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WINDING UP OF THE 1971 FUND

OPINION OF DR THOMAS A MENSAH

Note by the Director

Summary:	An opinion by Dr Thomas A Mensah on the most appropriate procedures for the winding up of the 1971 Fund is attached.
Action to be taken:	Information to be noted.

1 As stated in paragraph 3 of document 71FUND/A.22/4, in June 1999 the Director instructed Dr Thomas A Mensah to give an opinion on the most appropriate procedures for the winding up of the 1971 Fund.

2 The opinion is attached to the present document, together with the author's CV.

3 **Action to be taken by the Assembly**

The Assembly is invited to take note of the information contained in this document.

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ANNEX

WINDING UP OF THE 1971 INTERNATIONAL OIL POLLUTION COMPENSATION FUND

EXECUTIVE SUMMARY

By Thomas A. Mensah

1. Denunciation of the 1971 Fund Convention by Contracting States with large contributors has reduced the contribution base of the Fund and, thereby, significantly increased the potential burden on the contributors in the remaining Contracting States. It has also put the continued viability of the Fund in doubt.

2. The possibility that the Fund may not be able to meet its obligations to pay compensation for pollution damage could raise the issue of possible responsibility of individual Contracting States. Although there are strong arguments in support of the view that the Fund is a legal entity distinct from the Contracting States, there can be no guarantee that a claim against a Contracting State in some jurisdiction might not succeed.

3. The organs of the Fund have concluded that there is an urgent need to terminate the 1971 Fund. Since the number of Contracting States is still well above the threshold for termination provided under article 43 of the Convention, there is need for an alternative method to terminate the 1971 Fund.

4. The procedure for "accelerated" denunciation of the Convention under article 42 cannot be depended upon to achieve this purpose because there is no assurance that a sufficient number of Contracting States will take advantage of the procedure, even if a determination is made by the Assembly that there has been a significant increase in the level of contributions for the remaining Contracting States.

5. Accelerated denunciation of the Convention would not solve the problem of the "gap" in the protection for Contracting States which move from the 1971 Fund to the 1992 Fund. It has been suggested that the "gap" might be eliminated by a resolution of the 1992 Fund Assembly which would shorten the period between the deposit of instruments of accession to the 1992 Fund Protocol and the entry into force of the Protocol for the acceding States. But such a resolution would not work if any of the Contracting States to the 1992 Protocol objects to the use of a resolution for this purpose.

6. It would be possible to amend article 43 of the Convention in order to raise the threshold for termination above the current number of three. Such an amendment would be adopted by a diplomatic conference convened at the initiative of IMO, in accordance with paragraph 1 of article 45 of the Convention.

7. It has been proposed that, pending its entry into force, such an amendment might be applied "provisionally" to terminate the Convention. This does not appear to be a viable solution. There would be serious complications if the conditions for entry into

force were not fulfilled at the end of the period of provisional application.

8. An amendment adopted by a diplomatic conference can be brought into force fairly rapidly through the "simplified" or "accelerated" procedure based on "tacit acceptance" by Contracting States. It could also be provided that, upon entry into force, the amendment will apply to all Contracting States, except those who declare that they do not consent to be bound. Contracting States making such a declaration will be considered as having denounced the Convention.

9. The simplified procedure has been used in many international agreements, including the 1974 SOLAS Convention, the 1978 MARPOL Protocol, the 1992 Civil Liability and Fund Protocols, the 1994 Agreement for the Implementation of Part XI of the 1982 Convention on the Law of the Sea and the 1996 HNS Convention.

10. The suggestion that the 1971 Convention may be deemed to have been terminated "due to a fundamental change of circumstances" may not be effective in resolving the problem. There are plausible legal arguments against the contention, and it is possible that it will not be accepted in the courts of some Contracting States. In that case, serious problems would arise if the Fund were to be deemed to have been terminated in some Contracting States but not in others.

11. The involvement of the International Court of Justice (ICJ) does not appear to offer an effective way out. It may not be easy to present the issue to the ICJ as a contentious "dispute" between two Contracting States. Even if a dispute were presented to the ICJ the decision would only bind the parties to the dispute. There is also the possibility that the ICJ will either not accept to adjudicate on the dispute or not agree that the changed circumstances are sufficient to terminate the Convention.

12. The suggestion to request an advisory opinion from the ICJ may also not be a viable solution. The IMO Assembly may not consider that the interpretation or application of the 1971 Fund Convention is a question which IMO can refer to the ICJ pursuant to the relevant provisions of the IMO Convention or the Charter of the United Nations. And the ICJ may decline to give an advisory opinion, even if the IMO Assembly were to agree to refer the matter to it.

13. Liquidation of the 1971 Fund cannot be undertaken through the courts of the United Kingdom because the Fund, as a body with international legal personality, is not subject to the domestic law of the United Kingdom. Moreover, because of the special nature of the tasks and related decisions needed for the "liquidation" of the 1971 Fund, including liquidation of the "residual" body (legal person) referred to in paragraph 3 of article 44 of the Convention, winding up in this case may not be a suitable task for a "liquidator" in the normal sense. A more appropriate arrangement might be for function to be entrusted by the 1971 Fund to the 1992 Fund, subject to suitable arrangements for reimbursement of expenses and related matters.

WINDING UP OF THE 1971 INTERNATIONAL OIL POLLUTION COMPENSATION FUND

By Thomas A. Mensah

Introduction

1. The 1971 International Oil Pollution Compensation Fund (the 1971 Fund) administers the scheme for compensation for oil pollution damage (and related indemnity to shipowners) established by the International Convention for the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (the 1971 Fund Convention).

2. The 1971 Fund is part of the comprehensive regime of liability and compensation for oil pollution damage established jointly by the International Convention on Civil Liability for Oil Pollution Damage, 1969 (the 1969 Civil Liability Convention) and the 1971 Fund Convention. Indeed, the 1971 Convention is described as "supplementary" to the 1969 CLC Convention.

3. The 1969 and 1971 Conventions have been operated as complementary parts of a common regime. Hence when it was decided to revise the regime to increase its scope of coverage and the level of protection it affords to victims of pollution damage, it was considered necessary to revise both instruments at the same time and in a closely co-ordinated manner. The revision was effected by the adoption of two new treaty instruments, the Protocol of 1992 to amend the International Convention for Oil Pollution Damage, 1969 (the 1992 CLC) and the Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (1992 Fund Protocol).

4. When they adopted the 1992 Protocols the Contracting States expected that the revised scheme in the new Protocols would, in due course, completely replace the scheme of the 1969 CLC and the 1971 Fund Convention. In particular, they hoped that all or most of the States participating in the 1969/1971 scheme would transfer to the 1992 scheme by accepting the 1992 Protocols and denouncing the 1969 and 1971 conventions. This would ultimately lead to the "termination" of the 1969/71 regime, as envisaged in article 43, paragraph 1, of the 1971 Fund Convention which provides that the Convention "shall cease to be in force when the number of Contracting States falls below three".

5. To facilitate the change-over from the 1969/71 to the 1992 regime, transitional provisions were incorporated in the 1992 instruments to permit States to move from the 1968/1971 scheme to the 1992 scheme in a more or less seamless manner. Contracting States would denounce the 1969/71 conventions when they accepted the 1992 protocols; and they would become parties to the 1992 protocols at the same time as their denunciations of the 1969/1971 conventions became effective. This arrangement would have the double advantage of ensuring, first, that Contracting States would not be

left without cover when they switched to the new scheme and, secondly, that they would not be obliged to participate simultaneously in the two schemes. The arrangement also ensured that the 1971 Fund would not cease to operate until there was a viable 1992 Fund actually in operation.

6. The continued operation and viability of the 1971 Fund was predicated on two conditions. These are that:

(a) there would be a sufficient number of Contracting States, with contributors able to make the levels of contributions needed to enable the 1971 IOPC Fund to discharge its obligation to pay compensation for damage covered by the 1971 Fund Convention; and

(b) the number of Contracting parties would not fall below the point where the contributions required from contributors in the remaining Contracting States would be "significantly increased".

7. To ensure that these conditions will be fulfilled the Convention provides, in article 43, that the Convention "shall cease to be in force when the number of Contracting States falls below three". In addition, article 42 of the Convention provides for a mechanism of "accelerated denunciation" by which Contracting States are able speedily to leave the 1969/1971 scheme when a change occurs in the number of Contracting States which results in a "significant increase in the level of contributions for the remaining Contracting States". Article 42 of the Convention gives to each Contracting State, and also the Director of the Fund, the right to set in motion the process to enable Contracting States which find it necessary to do so to denounce the 1971 Fund Convention.

8. This procedure is, of course, subject to the proviso that the Fund will be obliged (and enabled) to discharge its obligations in respect of incidents which occur while the Fund was still operational (articles 43, paragraph 2, and 44 of the 1971 Fund Convention)

9. This mechanism for "accelerated denunciation" under article 42 of the 1971 Convention is itself based on two assumptions.

