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WINDING UP OF THE 1971 FUND

Note by the Director

Summary:

An examination is made of various ways of speeding up the winding up of the 1971 Fund. Options studied include: amendment to Article 43.1 of the 1971 Fund Convention by means of a Conference to the effect that the Convention would be terminated well before the number of Contracting States falls below three; adoption of a Resolution by the 1971 Fund Assembly terminating the Convention; involving the International Court of Justice or an Arbitration Tribunal; using the procedure for rapid denunciation laid down in Article 42.

Action to be taken:

Decide on measures to be taken to speed up the winding up of the 1971 Fund, and in particular consider whether to use the option of amending Article 43.1.

1 Introduction

1.1 Since the entry into force in 1996 of the 1992 Protocol to the 1971 Fund Convention, the number of Contracting States has fallen significantly as a result of denunciations from 76 in May 1998 to 45 at the time of the 22nd session of the Assembly. By August 2000 the number of Member States will have dropped to 40 as a result of instruments of denunciation which have been deposited. Two of these remaining 40 States have acceded to the 1992 Fund Convention without denouncing the 1971 Fund Convention, but it is expected that instruments of denunciation will soon be deposited by these States. It is also expected that a significant number of other States will in the near future accede to the 1992 Fund Convention and denounce the 1971 Fund Convention.

1.2 As a result of these denunciations the contribution base has decreased dramatically and the 1971 Fund will therefore not be able to function properly. However, under Article 43.1 the 1971 Fund Convention ceases to be in force when the number of Contracting States falls below three. Although it is expected that the number of 1971 Fund Member States will decrease considerably in the coming

18 months, it is extremely unlikely that the number of Member States will fall below three in the foreseeable future, resulting in the 1971 Fund Convention ceasing to be in force and the 1971 Fund being wound up.

1.3 This document examines whether a procedure can be found which would make it possible to terminate the 1971 Fund Convention in the near future, and in any event before the number of Member States falls below three.

1.4 The issue was discussed by the Assembly at its 4th extraordinary session (document 71FUND/A/ES.4/16, paragraphs 15.1.1 - 15.1.36). At that session the Assembly adopted Resolution N°13 on the operation of the 1971 Fund after 16 May 1998 in the event that the governing bodies of the 1971 Fund (the Assembly and the Executive Committee) would be unable to achieve a quorum. The Resolution creates a body (the Administrative Council) which shall assume the functions of the Assembly and the Executive Committee in the event that neither the Assembly nor the Executive Committee achieves a quorum. The Assembly also adopted Resolution N°14 to the effect that urgent consideration should be given to exploring whether procedures could be established to enable the 1971 Fund to be wound up speedily. These Resolutions are reproduced as Annexes I and II to this document.

1.5 At its 59th session, the Executive Committee acting on behalf of the Assembly considered the matter further (document 71FUND/EXC.59/17/A.21/24, paragraph 6).

1.6 During the discussions in the Executive Committee a number of delegations reiterated the many difficulties facing the 1971 Fund with regard to its ability to function in the face of its declining membership, acknowledging that the problems could only get worse as more States denounced the 1971 Fund Convention. In particular, several delegations feared the situation in which an incident would occur resulting in an obligation for the 1971 Fund to pay compensation to victims when there were no contributors in the remaining Member States. The question of possible State responsibility was raised in this regard.

1.7 During the week preceding the 61st session of the Executive Committee, in April 1999, informal consultations were held at a meeting convened by the Director open to all 1971 Fund Member States and former Member States. The various views expressed at the meeting have been taken into account in the further studies of the issues involved.

1.8 Articles 41 - 44 of the 1971 Fund Convention are relevant to the winding up of the 1971 Fund. These Articles are reproduced at Annex III.

2 Encouraging Member States to denounce the 1971 Fund Convention

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

2.2 The Director and the Head of the External Relations and Conference Department attended the ninth meeting of States Parties to the United Nations Convention of the Law of the Sea, held in New York from 19 to 28 May 1999. In connection with that meeting, they met representatives (in many cases at the level of ambassadors) of 21 of the remaining 1971 Fund Member States, mainly those States which do not normally attend the sessions of the 1971 Fund's governing bodies, to inform them of the problems which their States would face if they were to remain Parties to the 1971 Fund Convention. The representatives of those States were invited to draw the attention of their respective Governments to the importance of their States denouncing the 1971 Fund Convention as soon as possible. The meetings were followed up by letters to the persons concerned.

2.3 During that meeting of the State Parties some delegations drew attention to a matter of considerable urgency, namely the problems facing the 1971 Fund. An urgent appeal was made to all parties to the 1969 Civil Liability Convention and the 1971 Fund Convention to deposit their instruments of denunciation to these Conventions as soon as possible and to take the necessary legislative steps to accede to the 1992 Protocols (document of United Nations Convention on the Law of the Sea SPLOS/48, paragraph 44).

3 Further studies

3.1 In June 1999 the Director instructed two eminent experts in public international law, Dr Thomas A Mensah^{<1>} and Sir Arthur Watts KCMG QC^{<2>}, to give opinions on the most appropriate procedures for the winding up of the 1971 Fund.

3.2 The experts were instructed to consider whether procedures were available under international law which would make it possible for the 1971 Fund to be wound up in the near future, even though the number of remaining Member States greatly exceeded three, and if such procedures existed, to express an opinion on their feasibility from a legal, practical and political point of view. The Director made reference to the options considered so far by the governing bodies of the 1971 Fund, ie amendment to Article 43.1 of the 1971 Fund Convention and acceleration of the denunciation procedure by application of Article 42 of the Convention. He also raised the question of whether there was the possibility under international law of terminating the 1971 Fund Convention due to a fundamental change of circumstances (cf Article 62 of the Vienna Convention on the Law of Treaties) and whether it would be worth considering involving the International Court of Justice. The experts were also instructed to address the procedure to be used for the liquidation of the 1971 Fund.

3.3 The opinions were presented in late August 1999. The present document has been elaborated on the basis of those opinions, which are reproduced in documents 71FUND/A.22/4/1 and 71FUND/A.22/4/2, respectively.

4 General analysis of the situation

4.1 Background

4.1.1 The Director considers that it is necessary to distinguish between the 1971 Fund Convention and the 1971 Fund Organisation established under that Convention. In the Director's view it would be necessary from a formal point of view to bring about the termination of the Convention, which would result in the dissolution of the Organisation which has to be wound up through some process of liquidation.

4.1.2 The 1971 Fund Convention contains provisions which would enable States to terminate the compensation regime created by that Convention. Firstly, the Convention contains the usual provisions on denunciation which enable States to denounce the Conventions with effect from 12 months from the date of deposit of the instrument of denunciation (Article 41). Secondly, it contains special provisions which allow States to denounce the Convention faster in particular circumstances as a result of a shortening of this one year period (Article 42).

4.1.3 When the 1992 Protocols were adopted it was expected that States would transfer from the 'old' regime established by the 1969 and 1971 Conventions to the 'new' regime created by the 1992 Conventions. However, a number of States have not availed themselves of the possibility of withdrawing from the old regime and transferring to the new regime, although the old regime is rapidly becoming inoperative.

<1> Former Assistant Secretary-General and Director of the Legal Affairs and External Relations Division of IMO, President of the International Tribunal for the Law of the Sea (see CV attached to document 71FUND/A.22/4/1).

