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WINDING UP OF THE 1971 FUND

OPINION OF SIR ARTHUR WATTS KCMG QC

Note by the Director

Summary:	An opinion by Sir Arthur Watts KCMG QC 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 Sir Arthur Watts KCMG QC 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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20 Essex Street

ADVICE

by

Sir Arthur Watts KCMG QC

WINDING UP OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1971

Introduction

1. My Advice is sought on the procedures available under international law for the winding up of the International Oil Pollution Compensation Fund 1971 ("the 1971 Fund").

2. The 1971 Fund was set up by the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 ("the 1971 Convention"). That Convention established the 1971 Fund as an international organisation, with its own legal personality, organs and institutions.

3. The 1971 Convention operates together with, although legally separate from, the International Convention on Civil Liability for Oil Pollution Damage 1969 ("the 1969 Convention"). This Convention governs the liability of shipowners for oil pollution damage, the shipowner's liability being limited to an amount which is linked to the tonnage of his ship. While the primary liability thus rests with the shipowner, there are circumstances in which the compensation paid by the shipowner (or his insurer) under the 1969 Convention does not fully compensate the victim of oil pollution damage. The 1971 Fund was set up in order that in such circumstances the victims may receive additional compensation. To this end the 1971 Fund is financed by a levy on receipts of crude and heavy fuel oil (known as 'contributing oil') after sea transport in ports and terminal installations in Contracting States: this levy is payable by

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entities (either public or private) in Contracting States to the 1971 Convention which receive more than 150,000 tonnes of such oil per year ('contributing entities').

4. The 1969 and 1971 Conventions were amended in 1992: these amendments have resulted in the establishment of a new Fund - the '1992 Fund' - with functions equivalent to those of the 1971 Fund. Many States have accordingly denounced, or are in the process of denouncing, the 1969 and 1971 Conventions, becoming parties instead to the newer 1992 regime. The result of these denunciations is that the number of Contracting States to the 1971 Convention in which contributing oil is received has decreased; moreover, since several of the denouncing States accounted for the receipt of large amounts of oil, the proportionate decrease in receipts of contributing oil - and thus of levies payable to the 1971 Fund - has been much greater. I am instructed that from a maximum of about 1,200 million tonnes of contributing oil on which the levies are based it is likely that by the end of the year 2000 the amount could have declined to as little as 35 million tonnes. Since the levies on contributing entities are in large part calculated by dividing payments to be made by the Fund by the total amount of contributing oil received in Contracting States, the effect of a reduction in the contribution base is that for any given oil spill in any of the States which remain parties to the 1971 regime, the levies payable by contributing entities in those remaining States will be considerably increased, and if the spill is major the financial burden on those entities will be very considerable and there is an increased risk that the remaining contributing entities will be unable to fund potential claims arising from incidents. Furthermore, if there are inadequate contributions to the 1971 Fund, the Fund will be unable to meet the requirements of the 1971 Convention that it should pay compensation to victims. It is for these reasons that it has become a matter of urgency that the 1971 Convention be terminated and the 1971 Fund wound up.

5. A significant feature of the present situation is that none of the remaining Contracting States to the 1971 Convention appears to be positively opposed to the termination of that Convention and the winding up of the 1971 Fund. There is thus no putative opponent to whatever scheme may be adopted to allow for the Fund's winding up. It appears to be more a matter of inertia on the part of many of the remaining Contracting States, than of opposition.

6. As a matter of international law, the question of bringing the 1971 regime to an end is governed by the 1971 Convention and customary international law. Many of the relevant rules of customary international law are now set out in the Vienna Convention on the Law of Treaties 1969. However, since the 1971 Convention was concluded in 1971 and entered into force in 1978, and the Vienna Convention did not enter into force until 27 January 1980, the provisions of the Vienna Convention do not as such apply to the 1971 Convention (Article 4 of the Vienna Convention): however, many of those provisions embody rules of customary international law and may therefore be taken as a convenient expression of the applicable customary rules.

Existing provisions of the 1971 Convention

7. It is necessary to bear in mind the distinction between the 1971 Convention, and the organization - the 1971 Fund - established by that Convention. Formally it is probably necessary in present circumstances to bring about the termination of the Convention, which will result in the dissolution of the Fund based on that Convention and will call for the Fund to be wound up through some process of liquidation.

8. The 1971 Convention contains certain provisions which are relevant to the winding up of the 1971 Fund, but none of them provides a complete solution to the immediate problem.

(a) Most directly in point are Articles 43 and 44, which provide for the Fund to cease to be in force when the number of

Contracting States falls below three (Article 43), and for the Fund then to be wound up, a leading role in the process being given to the Assembly (Article 44). But I am instructed that it is extremely unlikely that within the foreseeable future the number of Contracting States will fall below three and so bring Articles 43 and 44 into operation.

(b) Articles 41 and 42 are indirectly relevant, since they provide for the denunciation of the 1971 Convention by individual Contracting Parties. Enough such denunciations would bring the number of remaining Contracting Parties below three, and so bring Articles 43 and 44 into operation. But, so I am instructed, this is unlikely to happen within the foreseeable future.

Denunciation of the Convention

9. Within the framework of the 1971 Convention as it presently stands (and subject to what is said below about possible action by the organs of the 1971 Fund) the only available procedure for securing the winding up of the 1971 Fund is by accelerating the rate of denunciations of the 1971 Convention so as to lead to the reduction in the number of Contracting Parties below three. This involves persuading the remaining Contracting Parties to denounce the Convention, either under Article 41 (which requires a year to pass before denunciations become effective) or under Article 42 (which provides a more accelerated procedure for denunciations to become effective). So far, many Contracting Parties have resisted appeals already made to denounce the 1971 Convention. They cannot be forced to do so, although the level of political and diplomatic persuasion might be intensified.