10. The first is that the Contracting States which are likely to be affected by a decrease in the number of States participating in the Fund will take advantage of the right given to them under the article, not only to request a meeting of the Assembly to make the determination required for accelerated denunciation but also to attend the extraordinary session of the Assembly and thus make it possible for the Assembly to make that determination. It is also assumed that Contracting States concerned will avail themselves of the opportunity afforded to them by a determination of the Assembly and actually deposit the requisite instruments of denunciation of the Convention within the time-limit set in the article.

11. The second assumption underlying the mechanism for accelerated denunciation under article 42 of the 1971 Fund Convention is that the organs of the 1971 Fund (i.e. the Assembly or, as appropriate, the Executive Committee) will have the quorum

needed to make the determination envisaged in that article.

The problem

12. The need for an alternative procedure to wind up the 1971 Fund has arisen because the assumptions underlying articles 42 and 43 of the 1971 Fund Convention have not been realized since the entry into force of the 1992 Protocols. Although many Contracting States have left the 1971 Fund for the 1992 Fund, many still remain with the 1971 Fund. And, with the decrease in the number of Contracting States, and the consequential reduction in the total quantity of contributing oil received in the remaining Contracting States, there has been a major increase in the level of the contributions that are likely to be required from the contributors in remaining Contracting States to cover the Fund's liability to pay compensation. This means that the financial burden on contributors in the remaining Contracting States would be particularly heavy if a major incident involving the liability of the 1971 Fund were to occur.

13. Thus, the scenario which article 42 of the Convention was intended to prevent has materialized. Indeed, as the remaining Contracting States with relatively large quantities of contributing oil leave the 1971 Fund Convention, there is reason to expect that the situation will become even more serious. But, because the number of Contracting States to the 1971 Convention is still well above the threshold at which the Convention ceases to be in force, the 1971 Fund continues to be in operation. While this situation persists, contributors to the 1971 Fund in the remaining Contracting States are exposed to the risk of being required to make greatly increased contributions to meet the liability of the 1971 Fund in respect of a serious incident covered by the 1971 Fund Convention.

14. In spite of this the remaining Contracting States in the 1971 Fund Convention have not taken the steps available to them under the Convention to protect themselves from the potentially onerous obligation to contribute to the 1971 Fund's liability. Moreover, because many Contracting States do not attend meetings of the Assembly and Executive Committee of the 1971 Fund, the bodies do not obtain the quorum needed to enable them to make the necessary determination.

15. In the circumstances, there is the real possibility that the 1971 Fund may not be in a position to discharge its obligation to pay compensation for pollution damage arising from a major incident because the persons in the remaining Contracting States who are obliged to contribute to the Fund will not have the capacity to make the contributions needed to meet its obligations. Indeed, there could soon be the situation where there are no persons in the remaining Contracting States obliged to pay contributions to the 1971 Fund. Such a situation could pose serious and complicated legal problems, including questions about possible responsibility of the Contracting States themselves.

16. The issue of the possible direct responsibility of Contracting States in the event that the Fund is unable to meet its obligations raises difficult legal questions under both national and international law. While there is general acceptance of the view that an international (inter-governmental) organization is a legal entity distinct from its member

States, there is no clear and unambiguous agreement that such legal personality necessarily excludes the possibility that member States of the organization may be held individually liable, either alone or jointly, for its obligations. The views of academic writers on the point are not unanimous, and there are major differences in the few judicial pronouncements of the matter.

17. In two leading cases where these issues were raised, different conclusions were reached by national courts, on the one hand, and an international tribunal, on the other hand. In the case of *Westlands Helicopters v the Arab Organization for Industrialization (AOI) and others* the International Chamber of Commerce (ICC) Arbitral Tribunal ruled that an international organization which is composed of several independent States may be held liable for the financial obligations of the organization to third parties. The arbitral tribunal stated that "in the absence of any provision, expressly or implicitly excluding the liability of the [four] member states [to fulfil the obligations undertaken by the organization]..... third parties could legitimately count on their liability". This view was directly rejected by the Swiss Courts to which one of the member States of the AOI appealed. The Court of Justice of Geneva stated that the AOI was "legally and financially, an organization independent of its founding States" while the Federal Supreme Court of Switzerland ruled that the Statute of the Organization included what it called "unequivocal signs of the total independence of the Organization in relation to its founding States" and that this autonomy "rules out any possibility of the contracts [the Organization] concludes with third parties ... being regarded as an act undertaken by a delegate or organ engaging the founding States".

18. The same conclusion was reached by the English Courts in the case resulting from the default of the *International Tin Council* (ITC) after the collapse of the *buffer stock's* finances created the situation in which there were insufficient funds to honour contracts concluded by the ITC. In dealing with the "direct actions" brought by creditors against the member States of the ITC, the High Court of England ruled that ITC was a "legal person" and accordingly that "its members are not liable to third parties for its obligations by reason of their membership, either in addition to or in place of the ITC". This ruling was upheld by both the Court of Appeal and the House of Lords. It must be emphasized that the judgments in this case were based essentially on English Law rather than international law. It is also pertinent to call attention to the important note of caution sounded by the Judge in the High Court when he stated that "it is open to question whether in international law a legal personality necessarily excludes direct liability of the members of an association to its creditors".

19. In the case of the 1971 Fund there may be even more "unequivocal signs" not only of its independence in relation to its Member States but, perhaps even more important, its distinctness from those States in respect of liability to pay compensation and the ownership of assets. With regard to the source of its funds, the Fund differs from the classical international organization in that the obligation to contribute is not on the member States but rather on the "persons" who receive contributing oil in the various Contracting States. Thus, with the exception of States which may decide voluntarily and in their sovereign discretion to assume themselves the obligation to pay contributions to the Fund pursuant to article 14 of the Fund Convention, no Contracting State of the

1971 Fund Convention has any financial obligations to the Fund. This is made even more clear in article 44 of the Convention which provides that, after winding up of the Fund, any remaining assets of the Fund are to be distributed "among those persons who have contributed to the Fund". Contracting States of the Fund are not entitled to a share of these assets, except to the extent that they have voluntarily contributed to the Fund under article 14.

20. It may thus be asserted with some confidence that direct claims against Contracting States, in a case where the 1971 Fund is unable to meet its obligations to pay compensation for pollution damage, are not likely to succeed. However, there can be no certainty in these matters, and the possibility of such claims being brought cannot be discounted, nor can it be completely excluded that a court or tribunal in some Contracting State may follow the reasoning of the ICC Tribunal, as opposed to the conclusions of the Swiss and English Courts. This possibility makes it more necessary and advisable for the Contracting States to look for a quick and effective solution to the problem now presented to the 1971 Fund.

21. Apart from the risk that individual Contracting States might be held directly liable for unsatisfied obligations of the 1971 Fund in respect of compensation for pollution damage, reference should also be made to the likely negative impact of a situation in which persons who suffer damage are unable to obtain compensation because the 1971 Fund is unable to meet its obligations. The inability of the 1971 Fund to meet its obligation in such a situation and for such a reason could adversely affect the credibility of the international liability and compensation regime as a whole. This could impact negatively on the 1992 Fund, in spite of the fact that the 1992 Fund is legally distinct from the 1971 Fund.

22. It is in the context of these concerns that the Governing Bodies of the 1971 Fund have found it necessary to look for possible ways to bring about a speedy termination of the 1971 Fund, before the situation arises in which the Fund is either unable to meet its obligations to pay compensation at all, or is able to do so only by requiring contributors in the remaining Contracting States to make excessively large contributions.

23. In the discussions on alternative approaches, a number of possible options for achieving the desired objective have been suggested. These include:

(a) Amending article 43, paragraph 1 of the 1971 Fund Convention to change the threshold for the termination of the Convention, and thus make it possible to bring the Fund to an end much earlier.

(b) Using the mechanism of accelerated denunciation of the 1971 Fund Convention as provided for in article 42 of the Convention under which the Assembly of the Fund makes the determination that permits Contracting States to denounce the 1971 Convention in a shorter time than the twelve months that would normally be required under article 41, paragraph 2, of the Convention.

(c) Termination of the 1971 Fund Convention due to fundamental change of circumstances, on the ground that the denunciations of the 1971 Convention have made the compensation system inoperable due to the radical decrease in the contribution base.

(d) Involvement of the International Court of Justice, either by way of a contentious case brought before the Court by a Contracting State or Contracting States or, alternatively, through a request for an advisory opinion from the Court.

24. I will deal with these various options separately and in turn. In response to the guidance given in the request for my opinion, I shall consider each of them from the legal, practical and political points of view.

(a) Amending article 43 of the 1971 Fund Convention

25. The purpose of an amendment of article 43 of the 1971 Fund Convention would be to bring about the "winding up of the Convention" before the number of Contracting States falls below the threshold of three currently provided for in the article.