<2> Former Legal Adviser to the United Kingdom Foreign and Commonwealth Office (see CV attached to document 71FUND/A.22/4/2).

4.1.4 As mentioned above, at its 4th extraordinary session the Assembly adopted Resolution N°13 to overcome certain difficulties which had arisen, in particular due to the fact that the Assembly and, later, the Executive Committee would not achieve a quorum. However, the 1971 Fund will in any event not be able to function properly in the future due to the lack of a significant contribution base. If a major incident were to occur in a 1971 Fund Member State, the economic burden on the few contributors in the remaining Member States might be so heavy that at least some of them would be unable to fulfil their obligations. A situation might even arise where there would be no contributors in the remaining Member States. The Director believes that it is the duty of the remaining Contracting States to ensure, if at all possible, that this situation does not arise. It should be noted that, if the 1971 Fund were to become unable to fulfil its financial obligations, this would be detrimental to the credibility of not only the compensation regime established under the 1969 and 1971 Conventions, but also to the compensation regime created by the 1992 Conventions.

4.2 State liability

4.2.1 In their opinions (paragraphs 16 - 20 and paragraphs 11 and 12, respectively) Dr Mensah and Sir Arthur Watts have raised another issue of considerable importance. They have made the point that if the remaining Contracting States allow the 1971 Fund Convention to remain in force in circumstances where the 1971 Fund is not financially able to meet its obligations, those States might incur certain legal liabilities.

4.2.2 Sir Arthur Watts has indicated two lines along which it could be argued that such liabilities have arisen: firstly, 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 secondly, on the ground that they have allowed a situation to arise in which, as a result of 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. It has been pointed out in the opinion, however, that these lines of arguments are open to counterarguments denying any liability on the part of the remaining States.

4.2.3 Dr Mensah states that while there is general acceptance of the view that an intergovernmental organisation is a legal entity distinct from its Member States, there is no clear or unambiguous agreement that such a legal personality necessarily excludes the possibility that Member States of the organisation may be held individually liable for the obligations of the organisation. He cites two court cases where national courts have held that the Member States were not liable for such obligations. He expresses the view that direct claims against Contracting States in a case where the 1971 Fund is unable to fulfil its obligations are not likely to succeed, but that there can be no certainty in these matters.

4.3 General rules of international treaty law

4.3.1 In the extraordinary situation in which the 1971 Fund may in the near future be unable to fulfil its financial obligation to victims of oil pollution damage, the Assembly, the Executive Committee or the Administrative Council, as the case may be, might wish to consider various ways of speeding up the winding up of the 1971 Fund. In this context, it may be useful to look outside the 1971 Fund Convention and examine whether the general rules of international treaty law could be used for speeding up the termination of the 1971 Fund Convention.

4.3.2 It is generally accepted that, as a matter of customary international law, a treaty may be terminated: (a) as a result of circumstances which arise after its conclusion which result in the impossibility of further performing it ('supervening impossibility of performance'); or (b) as a result of unforeseen fundamental changes in the essential basis for the Parties' agreement to the treaty ('fundamental change of circumstances'). These customary grounds for terminating a treaty are reflected in Articles 61 and 62 of the Vienna Convention on the Law of Treaties^{<3>} which are reproduced in Annex IV.

<3> It should be noted that the provisions of the Vienna Convention do not as such apply to the 1971 Fund Convention, since the Vienna Convention did not enter into force until 1980, ie after the adoption of the 1971 Fund Convention (cf Article 4 of the Vienna Convention). However, many of the provisions in the Vienna Convention embody rules of customary international law and may therefore be taken as an expression of the applicable customary rules.

4.3.3 These provisions are analysed in some detail in the opinions by Dr Mensah and Sir Arthur Watts.

4.3.4 For the reasons set out in Sir Arthur Watts' opinion (paragraph 34), Article 61.1 (impossibility of performance) would not be of any direct assistance as regards the termination of the 1971 Fund Convention.

4.3.5 On the other hand, Article 62.1 may be of direct relevance (see Mensah paragraphs 57 - 64, Watts paragraph 34). It appears that the disappearance of a sufficient financial basis for the operation of the 1971 Fund is a fundamental change of circumstances. However, as to the question of whether or not this change of circumstances was foreseen by the Parties when the treaty was adopted, Sir Arthur Watts and Dr Mensah appear to disagree. Sir Arthur states (paragraph 34) that this change of circumstances seems not to have been foreseen, although the possibility that denunciations might lead to a significant increase in the level of contributions for remaining Contracting States was foreseen in Article 42. He also considers that the original circumstances (ie the existence of an adequate financial base) was an essential basis for the Parties' original consent to the Convention. Dr Mensah states that a plausible case can be made in support of the contention that the reduction in the number of Contracting States has resulted in a fundamental change of circumstances and that this change has radically transformed the extent of those States' obligations under the Convention. He considers on the other hand that it may not be so easily argued that the continued participation of any particular number of Contracting States constitutes an essential basis of the consent of the Parties to be bound by the Convention. He mentions that 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 contributors in the remaining Contracting States, and that Article 42 addresses this possibility.

4.3.6 Normally, the right to invoke a fundamental change of circumstances rests with a State Party to the treaty, allowing that State to denounce or withdraw from a multilateral treaty while leaving the treaty intact as between the remaining Contracting States. However, it is unlikely that the Contracting States to the 1971 Fund Convention which have not denounced that Convention would act on the basis of general rules of international law in order to withdraw from the Convention.

4.3.7 Dr Mensah makes the point (paragraph 60) that, if it were considered that there was a fundamental change of circumstances, the 1971 Fund could invoke this change in order to deny liability to pay compensation for damage caused by an incident which had already occurred or before an incident had occurred. He states that a decision to that effect could possibly be taken by one of the organs of the 1971 Fund. In his view such a contention could possibly be made by one of the contributors to the 1971 Fund for the purpose of avoiding paying contributions. He draws attention to the fact that it would be for the national courts competent under Article 7.1 of the 1971 Fund Convention to determine the validity of such an argument. In his opinion Dr Mensah examines the legal and practical complications that would arise if there were divergencies in the decisions on this point of courts in different Contracting States. He concludes therefore that a reliance on invoking the ground of fundamental change of circumstances seems not to provide an effective solution to the problem facing the 1971 Fund.

4.3.8 The Director considers that, to be of value, the procedure to be used to terminate the 1971 Fund Convention should be one that can be expected to apply to all remaining Contracting States and which will not be subject to challenge in the courts of individual Contracting States. Only such a procedure will make it possible to terminate the 1971 Fund Convention and wind up the 1971 Fund in the near future. It appears that none of the options considered below is completely satisfactory, and it is a question therefore of choosing the option which is least likely to create problems.

5 Options to be considered

5.1 Amendment of Article 43.1 of the 1971 Fund Convention

Procedure for adoption of amendment

5.1.1 Both Dr Mensah and Sir Arthur Watts take the view that the best option would be to amend Article 43 of the 1971 Fund Convention so as to allow for the termination of the Convention well before the number of Contracting States falls below three. The Director agrees with this view.

5.1.2 Such an amendment could be adopted following the procedure laid down in Article 45 of the 1971 Fund Convention (see Annex III). Since it is unlikely that the required one-third of the remaining Contracting States (ie 16) would make a request to the International Maritime Organization (IMO) for the convening of a Conference to revise Article 43, the Director has invited the Secretary-General of IMO to consider whether he would be prepared, on behalf of IMO, to convene such a Conference. The Secretary-General has informed the Director that he will raise the issue at the sessions of the IMO Council and Assembly to be held in November 1999. He has stated that it would be helpful if the 1971 Fund could pay the cost of such a Conference.