10. However, even if further political and diplomatic pressure were to be applied in an attempt to secure sufficient early denunciations to bring Articles 43 and 44 into operation, it seems likely that sufficient denunciations would still not occur soon enough to avoid the problems which are foreseen.

11. It may, all the same, be relevant to note that if the remaining Contracting States allow the 1971 Convention to remain in force in circumstances of financial inadequacy they might be incurring certain legal liabilities. There are, in essence, two lines along which those liabilities might be argued to arise: first, on the ground that those States have allowed a situation to arise in which the financing of the Fund which they set up has become inequitable, and second, on the ground that they have allowed a situation to arise in which, as a result of the higher contributions called for from the remaining contributing entities and the consequential inability of some or all of them to pay their assessed contributions, the financial arrangements for the Fund are at risk of collapsing. There are a number of ways in which such arguments might be put, each very much depending on the particular facts as they might arise. For example:

(a) Although the financial structure established by the 1971 Convention is essentially based on the contributing entities, rather than the Contracting States themselves, being under an obligation to provide the necessary funds to finance the Fund's activities, those States have undertaken a specific obligation under the Convention to "ensure that any obligation to contribute to the Fund arising under this Convention in respect of oil received within the territory of that State is fulfilled and [to] take any appropriate measures under its law .... with a view to the effective execution of any such obligation" (Article 13.2). In the circumstances now being contemplated it cannot be excluded that a substantial increase in the financial burden on contributing entities may result in their inability to meet their obligations to pay the Fund's levies, which in turn would give rise to legal consequences for the Contracting State concerned under Article 13.2.

(b) At a more general level, the parties to the 1971 Convention established a régime under which compensation would be paid to victims, and they established the 1971 Fund as the vehicle for making those payments. Apart from their express

obligation under Article 13, they can be argued to have assumed an implicit obligation, based on the obligation to fulfil their treaty obligations in good faith, to ensure that the Fund they established would be adequately and equitably financed to enable it to meet the obligations which the Convention imposed upon it. Contracting States could incur liability for allowing a situation to arise in which **either** the financial arrangements for the Fund continue to apply but only at the cost of inequitably high contributions from the contributing entities in the remaining Contracting States, **or** the financial arrangements collapse because those entities cannot meet the high levels of contribution required from them.

(c) The 1971 Fund also has certain rights as against its member States. It has an obligation under the 1971 Convention to pay compensation in certain circumstances; it relies on financing by way of payment of levies by contributing entities in Contracting States; if the Fund has obligations which it must fulfil under the Convention, and the financial arrangements made under the Convention are inadequate to enable it to fulfil those obligations, the Fund may be entitled to hold the remaining Contracting States liable for continuing the Fund in being while at the same time failing to provide it with the resources with which to meet its obligations under the Convention.

12. No doubt particular circumstances could suggest other lines of argument leading to a similar result; and equally, each of the foregoing possible lines of argument is open to counter-arguments denying any liability on the part of the remaining Contracting States. Moreover, any arguments which might apply to a hypothetical future situation can, inevitably, only be put forward hesitantly: everything would depend on the particular circumstances as they might arise at the time. At present all that can be said is that, since the sums of money involved in an oil pollution claim can be large, anyone affected is likely to be tempted to consider all possible ways of recovering redress for their losses, including recourse against those States, still

members of the 1971 Fund, who are responsible for continuing the Fund in existence while knowing that the financial base for the payment of compensation under it is in jeopardy.

An amending Conference

13. In these circumstances the orthodox course from an international legal point of view would be to amend the 1971 Convention in order to insert into it a new provision which would allow for the 1971 Fund to be wound up in circumstances other than those already covered by Article 43.

14. Article 45 of the 1971 Convention allows the IMO to convene a Conference "for the purpose of revising or amending [the 1971] Convention". The IMO "may" convene such a Conference at any time under Article 45.1; it "shall" do so (under Article 45.2) if not less than one-third of all Contracting States so request: with 52 present Contracting States, this therefore requires a request supported by at least 18 Contracting States.

15. Unless 18 or more of the Contracting States make such a request for the mandatory convening of a Conference, it will be necessary to persuade the IMO to exercise the discretion which it is given by Article 45.1. In practice this presumably means that an appropriate organ of the 1971 Fund will have to convey a suitable request to the IMO to convene a Conference. The decision whether to ask the IMO to do this, and the IMO's subsequent decision whether or not to do so, are decisions of policy alone: there are no legal conditions to be met (other than that the purpose of the Conference must be to revise or amend the 1971 Convention), and in particular there is no need to establish a legal justification of the kind mentioned in paragraphs 32-34 below for the convening of the Conference.

16. The Conference would be a Conference of the Contracting States: although this is only stipulated expressly in relation to a Conference convened under the mandatory provision of Article 45.2, it would seem (both by implication from Article 45.2, and

as a matter of principle) also to apply to a Conference convened under the discretionary provision of Article 45.1. The "Contracting States" participating in the Conferences would be those States which are parties to the 1971 Convention at the time the Conference is held: other States might be able to attend in a more limited capacity, but without right to vote on the amendments which are the subject of the Conference.

