as to whether the 1971 Fund Convention made it possible to take out insurance to cover Major Claims Funds. However, the Director considers that the present situation is different.

7.11 Firstly, the 1971 Fund finds itself in a very precarious situation which makes it necessary to consider all possibilities to terminate and wind up the Fund in an orderly manner, in order to preserve the credibility of the international compensation regime represented by the 1971 Fund and the 1992 Fund.

7.12 Secondly, the envisaged insurance solution would cover the 1971 Fund's payments from the General Fund as well as its payments from Major Claims Funds, not only as regards claims for compensation and for indemnification of the shipowner but also as regards the 1971 Fund's

expenses in respect of fees payable to surveyors, technical experts and lawyers arising from a particular incident. The amount payable from the General Fund is 1 million SDR per incident, which as at 15 September 2000 corresponds to £915 000.

7.13 The Director considers that, if the proposed insurance solution were adopted, the one-off premium should be paid from the balance on the General Fund. As set out in paragraph 4.1 of document 71FUND/A.23/18, there would be sufficient funds available in the General Fund to pay the premium, to cover the deductible for several incidents and to reimburse the 1992 Fund the 1971 Fund's share of the costs of running the joint Secretariat.

7.14 If the Assembly were to accept the Director's proposal to take out insurance with the proposed cover, the Assembly may wish to authorise the Director to conclude an agreement to this effect with an appropriate insurer.

7.15 If the 2000 Protocol were not to enter into force as a result of objections being presented by at least one third of the remaining Member States, the Director would refer the issue to the Assembly for renewed consideration.

8 Administration of the 1971 Fund

8.1 At its October 1999 session the Executive Committee took note of the fact that the External Auditor had strongly recommended that the 1971 Fund should consider the need ultimately to appoint a liquidator for the 1971 Fund and that the Director had stressed the need for the Committee to give him instructions in this regard.

8.2 The Director suggested that he should carry out a study of the various issues relating to the liquidation of the 1971 Fund. He mentioned that one option to be considered would be whether a liquidator - in the technical sense of the word - should be appointed to take over the administration of the 1971 Fund. He stated that in a normal liquidation, a liquidator would take over the management of the entity in liquidation but that a corresponding arrangement in respect of the 1971 Fund would result in such a liquidator taking over *inter alia* the handling of claims for compensation and the application of the criteria for the admissibility of claims. The Director expressed the view that it would be difficult for any liquidator who was not totally familiar with the IOPC Funds' policy on the admissibility of claims laid down by the Assemblies and Executive Committees of the 1971 and 1992 Funds to perform this function without a significant risk that he would apply criteria different from those applied by the IOPC Funds' organs, which would have serious consequences for the uniformity of application of the 1971 and 1992 Fund Conventions. The Director suggested that it would therefore have to be considered whether the winding up and liquidation should, at least for the time being, be handled by the organs of the 1971 Fund (ie the Assembly, the Executive Committee and the Administrative Council) and the Director. The Director also suggested that consideration should be given to whether the winding up of the 1971 Fund could be entrusted to the organs of the 1992 Fund, without in any way implying any liability on the part of the 1992 Fund, its Member States and the contributors in those States for the obligations of the 1971 Fund. In the Director's view, if the liquidation were to be dealt with by the organs of the IOPC Funds it might be appropriate to involve some eminent person outside the IOPC Funds so as to ensure that the liquidation was carried out correctly and impartially. If instructed to carry out such a study, the Director intended to consult the External Auditor and to use outside expertise, for example, accountants and solicitors, to consider the various issues involved.

8.3 Some delegations considered that it would not be possible to appoint a liquidator in the normal sense for the reasons mentioned by the Director. In the view of those delegations the liquidation should be dealt with by the organs of the IOPC Funds.