5.1.3 It appears that such a Conference would be of very short duration, say of one or two days. The Director has invited IMO to provide an estimate of the cost of a two day Conference.

5.1.4 If the 1971 Fund Assembly were to favour this option, it might wish to instruct the Director to make a formal request to the Secretary-General of IMO that he should convene such a Conference. The Assembly would in that case have to decide whether the 1971 Fund should offer to pay for the cost of the Conference.

5.1.5 Normally a Conference would be a Conference of the remaining States Parties to the 1971 Fund Convention. Other States, including former Parties to the Convention, would be entitled to attend as observers but without voting rights. It should be noted that the 1984 and 1992 Conferences which adopted Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention were composed of all States, whether Parties to the Convention or not, and all States had the right to vote. The Director considers, however, that the situation under consideration is different from the revisions in 1984 and 1992 and that the envisaged Conference to amend Article 43.1 of the 1971 Fund Convention should be a Conference of the remaining Parties to that Convention only, with other States having observer status.

5.1.6 Article 45 of the 1971 Fund Convention does not specify the number of Contracting Parties which have to attend such a conference in order to constitute a quorum, and it appears that there is therefore no particular quorum requirement. From a political point of view, the number of Contracting States attending the Conference should be sufficiently high to give the results of the Conference international respect. However, normally a Conference convened by IMO does attract a high level of participation. It would clearly be important that the remaining Contracting States are made aware of the importance of attending the Conference. If there was a low level of participation on the part of the remaining Contracting States, this could result in difficulties in respect of the acceptance of the result.

Substantive content of amendment

5.1.7 The Conference would have to decide on the substantive amendment to Article 43.1. In the Director's view the best solution would be a simple amendment, stating that the 1971 Fund Convention would cease to be in force from the date when the number of Contracting States falls below a certain figure which can be determined by the Conference in the light of the situation at that time. The Director believes that the figure should be set so as to ensure that the Convention ceases to be in force in the very near future. Although it would be possible to include other criteria than the number of remaining Contracting States, eg the total quantity of contributing oil receipts in those States, the Director is not in favour of such a solution. He considers that when the denunciation of the 1971 Fund Convention by Italy takes effect (cf paragraph 5.3.3 below) the quantity will already have fallen to such a level that the 1971 Fund will no longer be financially viable.

5.1.8 It should be noted the provisions of Article 44.1 would continue to apply to claims for pollution damage arising out of incidents which occurred before the date of termination of the treaty and to the 1971 Fund's right to levy contributions to meet its obligations in respect of such incidents.

5.1.9 The Conference would also have to decide on the kind of treaty instrument to be used. The Director suggests that the most appropriate instrument would be a Protocol of Amendment.

5.1.10 The Conference would have to determine the number of affirmative votes needed for the adoption of the new treaty instrument. The normal rule for adoption is that two-thirds of the States present and voting vote in favour (Article 9.2 of the Vienna Convention). However, at the 1984 and 1992 Conferences referred to in paragraph 5.1.5 above where also non Contracting States had the right to vote, the adoption of the Protocols required that this two-thirds majority included half of the States which were Parties to the respective Conventions. As mentioned in paragraph 5.1.5 the Director takes the

view that only the remaining Contracting States should have the right to vote at the Conference to amend Article 43.1. The adoption of the proposed Protocol should therefore require a two-thirds majority of those States.

5.1.11 As a result of the proposed amendment to Article 43.1, the details of the winding up of the 1971 Fund would have to be dealt with by the Assembly under Article 44.2 or, in the absence of quorum in the Assembly, by the Executive Committee or Administrative Council (see section C below).

Entry into force of amendment

5.1.12 A crucial issue is that of bringing such an amendment into force. The decision on the conditions for entry into force of the treaty instrument will have to be taken by the Conference (cf Article 24.1 of the Vienna Convention on the Law of Treaties reproduced at Annex IV). The normal practice in respect of an amendment to a treaty which is already in force is to make the entry into force of the amendment conditional on acceptance by a specified number of Contracting States, generally two-thirds of the total number of Contracting States. Normally, such an acceptance would have to be explicit (ie by ratification, acceptance, approval or accession). In the particular circumstance of the 1971 Fund Convention it is unlikely that an amendment could be brought into force within a reasonable period of time by the procedure of 'express acceptance'. In addition, an amendment would only be binding on the States which had expressed their acceptance, which would create serious complications. It is therefore necessary to find a solution which both ensures rapid entry into force of the amendment and makes the amendment binding on all remaining Member States.

Provisional application

5.1.13 One option could be that the Protocol provided for the amendment to enter into force in the usual way but that the Protocol provided for the provisional application of the amendment pending its entry into force. On this point reference is made to Article 25 of the Vienna Convention on the Law of Treaties (see Annex IV).

5.1.14 The procedure of provisional application has been accepted in practice as a matter of customary international law. This procedure was utilised in respect of the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention of the Law of the Sea, 1982, adopted by the General Assembly of the United Nations. This issue is discussed by Dr Mensah (paragraphs 34 - 37) and Sir Arthur Watts (paragraph 20). It should be emphasised that the procedure of provisional application is essentially intended to be used for an interim period pending the entry into force of the treaty itself. However, as regards the envisaged Protocol to the 1971 Fund Convention it is possible, or even very likely, that it would never enter into force or that it would enter into force when the 1971 Fund Convention had already been terminated and the 1971 Fund wound up.

5.1.15 In the light of the foregoing, a procedure of provisional application would not, in the Director's view, be suitable for the amendment of the 1971 Fund Convention.

Accelerated amendment procedure

5.1.16 It appears that under international law a Conference has the power to lay down conditions for the entry into force which it considers appropriate in the specific circumstances and politically acceptable.

5.1.17 In the light of the difficulties which would result if explicit acceptance of the amendments were required, the Director suggests that it would be appropriate to consider whether the envisaged amendment to Article 43.1 of the 1971 Fund Convention could be brought into force by means of a simplified procedure. Under this procedure, the consent of a State to be bound would be given not by express indication but by tacit or implied consent, ie by States failing to object within a certain period of time. The amendment would be deemed to have been accepted by a specific date (say six months after the date of the adoption of the Protocol) unless a given number of Contracting States expressly notify their objection to the depositary (ie the Secretary-General of IMO) prior to that date. Unless the required number of objections were submitted before the expiry of that period, the amendment would enter into force for all Contracting States on a specified date (say 12 months after the date of its adoption). Alternatively, it would be possible to provide that the Protocol would not enter into force for a State which had made an objection within the prescribed period, but that such a State would be

considered to have denounced the 1971 Fund Convention with effect from the date on which the amendment entered into force^{<4>}.

5.1.18 It cannot be ruled out that a sufficient number of Contracting States might make objections within the prescribed period, resulting in the amendment not coming into force. It appears, however, that this is very unlikely, in view of the fact that most of the remaining Contracting States would consider it in their interest not to remain Members of an organisation which is no longer viable.

