



**INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971**

EXECUTIVE COMMITTEE
55th session
Agenda item 3

71FUND/EXC.55/14
8 October 1997

Original: ENGLISH

INCIDENTS INVOLVING THE 1971 FUND

IRVING WHALE

Note by the Director

1 Introduction

1.1 On 5 September 1970, the Canadian registered oil barge *Irving Whale* left Halifax (Canada) towed by the tug *Irving Maple*. The barge was loaded with 4 270 tonnes of heavy fuel oil. The tug and the *Irving Whale* were on passage to Bathurst, New Brunswick (Canada), via the Canso Canal. On 7 September the *Irving Whale* sank in approximately 67 metres of water in the Gulf of St Lawrence.

1.2 Following the sinking, heavy fuel oil was released from the barge. Over the years, small quantities of oil continued to seep from the barge. In 1991, it was determined that there were still over 3 000 tonnes of oil on board. The Canadian Government considered pumping the oil from the sunken barge, but the water temperature would have made it necessary to heat the oil, and it was decided that a better option would be to raise the barge.

1.3 As required under Canadian law, an assessment was made of the impact on the environment of raising the *Irving Whale*. The results of this assessment were published in 1994. The refloating operation was planned for 1995 and a contract for the refloating was concluded in June of that year.

1.4 The barge's heating coils contained a chemical routinely used during the 1960s when the barge was constructed but which more recently has been recognised as a marine pollutant. In August 1995 an environmental group obtained an injunction obliging the Government to prepare a further environmental assessment.

1.5 The report of the further environmental assessment was published in March 1996. Further attempts to obtain an injunction failed and the refloating took place in the summer of 1996. The barge was successfully removed. A small quantity of oil was released during the refloating operation. The cost of the 1995 preparations and of the refloating operation in 1996 (including clean-up costs) amount to some Can\$42 million (£19 million).

1.6 In 1997, the Canadian Government took action before the Federal Court of Canada against the owners and operators of the *Irving Whale*, claiming compensation for the cost referred to in paragraph 1.5. The Canadian Ship-Source Oil Pollution Fund is a party to the proceedings by statute. So far, all defendants have denied liability although formal defences have not yet been filed.

1.7 The Government of Canada has notified the 1971 Fund of the legal action. The Director has informed the Government that in his view the 1971 Fund Convention does not apply in this case.

2 Director's analysis

2.1 The sinking of the *Irving Whale* occurred in 1970. The 1971 Fund Convention entered into force in respect of Canada in April 1989. The preparations for the refloating operation were carried out in 1995 and the refloating took place in 1996.

2.2 The Canadian Government has not claimed compensation for the cost of the clean-up operations incurred in connection with the sinking of the *Irving Whale* in 1970. The claim relates only to the cost of the preparations in 1995 and the refloating operation (including clean-up) in 1996.

2.3 The Director takes the view that, although the lifting of the barge was carried out in 1996, these operations should be considered as being part of the incident which started with the sinking of the barge in 1970. It should be noted that "incident" is defined as any occurrence or series of occurrences having the same origin (Article I.8 of the 1969 Civil Liability Convention and Article 1.1 of the 1971 Fund Convention).

2.4 A similar situation was addressed by the 1971 Fund in the *Czantoria* case (Canada, 1988). In that case, the Executive Committee decided that the 1969 Civil Liability Convention and the 1971 Fund Convention did not apply to damage sustained in a given State after the entry into force of the respective Convention for that State resulting from an incident occurring before the entry into force (document FUND/EXC.24/6, paragraph 3.4.6).

2.5 In the light of the Executive Committee's decision in the *Czantoria* case, the Director considers that the claim presented by the Canadian Government does not fall within the scope of application of the 1971 Fund Convention.

2.6 Subject to any instructions which the Executive Committee may give him, the Director intends to intervene in the court proceedings pursuant to Article 7.6 of the 1971 Fund Convention to protect the 1971 Fund's interests.

3 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
- (b) to decide whether the claim by the Canadian Government falls within the scope of application of the 1971 Fund Convention; and
- (c) to give the Director such instructions in respect of this incident as it may deem appropriate.