17. Although the Conference would be a Conference 'of the Contracting States', it is not necessary that all Contracting States attend the Conference. They all have the right to attend, and must be given the opportunity to do so (in particular, by being given due notice that the Conference is being held): but it is for them to decide whether to do so or not. Nothing is said in Article 45 as to the necessary quorum at such a Conference, and it would therefore seem that as a matter of law no particular quorum is required. Politically, however, the number attending the Conference ought to be sufficient for the results of the Conference to be worthy of international respect. Moreover, if there are too many absentee States, the problems associated with gaining unanimous approval for the amendments adopted at the Conference are likely to be increased (see below, paragraph 21).

18. The Conference need not be a lengthy affair. With adequate preparation, a single day, or even half a day, could suffice, if the Contracting States were willing to act that speedily.

19. The Contracting States attending the Conference have (legally) a free hand in deciding what amendment to the 1971 Convention in appropriate. It is a matter of policy for them to decide upon new provisions which in their view are appropriate to the requirements of the present situation, i.e. which will allow the winding up of the 1971 Fund as soon as possible. Similarly the kind of treaty instrument in which the amendments would be embodied is a matter for the parties to decide. For

convenience I will assume that the instrument will be a Protocol of Amendment. Since the Conference will be convened by the IMO, I assume that the IMO Secretariat will, as I understand is usual, prepare a set of draft Rules of Procedure (following a standard text) which will govern the conduct of the Conference, and in particular the number of affirmative votes needed for the adoption of such a Protocol of Amendment.

20. Given the urgency of the situation, the speed with which the Protocol of Amendment would become legally effective would be of great importance. There are a number of options: the choice between them is essentially one of policy to be made by the Contracting States meeting in the Conference.

(a) The Protocol could be subject to ratification. This would mirror the procedure for the entry into force of the 1971 Convention itself. It would, however, be likely to involve delay before the Protocol would enter into force; moreover, it could raise problems in relation to the effect of the Protocol for those States which signed the Protocol at the Conference but did not ratify it or those which did not attend the Conference (as to which see paragraph 21 below).

(b) The Protocol could enter into force on signature. This would involve immediate effectiveness. It too, however, would raise problems in relation to those Contracting States which attended the Conference but did not sign the Protocol or which did not attand the Conference (again, see paragraph 21 below).

(c) As a variant on (b), but subject to the same comments, the Protocol could provide that it would enter into force a stated number of days/weeks/months after its signature at the Conference.

(d) The Protocol could enter into force in one of the ways mentioned, but along with a provision for its provisional application with immediate effect pending its entry into force.

This procedure is accepted in State practice and as a matter of customary international law, and is recognised by Article 25 of the Vienna Convention on the Law of Treaties 1969. It would, however, be subject to the same problem of non-participation in the Conference or non-approval of the resulting Protocol of Amendment as the previous options (see below, paragraph 21). There might, moreover, be a possibility of criticism if the provisional application course were to be adopted in that it is essentially an interim procedure pending the eventual entry into force of a treaty, and there would be the distinct possibility, even probability, in the present circumstances that the Protocol would never enter into force definitively, and would indeed have been intended at the outset never to do so, since by the time when it might otherwise enter into force the winding up of the 1971 Fund under the 'provisionally applied' Protocol would have been completed.

21. One practical problem concerns the limited number of Contracting States which might participate in a Conference, or which, if they do participate, might refrain from signing a Protocol of Amendment, or from ratifying it if they do sign it. To be sure that those States, by their inactivity, do not frustrate the achievement of the Conference's purposes, it will be necessary to adopt a procedure which will serve to commit all Contracting States to the Conference's outcome - i.e. to the Protocol. It would be best if that commitment were to take the form of all the States which were Contracting States at the time the Protocol of Amendment was adopted becoming parties to the Protocol: the terms of Article 40.4 of the Vienna Convention on the Law of Treaties need to be borne in mind, namely that "The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement".

22. A procedure which could serve the purpose in mind would be one involving reliance on the tacit or implied consent of those Contracting States which do not expressly signify their consent to the Protocol of Amendment but which remain silent and

inactive in that regard. While such a provision could be drafted in various ways, one way of doing so would be for the entry into force provision of the Protocol to provide that (a) the Protocol is signed on the day of the Conference (or the final day if its lasts more than one day), (b) it will enter into force for all Contracting States [3] months after the date of signature, (c) copies of the Protocol will be sent to all Contracting States (presumably by the IMO, as depositary), and (d) Contracting States which have not expressed their consent to the Protocol by signing it at the Conference will be able to give their consent to the entry into force of the Protocol for them by express notification in writing to the depositary within the [3]-month period, failing which they will be assumed to have given their consent to the Protocol entering into force for them in the absence of any objection within that same period.

23. Such a procedure of tacit approval of the Protocol of Amendment to the 1971 Convention is not without its risks.

(a) First, one or more Contracting States might express its dissent from the Protocol;

(b) Second, there are problems of legal principle about seeking to impose upon States an 'implied consent' procedure, involving them becoming parties to a new treaty (i.e. the Protocol of Amendment) without their consent in some form or other. If, of course, no State objects and all either expressly consent or at least so conduct themselves that they can be regarded as having tacitly consented, then there is no practical problem. But if one or more States does object, the problem lies in the difficulty of finding a legal basis for imposing upon an objecting State the provisions of the new Protocol. In principle, <u>all</u> parties to a multilateral treaty (e.g. the 1971 Convention) have to agree to any amendment to the treaty. Although the amending treaty can provide that it will enter into force for <u>all</u> parties to the original treaty when, say, two-thirds of them have become parties to the amending treaty, and

that silence on the part of the remainder will be deemed to constitute consent, that provision itself needs the consent of all parties before it can be legally effective to result in silence constituting consent. Of course, States can - and often do - agree in a treaty that it may be amended by way of some procedure which does not involve their express consent, but then they will in the original treaty have expressly given their consent to that procedure: this is the position as regards the amendment procedure for compensation limits agreed in Article 33 of the Convention as amended by the 1992 Protocol. In relation to the 1971 Convention there is no such prior consent to a special procedure, and any party to the 1971 Convention would be entitled to object to any attempt to force a 'tacit consent' procedure upon it against its express objection to such a procedure.