26. Such an amendment can be adopted by a diplomatic conference or a conference of Contracting States, convened pursuant to article 45 of the Convention. Under this article a conference may be convened either by the International Maritime Organization (IMO) on its own initiative (paragraph 1) or at the request of at least one-third of the Contracting States to the 1971 Fund Convention (paragraph 2). In view of the past reaction of Contracting States to requests for action on the Convention, it is not realistic to expect that the required number of Contracting States will be persuaded to request the Secretary General of IMO to convene a conference. Therefore, the more realistic course of action would appear to be for the Assembly of the Fund to request the Secretary General of IMO to convene a conference pursuant to paragraph 1 of article 45. The initiative may be taken by the Executive Committee in case the necessary quorum for an Assembly meeting is not obtained. (Action could also be taken by the Administrative Council created by Resolution No. 13, if the required quorum for a meeting of the Executive cannot be achieved).

27. In case the Secretary General finds it difficult to convene a conference because of budgetary constraints, the Fund might offer to reimburse IMO for the expenses involved. To reduce expenses, the conference, which should not last more than two working days, could be held in conjunction with a meeting of the Assembly or Executive Committee of the 1971 Fund or, as the case may be, the Administrative Council.

28. A conference convened under article 45 of the Convention would be requested to adopt an amendment to article 43, paragraph 1, of the 1971 Fund Convention to bring about the termination of the Convention earlier than currently provided for in the article. The amendment could make it possible for the convention to cease to be in force when the number of Contracting States falls below a number much higher than three. The amendment could also provide that it will enter into force when the total quantity of

contributing oil received in all remaining Contracting States falls below a specified number (millions) of tons, or on such other conditions as the conference may consider appropriate.

29. The draft text of the amendment, together with the final clauses and any transitional provisions, might be prepared by the Assembly or the Executive Committee or the Administrative Council, using whatever procedure or arrangement it considers appropriate, having regard to the urgency of the matter. If there is real consensus among the Governments which are likely to attend the conference, and provided that the draft is sufficiently prepared before the conference, it should be feasible to envisage that the conference will complete its work in no more than two days.

30. There is always the question whether a sufficient number of Contracting States will attend a conference convened to adopt the amendment. While there can be no guarantee that approaches to Governments will work, past experience suggests that it may not be too difficult to persuade Governments to attend such a conference by sending representatives from their diplomatic missions in London.

Bringing the amendment into force

31. Although article 45 of the 1971 Fund Convention provides that it may be amended by a diplomatic conference or a conference of Contracting States, it does not specify the conditions to be satisfied before an amendment adopted by such a conference can enter into force. In such a case the general law of treaties applies. Under international law a conference which adopts a treaty or an amendment to the treaty in such a situation has the right to establish the conditions for entry into force (article 24, paragraph 1, of the Vienna Convention on the Law of Treaties, 1969). The normal practice, in respect of an amendment to a treaty already in force, is to make entry into force of the amendment dependent on its acceptance by a specified number of Contracting States, generally two thirds of the total number of Contracting States. And, except in special cases, an amendment which enters into force is only binding on existing Contracting States if they have expressed their intention to be bound by the amendment. In the particular circumstances of the 1971 Fund Convention, it appears unlikely that an amendment can be brought into force by this procedure. The record of the Contracting States so far makes it unrealistic to expect that the requisite acceptances will in fact be obtained to bring the amendment into force, no matter how low the number of acceptances required for entry into force may be.

32. Using the usual procedure of "express acceptance" to bring the amendment into force would entail an even more serious difficulty in the case of the 1971 Fund Convention. Under the normal procedure an amendment which enters into force applies only to the Contracting States which have expressed their consent to be bound by it. In the case of an amendment to terminate the 1971 Fund Convention, such a result could create serious complications. The effect of the application of the amendment is to bring about the termination of the 1971 Convention, with the consequential dissolution of the 1971 Fund. Hence it would hardly be practicable for such an amendment to apply to some Contracting States but not to others.

33. Consequently, the only practical approach in this case appears to be to provide that the amendment will, upon entry into force, apply to all Contracting States, including those Contracting States which have not expressly accepted the amendment.

Provisional application of the amendment

34. One way suggested for achieving this objective is to provide for the amendment to enter into force in the usual way but for the Contracting States to agree to apply the amendment provisionally, pending its entry into force. Provisional application of a treaty pending its entry into force is permissible under international law if the treaty so provides or if the States negotiating the treaty have agreed "in some other manner" to such provisional application (1969 Convention on the Law of Treaties, article 25). And, as pointed out in the discussions in the Assembly of the Fund, the procedure of provisional application was utilized in the 1994 Agreement Relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, 1982, adopted by the General Assembly of the United Nations on 28 July 1994. Article 7 of the Agreement provides that, if the Agreement has not entered into force by 16 November 1994, it shall be applied provisionally by certain categories of States. However, provisional application of the 1994 Agreement was stated to be for a specified period. Upon the expiration of that period provisional application would be terminated. Article 7, paragraph 3, of the 1994 Agreement provided that provisional application "shall terminate upon the date of entry into force of the Agreement" and also added that "in any event, provisional application shall terminate on 16 November 1998" if the conditions for entry into force, as specified in article 6 of the Agreement, have not been fulfilled by that date".

35. The approach adopted by the General Assembly was entirely suitable for the 1994 Agreement: it made it possible to bring into force the important modifications to the 1982 Convention at the same time as the Convention itself came into force; but it also gave much-needed time to Governments to take the steps necessary to satisfy their respective constitutional requirements for expressing their consent to be bound on a permanent basis. In the circumstances, the procedure was not only legally correct, but it also made good sense in practical and political terms. This was particularly so since the provisional application of the Agreement and the 1982 Convention was "reversible", in the sense that it would terminate if the conditions set for provisional application were not fulfilled. This in fact happened in the case of some of the States which had agreed to apply the Convention and the 1994 Agreement provisionally. At the end of the stipulated period (16 November 1998) provisional application of the Convention and the 1994 Agreement terminated in respect of those States which had not been able to complete the ratification process. In effect these States left the 1982 Convention and the 1994 Agreement regime. However, their departure did not affect the continued operation of the Convention and the 1994 Agreement, nor the legal status of the remaining States as Parties.

36. It is very doubtful that a procedure involving the "provisional application" of an amendment would be suitable for the 1971 Fund Convention in the present case, having

regard to the purpose of the proposed amendment. The purpose of the amendment is to terminate the 1971 Fund Convention and dissolve the 1971 Fund organization; hence its entry into force will terminate the 1971 Convention as a treaty instrument. It is not possible to terminate the 1971 Fund Convention "provisionally", because termination in this case cannot be reversed if the entry into force requirements are not fulfilled.

37. It follows that the suggestion to bring about the winding up of the 1971 Fund by adopting an amendment to the Convention and applying it provisionally would not be feasible, either legally or in practical terms.

Accelerated and "tacit" acceptance procedure to bring an amendment into force

38. However, it would be possible for an amendment to the 1971 Fund Convention adopted by a diplomatic conference or a conference of Contracting States to be brought into force with minimum delay and made applicable to all or most of the Contracting States. This could be done through a "simplified" procedure under which the consent of States to the amendment will be given not by express indication but "tacitly", i.e. by States failing to object to it.

39. Using such a procedure, the diplomatic conference or conference of Contracting States, convened under article 45 of the 1971 Convention, could actually determine the date on which the amendment adopted by it shall enter into force. The amendment could be constructed along the following lines:

(a) The conference would adopt an amended text of article 43, paragraph 1, of the 1971 Convention providing that the Convention shall cease to be in force if the number of Contracting States falls below a certain number (much higher than the current number of three); or if the total quantity of contributing oil received in all Contracting States falls below a specified number (millions) of tons; or if the Assembly determines that a situation has occurred which has resulted or will result in a "significant increase in the level of contributions for the remaining Contracting States".

(b) The amendment would also provide for an entry into force process that dispenses with the need for Contracting States to make formal expressions of their consent to be bound by the amendment. Under this arrangement the amendment would be deemed to have been accepted by a specified date, unless a given number of Contracting States, or a proportion of the total number of Contracting States, expressly notify their objection prior to that date.

(c) The amendment would also provide that it would enter into force on a specified date for all Contracting States, with the exception of those which, prior to a specified date, declare that they do not wish to be bound. A Contracting State which makes such a declaration would be considered to have denounced the Convention with effect from the date on which the amendment is to enter into force.

40. This approach has a number of advantages from a practical point of view. These include:

(a) It makes it possible for Contracting States and other interested parties to know well in advance the exact date on which the amendment will enter into force and the Convention will cease to be in force.

(b) It ensures that termination of the Fund Convention will apply in respect of all Contracting States, subject to the obligations of the Fund and Contracting States in relation to incidents which occurred prior to the date of termination (article 43, paragraph 2, of the Convention).

(c) It makes it possible for Contracting States of the 1971 Fund Convention which wish to transfer to the 1992 Convention to do so without any gap in coverage or with a gap of a very short duration. This is because Contracting States will be able to submit their instruments of ratification or acceptance of or accession to the 1992 Fund Convention at a time which ensures that the ratification will become effective at or prior to the time when they leave the 1971 scheme. Even where the two events cannot be exactly synchronized, this procedure will ensure that the gap in coverage will be for a relatively short period.

(d) The entry into force of the amendment will not depend on any specific action by the remaining Contracting States. Consequently, entry into force will not be prevented or delayed by lack of action on the part of any of them.