5.1.19 It should be noted that tacit amendments procedures are used for the amendments of several treaties adopted under the auspices of IMO, for example the International Convention for the Safety of Life at Sea, 1974, as modified by the 1978 Protocol thereto (SOLAS 74/78), and the International Convention for the Prevention of Pollution from Ships, 1973, as amended by the 1978 Protocol thereto (MARPOL 73/78). However, it is recognised that these Conventions contain provisions providing for such procedures. The Contracting States are therefore presumed to have given their consent to that procedure by their ratification of the original treaty. This is not the case for the 1971 Fund Convention, since that Convention does not make provision for such an amendment procedure. In addition, this procedure has in general been restricted to amendments to provisions in the technical annexes to Conventions, whereas amendments to the main articles are brought into force by the normal procedure which requires explicit acceptance by the States concerned. It should be noted that the 1992 Protocol to the 1969 Civil Liability Convention and the 1992 Protocol to the 1971 Fund Convention also provide for such a procedure for amendment of the limitation amounts and compensation limits, respectively (Article 15 and Article 33, respectively, of the Final Clauses). A similar procedure is included in the International Convention on liability and compensation for damage in connection with the carriage of hazardous and noxious substances by sea (HNS Convention).

5.1.20 It appears, however, that the absence of such a provision does not necessarily rule out the use of this procedure for amending the 1971 Fund Convention. In his opinion (paragraph 43) Dr Mensah draws attention to the fact that the simplified procedure involving tacit acceptance by States was used for ensuring a rapid entry into force of the Agreement Relating to the Implementation of the United Nations Convention on the Law of the Sea, 1982. The General Assembly of the United Nations thus considered it possible to use this procedure, although the parent 1982 Convention did not contain any provisions envisaging such a simplified procedure, and no objections were raised to the procedure. The modifications were clearly substantive in character since they involved significant changes to Part XI of the Convention.

5.1.21 As pointed out by Dr Mensah in his opinion (paragraph 44), opposition to tacit acceptance procedures is normally made for constitutional reasons, since in many States an amendment to a treaty has to be approved by Parliament before the executive branch of the State can accept the amendment. Admittedly, the 1971 Fund Convention does not contain any provision bringing amendments into force by tacit acceptance. However, in the case under consideration the amendment would not impose any further obligations on the Contracting States but is intended to relieve those States and the contributors in those States of potentially onerous obligations under the 1971 Fund Convention. It appears, therefore, that most Contracting States might not need parliamentary approval in order to be able to agree to such an amendment. In States which need such approval, the proposed procedure makes it possible for them to obtain such an approval.

5.1.22 The Director agrees with Dr Mensah and Sir Arthur Watts that, in the very special situation which necessitates urgent action to be taken, it is unlikely that a significant number of Contracting States would raise objections to the use of the tacit amendment procedure. As Dr Mensah states (paragraph 46), it is likely that for many Contracting States the reason for their not having denounced the 1971 Fund Convention is administrative inertia. Even if the Governments of some Contracting States were to raise objections, it is in the Director's view improbable that a sufficient number of objections would be lodged to prevent the entry into force of the amendment. As stated above, it is proposed that a State which feels sufficiently strongly about the matter would have the option of denouncing the Convention.

<4> In this context reference is made to Article 40.4 of the Vienna Convention on the Law of Treaties under which an amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement.

5.1.23 In the light of the considerations set out above, the Director has prepared a draft Protocol to the 1971 Fund Convention containing an amendment to Article 43.1 of the Convention and including provisions on entry into force under a tacit acceptance procedure. The draft Protocol is at Annex V.

5.2 Assembly Resolution

5.2.1 An alternative solution would be for the 1971 Fund Assembly to adopt a Resolution to the effect that the 1971 Fund Convention would cease to be in force when certain conditions are fulfilled although the number of the remaining Contracting States has not fallen below three.

5.2.2 As set out above, in the present situation there is, in the Director's view, a fundamental change of circumstances which justifies the early termination of the 1971 Fund Convention. In this situation, the Director considers that the Assembly as the supreme governing body of the 1971 Fund composed of all Member States could be considered to have the power to adopt such a Resolution. This would follow from the general power of the Assembly and in particular the power to take all appropriate measures to complete the winding up of the 1971 Fund (Article 44.2), which indicates that the winding up of the 1971 Fund comes within its powers.

5.2.3 Since it is unlikely that the 1971 Fund Assembly will achieve a quorum in the future, a decision to adopt such a Resolution would have to be taken by the Executive Committee or, if also the Executive Committee fails to achieve a quorum, by the Administrative Council, on the basis of the delegation of authority laid down in Resolution N°13 adopted by the Assembly. Under that Resolution the Executive Committee and the Administrative Council are also entrusted with the function of taking 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.

5.2.4 However, as pointed out by Sir Arthur Watts in his opinion (paragraph 39), although Article 44.2 does not state that it applies only to the situations in which the Convention ceases to be in force pursuant to Article 43, it is not beyond question that the Assembly has the power to extend the scope of Article 44.2 to a situation to which that Article arguably does not apply. If there may be a question as to whether the Assembly in fact has this power, there would also be the question of whether the Assembly could properly transfer this power to the Executive Committee or the Administrative Council. It should be noted, however, that no Member State has questioned the legal validity of Resolution N°13.

5.2.5 If a Resolution terminating the 1971 Fund Convention were to be adopted, it could proclaim that the 1971 Fund Convention would cease to be in effect from a date to be specified, say three months from the date of the Assembly's adoption of the Resolution. The Resolution should also provide for the administrative arrangements for the winding up of the 1971 Fund, including the procedures for the handling of claims against the 1971 Fund arising from incidents which occurred before the date of the termination of the 1971 Fund Convention.

5.2.6 The basis for the Resolution, in the Director's view, would primarily be the powers given to the Assembly in the 1971 Fund Convention, or in the case of the Executive Committee or the Administrative Council, the delegation of powers to those bodies as laid down in Resolution N°13. The fundamental change of circumstances would constitute a secondary and supporting legal justification for the adoption of a Resolution terminating the 1971 Fund Convention.

5.2.7 As mentioned by Sir Arthur Watts (paragraph 42), there are several cases in which international organisations have been dissolved by action of their plenary organs in the absence of specific constitutional provisions for dissolution, and some involving decisions in which not all Member States have participated.

5.2.8 The Director shares the view expressed by Sir Arthur Watts in his opinion (paragraph 43) that the adoption of a Resolution by the Assembly would be a legally effective way to terminate the 1971 Fund Convention and lay down procedures for the winding up of the 1971 Fund. He also agrees with Sir Arthur that it is unlikely that there would be any challenge of the legal validity of the approach. However, Sir Arthur has drawn attention to the problems which this option would raise. It should be noted that even if the validity of the Resolution were not challenged by a State, it is conceivable that an individual claimant might challenge the Resolution before the courts in his country. The Director considers that this option is less solid than the formal procedure of amending Article 43.1 of the 1971

Fund Convention by means of a Conference. For this reason, he takes the view that the adoption of an Assembly Resolution should be a second choice option.

5.3 Acceleration of the denunciation procedure by application of Article 42 of the 1971 Fund Convention

5.3.1 Under Article 41.3 of the 1971 Fund Convention, an instrument of denunciation takes effect one year after it is deposited with the Secretary-General of the IMO. This period of one year may be reduced by implementation of the procedure laid down in Article 42. That Article deals with the case where denunciation by one Contracting State significantly increases the level of contributions for the remaining Contracting States. In that situation any Contracting State may request the Director to convene an extraordinary session of the Assembly, to be held within 60 days of such a request. The Director may also convene such an Assembly on his own initiative. If the Assembly decides that the denunciation in question will result in a significant increase in the level of contributions for the remaining Contracting States, any such State may denounce the Convention not later than 120 days before the date when that denunciation takes effect, with effect from the same date.