8.4 On this point the lawyer from Clifford Chance has expressed the view that there is no need for the Director to seek the advice of liquidation experts. In his view the difficulties facing the 1971

Fund are purely legal ones, ie what is the correct legal framework for bringing about the closure of the 1971 Fund. He has expressed the view that the practicalities of running the 1971 Fund – once an appropriate legal framework can be established to cut off the 1971 Fund's liabilities – are reasonably straightforward. With the benefit of a legally binding cut-off date, the existing management of the 1971 Fund can in his view proceed to resolve the outstanding claims in the ordinary course of business. He has stated that once these claims have been resolved, the 1971 Fund management can proceed to establish an equitable manner of distributing the surplus left in the Fund (if any) to contributors.

8.5 The Director maintains his position that the liquidation and winding up of the 1971 Fund should be handled by the organs of the 1971 Fund.

8.6 At its April 2000 session the Administrative Council considered a proposal by the Director (document 71FUND/EXC.63/10) to the effect that, in order to ensure that the winding up of the 1971 Fund was impartial and equitable, it might be appropriate to consider appointing some eminent person outside the 1971 Fund, but who was nevertheless familiar with the operation of the Organisation, to oversee the winding up. The Administrative Council noted that the Director had proposed that Dr Thomas A Mensah might be a suitable candidate for such an appointment.

8.7 It was decided that the question of whether to appoint a person to oversee the winding up of the 1971 Fund, and if so whom, should be considered at the October 2000 session of the Assembly/Administrative Council in a broader context of the discussions which would be held at that time (document 71FUND/AC.1/EXC.63/11, paragraph 4.6). The Assembly may wish to examine this issue.

9 The 1992 Fund's involvement in the operation and activities of the 1992 Fund

9.1 As mentioned above, the 1992 Fund Assembly considered at its April 2000 session the future role of the 1992 Fund, its Director and its Secretariat in the operation and activities of the 1971 Fund (paragraph 4.1 above).

9.2 The Director recognises the concerns expressed by the delegations of former 1971 Fund Member States in respect of the continued involvement of the 1992 Fund in the operation of the 1971 Fund. The Director is aware of the fact that the 1971 Fund and the 1992 Fund are two totally separate entities, that the 1992 Fund and its Member States have no legal or financial liabilities vis-à-vis the 1971 Fund in respect of future incidents and that these obligations are limited to those laid down in Article 44.2 of the 1971 Fund Convention. The Director nevertheless agrees with the point made by several delegations that the credibility of the Fund regime as a whole is at stake, since the two Organisations are often perceived as being one and the same.

9.3 It has been suggested that the involvement of the joint Director and the joint Secretariat should be limited to handling outstanding issues in respect of 'old incidents' (incidents which occurred before a certain date), whereas new incidents should be dealt with in a different manner, perhaps by a different person acting as Director and a separate Secretariat.

9.4 The Director believes that it would be very difficult from an administrative point of view to arrange a separation of tasks along these lines. Firstly, the general administrative tasks of the Secretariat are closely linked with the handling of incidents. It is difficult to see how a separate Secretariat could be set up to deal with new incidents. It would probably be very difficult to recruit a new Director and a new Secretariat to perform these tasks, except at excessively high costs, which the 1971 Fund may be unable to pay. There is also a risk that if there were to be two Directors and two Secretariats, the policy in respect of claims assessment would differ between the two Organisations, which would cause considerable uncertainties among potential claimants.

9.5 The Director also doubts whether it would be legally possible to split the administration of the 1971 Fund in this manner. The administrative provisions of the 1971 Fund Convention are based

on the assumption that the governing bodies, the Assembly and the Executive Committee, are responsible for the entire Organisation. The Director doubts whether the Administrative Council set up by the Assembly has the power to decide to split the administration. It appears that under Article 28 of the 1971 Fund Convention the Organisation can have only one Secretariat and only one Director.

9.6 Another option which has been mentioned would be that the 1992 Fund ceases to have a joint Secretariat with the 1971 Fund from a specific date and that as from that date the 1992 Fund would take over the administration of the 1971 in respect of all incidents which occurred before that date. As a consequence the present 'joint Director' would resign as Director of the 1971 Fund.