24. Both risks identified in the preceding paragraph may as a practical matter be minimal since I understand that, as noted in paragraph 5 above, the failure of Contracting States so far to denounce the 1971 Convention is more a matter of inertia than of positive attachment to its continued existence or positive opposition to its termination.

25. Despite this slight shadow of risk, proceeding by way of amendment to the 1971 Convention in the manner outlined above would be a relatively straightforward and probably effective way of establishing a proper framework for terminating the 1971 Convention and winding up the 1971 Fund. It is, however, a matter for decision by the Contracting States as a matter of policy whether they are willing to adopt one or other of the courses mentioned. In case they are unwilling to do so, other alternatives should be mentioned. It should be noted, however, that none of them is clearly legally sounder than the treaty amendment procedure, and some are either clearly less satisfactory or have to be excluded.

Liquidation of the 1971 Fund under English (or any other national) law.

26. The Fund has legal personality (1971 Convention, Article 2.2); the Fund's Headquarters are in London; the Fund's legal personality has been given effect in English law (The International Oil Pollution Compensation Fund (Immunities and Privileges) Order 1979, Article 5. Despite these considerations it would not be appropriate for an application to be made for the 1971 Fund to be wound up under English law.

27. This option has been excluded by recent decisions of the English Courts in relation to the International Tin Council, where just such a winding up order was sought, and refused (In re International Tin Council [1988] 3 WLR 1159 (Court of Appeal)). The reasoning underlying the Tin Council decisions not only excludes the jurisdiction of the English courts for winding up purposes, but also excludes the jurisdiction of any member State acting individually:

> "Any attempt by one of the member states to assume responsibility for the administration and winding up of the organisation would be inconsistent with the arrangements made by them as to the manner in which the enterprise is to be carried on and their relations with each other in that sphere regulated.... If [sovereign states] choose .. to carry on [their collective enterprise] through the medium of an international organisation, no one member state, by executive, legislative or judicial action, can assume the management of the enterprise and subject it to its own domestic law." (Millet J, [1987] Ch. 419, 452; cited with approval by the Court of Appeal, at p. 1165)

28. The consequence of the Tin Council decisions would thus appear to be that an international organisation set up by treaty must be regulated by appropriate international mechanisms. These mechanisms do not exist on a permanent basis: they would have to be established ad hoc. It would be essential, in those circumstances, that the 1971 Fund should do all it can to ensure that in establishing an ad hoc mechanism it does so on a sound legal basis, both as to the circumstances justifying the winding up, the procedures whereby the decision to wind up the 1971 Fund

is taken, and the nature of the winding up mechanism to be established.

29. In this last context it should be understood that the winding up of the 1971 Fund would not necessarily involve the appointment of a 'liquidator' in the sense of someone appointed by a court to take over the management of the enterprise under liquidation and conduct its winding up in accordance with relevant provisions of English law, and subject to supervision by the courts. In the context of the 1971 Fund there is no question of anyone being appointed by an external authority (such as a court) to realise the Fund's assets, satisfy its liabilities, and take over its management until such time as it can be finally wound up. What is needed is for the Fund itself (probably in exercise of powers vested, or to be vested, in the Assembly) to appoint some suitable person to perform such functions and have such powers as the Fund considers appropriate in the circumstances involving its winding up. This Fund-appointed person could be a member of the Fund Secretariat or some other person; his/her functions and powers probably need to reflect many of those which would be customary for a court-appointed liquidator, in which respect it would be advisable to take expert liquidation advice from within the UK (as the seat of the Fund's headquarters).

Assembly Resolution

30. An alternative procedure to that whereby the 1971 Convention would be amended in the manner discussed above would be for the 1971 Fund Assembly to adopt a Resolution to equivalent effect.

31. The Assembly is the plenary organ of the 1971 Fund. The situation which has now arisen can be strongly argued to constitute circumstances which in international law justify bringing the 1971 Convention, and the 1971 Fund, to an end (see following paragraphs). The Assembly, particularly as the plenary organ of the 1971 Fund, can equally strongly be argued to be the

body empowered to take the necessary action (see paragraph 37 ff. below).

32. As a matter of customary international law it is accepted that a treaty may be brought to an end as a result of circumstances arising after its conclusion which result in the impossibility of further performing it 'supervening impossibility of performance'), or as a result of unforeseen fundamental changes in the essential basis for the parties' agreement to the treaty ('fundamental change of circumstances'). These two customary grounds for terminating a treaty are reflected in the provisions of Articles 61 and 62 of the Vienna Convention on the Law of Treaties 1969 which, so far as directly relevant, read as follows:

(a) Article 61.1:

"A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty....."

(b) Article 62.1:

"A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."

33. Neither of these legal grounds for terminating a treaty operates automatically, either under the Vienna Convention or as a matter of customary international law. They have to be invoked by an interested party (usually a party to the treaty). And when invoked, they do not result in the immediate termination of, or withdrawal from, the treaty: the Vienna Convention prescribes

certain procedures to be followed (Articles 65, 67 and 70), and as matter of customary international law the relevant procedural requirement is probably that at least reasonable notice must be given of the perceived defect in the treaty before a State is justified in acting upon it.