5.3.2 This procedure would assist those States which did in fact submit instruments of denunciation by reducing the time it would take before the denunciation took effect. There is a significant risk, however, that the procedure provided for in Article 42.3 would have only limited effect on the winding up process, since a number of States would not denounce the Convention during the period specified in that Article. The main problem appears to be how to convince Governments of the need for urgent denunciation of the 1971 Fund Convention.

5.3.3 It is expected that Italy will ratify the 1992 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention in the near future and simultaneously denounce the 1969 and 1971 Conventions. At the time of the 22nd session of the Assembly, the 1971 Fund will have 45 Member States. The total quantity of contributing oil received in these States is approximately 251 million tonnes, out of which some 148 million tonnes was received in Italy. A denunciation of the 1971 Fund Convention by Italy would therefore result in a significant decrease in the total quantity of contributing oil, ie a decrease of 59% from 251 million tonnes to 103 million tonnes. This would result in a significant increase in the level of contributions for contributors in the remaining 1971 Fund Member States.

5.3.4 A denunciation by Italy of the 1971 Fund Convention would, in the Director's view, result in the conditions for the application of Article 42 being fulfilled. Any remaining 1971 Fund Member State, or the Director himself, would then be entitled to invoke the procedure laid down in that Article for convening an extraordinary session of the Assembly.

5.3.5 It is unlikely that an extraordinary Assembly convened under Article 42 would obtain a quorum. Should no quorum be achieved, the functions of the Assembly would be delegated to the Executive Committee, pursuant to 1971 Fund Resolution N°13. It is also unlikely that after October 1999 the Executive Committee will achieve a quorum. If the Committee also fails to achieve a quorum, the functions of the Assembly would be delegated to the Administrative Council to be established under that Resolution. It appears that the Executive Committee and the Administrative Council, as the case may be, would have the power to take a decision under Article 42.3.

5.3.6 It is likely that many States which are still Members of the 1971 Fund at the time of the denunciation of the 1971 Fund Convention by Italy would wish to leave the 1971 Fund at the same time as Italy and would therefore wish to invoke the procedure under Article 42. However, under Article 30.3 of the Final Clauses of the 1992 Fund Convention those States would not be able to become Members of the 1992 Fund until 12 months after the date on which they deposit their instrument of ratification of the 1992 Protocols. Those States would therefore be without financial protection for a number of months.

5.3.7 It has been suggested that a procedure could be devised which would eliminate this 'gap' in financial protection and thereby encourage the remaining 1971 Fund Member States to denounce the 1971 Fund Convention by using the procedure laid down in Article 42. This might be done by means of a Resolution adopted by the 1992 Fund Assembly setting out an agreement between all Parties to the 1992 Fund Convention that, notwithstanding the provisions of Article 13.4 of the Final Clauses of the 1992 Protocol to the 1969 Civil Liability Convention and Article 30.3 of the Final Clauses of the 1992 Protocol to the 1971 Fund Convention, the 1992 Protocols would come into force for those States on

the same date as their denunciation of the 1971 Fund Convention became effective, if the State concerned so wished.

5.3.8 It appears that such a procedure would be consistent with the provisions of Article 39 of the Vienna Convention on the Law of Treaties (see Annex IV), under which a treaty may be amended by agreement between the parties.

5.3.9 It is recognised that Article 14 of the Final Clauses of the 1992 Protocol to the 1969 Civil Liability Convention and Article 32 of the Final Clauses of the 1992 Protocol to the 1971 Fund Convention set out a different procedure for the adoption of amendments, ie by means of a Conference. However, it appears that from a treaty law point of view there is no obstacle to a different procedure being followed, provided that there is general agreement to this effect.

5.3.10 It should be noted that the 1969 Civil Liability Convention does not contain any provisions corresponding to Article 42 of the 1971 Fund Convention. Any denunciation of the 1969 Civil Liability Convention will therefore take effect for a State twelve months from the date of the deposit of the instrument of denunciation. This twelve month period could be shortened only by explicit agreement given by all remaining Parties to that Convention. It is not realistic to expect such an agreement to be obtained from all those States within a reasonable period of time. However, there is no legal obstacle for a State which ratifies the 1992 Protocols after the expiry of the transitional period laid down in Article 36 bis of the 1992 Protocol to the 1971 Fund Convention remaining Party to the 1969 Civil Liability Convention (cf Article 31 of the Final Clauses of that Protocol).

5.3.11 It should be noted, however, that during the consultations in April 1999 referred to in paragraph 1.7 above, a number of 1992 Fund Member States indicated that they would encounter constitutional difficulties in accepting a shortening of the period for the entry into force of the 1992 Fund Convention. It is unlikely, therefore, that all Contracting States to the 1992 Fund Convention would agree to such a procedure.

5.3.12 The Director considers it unlikely that using the accelerated denunciation procedure under Article 42 would solve the problems facing the 1971 Fund. Firstly, some Contracting States might feel reluctant to use this procedure since it would result in their being without financial protection for a number of months. It is in any event very unlikely that a sufficient number of States would avail themselves of the opportunity to denounce the 1971 Fund Convention in accordance with Article 42.3 in order for the number of Contracting States remaining after the expiry of the period referred to in that provision to fall below three.

5.3.13 The Director intends in any event to convene an extraordinary Assembly under Article 42.3 of the 1971 Fund Convention when Italy denounces that Convention, so as to enable the remaining Contracting States to consider whether they wish to use the procedure provided for in that Article.

5.4 Litigation before the International Court of Justice

5.4.1 One possibility of obtaining legal assurance that a solution pursued by the 1971 Fund's governing bodies would be in conformity with international law would be by means of a decision by the International Court of Justice (ICJ). However, only States can be parties in cases before the ICJ. The 1971 Fund could not therefore be a party itself to such a case.

5.4.2 It would therefore be necessary to arrange for two or more of the remaining Contracting States to have a dispute on the future of the 1971 Fund and to bring the dispute before the ICJ. Dr Mensah argues (paragraph 68) that it is difficult to see what could plausibly be characterised as a dispute between Contracting States. In their opinions Sir Arthur Watts (paragraph 47) and Dr Mensah (paragraphs 69 and 70) give a number of reasons why this is not an attractive solution. In the Director's view this is particularly so since it would be necessary to involve one of the remaining Contracting States to argue against the lawfulness of any arrangement for the termination of the 1971 Fund Convention. In any event the judgement would be binding only as between the States parties to the litigation before the ICJ, although it would obviously have a considerable persuasive effect for other States and for national courts. The Director takes the view, therefore, that this is not a viable option.

5.5 Advisory opinion by the ICJ

5.5.1 Another means of obtaining such legal assurance might be to seek an advisory opinion by the ICJ. The ICJ may give advisory opinions only at the request of bodies authorised by or in accordance with the Charter of the United Nations to make such a request (Statute for the ICJ, Article 65.1). Organs or specialised agencies may request advisory opinions, if so authorised by the General Assembly, "on legal questions within the scope of their activities". The 1971 Fund is not a specialised agency and is therefore not entitled itself to request an advisory opinion. However, the IMO is a specialised agency which has the right to seek advisory opinions.

