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RESPONSE CENTRE FOR THE MEDITERRANEAN SEA

CENTRE REGIONAL MEDITERRANEEN POUR L'INTERVENTION
D'URGENCE CONTRE LA POLLUTION MARINE ACCIDENTELLE

MEDITERRANEAN ACTION PLAN
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Regional Marine Pollution Emergency
Response Centre for the Mediterranean
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LIABILITY AND COMPENSATION FOR

MARINE POLLUTION DAMAGE

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LIABILITY AND COMPENSATION FOR MARINE POLLUTION DAMAGE

THE 1992 PROTOCOLS AMENDING THE 1969 CIVIL LIABILITY CONVENTION
AND THE 1971 FUND CONVENTION
AND RECENT DEVELOPMENTS IN THE IOPC FUNDS

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1 The Convention framework

The international regime of liability and compensation for oil pollution damage was devised in the aftermath of the *Torrey Canyon* incident in 1967. The liability of shipowners for oil spills from tankers was dealt with in the 1969 Civil Liability Convention (or CLC). This Convention laid down the principle of strict liability for shipowners, created a system of compulsory liability insurance and normally allows for the shipowner's liability to be limited on the basis of the size of the tanker. Supplementary compensation financed by levies on oil receivers in Contracting States was established under the 1971 Fund Convention. The Fund Convention set up the International Oil Pollution Compensation Fund 1971 (1971 Fund) to administer the regime.

This so-called 'old' regime of the 1969 and 1971 Conventions was amended in 1992 by two Protocols which came into force in May 1996. The amended Conventions are known as the 1992 Civil Liability Convention and the 1992 Fund Convention. The 1992 Fund Convention created a separate Organisation, known as the 1992 Fund.

2 Comparison of the 'old' and 'new' regimes

The main differences between the 'old' regime of the 1969 Civil Liability Convention and the 1971 Fund Convention and the 'new' regime of the 1992 Conventions are set out below and are also summarised in Annex I.

The 1969 and 1971 Conventions apply to pollution damage suffered in the territory (including the territorial sea) of a State Party to the respective Convention. Under the 1992 Conventions, however, the geographical scope is wider, with the cover extended to pollution damage caused in the exclusive economic zone (EEZ) or equivalent area of a State Party. A State which has not

established an exclusive economic zone may determine that the Convention applies to an area beyond and adjacent to the territorial sea determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

The definition of pollution damage in the 1992 Conventions has the same basic wording as the definition in the original Conventions, but with the addition of a phrase to clarify that, for environmental damage (other than loss of profit from impairment of the environment), compensation is limited to costs incurred for reasonable measures actually undertaken or to be undertaken to reinstate the contaminated environment.

The 1969 Civil Liability Convention and the 1971 Fund Convention apply only to damage caused or measures taken after oil has escaped or been discharged. These Conventions do not apply to pure threat removal measures, ie preventive measures which are so successful that there is no actual spill of oil from the tanker involved. Under the 1992 Conventions, however, expenses incurred for preventive measures are recoverable even when no spill of oil occurs, provided that there was a grave and imminent threat of pollution damage.

The 1969 and 1971 Conventions apply only to ships which actually carry oil in bulk as cargo, ie generally laden tankers. Spills from tankers during ballast voyages are therefore not covered by these Conventions. The 1992 Conventions apply to spills from sea-going vessels constructed or adapted to carry oil in bulk as cargo, ie both laden and unladen tankers, including spills of bunker oil from such ships. Neither the 1969/1971 Conventions nor the 1992 Conventions apply to spills of bunker oil from ships other than tankers.

The limit of the shipowner's liability under the 1969 Civil Liability Convention is the lower of 133 Special Drawing Rights (SDR) (US$186) per ton of the ship's tonnage or 14 million SDR (US$20 million)<1>. Under the 1992 Civil Liability Convention, the limits are:

(a) for a ship not exceeding 5 000 units of gross tonnage, 3 million SDR (US$4 million);

(b) for a ship with a tonnage between 5 000 and 140 000 units of tonnage, 3 million SDR (US$4 million) plus 420 SDR (US$587) for each additional unit of tonnage; and

(c) for a ship of 140 000 units of tonnage or over, 59.7 million SDR (US$83 million).

There is a simplified procedure under the 1992 Civil Liability Convention for increasing these limits.