(e) Entry into force will not be held up or delayed by the failure to secure the quorum for meetings of the Assembly of the 1971 Fund. Even if the entry into force were to involve a decision of the Assembly, such decision could be taken by the Executive Committee or, as necessary, the Administrative Council, in accordance with the resolutions of the Assembly already in place.

41. From the legal point of view it does not appear that there would be serious objections to a simplified procedure for entry into force based on "tacit acceptance" of the amendment by the Contracting States. As already stated, there is no rule of international treaty law which prevents a diplomatic conference or a conference of Contracting States, convened under article 45 of the 1971 Fund Convention, from using such a procedure to bring an amendment into force. Neither article 24 nor article 40 of the Vienna Convention on the Law of Treaties places any limitations on the right of such a conference in this regard; and there is no such limitation, express or implied, in article 25 or any other provision of the 1971 Convention itself.

42. The "tacit acceptance" procedure has been used, in various forms, in a number of international agreements (See Annex 2). In general the procedure has been restricted to amendments to the provisions in the "technical annexes" to conventions. Amendments to the main articles are brought into force through the normal procedure which requires "explicit" indications of acceptance by the States concerned. It is also the case that the "tacit acceptance" procedure is commonly adopted for amendments in cases where the

parent treaty makes provision for such an amendment procedure. In such cases, the procedure is justified by the fact that States which agree to be bound by the parent treaty are to be presumed to have accepted the procedure when they express their consent to be bound by the treaty. This is not the case with the 1971 Fund Convention, since the Convention does not make provision for such an amendment procedure.

43. But the absence of such a provision in the 1971 Fund Convention does not necessarily make the procedure inappropriate for amending that Convention. In a situation not very different from the case of the 1971 Fund Convention, the General Assembly of the United Nations considered it both legally permissible and politically appropriate to use the "simplified" process involving the tacit acceptance by States to achieve the important and urgent purpose of ensuring early entry into force of the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, 1982. Article 5 of the 1994 Agreement, entitled "*Simplified procedure*", provides that "A State or entity which has deposited before the date of the adoption of this Agreement an instrument of ratification or formal confirmation of or accession to the Convention and which has signed this Agreement in accordance with article 4, paragraph 3(c), *shall be considered to have established its consent to be bound by this Agreement 12 months after its adoption, unless that State or entity notifies the depositary in writing before that date that it is not availing itself of the simplified procedure set out in this article*" (emphasis supplied). It is worth noting, in this regard, that no provision in the parent 1982 Convention envisaged the use of such a "simplified procedure" to amend the Convention. Even more pertinent, the modifications (amendments) to the 1982 Convention introduced by the 1994 Agreement related to the main articles of the Convention, and were clearly substantive in character since they involved significant changes to the regime of Part XI of the Convention as originally established. Nevertheless, the Member States of the United Nations considered it appropriate to use the simplified procedure for this purpose, and no objections were raised to that decision. Thus the use of the "tacit acceptance" procedure to bring an amendment to the 1971 Fund Convention would be neither contrary to international treaty law nor without precedent.

44. From the political point of view, the use of the tacit acceptance procedure in the present case is unlikely to meet serious opposition. The usual objection raised against the use of the procedure comes from States whose constitutional systems require the involvement of other branches of the government before the State assumes international obligations or modifies obligations previously assumed. For such States, the tacit acceptance procedure is only acceptable if it permits the necessary constitutional requirements to be met. This is generally considered to be the case if the original treaty, for which constitutional approval is given by the appropriate domestic institutions before ratification, provides that the tacit acceptance procedure may be used to amend the treaty. In such a case, the view seems to be that state organs concerned are presumed to have accepted that certain changes to the treaty can be effected by means of the procedure of tacit acceptance.

45. As noted earlier, such a justification cannot be applied to an amendment to the 1971 Fund Convention, since the Convention does not include any provision for adopting and

bringing amendments into force by the tacit acceptance procedure. However, there are other aspects which should make the use of the procedure to amend the 1971 Fund Convention less objectionable to States in the present case. In the first place, the amendment to the Convention will not impose additional obligations on the Contracting States. On the contrary, it is intended to relieve them of potentially onerous obligations under the 1971 Fund Convention. Hence most Contracting State may not need domestic parliamentary or other approval in order to agree to such an amendment. For those who need such approval, the procedure proposed for the amendment makes it possible for them to do so.

46. But perhaps the most important consideration in this regard is that most of the Governments concerned are not likely to raise objections to the procedure in the present case. The evidence so far shows that these Governments have not found it necessary or possible to take measures to denounce the Convention, in spite of the fact that denunciation would obviously be in their interest. The main reason for this appears to be administrative inertia on the part of the relevant Ministries or Departments. It is hardly to be expected that these same Ministries and Departments will be able not only to generate sufficient interest in an amendment to terminate the Convention but actually take a conscious decision to submit declarations of objection to the amendment. While there is always the possibility that some Governments may object to the simplified procedure on grounds of legal or political principle, it is very improbable that their number will be large enough to prevent the deemed acceptance of an amendment and its entry into force. In any case, any of the Contracting States which feel sufficiently strongly about the matter to wish to oppose the amendment, would have the option to denounce the Convention. Since the sole objective of the amendment is to assist Contracting States to avoid potentially onerous obligations under the 1971 Fund Convention, it does not appear reasonable to expect that any of them would find it necessary or justifiable to object to the amendment in the present case.

(b) Using the mechanism for "accelerated denunciation" of the 1971 Fund Convention

47. Another means suggested for solving the problem created by the reduction in the contribution base of the 1971 Fund is to have recourse to the mechanism for "accelerated denunciation" under article 42 of the Convention. This mechanism enables a Contracting State to denounce the 1971 Fund Convention in a relatively short time, if the Assembly of the Fund determines that a situation has arisen that results in a significant increase in the level of contribution for the remaining Contracting States. Upon a determination by the Assembly a Contracting State can denounce the 1971 Fund Convention; and such denunciation can take effect earlier than the time that would normally apply under article 41, paragraph 3, of the Convention.

48. The procedure for accelerated denunciation under article 42 will only be effective for dealing with the problem confronting the 1971 Fund if two conditions are fulfilled. The first condition is that the Assembly of the Fund should have the quorum needed to make the determination required to set the accelerated denunciation procedure in motion. The

second condition is that Contracting States should be willing and ready to submit instruments of denunciation of the 1971 Convention within the time limit specified in article 42, i.e. not later than one hundred and twenty days before the date on which the denunciation that resulted in a "significant increase in contributions for the remaining Contracting States" becomes effective.

49. The first of these conditions may not be too difficult to fulfil. According to the calculations of the Director, denunciation of the 1971 Fund Convention by Italy would be sufficient to trigger the mechanism under article 42 of the Convention. On that basis the Assembly would be entitled to make the determination provided for in paragraph 3 of that article. If a quorum is not obtained for a meeting of the Assembly, the determination may be made by the Executive Committee, by virtue of Resolution No 13 of the Assembly. In case a quorum for the Executive Committee is also not available, the determination can be made by the Administrative Council established by the same Resolution. Thus there should not be much difficulty in obtaining the determination that would make it possible for Contracting States which wish to do so to denounce the Convention through the accelerated mechanism of article 42.

50. However, the second condition may not be fulfilled so easily. While a number of Contracting States of the 1971 Fund Convention may take advantage of a determination under article 42 to denounce the Convention, this may not by itself reduce the number of remaining Contracting States to the threshold required for termination of the Convention under article 43, i.e. less than three Contracting States. In that case the situation would not be improved but might well have been made worse, because the departure of more Contracting States would further reduce the contribution base of the Convention, without making it any easier to terminate it.

51. There is also the problem of a possible gap in protection for Contracting States which avail themselves of the mechanism for accelerated denunciation under article 42 of the 1971 Fund Convention. The gap in protection occurs because, under article 30 of the 1992 Fund Convention, a State cannot become a Member of the 1992 Fund until 12 months after the date on which it deposits its instrument of accession to the 1992 Fund Protocol. Accordingly, a Contracting State to the 1971 Fund Convention which takes advantage of article 42 of the 1971 Fund Convention to leave that Convention within less than 12 months after the deposit of its instrument of denunciation cannot become a member of the 1992 Fund at the exact time when its denunciation of the 1971 Fund becomes effective. For, even if the State deposits its instrument of accession to the 1992 Fund Convention on the same date as it submits its instrument of denunciation of the 1971 Fund Convention, accession to the 1992 Fund Convention can only take effect some time after the denunciation of the 1971 has become effective. This would leave the State without protection from both the 1971 Fund and the 1992 Fund in the period between the effective date of its denunciation of the 1971 Convention and the date on which the 1992 Protocol enters into force for it. The possibility of this gap in protection may dissuade some Contracting States of the 1971 Convention from taking advantage of the accelerated denunciation mechanism in article 42 of the 1971 Fund Convention, even if the determination permitting them to do so is made by the Assembly or the appropriate organ of the Fund.

