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LEGAL AND PRACTICAL ASPECTS OF THE APPLICATION OF THE 1992 FUND CONVENTION TO THE HONG KONG SPECIAL ADMINISTRATIVE REGION

Note by the Director

Summary:	The document contains a study of the legal and practical implications of the People's Republic of China having limited its accession to the 1992 Fund Convention to the Hong Kong Special Administrative Region.
Action to be taken:	Information to be noted.

1 Introduction

1.1 On 5 January 1999 the People's Republic of China (PRC) deposited instruments of accession to the 1992 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention. As regards the latter Protocol, the instrument of accession limited its application to the Hong Kong Special Administrative Region (HKSAR).

1.2 At the Executive Committee's 2nd session the Director was requested by one delegation to study the legal and practical implications of the accession to the 1992 Fund Convention being limited to the HKSAR (document 92FUND/EXC.2/10, paragraph 7.1.4). These issues are dealt with in this document.

1.3 The background to this limitation of the accession is set out in document 92FUND/A.4/28 submitted by the Chinese delegation.

1.4 It will be recalled that when the United Kingdom ratified the 1971 Convention in 1976, it extended the scope of application to what was at that time the dependent territory of Hong Kong. It will also be recalled that, at its 20th session, the Assembly of the 1971 Fund agreed to consider that the 1971 Fund Convention should continue to apply to the HKSAR after 30 June 1997 when Hong Kong ceased to be a

dependent territory of the United Kingdom and was restored to the PRC even though the PRC was not a Party to that Convention (document 71FUND/A.20/30, paragraph 29.6).

2 The legal system of the HKSAR

2.1 The legal system of the HKSAR is based on common law and is separate and distinct from the legal system of the PRC. The Basic Law of the HKSAR provides for the continuity of the legal system that existed before the resumption of the exercise of sovereignty over Hong Kong by the PRC. The practice and procedure of the legal system remain largely unchanged.

2.2 The laws applicable in the HKSAR consist of the Basic Law, the laws which were previously in force in respect of Hong Kong (except when they contravene the Basic Law), and the laws enacted by the legislature of the HKSAR. The national laws of the PRC do not apply to the HKSAR, except for those listed in Annex III to the Basic Law (Article 8). The exceptions include the laws of the PRC on the territorial sea and the exclusive economic zone. The HKSAR's courts continue to rely on precedents from other common law jurisdictions, particularly English decisions and to a lesser extent decisions by courts in Australia, Canada and New Zealand.

2.3 The judiciary is independent from the legislative and executive branches of the Government.

2.4 For the purpose of oil pollution matters, the courts of the HKSAR are the Court of First Instance, the Court of Appeal and the Court of Final Appeal. There is no appeal from the courts of the HKSAR to the courts of the PRC.

3 Implementation legislation

3.1 The 1969 Civil Liability Convention and the 1971 Fund Convention are implemented in the law of Hong Kong by the Merchant Shipping (Liability and Compensation for Oil Pollution) Ordinance (Chapter 414 of the Laws of Hong Kong). The Ordinance was enacted in 1990 to replace the United Kingdom Merchant Shipping (Oil Pollution) Act 1971 and Merchant Shipping Act 1974, which the Ordinance follows closely.

3.2 In order to implement the 1992 Civil Liability Convention and the 1992 Fund Convention in the law of the HKSAR, the Merchant Shipping (Liability and Compensation for Oil Pollution) (Amendment) Ordinance was enacted in 1997 amending the Ordinance referred to in paragraph 3.1 above. The 1997 Ordinance will enter into force on a day to be determined by the Secretary for Economic Services. It is intended that it will come into force on 5 January 2000, ie on the date when the PRC's accession to those Conventions takes effect.

3.3 Limitation proceedings fall within the competence of the Court of First Instance. The shipowner is entitled to institute limitation proceedings if pollution damage is caused in the territory of the HKSAR or if costs of measures to prevent or minimise pollution damage in the HKSAR are incurred. The Court is also competent to hear actions relating to claims against the shipowner and his insurer for pollution damage caused in the HKSAR and for the cost of measures to prevent or minimise pollution damage in the HKSAR. The HKSAR Court of First Instance would be competent to deal with claims against the shipowner and his insurer for damage caused in mainland China, if an incident also gave rise to claims for pollution damage in the HKSAR.

3.4 Claims for compensation against the 1992 Fund would fall within the jurisdiction of the HKSAR Court of First Instance if they related to pollution damage caused in the HKSAR or to costs of measures to prevent or minimise pollution damage in the HKSAR. Since the 1992 Fund Convention does not apply to mainland China, the courts of the PRC would not be competent to entertain actions against the 1992 Fund.

3.5 The 1992 Fund Convention applies to pollution damage caused in the territory, including the territorial sea of a Contracting State and in the exclusive economic zone of a Contracting State, and to

preventive measures, wherever taken, to prevent or minimise such damage (Article 3). As mentioned above, the laws of the PRC on the territorial sea and the exclusive economic zone apply to the HKSAR.

3.6 The boundary of the HKSAR is laid down in an Order of the State Council of the PRC (N°221 of 1997, Description of the Boundary of the Administrative Division of the Hong Kong Special Administrative Region of the People's Republic of China). The boundary is described in the Order by means of co-ordinates. A map setting out the boundaries is annexed to the Order (and is reproduced in the Annex to document 92FUND/A.4/28).

3.7 The waters of the HKSAR, as set out in the Order, are located totally on the landward side of the baselines of the territorial sea of the PRC (cf Declaration of 15 May 1996 of the Government of the People's Republic of China on the baselines of the territorial sea of the People's Republic of China). The HKSAR therefore does not have a territorial sea but only internal waters (cf Article 8.1 of the United Nations Convention on the Law of the Sea), nor does the HKSAR have an exclusive economic zone (cf Article 55 of that Convention). It should be noted that under international law the internal waters of a State are considered to be part of the territory of that State. In view of this situation, there should be no difficulty, in the Director's view, in establishing the geographical area to which the 1992 Fund Convention applies in respect of the HKSAR.

3.8 A complex situation would arise if an incident were to cause pollution damage both in the HKSAR and in mainland China. It appears that in such a situation the matter would have to be dealt with in the same manner as if the incident had caused pollution damage both in a State Party to the 1992 Civil Liability Convention and the 1992 Fund Convention and in a State Party to only the 1992 Civil Liability Convention. The legal situation would correspond to that which existed in respect of the 1971 Fund Convention when Hong Kong was a dependent territory of the United Kingdom. Reference is also made to the *Evoikos* case, where pollution damage was caused in Malaysia, which was a Party to the 1969 Civil Liability Convention and the 1971 Fund Convention, and in Singapore which at that time was Party to only the 1969 Civil Liability Convention.

3.9 It is conceivable that claims for the costs of preventive measures taken outside the waters of the HKSAR but within the territorial sea or exclusive economic zone of the PRC could be pursued against the 1992 Fund in the HKSAR, provided that they were taken to prevent or minimise pollution damage in the HKSAR. In this regard reference is made to the decision of the 1971 Fund Executive Committee in the *Kihnu* case (document FUND/EXC.49/12, paragraph 3.4.6).

4 Action to be taken by the Assembly

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