Under the 1969 Civil Liability Convention, the shipowner is deprived of the right to limit his liability if the incident occurred as a result of the owner's personal fault (actual fault or privity). Under the 1992 Convention, however, the shipowner is deprived of this right only if it is proved that the pollution damage resulted from the shipowner's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

<1> The unit of account in the 1992 Conventions is the Special Drawing Right (SDR) as defined by the International Monetary Fund. In this paper, the SDR has been converted into US dollars at the rate of exchange applicable on 17 November 1998, ie 1 SDR = US$1.39743.

Claims for pollution damage under the Civil Liability Conventions can be made only against the registered owner of the ship concerned. This does not preclude victims from claiming compensation outside the Conventions from persons other than the owner. However, the 1969 Civil Liability Convention prohibits claims against the servants or agents of the owner. The 1992 Civil Liability Convention prohibits not only claims against the servants or agents of the owner, but also claims against the pilot, the charterer (including a bareboat charterer), manager or operator of the ship, or any person carrying out salvage operations or taking preventive measures.

The compensation payable by the 1971 Fund in respect of an incident is limited to an aggregate amount of 60 million SDR (US$84 million), including the sum actually paid by the shipowner (or his insurer) under the 1969 Civil Liability Convention. The maximum amount payable by the 1992 Fund in respect of an incident is 135 million SDR (US$189 million), including the sum actually paid by the shipowner (or his insurer) under the 1992 Civil Liability Convention. The 1992 Fund Convention provides a simplified procedure for increasing the maximum amount payable by the 1992 Fund.

Under the 1971 Fund Convention, the 1971 Fund indemnifies, under certain conditions, the shipowner for part of his liability pursuant to the 1969 Civil Liability Convention. There are no corresponding provisions in the 1992 Fund Convention.

In short, the 1992 Conventions provide much higher limits of compensation than the Conventions in their original versions and have a wider scope of application on several points.

3 Status of the Conventions

3.1 The 'new' regime

When the 1992 Fund Convention entered into force on 30 May 1996, nine States were Parties to the Convention and therefore Members of the 1992 Fund. Since then, the 1992 Fund Convention has entered into force for a further 18 States, bringing the present 1992 Fund membership to 27. In addition, 11 further States have deposited instruments of accession to the 1992 Fund Convention. The Convention will enter into force during the coming twelve months for these States, and will bring the number of 1992 Fund Member States to 38 by November 1999.

The 1992 Civil Liability Convention is also in force for three States which are not Parties to the 1992 Fund Convention. However, the 1992 Fund Convention will enter into force for one of these States at the end of this year.

The legislative process to implement the 1992 Conventions is in an advanced stage in a number of States. It is therefore expected that the 1992 Fund membership will continue growing.

3.2 The 'old' regime

The membership of the 1971 Fund rose to a peak of 76 Member States in March 1998. On 15 May 1998 instruments of denunciation took effect in respect of 24 States which had become Members of the 1992 Fund, and the number of States fell to 52. During the next 12 months, instruments of denunciation of the 1971 Fund Convention will take effect for eight States. By November 1999, therefore, the 1971 Fund will have only 44 Members.

3.3 Overall picture

With the expected continuation of the above-mentioned trends, the 1971 Fund will soon have fewer Members than the 1992 Fund. The relative number of Member States of the two Organisations is set out in Annex II and in the graph contained in Annex III.

The States of the Mediterranean fall into a number of different categories in terms of the Conventions. This is illustrated in Annex II.

4 Recent Developments

4.1 Difficulties ahead for the 1971 Fund

States not denouncing 'old' regime when acceding to 1992 Protocols
As the 1992 Protocols provide much higher limits of compensation than the Conventions in their original versions and have a wider scope of application on several points, there are no advantages for a State which has acceded to the 1992 Protocols in remaining a Member of the 1971 Fund. If an incident were to occur in a State which was a Member of both the 1971 Fund and the 1992 Fund, the legal situation would be very complex.

In April 1998 the 1971 Fund Assembly expressed its concern that some States had acceded to the 1992 Protocols without having deposited instruments of denunciation of the 1969 and 1971 Conventions. The Assembly therefore adopted a resolution in which Governments of 1971 Fund Member States which deposited instruments of accession to the 1992 Protocols were reminded of the need to deposit instruments of denunciation of the 1969 Civil Liability Convention and 1971 Fund Convention.