52. One way suggested to encourage Contracting States to take advantage of the accelerated denunciation mechanism of article 42 to denounce the 1971 Fund Convention is to eliminate the gap in protection cover for these States. It is proposed that this may be effected by the adoption of a resolution by the 1992 Fund Assembly "setting out an agreement between all the Parties to the 1992 Fund Protocol" to the effect that, notwithstanding the provisions of article 13.4 of the 1992 CLC Protocol and article 30.3 of the 1992 Fund Protocol, the 1992 Protocol would come into force, for any Contracting State of the 1971 Fund Convention which denounces the Convention using the mechanism in article 42, on the same date as that State's denunciation of the 1971 Fund Convention becomes effective.

53. The question that arises in this context is whether shortening the period for accession to the 1992 Fund Protocol in this way would be in conformity with the international law of treaties. In this connection, it has been remarked that "such a procedure would not be inconsistent with the provisions of article 39 of the Vienna Convention on the Law of Treaties". This article, entitled *General rule regarding the amendment of treaties*, reads:

> "A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide."

54. It is, of course, true that all States Parties to a treaty have the sovereign right and competence to amend the treaty through any procedure acceptable to them, except in so far as the treaty precludes a particular procedure, expressly or by necessary implication. In the case of the 1992 Fund Protocol, there is no provision which would preclude modification of the period for the entry into effect of an instrument of accession to the Convention, if all the States Parties to the Convention agree to that modification. Accordingly, there appears to be no bar to the procedure proposed to modify the accession process, so long as it is clearly established that this has the agreement of all the States Parties to the 1992 Protocol.

55. It is this requirement of unanimous agreement which makes it doubtful that the proposed course of action will in fact succeed in dealing with the problem. A proposal to adopt a resolution to change the requirements for accession to the 1992 Fund Convention will not be effective if there is objection from any of the Contracting States to the 1992 Fund Convention. Already representatives of some Contracting States are on record as indicating that their Governments have reservations about the procedure. It is likely that some of these Governments may not be able or willing to support such a resolution. In that case it will not be possible for the Assembly of the Fund to implement the resolution over the objection of those Contracting States. Unlike a diplomatic conference or a conference of Contracting States, the Assembly does not have the power to make modifications to the Convention if some Contracting States object to such modification. A resolution of the Assembly would be useful only to the extent that it provides a suitable procedure for Contracting States to indicate their unanimous consent to a proposed change to the Convention. Such consent may be indicated by

consensus if the Contracting States agree; but it cannot be obtained if any Contracting State expresses opposition to the proposed change, whether in the Assembly or subsequently. If such opposition is expressed, it will not be possible to apply the proposed modification, and the gap in protection will continue to present a difficulty for Contracting States to the 1971 Fund Convention which wish to take advantage of the accelerated denunciation mechanism under article 42 of the Convention.

56. It would appear, therefore, that the accelerated denunciation mechanism may not be effective for solving the problem facing the 1971 Fund. There is no guarantee that a sufficient number of Contracting States will actually take advantage of the mechanism and denounce the Convention in order to bring the remaining number of Contracting States below the threshold for termination as provided for in article 43, paragraph 1, of the Convention. One reason for this is the administrative inertia on the part of many of the Contracting States. It is this inertia that has to date prevented action to denounce the Convention by those States. The other consideration which might influence some Contracting States will be the concern that using the mechanism could leave them without cover if an incident causes oil pollution damage in their territory during the period between denunciation of the 1971 Fund Convention and the date on which the 1992 Fund Convention enters into force for them.

(c) Termination of the 1971 Fund Convention due to a fundamental change in circumstances

57. It has also been suggested that the problem might be solved by a determination to the effect that the 1971 Fund Convention has been terminated due to "a fundamental change in circumstances". The view has been expressed that such a decision could be justified on the ground that the reduction in the number of Contracting States, with the consequential decrease in the contribution base of the 1971 Fund, has made the Fund inoperable. Reference has been made in this regard to article 62 of the Vienna Convention on the Law of Treaties which provides that a fundamental change of circumstances from those existing at the time of the conclusion of a treaty may be invoked as a ground for terminating or withdrawing from the treaty. Termination or withdrawal in this case is permissible if two conditions are fulfilled, namely,

(a) the existence of [the original] circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and

(b) the effect of the change [in circumstances] is radically to transform the extent of the obligations still to be performed under the treaty.

58. A plausible case can be made in support of the contention that the reduction in the number of Contracting States to the 1971 Fund Convention has resulted in a fundamental change of circumstances for the remaining Contracting States, and that this change has radically transformed the extent of their obligations under the Convention.

59. However, it may not so easily be argued that the continued participation of any

particular number of States in the 1971 Convention "constituted an essential basis of the consent to be bound" of any Contracting State to the Convention. Every State was aware, before it consented to be bound by the Convention, that denunciation by some States could result in a "significant increase" in the level of contributions for the remaining Contracting States. Indeed, article 42 of the Convention envisages that very possibility, and the special mechanism for accelerated denunciation in that article was introduced to deal with that specific situation. That being the case, the claim that the new situation was not foreseen or foreseeable when the Contracting States agreed to be bound by the Convention may not be particularly convincing.

60. But even if a claim based on a fundamental change in circumstances could be sustained, the question remains by whom and how the change would be invoked to terminate the Convention. Such a claim could be made by the 1971 Fund itself in order to deny liability to pay compensation for damage that has already been caused. It may also be made before any incident has actually occurred, possibly by a decision of one of the organs of the 1971 Fund. Such a contention might also be advanced by or on behalf of a person or persons liable to pay contribution to the 1971 Fund for the purpose of avoiding the obligation to pay contributions to the Fund. Regardless of when and by whom the claim is made, it will be for a court of competent jurisdiction to determine its validity or otherwise. Pursuant to article 7, paragraph 1 of the 1971 Fund Convention, the court of competent jurisdiction in respect of a claim for compensation against the Fund is the competent court of the Contracting State in which a claim for compensation damage could have been brought against the owner of the ship involved in the incident that caused the pollution damage, as provided for in Article IX of the 1969 Civil Liability Convention. It is only such a court that will have jurisdiction to entertain and pronounce on a contention that the 1971 Fund has no obligation to pay compensation for an incident on the ground that the 1971 Fund Convention has been terminated due to a fundamental change in circumstances. (The same courts would also have jurisdiction to pronounce on a contention by a person liable to pay contribution to the 1971 Fund if that person claims that there is no obligation to pay contribution to the Fund because the Fund has ceased to exist.)

61. A difficult legal situation would ensue if a court of competent jurisdiction in a Contracting State were to declare that the 1971 Fund continues to exist and to bear the obligation to pay compensation, contrary to a determination of the competent organs of the Fund that the Fund Convention has been terminated because of a fundamental change of circumstances.

62. There is also the possibility that claims for pollution damage in respect of a single incident will be brought against the 1971 Fund before the courts of different States, where pollution damage resulting from the same incident has been caused in the territories of two or more States. In such a situation one may visualize the situation in which one of the courts accepts the decision that the 1971 Fund has been terminated due to a fundamental change of circumstances while another court rejects that view. It is also possible for contradictory conclusions to be reached on the same issue by courts in two Contracting States in relation to claims arising from two separate incidents.

63. Such divergences in the decisions of courts of different Contracting States would create a complex, and in many ways impossible, situation. Under the 1971 Convention there is no rule or mechanism for reconciling conflicting decisions of competent courts concerning the liability of the Fund (or the shipowner). Although, pursuant to article 8 of the 1971 Fund Convention, a decision of a court of competent jurisdiction in respect of a claim against the Fund is to be recognized as enforceable in all other Contracting States, nothing in that article suggests that the decision of a court in one Contracting State on a claim for compensation in that State can overrule a contrary decision of the competent court of another Contracting State in respect of damage caused in the territory of the latter State. Hence, in a situation where two competent courts disagree as to whether or not the 1971 Fund Convention has been terminated by reason of a fundamental change of circumstances, the result would be the anomalous situation in which the 1971 Fund would be deemed to have ceased to exist (and therefore not subject to the obligation to pay compensation for damage) in one Contracting State but at the same time considered to be in existence and hence under the obligation to pay compensation for pollution damage under the 1971 Convention in another State.

64. Because of the possible challenges to the validity of a determination that the 1971 Fund Convention has been terminated because of a fundamental change of circumstances, and in view of the legal and practical complications that would arise if such a claim were not accepted by competent courts in some Contracting States, it does not seem that reliance on the claim of termination based on a "fundamental change of circumstances" will provide an effective solution to the problem facing the 1971 Fund.

(d) Involvement of the International Court of Justice

65. It has been suggested that the problem might be resolved by a reference to the International Court of Justice. The idea is that the issue might be brought before the Court by one or more of the Contracting States in the form of a contentious case for adjudication or, alternatively, that the Court might be requested to give an advisory opinion on the matter.

66. While the idea appears attractive in principle, there could be very serious difficulties in the way of its practical implementation, whether the procedure used involves the submission of a contentious case between two or more Contracting States or whether the route chosen is to request an advisory opinion from the Court.