5.5.2 Sir Arthur Watts expresses the view (paragraph 51) that the links between IMO and the 1971 Fund are probably sufficient for issues relating to the termination of the 1971 Fund Convention to be regarded as arising within the scope of IMO's activities. In his opinion (paragraphs 48 - 52) Sir Arthur sets out in some detail how such an advisory opinion could be obtained, which questions could be put to the ICJ and the legal effect of such an advisory opinion. He mentions that the advisory opinion would not be legally binding in a formal sense, but that it would clearly be very authoritative. He makes the point that if the ICJ essentially supported the legality of the winding up decision taken by the 1971 Fund Assembly, the opinion would be an effective legal basis for answering any future legal challenges to the decision.

5.5.3 Dr Mensah questions in his opinion (paragraphs 71 - 74) whether IMO can in fact request the ICJ to give an advisory opinion regarding the interpretation and application of the 1971 Fund Convention, and refers to Articles 69 and 70 of the Convention on the International Maritime Organization, as amended. He also questions the usefulness of an advisory opinion from the ICJ for resolving the problems facing the 1971 Fund (paragraph 77), since the opinion would only be of an advisory character and as such would have no binding force.

5.5.4 Although an advisory opinion by the ICJ could be of some value, the Director is not in favour in using this procedure.

5.6 Ad hoc arbitration tribunal or panel of wise men/women

5.6.1 In his opinion (paragraphs 57 - 61), Sir Arthur Watts suggests that it would be possible for the 1971 Fund to establish an *ad hoc* arbitration tribunal to give an advisory opinion or binding decision on such questions as the 1971 Fund Assembly puts before it. He also mentions (paragraphs 62 - 63) the possibility of the 1971 Fund Assembly establishing a panel of three or five wise men/women to express an opinion as to whether the arrangements envisaged for the termination of the 1971 Fund Convention are legally sound.

5.6.2 The Director is not in favour of these options.

6 Liquidation of the 1971 Fund

6.1 Termination of the 1971 Fund Convention does not result in the liquidation of the 1971 Fund. It is clear from Article 44 that the Fund remains in being "as a legal person" after the Convention has ceased to be in force. Article 44 also entrusts the Assembly with the responsibility for taking "all appropriate measures to complete the winding up of the Fund, including the distribution in an equitable manner of any remaining assets among those persons who have contributed to the Fund".

6.2 The 1971 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). It appears however, that the United Kingdom courts would not have jurisdiction over this matter. In this context reference can be made to the case relating to the International Tin Council, where the Court of Appeal held that the Tin Council was not subject to the winding up jurisdiction of the English Courts^{<5>}. As a result, it would not be meaningful for the 1971 Fund to make an application for the Fund to be wound up under English Law (Sir Arthur Watts, paragraphs 27 and 28).

<5> The Director has been given the same advice by the 1971 Fund's English solicitors (Clifford Chance).

6.3 As mentioned in Sir Arthur Watts' opinion (paragraph 28), the consequence of the Tin Council decision would 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, but have to be established *ad hoc*.

6.4 The 1971 Fund Convention does not contain any provisions concerning the practical or legal aspects of the procedure for the winding up and liquidation of the 1971 Fund, except the very short provisions in Article 44. In this situation it is necessary to establish procedures for the winding up of the 1971 Fund.

6.5 As Dr Mensah points out (paragraphs 80 and 81), the 1971 Fund is not subject to any national laws in respect of liquidation. He states that, although Article 44 of the 1971 Fund Convention does not set out detailed procedures for the winding up of the 1971 Fund, it provides clear guidance with respect to both the body that is required to take the necessary measures and the principles to be applied to the process.

6.6 Dr Mensah makes the point that the fact that the winding up of the 1971 Fund 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 Fund Convention. The Assembly has been given the power under Article 44 to take all appropriate measures to complete winding up. The Assembly, or a body duly authorised to act on its behalf, has the power to appoint a liquidator and determine his terms of reference. The Assembly or other body can instruct the liquidator to apply the procedures and practices for liquidation developed under a particular legal system or within a particular international organisation, as appropriate.

6.7 Dr Mensah has dealt in some detail in his opinion with the various aspects of the winding up of the 1971 Fund. He considers 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 in his view to appoint a 'liquidator' in the technical sense for this purpose. In view of the international (intergovernmental) character of the Fund, he suggests that an intergovernmental body would be more appropriate to take the necessary decisions for winding up. He notes that the Assembly of the 1971 Fund will not be in existence when the final decision for winding up will be taken and that, in any case, the 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, in his view, for the Assembly of the 1971 Fund to entrust to the 1992 Fund the mandate of taking all the measures needed to complete the winding up of the 1971 Fund in accordance with Article 44.2 of the 1971 Fund Convention. He states that the 1992 Fund would, in effect, be the 'liquidator' of the 1971 Fund and that in that capacity the 1992 Fund Assembly would 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. He notes that in discharging such a mandate the organs of the 1992 Fund, and the Director, would 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 would rest with the relevant organs of the 1992 Fund.

6.8 In his Report on the Audit of the accounts for the 1998 financial period, the External Auditor strongly recommended that the Assembly, the Executive Committee or the Administrative Council - as the case may be - considered the need ultimately to appoint a liquidator to take over the administration of the 1971 Fund, including its and any resulting residual bodies' eventual liquidation. The External Auditor expressed the view that thought should be given now to the liquidator's role, mandate and relationship with the Director (document 71FUND/A.22/8, Annex II, paragraph 55).

6.9 The Director considers that to follow the recommendation of the External Auditor to appoint a liquidator, in the technical sense of that word, to take over the administration of the 1971 Fund might cause problems. In a normal liquidation, a liquidator is appointed to take over the management of the entity in liquidation and this function is carried out in accordance with the provisions of the applicable national law. A corresponding arrangement in respect of the 1971 Fund would result in this liquidator taking over *inter alia* the handling of claims for compensation and the application of the criteria for the admissibility of claims. The Director believes that it would be difficult for any liquidator who is not totally familiar with the IOPC Funds' policy on the admissibility of claims laid down by the Assemblies and Executive Committees of the 1971 and 1992 Funds to perform this function without a significant risk that he would apply criteria different from those applied by the 1992 Fund organs, which would have serious

consequences for the uniform application of the 1971 and 1992 Fund Conventions. It would also cause difficulty in the *Nakhodka* case where both the 1971 Fund and the 1992 Fund are involved. The Director considers therefore that the winding up and liquidation should, at least for the time being, be handled by the organs of the 1971 Fund (ie the Assembly, the Executive Committee and the Administrative Council) and the Director. However, those bodies may wish to consider Dr Mensah's proposal that at some stage they entrust the winding up of the 1971 Fund to the organs of the 1992 Fund.

6.10 In the light of the complexity of the issues involved, the Director considers that further studies are necessary before any decision can be taken as to the procedures to be applied for the liquidation of the 1971 Fund. Subject to any instructions which the Assembly may wish to give him, the Director intends to examine further, with the assistance of legal and financial experts and in consultation with the External Auditor, the various issues involved, and to submit a report to the October 2000 sessions of the 1971 Fund's governing bodies.

6.11 In view of the very special circumstances in which the winding up and liquidation of the 1971 Fund will have to be carried out without any appropriate legal framework, the Director considers that it would be very useful for him to be able to consult some individuals with considerable experience in Fund matters and an expertise in legal and financial issues. The Assembly may wish to consider appointing a panel of a limited number of individuals (say five to seven) to assist the Director in their personal capacity.