34. Although relevant, Article 61.1 (impossibility of performance) is probably not of direct help. It is not straightforward to argue that the existence of sufficient contributors in Contracting States to provide funds for paying compensation was "an object indispensable for the execution of the treaty", nor is it clear that even if it were such an 'indispensable object' it has already permanently disappeared or been destroyed. Article 62.1 is more directly relevant. The change in circumstances (i.e. the disappearance of an adequate financial base for the operation of the 1971 Convention) is clearly fundamental; it does not seem to have been foreseen (although the possibility that denunciations might lead to significant increases in the level of contributions for remaining Contracting States was foreseen in Article 42); the original circumstances (i.e. the existence of an adequate financial base) was an essential basis for the parties' original consent to the Convention; and the change which has occurred will radically transform the extent of the obligations to be performed under the Convention.

35. Given that legal grounds exist for bringing the 1971 Treaty to an end, notably in the form of there having been a fundamental change of circumstances, it is necessary to establish who may invoke them. In the normal situation, the right to invoke e.g. a fundamental change of circumstances is one which is vested in a party to the treaty: it enables that party to put an end to a bilateral treaty, or to denounce or withdraw from a multilateral treaty - while still leaving the multilateral treaty intact as between the remaining Contracting States (Vienna Convention, Article 70.2).

36. Obviously, therefore, any Contracting State may invoke the fundamental change of circumstances as a ground for denouncing or withdrawing from the 1971 Convention. But they have no need to rely on the general rule of international law, since Article 42 of the 1971 Convention allows them to denounce it anyway. In any event, the reasons (of inertia) which have led to insufficient numbers of ordinary denunciations will presumably equally prevent any Contracting States acting to the like effect on the basis of general rules of international law.

37. The situation facing the 1971 Fund is, however, different. It is necessary to adopt a procedure which will not be limited to the individual Fund members which wish to make use of it but which will operate for the whole remaining membership of the Fund. The most appropriate body for this purpose is the Assembly. It is the plenary organ of the 1971 Fund, and in the one context in which the 1971 Convention makes provision for the winding up of the Fund it is the Assembly which is given the lead role (Article 44.2). Moreover, in addition to the general powers granted to the Assembly under paragraphs 11, 13 and 14 of Article 18 of the 1971 Convention, the Assembly has already (in paragraph 2(e) of Resolution No. 13 of 16 May 1998) included under a general reference to "the following functions of the Assembly" the power "to take all appropriate measures to complete the winding up of the 1971 Fund, including the distribution in an equitable manner of any remaining assets among those persons who have contributed to the 1971 Fund", thereby asserting in general that the winding up of the Fund comes within its powers and functions.

38. In practice, however, the Assembly seems unlikely to be able to attract a quorum. With this possibility in mind, the Assembly adopted Resolution No. 13 on 16 May 1998 by which, in effect, it transferred the exercise of certain functions to the Executive Committee and also provided that, if the Executive Committee should itself fail to attract a quorum, relevant powers should be exercised by an Administrative Council specially

established for the purpose. For present purposes the immediately relevant powers conferred upon the Administrative Council by the Assembly under Resolution No. 13 are -

> a. "to perform such functions as are allocated to the Assembly under the 1971 Fund Convention or which are otherwise necessary for the proper operation of the 1971 Fund": para 4(a)
>
> b. "to give instructions to the Director concerning the administration of the 1971 Fund": para 4(c)
>
> c. "to supervise the proper execution of the convention and of its own decisions": para 4(d)
>
> d. "to take all appropriate measures to complete the winding up of the 1971 Fund, including the distribution in an equitable manner of any remaining assets among those persons who have contributed to the 1971 Fund, at the earliest possible opportunity": para 4(e).

39. Although the Assembly has thus asserted that its existing powers under the 1971 Convention include the power to take all appropriate measures to complete the winding up of the 1971 Fund, there is, strictly speaking, room to question whether that was so, given that the language of the Resolution involved the extension of the terms of Article 44.2 to a situation to which that Article arguably did not apply (although it has to be noted that Article 44.2 does not say in terms that it only applies to the situation in which the Convention ceases to be in force pursuant to Article 43). Nevertheless, it appears to be the case that no Contracting State has formally objected to Resolution No. 13, and all may therefore be argued to have acquiesced in its terms. To the extent that there may be a question about the Assembly's possession of this power, there would similarly be a question whether the Assembly could properly transfer such a power to the Administrative Council.

40. In the exercise of powers vested in the Assembly a Resolution could be adopted (either by the Assembly or by the Administrative Council) by virtue of which the Resolution would either -

(a) proclaim the termination of the 1971 Convention with effect from a date to be specified, and authorise measures to be taken immediately thereafter to achieve the consequential winding up of the 1971 Fund as soon as possible; the Resolution would go on to make provision for the necessary administrative arrangements in this connexion; or

(b) establish procedures whereby the Convention could be terminated and the Fund wound up following the taking of a further decision at some future date.

In either case the Resolution would go on to provide for its terms to be communicated to the Depositary (i.e. IMO), for circulation to all Contracting States, so formally putting them on notice of the proposed termination of the 1971 Convention and winding up of the 1971 Fund.

41. The legal justification for such action would primarily lie in the powers given to the Assembly by the instruments referred to. The 'fundamental change of circumstances' rule would be a secondary, and supporting, legal justification for the adoption of the Resolution, and it would no doubt also play its part in the political reasoning which would lead to that outcome.