Submission of the matter to the Court in the form of a contentious dispute

67. Two major legal obstacles need to be overcome before the matter can be submitted to the Court in the form of a contentious dispute. The first obstacle arises from the requirements concerning the nature of cases to be brought before the Court, and the second relates to the States which will be parties in the case and subject-matter of the dispute that will be submitted to the Court. Under its Statute and Rules, the Court normally deals with cases involving disputes between States, as opposed to requests for declaratory judgments. For example, article 38 of the Rules of the Court states that an application instituting proceedings before the Court must "indicate...the State against

which the claim is brought and the subject of the dispute". The application shall also "specify the precise nature of the claim...". This applies also where proceedings are brought before the Court by special agreement between the parties to the dispute. Article 39, paragraph 2 of the Rules provides that the notification of the special agreement shall "indicate the precise subject of the dispute". The Court has expressly stated that "the existence of a dispute is the primary condition for the Court to exercise its judicial function". For its purpose, the Court characterizes a dispute as "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".

68. It is not clear how the issue regarding the conditions and procedure for terminating the 1971 Fund Convention could be presented to the Court as a "dispute" between two or more Contracting States. To the extent that there may be disagreement about a point of law, it concerns how and on what grounds the 1971 Convention may be terminated in order to remove the threat which the present situation poses to all remaining Contracting States. There does not appear to be disagreement between any of the Contracting States concerning their rights or obligations vis à vis each other under the Convention. It is, therefore, not easy to identify what could plausibly be characterized as a "dispute", or the Contracting States which are parties in the dispute. Under the 1971 Fund Convention, most of the specific obligations of the Fund are to victims of pollution damage, whether they are States, juridical persons or individuals. Similarly, the major obligations due to the Fund are from the persons who receive contributing oil in Contracting States. Except in the cases where a Contracting State has voluntarily assumed the obligation to pay contributions to the Fund (article 14), the obligation to pay contributions to the Fund rests on the persons who actually receive contributing oil in the territories of Contracting States. Although there are many possibilities of disputes between the Fund, on the one hand, and a person in a Contracting State who is obliged to pay contributions to the Fund, on the other hand, such disputes cannot be brought before the International Court of Justice in contentious proceedings since neither the Fund nor the persons concerned will have standing to appear before the Court as parties to a case. In the present case, there is no disagreement concerning the obligation of contributors. The problem is created by the fact that the contribution due from all the persons obliged to contribute may not be sufficient to enable the 1971 Fund to meet its obligations. That being the case, it is difficult to see how the issue can be considered as constituting a dispute between Contracting States or even a dispute between the Fund and one or more of the Contracting States.

69. It is, of course, not inconceivable that two or more Contracting States may be able to "construct" a dispute between themselves solely for the purpose of submitting a case to the Court for a ruling. This can be done even by Contracting States which have not previously accepted the jurisdiction of the Court under article 36(2) of the Court's Statute. Two or more States can at any time bring a dispute to the Court by special agreement between them. But, assuming that the parties manage to construct a dispute in a form that the Court will accept to deal with, and assuming further that the Court decides that the Fund is to be considered as having been terminated, such a decision will only be binding on the States that were parties in the case before the Court (article 59 of the Statute of the Court). Hence, although a decision of the Court has

considerable authority, there can be no guarantee that its decision in such a case will be accepted and followed by the courts in every Contracting State when claims for compensation are brought before them against the 1971 Fund. A way round this difficulty would be for other Contracting States to intervene in the case before the Court. Such intervention is permitted under articles 62 or 63 of the Statute of the Court. In this way the decision of the Court would be binding on the intervening Contracting States in the same way as the "parties" in the case. (Article 63, paragraph 2 of the Statute of the Court). But there is no assurance that all or the majority of the remaining Contracting States will be persuaded to intervene in a case before the Court. If many of them refuse or fail to intervene, the decision of the Court will not be binding on them, and they, and especially their courts, may feel under no obligation to accept the decision of the Court.

70. And, as indicated above, the possibility cannot entirely be discounted that the Court itself may not sustain the claim that the 1971 Convention can be considered as having been terminated due to a fundamental change of circumstances - or for any other reason. This possibility, coupled with the foreseeable procedural difficulties in getting the matter before the Court, would seem to suggest that recourse to the International Court of Justice by the submission of a contentious case is not likely to provide the solution to the problem facing the 1971 Fund.

Involvement of the Court through the request or an advisory opinion

71. The other way suggested for obtaining the views of the ICJ is through a request for an advisory opinion, pursuant to article 65 of the Court's Statute. The suggestion is that such a request might be made by the International Maritime Organization (IMO) which is authorized, under its Convention, to refer legal questions to the International Court of Justice for an advisory opinion in accordance with article 96 of the Charter of the United Nations. (A request for an advisory opinion from the Court cannot be made by the 1971 Fund because the Fund is not authorized to request an advisory opinion from the Court). IMO has the right to request an advisory opinion from the ICJ by virtue of article 69 of its Convention, the 1958 Convention on the International Maritime Organization, as amended. The 1971 Fund Convention was adopted by a diplomatic conference convened by IMO and the draft text that finally became the Convention was prepared by the Legal committee of IMO. In addition, the Secretary General of IMO is the depositary of the Convention.

72. With regard to the right of IMO to request advisory opinions from the Court, article 70 of the IMO Convention must be read in conjunction with article 69. The texts of the two articles are as follows (emphasis added):

Article 69 (55 of the original 1958 Convention)

> Any question or dispute *concerning the interpretation or application of the Convention* shall be referred for settlement to the Assembly, or shall be settled in such other manner as the parties to the dispute agree. Nothing in this Article shall preclude the Council or the Maritime Safety Committee from settling *any such question or dispute* that may arise during the exercise of their functions

Article 70 (56 of the original 1958 Convention)

Any legal question which cannot be settled as provided in Article 69 shall be referred by the Organization to the International Court of Justice for an advisory opinion in accordance with Article 96 of the Charter of the United Nations.

73. The first question to be considered is whether the IMO can in fact request the ICJ to give an advisory opinion regarding the interpretation or application of the 1971 Fund Convention. This question divides itself into two sub-questions. The first is whether the organization has the right under its Convention to refer to the International Court of Justice legal questions that do not concern the *interpretation or application* of the IMO Convention. The second sub-question is whether, assuming that IMO may request an advisory opinion on a question that does not necessarily concern the interpretation or application of the IMO Convention, such a question should have arisen "during the exercise of its functions"(article 69 of the IMO Convention) or must fall "within the scope of its activities"(Article 96 of the Charter of the United Nations)?

74. A closer scrutiny of the wording of the two articles, and the necessary inter-relationship between them, appears to lead to the conclusion that the "questions" or "disputes" that may be referred by IMO to the Court for advisory opinions are those that concern "the interpretation or application of the Convention". If that interpretation were accepted, it would follow that the question (or dispute) as to how the 1971 Fund Convention may be terminated cannot be referred by IMO to the Court for an advisory opinion. This is because such a question or dispute does not "concern the interpretation or application" of the IMO Convention.

75. Even if article 70 of the IMO Convention is interpreted to permit the Organization to request an advisory opinion on a question that does not concern the "interpretation or application of the IMO Convention" itself, the Assembly of IMO might not agree that the question concerning the conditions and method for terminating the 1971 Fund Convention involves a question which has "arisen during the exercise of the functions" of the Organization or which falls "within the scope of its activities". On that basis the Assembly might decide that it would not be appropriate to submit the question to the ICJ.

76. The same considerations might lead the Court itself to decline to give an advisory opinion, even if the Assembly of IMO were to agree to refer the question to the Court.

77. Other uncertainties arise regarding the usefulness of an advisory opinion from the Court for resolving the problem facing the 1971 Fund Convention. The first relates to the party or parties to which an advisory opinion of the Court would be addressed, and the second concerns the effect that such an opinion could have on the problem facing the Contracting States to the 1971 Convention. In a well-known passage in one of its Advisory Opinions the ICJ stated that "the Court's opinion is given not to the States but to the organ which is entitled to request it". The Court also noted that its "reply is only of an advisory character and as such it has no binding force" (*Interpretation of the Peace*

Treaties Case (1950) ICJ Reports, 65). In the light of this view of the Court, it may be wondered what the effect of an advisory opinion of the Court would be on either the Assembly of IMO or the organs of the 1971 Fund, and what action these bodies might be able to take relative to the problem facing the 1971 Fund. More pertinently, it may be asked whether the advisory opinion of the Court will be accepted as binding by Contracting States which do not agree with the Court's reasoning. And, even if a Contracting State accepts the opinion of the Court, it cannot be assumed that a court of the State will consider itself bound by the advisory opinion of the Court, particularly when such a court has to deal with a case involving a claim against the 1971 Fund by a person who has suffered pollution damage within the jurisdiction of that court.

78. For the above reasons, it must be doubted that recourse to the International Court of Justice presents a viable and effective means of resolving the problem arising from the decrease in the number of Contracting States to the 1971 Fund Convention and, with it, the reduction in the contribution base of the 1971 Fund.