7 Conclusions

7.1 As mentioned above, there is no option for the early termination of the 1971 Fund Convention which is completely satisfactory. The Director strongly believes, however, that the best option would be that of an amendment to Article 43.1 of the 1971 Fund Convention adopted by a Conference convened under the auspices of IMO.

7.2 The Director considers that further studies are necessary before any decisions can be taken as to the procedures to be applied for the liquidation of the 1971 Fund.

8 Action to be taken by the Assembly

The Assembly is invited:

- (a) to take note of the information contained in this document and in the opinions of Dr Mensah and Sir Arthur Watts;
- (b) to take such decisions as it may deem appropriate on the various options for the termination of the 1971 Fund Convention dealt with in these documents;
- (c) if it were to choose the option of an amendment of Article 43.1 of the 1971 Fund Convention to be adopted by a Conference convened by the Secretary-General of IMO, to decide whether the 1971 Fund should undertake to pay the costs of such a Conference;
- (d) to consider the procedure for the liquidation of the 1971 Fund; and
- (e) to consider appointing a panel of individuals to assist the Director in their personal capacity in matters relating to the winding up of the 1971 Fund.

ANNEX I

Resolution N°13:
Operation of the 1971 Fund from 16 May 1998

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1971 (1971 FUND),

NOTING that there are 76 States Parties to the 1971 Fund Convention;

AWARE that 24 of these States will cease to be Members of the 1971 Fund from 16 May 1998 and that a number of other States will in the near future also cease to be Members of the 1971 Fund,

RECOGNISING that, as a result of these States leaving the 1971 Fund, it is likely, despite considerable efforts to be made by the Director, that the Assembly of the Organisation will no longer be able to achieve a quorum and that the same may in the near future apply to its Executive Committee,

ACKNOWLEDGING that this would result in the 1971 Fund's being unable to operate in a normal way,

MINDFUL that the 1971 Fund's objective is to pay compensation to victims of oil pollution damage in Member States,

RECALLING that it is the task of the Assembly, under Article 18.14 of the 1971 Fund Convention, to perform such functions as are necessary for the proper operation of the 1971 Fund,

AWARE that the Assembly may allocate functions to the Executive Committee in accordance with Article 26.1(c) of the 1971 Fund Convention,

NOTING that, under Article 44.2, the Assembly should 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 Fund,

CONSCIOUS of the need to establish a structure which will permit the 1971 Fund to operate from 16 May 1998 until such time as it is wound up,

RECOGNISING that it is the general responsibility of the Assembly to ensure the proper operation of the 1971 Fund and that it is therefore the duty of the Assembly to take the necessary measures to achieve this,

CONSIDERING that it is important to ensure that the interests of States which remain Members of the 1971 Fund are protected,

RECALLING Resolution N°11 of the 1971 Fund on co-operation between the 1971 Fund and its former Member States, in which it is recognised that former States Parties which have been affected by incidents covered by the 1971 Fund Convention but in respect of which settlements have not yet been finalised, should be entitled to present their views on pending cases in the competent bodies of the 1971 Fund,

- 1 **INSTRUCTS** the Director to convene a regular session of the Assembly of the 1971 Fund once every calendar year, and in the invitations to urge States to make every effort to be represented at the meeting, and to draw attention to the consequences of a quorum not being achieved.
- 2 **RESOLVES** that, in addition to those functions which are allocated to the Executive Committee pursuant to Article 26.1 of the 1971 Fund Convention, the following functions of the Assembly shall be delegated to the Executive Committee with effect from the first session of the Assembly at which the latter is unable to achieve a quorum, on the condition that if the Assembly were to

achieve a quorum at a later session or sessions, the Assembly would resume the functions previously allocated to the Committee:

- (a) to adopt the annual budget and fix the annual contributions;
- (b) to appoint auditors and approve the accounts of the 1971 Fund;
- (c) to supervise the proper execution of the 1971 Fund Convention and of its own decisions;
- (d) to perform such other functions as are otherwise necessary for the proper operation of the 1971 Fund;
- (e) 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;

3 **RESOLVES ALSO** that, whenever the Executive Committee fails to achieve a quorum, all functions undertaken by the Committee (ie those allocated by the Assembly and those allocated in accordance with the 1971 Fund Convention) shall revert to the Assembly;

4 **HEREBY CREATES** a body to be known as the Administrative Council, which shall have the following mandate:

- (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;
- (b) to establish a subsidiary body to consider the settlement of claims;
- (c) to give instructions to the Director concerning the administration of the 1971 Fund;
- (d) to supervise the proper execution of the Convention and of its own decisions;
- (e) 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;

5 **FURTHER RESOLVES** that the Administrative Council shall assume its functions whenever the Assembly fails to achieve a quorum after the functions allocated to the Executive Committee in accordance with paragraph 2 have reverted to the Assembly pursuant to paragraph 3, on the condition that, if the Assembly were to achieve a quorum at a later session, it would resume its functions;

6 **DECIDES** that the following States and organisations shall be invited to take part in sessions of the Administrative Council:

- (a) 1971 Fund Member States;
- (b) former 1971 Fund Member States;
- (c) other States which would be invited to attend sessions of the 1971 Fund Assembly as observers; and
- (d) intergovernmental organisations and international non-governmental organisations which have observer status with the 1971 Fund; and

7 **FURTHER DECIDES:**

- (a) that decisions of the Administrative Council shall be taken by majority vote of those 1971 Fund Member States and former 1971 Fund Member States present and voting, provided that a former 1971 Fund Member State shall have the right

- to vote only in respect of issues relating to incidents which occurred while the 1971 Fund Convention was in force for that State;
- (b) that there shall be no quorum requirement for the Administrative Council; that the Administrative Council shall meet at least once every calendar year at thirty days' notice upon convocation by the Director, either at his own initiative or at the request of its Chairman;
 - (c) that the Rules of Procedure of the Administrative Council shall be those of the Assembly, to the extent applicable;
 - (d) that the States invited to a session of the Administrative Council shall inform the Director of the person or persons who will attend; and
 - (e) that the sessions of the Administrative Council shall be held in public, unless the Council decides otherwise;

- 8 **FURTHER RESOLVES** that the Director of the 1971 Fund shall *ex officio* be the person who holds the post of Director of the 1992 Fund, provided that the Assembly of the 1992 Fund agrees thereto and that the Director of the 1992 Fund agrees to carry out the functions of the Director of the 1971 Fund also, or, if these conditions are not met, that the Director shall be appointed by the Executive Committee in accordance with paragraph 2 above, or by the Administrative Council in accordance with paragraph 4 above.