42. International organisations have their unique characteristics, and it is sometimes difficult to establish precise precedents for action which is contemplated. However, from a legal point of view there are distinct similarities between the kind of Assembly Resolution now being discussed, and the resolution adopted on 16 April 1946 by the Assembly of the League of Nations which dissolved the League: there was no provision in the Covenant of the League for its dissolution, the circumstances had however fundamentally changed, and the Assembly - the plenary organ of the League - unanimously (but not all member States were represented at the meeting) adopted a Resolution dissolving the League and making appropriate arragements regarding its assets and functions, many of which

were transferred to the newly-established United Nations (for details see McKinnon Wood, "The Dissolution of the League of Nations", British YB of Int. Law, 1946, pp. 317-323; Meyers, "Liquidation of League of Nations Functions", American Jo. of Int. Law, vol. 42(1948), pp. 320-354; UNYB, 1947-1947, pp. 110-113). Schermers and Blokker, International Institutional Law (3rd revised ed., 1995), at pp. 1025-1026, list 6 other international organizations dissolved, in the absence of specific constitutional provision for dissolution, by action of their plenary organs, in several cases involving decisions in which not all member States participated.

43. Although in my opinion the adoption by the 1971 Fund's Assembly (or by the Administrative Council in exercise of powers conferred by the Assembly) would be a legally effective way of proceeding, it has to be said that it is not free from the risk of legal challenge. The principal legal virtue of proceeding by way of an Assembly Resolution would be that the Assembly's powers to adopt such a Resolution could be seen to have been agreed by all the Contracting Parties when becoming parties to the 1971 Convention, and on the same basis they all agreed to the Assembly taking decisions by majority vote (Article 32) and therefore without the express consent (or even against the express objection) of a minority of Contracting Parties. The risks of legal challenge, although small, reside principally in the possibility that the Assembly's general power under Article 18.14 of the 1971 Convention to "perform such other functions as are ... necessary for the proper operation of the Fund" could be argued to be limited to the continuing functioning ("operation") of the Fund and not to its termination; similarly with its power to give instructions "concerning the administration of the Fund" (Article 18.11), and to supervise "the proper execution of the Convention" (Article 18.13); reliance on paragraph 4(e) of the Assembly's Resolution No. 13 of 16 May 1998 invites questions as to the legal soundness of that paragraph of that Resolution (above, paragraph 39); and the fact that the Assembly's functions would almost certainly in practice fall to be exercised by the

Administrative Council established by that Resolution could similarly invite questions as to the legitimacy of that Council's establishment and activities (although insofar as the Assembly has given the Council powers which were clearly vested in the Assembly, the entitlement of the Council to exercise those powers seems properly established).

44. It has to be repeated, however, that the present situation is somewhat abnormal in that there appears to be no real opposition to a proposal to adopt appropriate procedures for the winding up of the 1971 Fund. In that sense, therefore, although possible grounds on which the legality of what might be proposed can be discerned, there seems to be an air of some unreality in any assumption that a challenge would be likely. The inertia which is serving to deter States from denouncing the 1971 Convention would seem likely also to deter them from challenging any reasonable action taken to secure the termination of that Convention and the winding up of the 1971 Fund. To that extent it may be that the principal task of the 1971 Fund's organs, and in particular its Secretariat, is to satisfy themselves and the Contracting States that, despite the likely lack of challenge to whatever they may do, the course of action on which they embark can be defended as a matter of law.

45. Since the Courts of the State in which the 1971 Fund has its Headquarters do not have jurisdiction to arrange the winding up of the Fund (above, paragraphs 26-28), and since there is no international procedure available with equivalent powers to arrange the winding up of the Fund, the 1971 Fund can only secure by indirect means the necessary legal reassurance as to the propriety of whatever procedures which it may wish to adopt. A question to be posed at the outset is to what extent the 1971 Fund <u>needs</u> this kind of external legal reassurance, or whether (given the absence of any apparent opposition to the termination of the 1971 Convention and the winding up of the 1971 Fund) the Fund's own internal consideration of the legal issues could be sufficient. The following paragraphs indicate some principal

forms which such external legal reassurance might take, if it is decided that such reassurance is needed.

Litigation before the International Court of Justice (ICJ)

46. One such form of reassurance could come from a decision by the ICJ, upholding the lawfulness of whatever arrangements are made for the winding up of the 1971 Fund. However, only States may be parties to contentious litigation before the ICJ (Statute, Article 34.1). The 1971 Fund could not therefore itself be a party to such a case before the ICJ.

47. Rather, it would be necessary to 'arrange' for 2 or more Contracting States to have a dispute about the future of the Fund, and for them to agree to refer that dispute to the ICJ. From a technical, legal point of view it would be possible to organize such a dispute and have the States concerned refer it to the Court. But for several reasons this is not an attractive option:

- politically, it may be difficult to find 2 States willing to enter into such an arrangement;
- further, it would involve having one of those States arguing against the lawfulness of the winding up arrangements, and it may be undesirable to give currency to the 'unlawfulness' arguments in this way;
- tactically, it might be difficult for the Fund (not being a party) to keep control of how the proceedings developed;
- practically, the 2 litigating States might want to be reimbursed for their costs in conducting the litigation (since in effect the case would be being brought at the instance of the Fund);
- moreover, contentious litigation would be likely to be protracted (even though the parties might agree to an abbreviated procedure, the case would still have to take its place in the queue before the Court would deliberate on it and deliver Judgment),
- legally, the Court might not be sympathetic to litigation which was 'arranged' in that way;

- and in any event the decision would be binding only as beteeen the 2 States involved (Statute, Article 59): although for others (such as the Fund, or other States) the Judgment would have obvious persuasive effect, the formal legal effect of the Judgment would not be significantly greater (if greater at all) than that of an Advisory Opinion.