PROCEDURE FOR THE LIQUIDATION OF THE 1971 FUND

79. Termination of the 1971 Fund Convention under article 43, paragraph 1, does not result in the liquidation of the 1971 Fund. Article 44 of the Convention makes it clear that the Fund remains in being "as a legal person" after the Convention has ceased to be in force. In that capacity the 1971 Fund will continue to have the obligation to pay compensation for pollution damage arising from any incident that occurred before the Convention ceased to be in force. Article 44 also places on the Assembly of the Fund responsibility for taking the "measures to complete the winding up of the Fund". These measures include the "distribution in an equitable manner of any remaining assets among the persons who have contributed to the Fund".

80. These provisions of the 1971 Fund Convention underlie the fact that the 1971 International Oil Pollution Compensation Fund is a body corporate with an international legal personality. This means that its legal status and attributes do not arise under the laws of individual States, and its operations cannot be regulated by the national law of any of its Contracting States. It is, of course, true that the Fund is obliged to comply with decisions of competent national courts in respect of claims for compensation for pollution damage that have been properly brought before such courts. But this obligation arises from the provisions of the Convention and does not in any way make the Fund subject to the national laws, other than those relating to liability for oil pollution damage, as defined in the 1969 Civil Liability Convention and, by reference, in the 1971 Fund Convention.

81. The principle that the 1971 Fund is not subject to the national laws of Contracting States applies especially to the procedures for its liquidation after the termination (ceasing to be in force) of the 1971 Fund Convention. This is reinforced by the fact that the Convention itself includes a specific provision on the matter. Although article 44 of the 1971 Convention does not set out detailed procedures for the winding up of the 1971 Fund, it provides clear guidance with respect both to the body that is required to take the necessary measures and the principles to be applied in the process. The article

mandates the Assembly of the Fund to take all the measures appropriate to complete the winding up. Article 44 further states that these measures should include the distribution on an equitable basis of any remaining assets among the persons who, under the Convention, are entitled to share in those assets.

82. In the light of these provisions of the Convention, there appears to be a strong case in support of the view that the winding up of the 1971 Fund cannot be subject to the procedural or substantive national law of any Contracting State. It would follow that liquidation of the 1971 Fund cannot be effected by recourse to the courts of the United Kingdom as the Headquarters State of the Fund, since the matter would not fall within the jurisdiction of the courts of the United Kingdom. In this connection the Director has rightly drawn attention to the view expressed by the Court of Appeal in the case relating to the *International Tin Council*. The Court of Appeal ruling in the matter was that the International Tin Council, as an inter governmental international organization, was not subject to the winding up jurisdiction of English courts.

83. But the fact that winding up cannot be subject to any national law should not by itself prevent an effective winding up of the Fund, in line with the principles indicated in the 1971 Convention. The Convention gives the Assembly the power to take "all appropriate measures" to complete the winding up of the Fund. Pursuant to this provision, the Assembly, or a body properly acting for it, has the power to appoint a "liquidator" and to determine the terms of reference of the liquidator. By the same token, the Assembly or other appropriate body can direct the liquidator to apply procedures and practices for liquidation developed under a particular national legal system or within a named international organization, depending of what the Assembly or body concerned considers to be appropriate.

84. In this context reference may be made to the concerns expressed by the External Auditor of the 1971 Fund regarding possible difficulties that may arise in the winding up process, both before the 1971 Fund Convention ceases to be in force as provided for in the Convention and also after that stage has been reached. In particular the External Auditor has suggested that consideration be given to the "management of any remaining assets held by any residue body and their eventual distribution". The External Auditor also calls attention to the need for the "final winding-up of the residue body itself." For this purpose the External Auditor suggests that the Assembly of the Fund "consider the need ultimately to appoint a Liquidator to take over the administration of the 1971 Fund, including its and any residual bodies' eventual liquidation".

85. The "residual body" referred to by the External Auditor is the "legal person" that remains in being after the 1971 Fund Convention has ceased to be in force, pursuant to article 43 of the Convention. As provided for in article 44, paragraph 1, this "legal person" will be the entity that will bear the obligations and exercise the rights of the 1971 Fund in respect of pollution damage for which the 1971 Fund remains liable to pay compensation even after the 1971 Convention itself has ceased to be in force. This entity will operate as a person until such time as it is "dissolved". It is this dissolution that will mark the final and effective winding up of the 1971 Fund as a legal entity with rights and obligations. As the External Auditor quite pertinently points out, "the final winding-up

of the residual body may itself be delayed so long as there remain unsettled claims, including unresolved litigation, relating to past incidents involving the 1971 Fund".

86. In deciding to appoint a "liquidator" and in determining the terms of reference, consideration should be given to the nature of the functions to be undertaken by the liquidator, with particular regard to the legal problems that will confront a liquidator in the special case of the 1971 Fund. One of these will be the distribution of the remaining assets of the 1971 Fund. The liquidator will need to decide, at some time, on the portions of any remaining assets of the Fund that should, on an equitable basis, be returned to various former contributors to the Fund. Before any decision can be taken to apportion the remaining assets, the liquidator will need to make the determination that no further obligations of the 1971 Fund in respect of incidents covered by the 1971 Fund are outstanding or may reasonably be foreseen. Such a determination is necessary because the final winding up of the 1971 Fund itself cannot take place so long as there remain unsettled claims, including unresolved litigation, relating to past incidents that are covered by the 1971 Fund. Unsettled claims in this context could include claims for compensation (or indemnification) which have not yet been brought to the Fund or before any court but which might be brought at any time before the period of limitation applicable pursuant to article 6 of the Convention has elapsed.

87. Decisions on these matters will involve important and potentially sensitive questions of a type that would not normally be entrusted to the "liquidator" of a commercial concern. For example, the apportionment of the remaining assets of the 1971 Fund among former contributors could involve decisions with political implications that might be more suitable for a body composed of governmental representatives, as opposed to a Liquidator operating essentially according to legal and accounting principles. Similarly, a Liquidator might find it particularly difficult to take the decision that a point has been reached when the residual body of the 1971 Fund should be legally dissolved, thus bringing to a final end not only the operations but also the very existence of the 1971 Fund as a legal entity. It would be difficult, and perhaps impossible, for a normal Liquidator to bring about the dissolution of a legal entity in this way without the benefit of a decision or order of a court of competent jurisdiction. As indicated above, no national court would be competent to give such a decision or order. On the other hand, dissolution could be effected relatively easily by the decisions of an appropriate inter-governmental body, such as the Assembly of the Fund.

88. For these reasons it would appear more practical to assign responsibility for these important decisions to the 1971 Fund Assembly itself, or to another body, that would be more suitable for the kind of policy decisions that are bound to be required in the final stages of the liquidation process. However, the Assembly of the Fund will not be in existence after the 1971 Fund Convention has ceased to be in force; and it would not, in any case, be an effective body for this purpose in view of the predictable lack of the quorum for meetings. Accordingly, serious consideration should be given to an arrangement under which the function of supervising the winding up of the 1971 Fund would be assigned to the Assembly of the 1992 Fund. The decision to assign can be taken by the Assembly of the 1971 Fund (or in its place the Executive Committee or the Administrative Council) before the date on which the 1971 Fund Convention ceases to

be in force. Assignment of this function can, of course, only be made with the agreement of the 1992 Fund Assembly. And, it is understandable that the 1992 Fund Assembly would need to be assured that the 1992 Fund will be appropriately reimbursed for any expenses it might incur in discharging responsibilities in respect of the 1971 Fund.

89. Assuming that the issue of financial reimbursement is resolved satisfactorily, there would seem to be good reasons for the 1992 Assembly to accept responsibility to over-see the winding up of the 1971 Fund. First, the 1992 Fund, as the legal and factual successor of the 1971 Fund, is the most obviously suitable body to undertake the task which is so closely related to its own activities. Secondly, there can be little doubt that the 1992 Fund has a genuine interest in the orderly winding up of its predecessor Fund, since a loss of credibility in the 1971 Fund would probably have a negative impact on the 1992 Fund in particular and the concept of a compensation fund in general. Such a negative impact could undermine the achievements of more than thirty years' efforts in the development of a uniform international legal regime on liability and compensation for damage from ship-borne substances. Finally, acceptance of this function by the 1992 Fund would mean that the task of winding up of the 1971 Fund would be undertaken with the extensive experience and expertise on liability and compensation available to the Assembly of the Fund and its Director.

90. In the decision to assign the task of winding up of the 1971 Fund to the Assembly of the 1992 Fund, the Assembly of the 1971 Fund (or the body deciding in its place) would give the full mandate to the 1992 Fund Assembly to act on behalf of the 1971 Fund Assembly in respect of all appropriate measures, including the power to:

(a) Settle any claims against the 1971 Fund, including any litigation that remain unresolved in respect of any such claims;

(b) determine at which point the 1971 Fund, as a legal person, shall be deemed to have ceased to exist;

(c) distribute, upon the cessation of the 1971 Fund as a legal person, any remaining assets of the 1971 Fund among the persons who contributed to it, on the basis of the principle set out in article 44 of the 1971 Fund Convention;

(d) fix or approve the fees and other payments to be made to persons and institutions whose services are to be utilized in discharging the various tasks on behalf of the 1971 Fund, including the amount to be reimbursed to the 1992 Fund;

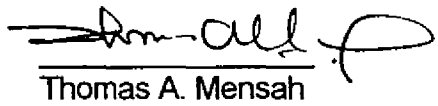
(e) make the final formal declaration that the 1971 Fund as an international "legal person" has been dissolved.