Unfortunately there are still two 1971 Fund Member States which have acceded to the 1992 Fund Protocol but have so far not deposited instruments of denunciation of the 1969 Civil Liability Convention and 1971 Fund Convention.

Operational problems for the 1971 Fund
In April 1998 the 1971 Fund Assembly addressed the problems which would arise for the 1971 Fund if, with the falling membership, the Assembly were unable to achieve a quorum (more than half of the Member States). There was particular concern that certain functions of the Assembly, such as adopting the budget, fixing annual contributions, settling claims and electing a legal representative (ie the Director), could not be carried out. The Assembly therefore adopted a

resolution - in the interests of victims of pollution damage - setting out certain measures which would enable the compensation system established under the 1971 Fund Convention to continue to function.

Despite extra efforts on the part of the Secretariat, the 1971 Fund Assembly did not achieve a quorum for its session in October this year, since only 18 of the 52 Member States were present at the required time. As a result, the items on the agenda of the Assembly were dealt with by the 1971 Fund's Executive Committee.

In October 1999, however, it is probable that the Executive Committee also will no longer be able to be able to achieve a quorum of two thirds of its 15 Member States. If that occurs the next step will be for the functions of the Assembly and Committee to be performed by a newly created body, to be known as the Administrative Council, which will have no quorum requirement. Decisions of the Administrative Council will be taken by majority vote of both 1971 Fund Member States and former 1971 Fund Member States, but former Member States will have the right to vote only in respect of issues relating to incidents which occurred while they were Members.

Financial consequences of remaining in the 1971 Fund

With the departure from the 1971 Fund of a number of States, the total quantity of contributing oil on which contributions are paid has been reduced from its maximum of 1 213 million tonnes to its present level of 345 million tonnes. By November 1999, it will have fallen to some 250 million tonnes. The effect of this reduction in the contribution base is the considerably increased financial burden which might fall on the contributors in those States which remain Members of the 1971 Fund, as set out in Annex IV.

Future of the 1971 Fund

The 1971 Fund Convention provides that the Convention will cease to be in force on the date when the number of Contracting States falls below three. There is considerable concern that before then the 1971 Fund will face a situation in which an incident occurs and the 1971 Fund has an obligation to pay compensation to victims, but where there are no contributors in any of the remaining Member States.

At the October 1998 sessions of the 1971 Fund bodies a number of ways were suggested in which Governments could assist in making other States aware of the consequences of remaining in the 1971 Fund, such as through diplomatic channels with neighbouring States and at regional workshops and seminars. The Director was instructed to continue and if possible increase his efforts to ensure that the implications of the situation were fully understood by all 1971 Fund Member States.

4.2 SUMED pipeline

At the 1992 Fund Assembly's October 1998 session, the Arab Republic of Egypt requested that the 1992 Fund should consider whether the contribution system in the 1992 Fund Convention would apply to oil passing through the SUMED pipeline. The Egyptian delegation proposed that the 1992 Fund Assembly should consider accepting Egypt as a Member of the 1992 Fund on the

basis that the oil passing through the SUMED pipeline would not be subject to contributions and that the right to receive compensation from the 1992 Fund would be waived in respect of incidents relating to the SUMED pipeline.

One delegation at the session supported the proposal by the Egyptian observer delegation. Another delegation expressed its understanding of the arguments put forward by the Egyptian delegation, but considered, nevertheless, that the proposal by the Egyptian delegation could be accommodated only by an amendment to the definition of the term 'receiver' in the 1992 Fund Convention, which would require a Diplomatic Conference. The delegation added that in its view it would be dangerous to make acceptance of the 1992 Fund Convention adopted by a Diplomatic Conference conditional upon a waiver of rights in respect of certain types of incidents.

The Assembly decided that it could not accept the Egyptian proposal that oil passing through the SUMED pipeline should not be subject to contributions, since an amendment to the 1992 Fund Convention adopted by a Diplomatic Conference would be necessary for receipts of such oil to be excluded from the contribution system.

4.3 Duty of States to submit oil reports

The 1971 and 1992 Funds are financed by contributions levied on any person who has received in one calendar year more than 150 000 tonnes of crude oil and heavy fuel oil ('contributing oil') in the respective Member State. The levy of contributions is based on reports of oil receipts in respect of individual contributors.