Recourse to the ICJ by the **Fund** for an Advisory Opinion.

48. An alternative to arranging a contentious case before the ICJ would be to seek from the ICJ an Advisory Opinion. The ICJ may only give Advisory Opinions at the request of bodies authorized by or in accordance with the UN Charter to make such a request (Statute, Article 65.1). Apart from the UN General Assembly and the Security Council, other organs of the UN and specialized agencies of the UN, if so authorized by the General Assembly, may also request Advisory Opinions "on legal questions arising within the scope of their activities" (Charter, Article 96.2). The Fund is not a specialized agency, and so is not able itself to request an Advisory Opinion.

Request to the ICJ by **IMO** for an Advisory Opinion.

49. The IMO is a specialized agency: it may therefore be authorized by the General Assembly to request Advisory Opinions on legal questions arising within the scope of its activities. The IMO has been duly authorized to seek Advisory Opinions: IMCO Convention 1948 (UNTS, 289, No. 4214), Art. 56 (now Art. 70), and UN-IMCO Agreement (UNTS, 324, No. 553), Art. IX.

50. The possible winding-up of the Fund, and the legal basis for, and modalities and consequences of, such a winding-up clearly raise legal questions. There is, however, a serious question whether the proper functioning of the 1971 Fund is a matter "within the scope of [IMO's] activities". This depends on the closeness of the links between the 1971 Fund and IMO.

51. Although the 1971 Fund and IMO are separate legal persons, both internationally and in English law, their links are

considerable. IMO's functions include maritime pollution control. The 1969 and 1971 Conventions were concluded at conferences initiated by IMO, i.e. the International Legal Conference on Marine Pollution Damage 1969 and the Conference on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971. Under both the 1969 and the 1971 Conventions the IMO has a role: as to the 1969 Convention see Article I.9 (definitions), Articles XIV-XV (instruments of ratification etc), Article XVI.2 (denunciation), Article XVII (territorial extension), Article XVIII (convening revision/amendment conference), and Articles XIX-XX (depositary functions), and as to the 1971 Convention see Article 1.1 (definitions), Article 14.2 (receipt of certain pre-entry into force declarations), Article 36 (convening first session of Assembly), Article 37 (instruments of ratification, etc.), Article 39 (pre-entry into force communications of certain information), Article 40 (entry into force), Articles 41.2 and 3 (denunciation), Article 45 (convening revision/amendment conference), Articles 46-47 (depositary functions), and Article 48 (translations). Moreover, I am informed that there is a co-operation agreement between the 1971 Fund and the IMO, the Fund and the IMO have mutual observer status, and the Fund has a right to put items on the agenda of the IMO Assembly. Taken together these links are probably sufficient for certain legal questions about the 1971 Fund, especially if they concern depositary and other similar functions performed by the IMO, to be regarded as "arising within the scope of [IMO's] activities". It would, of course, first be necessary to persuade the IMO that this was so, thereby giving rise to the possibility of IMO requesting an Advisory Opinion, and then to persuade the IMO to exercise its power to request an Advisory Opinion.

52. A request for an Advisory Opinion could relate to a future hypothetical situation ("If such-and-such were to happen, what would the legal consequences be?"), but it would probably be better tactically to present the ICJ with a specific situation which had already occurred, which the Court might be more ready

to endorse and reluctant to upset. If a Resolution of the kind referred to in paragraph 40 above were to be adopted by the 1971 Fund Assembly, including the transmission of the Resolution by IMO to all Contracting States, the basis for a request by IMO for an Advisory Opinion might then be established:

(a) IMO could, on receipt of the text of the Resolution, request an Advisory Opinion on a legal question relating to the legality of the Resolution and its effect on IMO's exercise of its depositary functions;

(b) alternatively - and preferably - IMO might circulate the Resolution as requested to all Contracting States, and if one or more of them objected, IMO might again be in a position to request an Advisory Opinion on the legal effect of the Resolution and its own powers as depositary, in view of the objection and the consequential uncertainty as to the legal effect of the Resolution and the status of the Fund. (If there is no objection within, say, 12 months, the Contracting States may be taken to have tacitly accepted the Resolution, and no legal question on which to seek an Advisory Opinion would have arisen.)

53. The legal question on which the Court's Opinion would be requested would need careful preparation: in effect, however, it could ask whether the Assembly's decision was lawful (or legally effective to achieve the winding up of the Fund) and, if not, what legal procedure should be followed to achieve that result. The IMO, in making its request, could indicate to the Court that it should consider the 1971 Fund to be an "international organization ... likely to be able to furnish information on the question" for purposes of Article 66.2 of the ICJ Statute (which would give the Fund an opportunity itself to furnish a written (or oral) statement relating to the question on which the Advisory Opinion has been sought). All States entitled to appear before the Court (which would appear to include all Contracting States) are notified of the request, and may submit written (or oral) statements (Statute, Article 66.2).

54. The Court can be asked to deal with a request for an Advisory Opinion as a matter of urgency (Rules of Court, Article 103). The procedure before the Court in cases involving Advisory Opinions is much abbreviated compared with normal contentious cases (and in particular does not have to include an oral phase: Rules, Article 105.2(b)): in the present kind of case, which appears to be essentially technical rather than highly political (compared for example with the recent requests for Advisory Opinions on the legality of nuclear weapons), the Court might be expected to deliver its Opinion within about 9 months.