9.7 The Director sees great difficulties with this latter option. Firstly, such a transfer of duties would have to be endorsed by the 1971 Fund Assembly or Administrative Council. It is very doubtful, in the Director's view, that the Assembly would have the power to make such a transfer, and this doubt is even stronger in respect of the Administrative Council.

9.8 Unless the 1971 Fund Assembly/Administrative Council were to be able to appoint a new Director, the 1971 Fund would not have any legal representative and would not be operative. It has been suggested that the Secretary-General of IMO should notify the remaining 1971 Fund Member States that the 1971 Fund is no longer able to operate. It is doubtful whether the Secretary-General of IMO, who is the depository of the 1971 Fund Convention, would be prepared to carry out this task, since it is not included in the depositary functions set out in Article 46 of the 1971 Fund Convention. It is also unclear what would be the legal significance of such a declaration.

9.9 Another more radical solution would be for the 1971 Fund Assembly/Administrative Council to entrust the administration of the 1971 Fund to the 1992 Fund on behalf of the 1971 Fund's governing bodies. This could obviously be done only with the approval of the 1992 Fund Assembly. Such a decision would have to include a caveat to the effect that 1992 Fund Member States and the contributors in those States would not have any liability for the obligations of the 1971 Fund, except in so far as such liability follows from Article 44 of the 1971 Fund Convention in respect of incidents which occurred when a State was still a Member of the 1971 Fund. It should be noted, however, that a number of 1992 Fund Member States have in the past expressed their opposition to a solution along these lines.

9.10 In the light of the considerations set out above, the Director cannot see any practical solution other than the present arrangement under which the 1992 Fund shares a Secretariat with the 1971 Fund and the 1992 Fund's Director is Director also of the 1971 Fund. In his view the present arrangement should therefore be maintained.

9.11 If the 2000 Protocol to the 1971 Fund Convention did not enter into force, the Assembly might wish to re-examine this issue at that stage

10 Summary of the Director's conclusions and proposals

10.1 The Director considers it unlikely that an English Court would be prepared to issue a winding up order in relation to the 1971 Fund (paragraph 5.2.2).

10.2 The Director takes the view that it would not be possible to transfer the 1971 Fund's assets and liabilities to an English company, followed by the liquidation of the latter under English insolvency legislation (paragraph 5.2.3).

10.3 It is suggested that the 1971 Fund should purchase insurance covering any liabilities up to 60 million SDR (£55 million) per incident which may occur up to the end of 2001 with a possibility of extension up to the summer of 2002 should that be when the 1971 Fund Convention ceased to be in force (paragraph 7.7).

10.4 The Director considers that the liquidation and winding up of the 1971 Fund should be handled by the 1971 Fund's organs (paragraph 8.5). It is proposed that the Assembly should consider whether to appoint a person to oversee the winding up of the 1971 Fund in order to ensure that the winding up is impartial and equitable (paragraph 8.7).

10.5 The Director considers that the present arrangement under which the 1992 Fund and 1971 Fund share a Secretariat and the 1992 Fund Director is Director also of the 1971 Fund should be maintained (paragraph 9.10).

11 Action to be taken by the Assembly

The Assembly is invited:

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

(b) to note the outcome of the Diplomatic Conference which considered amending Article 43.1 of the 1971 Fund Convention (section 6 and document 71FUND/A.23/4/Add.1);

(c) to consider whether liquidation of the 1971 Fund could be arranged under English law (section 5);

(d) to consider whether the 1971 Fund should purchase insurance to cover the Fund's liabilities arising from new incidents (section 7);

(e) to consider how the 1971 Fund should be administered in the future, and in particular the position of the joint Secretariat and the Director (section 8);

(f) to decide whether to appoint a liquidator to take over the management of the 1971 Fund (paragraphs 8.1 - 8.5);

(g) to decide whether to appoint an eminent person outside the 1971 Fund to oversee the winding up of the 1971 Fund (paragraphs 8.5 - 8.6); and

(h) to give the Director such other instructions as it may deem appropriate on the issues dealt with in this document.