The obligation to submit oil reports rests on the Member States. These reports are essential to the functioning of the Fund system, as they provide the data from which contributions can be assessed and invoices issued. The reports have to be submitted to the Secretariat by 31 March each year. If no entity in a Member State has received more than 150 000 tonnes of contributing oil in the year in question, the State is required to notify the Secretariat accordingly ('nil' reports).

The non-submission of oil reports by a number of States was considered by the delegations at the October 1998 sessions of the governing bodies of both the 1971 Fund and the 1992 Fund to be a matter of serious concern to other Member States and in particular to the contributors in those States, since without oil reports the Secretariat cannot issue invoices for contributions. At that time four Members of the 1992 Fund and 24 Members of the 1971 Fund had not submitted their reports on contributing oil received in 1997. Moreover, for nine of the 1971 Members, reports were outstanding for between three and ten years.

Some delegations raised the possibility of withholding compensation payments to claimants in States which had not submitted oil reports. Many delegations, however, were of the view that such a course of action could be considered only in respect of claims submitted by a Government or Government authority.

The 1992 Fund Assembly decided in October 1997 that when electing members to the Executive Committee the Assembly may take into account the extent to which a particular State has fulfilled its obligation to submit reports on receipts of contributing oil in accordance with the Fund Convention.

In accordance with the decisions taken by the Funds' governing bodies in October this year, if a State does not submit its oil reports in future, the Director will make contacts with that State and emphasise the concerns expressed by the governing bodies of each Organisation. The Assembly will review individually each State which has not submitted its report and decide on the course of action to be taken for each State.

5 Conclusions

The advantages for a State of being a Member of the 1992 Fund can be summarised as follows. If an oil pollution incident occurs involving a tanker, compensation is available to governments or other authorities which have incurred costs for clean-up operations or preventive measures and to private bodies or individuals who have suffered damage as a result of the pollution. This is independent of the flag of the tanker, the ownership of the oil or the place where the incident occurred, provided that the damage is suffered in a 1992 Fund Member State. States which are at present outside the international regime are therefore urged to consider accession to the 1992 Conventions.

The 'old' regime of the 1969 and 1971 Conventions is losing importance and the 1971 Fund will be facing operational difficulties in the future. Governments of 1971 Fund Member States are therefore urged to accede to the 1992 Protocols and denounce the 'old' Conventions, so that they can benefit from the wider scope of application of the 'new' regime and the much higher limits of compensation and avoid the potentially increased cost for contributors in those States of remaining in the 1971 Fund.

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Annex I

Comparison of 'old' and 'new' regimes

	'Old' Regime		'New' Regime	
	1969 CLC	**1971 FC**	**1992 CLC**	**1992 FC**
SCOPE				
Geographical	Territory including territorial sea		Territory including territorial sea and EEZ or equivalent, if declared	
Pure threat-removal measures	Not covered		Covered if grave and imminent threat of pollution	
Unladen tankers	Not covered		Covered	
SHIPOWNER'S LIABILITY				
Dependent on size of tanker	Yes		Yes	
Minimum for small ships	None		3 million SDR (US$4 million)	
Maximum liability	14.0 million SDR (**US$20 million**)		59.7 million SDR (**US$83 million**)	
FUND'S COMPENSATION				
Maximum (including CLC)		60 million SDR (**US$84 million**)		135 million SDR (**US$189 million**)
INCREASING LIMITS	Requires diplomatic conference		Simplified procedure established	
ORGANISATION		1971 Fund		1992 Fund