55. Because of the procedure adopted for Advisory Opinions, the costs involved for the Fund would be relatively modest. There would be no costs for the services of the Judges of the ICJ, for the Court's registry and secretarial support, or for use of the Court's premises, since all these are met out of the UN budget. Any submissions, whether in writing or orally, by the Fund could be done by in-house personnel, but if external advice (e.g. legal, or financial) were needed the Fund would have to pay for it. Any Contracting States participating in the proceedings before the Court would be responsible for meeting their own costs.

56. The Advisory Opinion would not be legally binding in a formal sense, but it would clearly be very authoritative, and if the Court essentially supported the legality of the winding up decision taken by the Assembly the Opinion would be an effective legal basis for answering any future legal challenges to the decision.

Ad hoc arbitration tribunal

57. While normally arbitration, like the ICJ, is used for the settlement of disputes between 2 or more States, there is in principle no reason why an arbitral tribunal should not be established to serve whatever purpose those setting it up wish it to perform: those purposes could include the giving of an advisory opinion, or a binding decision.

58. Setting up such an arbitration would be within the powers of the Assembly (e.g. under Article 18.9 (establishment of a temporary subsidiary body) and Article 18.14 (such other functions as are necessary for the proper operation of the Fund); and equivalent powers are vested in the Administrative Council by virtue of paragraph 4(a) of Resolution No. 13). The Assembly would determine the task of the tribunal, including in particular the terms of the question on which the tribunal's decision or advice would be required.

59. The procedure before the tribunal could be fixed by the Assembly in such a way as to result in an expeditious resolution of the matter submitted to it: the Assembly could lay down tight time limits for written pleadings or observations and for delivery of the tribunal's award, and could forgo oral hearings altogether (thereby keeping the process speedy). The Assembly could determine who was entitled to submit written pleadings or observations: it might, for example, be both convenient and appropriate for the 1971 Fund Secretariat to have to submit a statement explaining the situation which has arisen (thus ensuring that there would be a basic statement of the issues before the tribunal), and for all remaining Contracting Parties to the 1971 Convention to be entitled to submit their own observations upon the issues put before the tribunal.

60. A tribunal composed of three people would be appropriate (five people would be an alternative). It would be important to attract people of high international legal standing to serve as members of the tribunal: for an arbitration which was procedurally compact, it should not be too difficult to find suitable people who would be willing to serve. The Assembly itself (perhaps through the Director) could identify and then appoint the members of the tribunal, or the task of doing so could be given (with their previously obtained consent) to e.g. the President of the ICJ, the President of the International Tribunal on the Law of the Sea, and the Secretary-General of IMO, each of whom could be asked to appoint one member.

61. Costs could be kept low: they would include (i) arbitrators' fees/expenses, (ii) secretarial/registry support, (iii) premises for meetings, (iv) any external advice which the Fund might wish to seek (in-house costs would be part of the general budget): any parties wishing to participate would be responsible for meeting their own costs

Three (five?) Wise Men/Women

62. A less formal mechanism for seeking external legal reassurance that whatever course the 1971 Fund wished to embark upon was legally sound would involve the appointment of 'three (or five) Wise Men or Women'. The degree of reassurance gained would depend to a large extent upon the choice of persons to act.

63. In effect this course would be a less formal (and probably quicker) alternative to an arbitral tribunal, and the various comments made above about formal arbitration apply also to this less formal alternative. In particular costs would be likely to be even lower than in the case of a formal arbitration.

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19 August 1999

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Downing College, Cambridge University		1952-6
BA:	Economics (1952)	
	Law (1954: Class II.1)	
LL.M	Public International Law (1955: Class I)	
	Whewell Scholar in International Law	1955
	Scholar, Downing College	1955
Research:		1955-6
MA		
Hague Academy of International Law		1955

B. Professional

Called to the Bar, Gray's Inn	1957
Queen's Counsel	1988
Associé, Institut de droit international	1991-7
Member, ...	1997-
President, International Law Association (British Branch)	1992-8
Hon. President	1998-
Master of the Bench, Gray's Inn	1996-

Member, Western European Union Appeals Board 1987-9

The High Representative's Special Negotiator (i.e. Mediator) on Succession Issues (for former Yugoslavia) 1996-..

Panel of Arbitrators, UN Law of the Sea Convention (Annex VII) 1998-..

Arbitrator, ICC arbitration 1998-

Agent for the United Kingdom, USA-UK Heathrow User Charges Arbitration 1987-91

Counsel and Advocate before the International Court of Justice for

- France, New Zealand v. France (Nuclear Tests Case), 1995
- Nigeria, Cameroon v. Nigeria, 1995-
- Slovakia, Gabcikovo/Nagymaros Project (Hungary/Slovakia), 1997-
- Indonesia, Case concerning Ligitan and Sipadan (Indonesia/Malaysia) 1998-

Expert witness (on matters of public international law) -

CFE v. Republic of Yemen (ICC Arbitration)

Re Certain Matters Relating to Taxation (New Zealand Commission of Inquiry)

C. Honours

CMG 1977
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D. Administrative offices held

Chairman, Advisory Board on Overseas Government Legal Advisers Course, 1987-1991

Member, Board of Management, British Institute of International and Comparative Law, 1987 -

Member, Board of the Institute of Advanced Legal Studies, London, 1988 - 1991

Member, Advisory Board, Walther Schücking Institut für Internationales Recht an der Universität Kiel, 1989 -

Member, Council of the International Law Association (British Branch), 1989 - (President, 1992 - 1998; Hon. President 1998 -)

Member, Editorial Committee, British Yearbook of International Law, 1990-

Member, Executive Council, International Law Association (Headquarters), 1991 - 1998