91. In undertaking this function the 1992 Fund Assembly will rely as usual on assistance and back-up support from the Director of the 1992 Fund. As is the case with the running of the Fund, the Director will be authorized to make use of the professional and other expert services and advice, both in discharging any tasks

that may be requested of him by the Assembly and also in providing background information and related services to assist the Assembly in its own decision-making. Indeed, it is to be expected that the services of a suitable person or persons with suitable expertise in the winding up of financial institutions will be needed to advise the Assembly and the Director concerning technical, financial and accounting problems arising in the course of the winding up process of the Fund, and in calculating the portions of the assets of the Fund to be distributed to the various former contributors. These experts will not be the "liquidators" of the Fund in the sense that they are persons with the authority to take the operative decisions, but they will play a crucial role in the actual process of winding up of the Fund.

92. The Assembly may also find it useful to appoint a small group, consisting of suitably qualified representatives and/or experts, to advise the Director in dealing with specific issues, either because they are particularly "technical" in character or because they may have major policy implications. However, the Assembly may conclude that the Executive Committee would be appropriate and adequate to provide the necessary advice and direction to the Director in the discharge of his tasks in respect of the 1971 Fund. In that case there may be no need for a special group.

93. My conclusion, therefore, is that liquidation of the 1971 Fund cannot be undertaken by reference to the laws of the United Kingdom (or any other Contracting State). Hence it would not be necessary to appoint a "liquidator" in the technical sense for this purpose. In view of the international (inter-governmental character) of the Fund, it appears that an inter-governmental body would be more appropriate to take the necessary decisions for winding up. The Assembly of the 1971 Fund will not be in existence at the time the final decision for winding up will be taken. In any case, the 1971 Fund Assembly would not be an effective body for such a task because of its inability to obtain the necessary quorum for meetings. A more practical solution might be for the Assembly of the 1971 Fund to entrust to the 1992 Fund the mandate (and power) to take all the measures needed "to complete the winding up of the [1971] Fund" in accordance with article 44, paragraph 2, of the 1971 Convention. The 1992 Fund will, in effect, be the "liquidator" of the 1971 Fund. In that capacity the 1992 Assembly will have the duty and power to manage the assets and deal with the liabilities of the 1971 Fund and, at the appropriate time, to effect the dissolution of the 1971 Fund as a legal person. In discharging such a mandate the organs of the 1992 Fund, and the Director of the Fund, will need the advice and assistance of a person or persons with expertise in the technical, legal and financial aspects of winding up operations. But responsibility for any decisions taken will rest with the relevant organs of the 1992 Fund.

Signed: 

Thomas A. Mensah
20 August 1999

ANNEX 1

AMENDMENT TO ARTICLE 42 OF THE 1971 FUND CONVENTION

THE CONTRACTING STATES to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (hereinafter the "1971 Fund Convention"),

RECALLING article 43, paragraph 1, of the 1971 Fund Convention which provides that the Convention shall cease to be in force on the date when the number of Contracting States falls below three,

RECALLING ALSO article 42 of the 1971 Fund Convention which provides for measures to be taken in the event of a denunciation the result of which will significantly increase the level of contributions for remaining Contracting States,

NOTING that denunciations of the 1971 Fund Convention [will soon] [are likely to] result in significant increase in the level of contributions from remaining Contracting States,

MINDFUL of the need to ensure at all times that the 1971 International Oil Pollution Compensation Fund (1971 IOPC Fund) is able to meet in full its obligations to pay compensation to victims of pollution damage arising from incidents covered by the 1971 Fund Convention,

CONCERNED that further reductions in the contribution base of the 1971 IOPC Fund could seriously impair the ability of the Fund to discharge its obligations,

RECOGNIZING that failure of the 1971 IOPC Fund to meet its obligations could adversely affect the credibility of the international regime for liability and compensation for oil pollution damage,

DESIRING to facilitate the orderly termination of the 1971 Fund Convention without undue complications for Contracting States or for victims of marine pollution damage,

RE-AFFIRMING the provisions of article 43, paragraph 2, and article 44 of the 1971 Fund Convention regarding the obligation of Contracting States and the 1971 IOPC Fund with respect to incidents occurring before the 1971 Fund Convention ceases to be in force,

HAVE AGREED AS FOLLOWS

Article 1

Article 42, paragraph 1, of the Convention is replaced by the following text:

1. This Convention shall cease to be in force on the date when the number of Contracting States falls below (x).

Article 2

1. This amendment shall be subject to acceptance by Contracting States in accordance with article 3.

2. The text of the amendment shall be communicated by the Secretary General of the Organization (the depositary) to all Contracting States.

Article 3

1. This amendment shall be deemed to have been accepted (6 months) from the date of its adoption unless, prior to that date, objections to acceptance have been communicated to the Secretary General by not less than [8] [one-third of the] Contracting States.

2. Any Contracting State may indicate its acceptance of this amendment by depositing the appropriate instrument with the Secretary General (the depositary) at any time prior to the expiry of the [six months] period specified in paragraph 1.

3. An objection to acceptance under paragraph 1 may be withdrawn at any time prior to the date of deemed acceptance in accordance with paragraph 1.

Article 4

1. This amendment shall enter into force [6] months after the date on which it is deemed to have been accepted in accordance with paragraph 1 of article 3.

2. Upon entry into force this amendment shall apply to all Contracting States with the exception of those Contracting States which, at least [six] months before the date of entry into force, have declared that they do not wish to be bound by the amendment.

3. A declaration made under paragraph 1 of this article may be withdrawn at any time prior to the date of entry into force of this amendment.

4. A Contracting State which has made a declaration under paragraph 2 and which does not withdraw the declaration prior to the date of entry into force of this amendment shall be deemed to have denounced the Convention. Such denunciation shall take effect on the date of entry into force of this amendment.

[5. A State which becomes a Contracting State before the expiry of the [6] month period for acceptance provided for under paragraph 1 of article 3 shall be bound by the amendment when it enters into force.]

Article 5

A declaration or communication referred to in articles 3 and 4 shall be notified in writing to the Secretary General who shall bring each such notification and the date of its receipt to the notice of the Contracting States and the Director of the [1971 Fund] [1992 Fund].

ANNEX 2

Some treaties and other international agreements which use the "simplified" amendment procedure

1. International Convention for the Safety of Life at Sea, 1974: article VII

2. International Convention for the Prevention of Marine Pollution, 1773 (MARPOL 73): article 16

3. Protocol of 1978 relating to the International Convention for the Prevention of Marine Pollution, 1973 (MARPOL 78): article VI adopts the procedure in article 16 of MARPOL '73)

4. Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 (1992 CLC): article 15

5. Protocol of 1992 to Amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (1992 Fund Convention): article 33

6. International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (1996 HNS): article 48

7. 1994 Agreement on the Implementation of Part XI of the 1982 United Nations Convention on the Law of the Sea: article 5

CURRICULUM VITAE (SUMMARY)

Thomas A. Mensah

Present Position:

President, International Tribunal for the Law of the Sea, Hamburg, Germany
Also: Chairman, F4 Panel (Environmental Claims) UN Compensation Commission, Geneva

Previous position:

High Commissioner (Ambassador) of Ghana to South Africa

Education:

1. University of Ghana: B.A. (First Class), June 1956
2. University of London: LL.B (Honours), June 1959
3. Yale University Law School: LL.M (1961); J.S.D (1964)

Other position held:

1. Lecturer in Law, University of Ghana: 1963 to 1968 (Dean of Faculty, 1966-68)
2. Associate Legal Officer, International Atomic Energy Agency, Vienna: 1965 to 1966
3. International Maritime Organization (IMO), London: 1968 to 1990
   Director Legal Division : 1968 to 1976
   Assistant Secretary General: 1976 to 1990
4. Special Advisor on Environmental Law and Institutions, United Nations Environment Programme (UNEP), Nairobi: 1991 to 1992
5. Visiting Professor, World Maritime University, Malmo, Sweden: 1981 to 1990.
6. CLEVERINGA Professor of Law, Leiden University, Netherlands: 1993 to 1994
7. Professor & Director, Law of the Sea Institute, University of Hawaii: 1993 to 1995.

Professional Associations:

1. Associate Member, INSTITUT DE DROIT INTERNATIONAL
2. Titular Member, Comité Maritime International (CMI)
3. Member, American Society of International Law
3. Member, British Maritime Law Association
4. Member, Standing Committee, International Maritime Arbitration Organization, Paris
5. Member, Commission on Environmental Law, IUCN, Bonn, Germany

Publications

Articles and papers on public international law, law of the sea, maritime and shipping law, international environmental law and the settlement of international disputes.