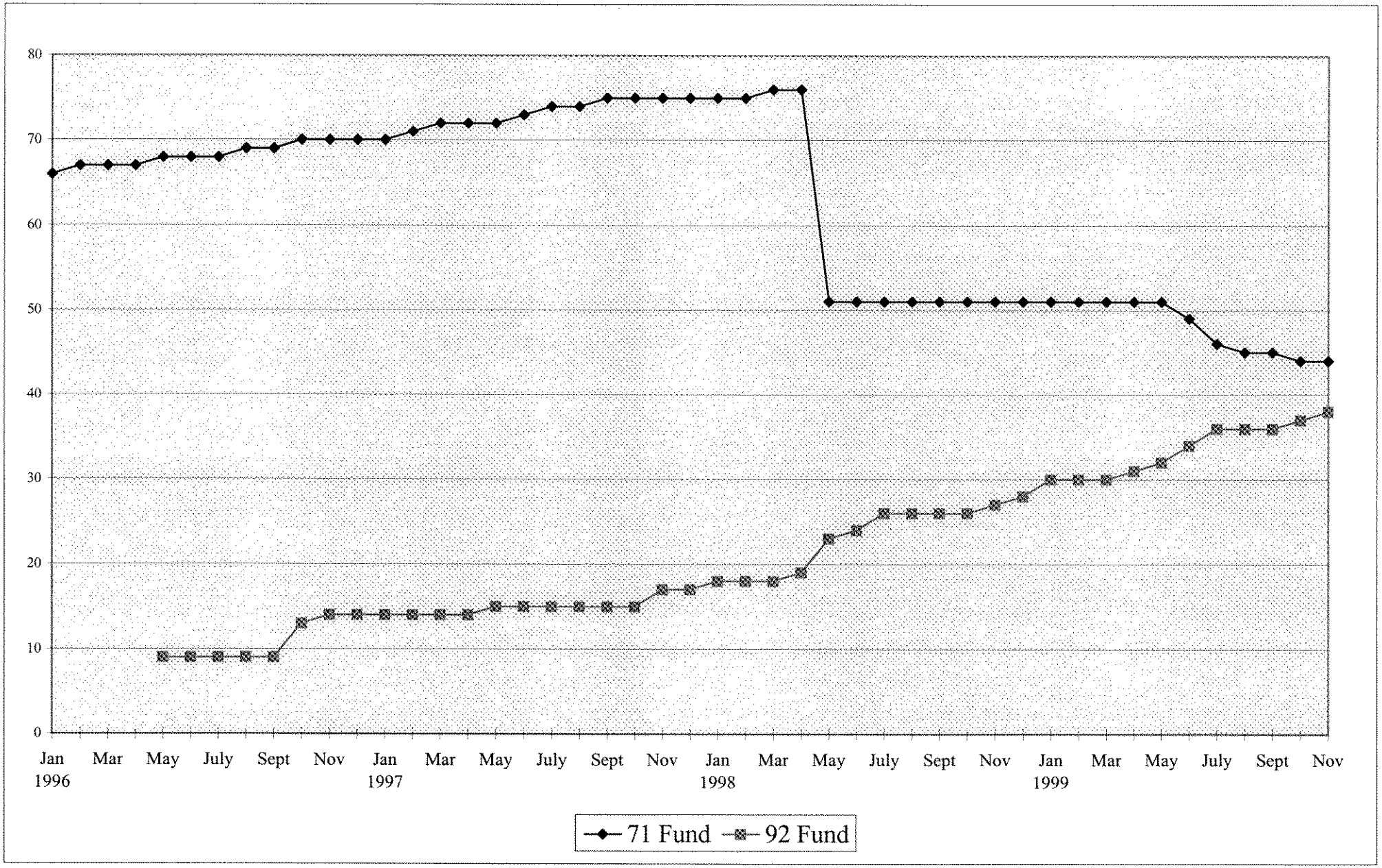
Annex II

Status of Conventions

	'Old' Regime		'New' Regime	
	1969 CLC	**1971 FC**	**1992 CLC**	**1992 FC**
STATUS				
In force November 1998	76	52	30	27
Joining soon	1	0	10	11
Leaving soon	-8	-8	0	0
In force November 1999	**69**	**44**	**40**	**38**
MEDITERRANEAN STATES				
In force November 1998	As 1971 FC, plus Egypt and Lebanon	Albania, Algeria, Croatia, Italy, Malta, Morocco, Slovenia, Syria, Yugoslavia	As 1992 FC, plus Egypt	Cyprus, France, Greece, Monaco, Spain, Tunisia
Changes by November 1999		*Leaving:* Algeria, Croatia		*Joining:* Algeria, Croatia

Annex III

1971 Fund and 1992 Fund Membership



Annex IV

Contributions

	'Old' Regime		'New' Regime	
	1969 CLC	1971 FC	1992 CLC	1992 FC
CONTRIBUTING OIL BASE Total 'contributing oil' receipts				
April 1998		1 213 million tonnes		718 million tonnes
November 1998		345 million tonnes		969 million tonnes
November 1999		252 million tonnes		1 117 million tonnes
SHARE OF CONTRIBUTIONS Relative share of levies for a State receiving 10 million tonnes				
April 1998		0.8%		1.4%
November 1998		2.9%		1.0%
November 1999		4.0%		0.9%