* * *

ANNEX II

Resolution N°14:
Winding up of the 1971 Fund

THE ASSEMBLY OF THE INTERNATIONAL OIL POLLUTION COMPENSATION FUND 1971 (1971 FUND),

AWARE that 24 of the present 76 States Parties to the 1971 Fund Convention will cease to be Members of the 1971 Fund from 16 May 1998 and that a number of other States will in the near future also cease to be Members of the 1971 Fund,

NOTING that the 1992 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention (1992 Protocols) were intended to replace the Conventions in their original versions,

RECOGNISING the difficulties which may be encountered in the operation of the 1971 Fund as a consequence of not achieving a quorum in the Assembly and Executive Committee after 16 May 1998,

RECALLING the procedures laid down in Resolution N°13 to address these difficulties,

BUT ACKNOWLEDGING that the 1971 Fund may nevertheless be unable to operate in a normal way in a few years' time,

CONSCIOUS that the majority of the present contributors to the 1971 Fund are located in States which have denounced the 1971 Fund Convention or which are expected to do so in the near future,

AND AWARE of the considerably increased financial burden which may fall on those contributors in States which remain Members of the 1971 Fund after other States have denounced the 1971 Fund Convention,

RECALLING that it is the task of the Assembly, under Article 18.14 of the 1971 Fund Convention, to perform such functions as are necessary for the proper operation of the 1971 Fund,

NOTING that Article 43 of the 1971 Fund Convention provides that the Convention shall cease to be in force on the date when the number of Contracting States falls below three,

AWARE that, under Article 44.2 of the 1971 Fund Convention, the Assembly should 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 Fund,

RECOGNISING that, before the winding up could take place, the 1971 Fund would have to meet its obligations in respect of all incidents which occurred before the Convention ceased to be in force,

BUT MINDFUL that it will not be possible for the 1971 Fund to fulfil its objective of paying compensation to victims of oil pollution damage in Member States if there are no persons in the remaining Member States who are liable to pay contributions,

CONSCIOUS that Article 42 of the 1971 Fund Convention may provide a means of accelerating denunciation of the 1971 Fund Convention,

RESOLVES that urgent consideration should be given to exploring whether procedures could be established to enable the 1971 Fund to be wound up speedily.

* * *

ANNEX III**Relevant provisions of the 1971 Fund Convention****Article 41**

1 This Convention may be denounced by any Contracting State at any time after the date on which the Convention comes into force for that State.

2 Denunciation shall be effected by the deposit of an instrument with the Secretary-General of the Organization.

3 A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after its deposit with the Secretary-General of the Organization.

4 Denunciation of the Liability Convention shall be deemed to be a denunciation of this Convention. Such denunciation shall take effect on the same date as the denunciation of the Liability Convention takes effect according to paragraph 3 of Article XVI of that Convention.

5 Notwithstanding a denunciation by a Contracting State pursuant to this Article, any provisions of this Convention relating to the obligations to make contributions under Article 10 with respect to an incident referred to in Article 12, paragraph 2(b), and occurring before the denunciation takes effect shall continue to apply.

Article 42

1 Any Contracting State may, within ninety days after the deposit of an instrument of denunciation the result of which it considers will significantly increase the level of contributions for remaining Contracting States, request the Director to convene an extraordinary session of the Assembly. The Director shall convene the Assembly to meet not later than sixty days after receipt of the request.

2 The Director may convene, on his own initiative, an extraordinary session of the Assembly to meet within sixty days after the deposit of any instrument of denunciation, if he considers that such denunciation will result in a significant increase in the level of contributions for the remaining Contracting States.

3 If the Assembly at an extraordinary session convened in accordance with paragraph 1 or 2 decides that the denunciation will result in a significant increase in the level of contributions for the remaining Contracting States, any such State may, not later than one hundred and twenty days before the date on which that denunciation takes effect, denounce this Convention with effect from the same date.

Article 43

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

2 Contracting States which are bound by this Convention on the date before the day it ceases to be in force shall enable the Fund to exercise its functions as described under Article 44 and shall, for that purpose only, remain bound by this Convention.

Article 44

1 If this Convention ceases to be in force, the Fund shall nevertheless

- (a) meet its obligations in respect of any incident occurring before the Convention ceased to be in force;

(b) be entitled to exercise its rights to contributions to the extent that these contributions are necessary to meet the obligations under sub-paragraph (a), including expenses for the administration of the Fund necessary for this purpose.

2 The Assembly shall take all appropriate measures to complete the winding up of the Fund, including the distribution in an equitable manner of any remaining assets among those persons who have contributed to the Fund.

3 For the purposes of this Article the Fund shall remain a legal person.

Article 45

1 A Conference for the purpose of revising or amending this Convention may be convened by the Organization.

2 The Organization shall convene a Conference of the Contracting States for the purpose of revising or amending this Convention at the request of not less than one-third of all Contracting States.

* * *

ANNEX IV

Relevant Provisions of the Vienna Convention on the Law of Treaties

Article 24

Entry into force

- 1 A treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree.
- 2 Failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States.
- 3 When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.
- 4 The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text.

Article 25

Provisional application

- 1 A treaty or a part of a treaty is applied provisionally pending its entry into force if:
 - (a) the treaty itself so provides; or
 - (b) the negotiating States have in some other manner so agreed.
- 2 Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

Article 39

General rules regarding the amendment of treaties

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.

Article 40

Amendment of multilateral treaties

- 1 Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.
- 2 Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

- (a) the decision as to the action to be taken in regard to such proposal;
- (b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3 Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4 The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.

5 Any State which becomes the party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

- (a) be considered as a party to the treaty as amended; and
- (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 61

Supervening impossibility of performance

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. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2 Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Article 62

Fundamental change of circumstances

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.

2 A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

- (a) if the treaty establishes a boundary; or
- (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3 If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

ANNEX V

DRAFT

Protocol of [2000] to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971

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 result in a significant increase in the level of contributions from contributors in remaining Contracting States,

MINDFUL of the need to ensure that at all times the International Oil Pollution Compensation Fund 1971 (1971 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 Fund could seriously impair the ability of the Fund to discharge its obligations,

RECOGNISING that failure of the 1971 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 complication for Contracting States or for victims of oil pollution damage,

REAFFIRMING the provisions of Article 43, paragraph 2 and Article 44 of the 1971 Fund Convention regarding the obligation of Contracting States and the 1971 Fund with respect to incidents occurring before the 1971 Fund Convention ceases to be in force.

ADOPT THE FOLLOWING AMENDMENTS TO THE 1971 FUND CONVENTION

Article I

For the purpose of the present Protocol:

- 1 "Convention" means the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.
- 2 "Liability Convention" has the same meaning as in the Convention.
- 3 "Organization" has the same meaning as in the Convention.
- 4 "Secretary-General" means the Secretary-General of the Organization.

Article II

Article 43, 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 [25].

Article III

1 This amendment shall be subject to acceptance by Contracting States in accordance with this Article.

2 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 [one-third] of the Contracting States.

3 Contracting States may indicate their acceptance of this amendment by signing it without reservation as to ratification, acceptance or approval, or by depositing the appropriate instrument with the Secretary-General at any time prior to the expiry of the [six months] period specified in paragraph 1.

4 An objection to acceptance under paragraph 1 may be withdrawn at any time prior to the date of deemed acceptance in accordance with paragraph 2.

Article IV

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

2 Upon its 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 2 of this Article may be withdrawn at any time prior to the entry into force of this amendment.

4 A Contracting State which has made a declaration under paragraph 2 of this Article 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, or such earlier date as may be specified by the Contracting State in a communication to the Secretary-General.

Article V

1 The text of this Protocol shall be communicated by the Secretary-General to all Contracting States immediately after its adoption.

2 A declaration or communication referred to in Articles III and IV shall be notified in writing to the Secretary-General. The latter 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.

As soon as this Protocol enters into force, a certified true copy thereof shall be transmitted by the Secretary-General to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

The present Protocol is established in a single original in the English and French languages, both texts being equally authentic. Official translations in the Russian and Spanish languages shall be prepared by the Secretariat of the Organization and deposited with the signed original.

IN WITNESS WHEREOF the undersigned being duly authorised for that purpose have signed the present Protocol.
