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FUTURE ROLE OF THE 1992 FUND IN THE OPERATION OF THE 1971 FUND

Note by the Director

Summary:	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 the 1992 Fund's involvement in the operation and activities of the 1971 Fund, in particular the position of the joint Secretariat and the Director.

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.
- 1.4 The 1992 Fund and the 1971 Fund have a joint Secretariat and the 1992 Fund Director is *ex officio* Director also of the 1971 Fund. The problems facing the 1971 Fund is therefore of concern to the 1992 Fund and its Member States.

2 Consideration by the 1971 Fund Executive Committee at its October 1999 session

- 2.1 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.
- 2.2 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.
- 2.3 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.
- 2.4 The 1971 Fund 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 4 below. A detailed report on the Conference is submitted to the 1971 Fund Assembly in document 71FUND/A.23/4/Add.1.
- 2.5 During the 1971 Fund 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.

3 Consideration by the Assembly in April 2000

- 3.1 At its 4th extraordinary session, held in April 2000, the 1992 Fund Assembly discussed 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.

- 3.2 The Assembly instructed the Director 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.

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

- 4.1 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.
- 4.2 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.
- 4.3 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.
- 4.4 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.

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

- 5.1 The Director has submitted for consideration by the 1971 Fund Assembly at its October 2000 session whether the 1971 Fund should buy insurance cover for its future liabilities.
- 5.2 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 1971 Fund Assembly's October 2000 session.

6 Administration of the 1971 Fund

- 6.1 At its October 1999 session the 1971 Fund 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.
- 6.2 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.
- 6.3 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.
- 6.4 On this point a lawyer in the liquidation department of Clifford Chance, a major firm of London solicitors whom the Director has consulted, 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.

- 6.5 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.
- 6.6 At its April 2000 session the 1971 Fund 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.
- 6.7 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 1971 Fund Assembly/Administrative Council in a broader context of the discussions which would be held at that time.

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

- 7.1 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 3.1 above).
- 7.2 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.
- 7.3 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.
- 7.4 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.
- 7.5 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.
- 7.6 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.

- 7.7 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 1971 Fund Assembly would have the power to make such a transfer, and this doubt is even stronger in respect of the Administrative Council.
- 7.8 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 depository 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.
- 7.9 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.
- 7.10 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.
- 7.11 If the 2000 Protocol to the 1971 Fund Convention did not enter into force, the 1992 Fund Assembly might wish to re-examine this issue at that stage.

8 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 4);
 - (c) to consider the 1992 Fund's involvement in the operation and activities of the 1971 Fund, in particular the position of the joint Secretariat and the Director (sections 6 and 7); and
 - (d) to give the Director such other instructions as it may deem appropriate on the issues dealt with in this document.
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