



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1971

EXECUTIVE COMMITTEE
60th session
Agenda item 3

71FUND/EXC.60/11
7 January 1999

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INCIDENTS INVOLVING THE 1971 FUND

IRVING WHALE

Note by the Director

Summary:	The Canadian Court has declared that the Fund has no liability with regard to the <i>Irving Whale</i> case.
Action to be taken:	Information to be noted.

1 Introduction

- 1.1 The Canadian registered oil barge *Irving Whale* loaded with 4 270 tonnes of heavy fuel oil sank on 7 September 1970 in approximately 67 metres of water in the Gulf of St Lawrence (Canada).
- 1.2 The 1971 Fund Convention entered into force in respect of Canada in April 1989.
- 1.3 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 was still over 3 000 tonnes of oil on board, and the Canadian Government decided to raise the barge.
- 1.4 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 preparations in 1995 and of the refloating operation in 1996 (including clean-up costs) amounted to some Can\$42 million (£16 million).
- 1.5 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 costs referred to in paragraph 1.4. The Canadian Ship-Source Oil Pollution Fund was a party to the proceedings by statute. The defendants denied liability and formal defences were filed by all parties.

1.6 It should be noted that the Canadian Government did not claim compensation for the cost of the clean-up operations incurred in connection with the sinking of the *Irving Whale* in 1970. The claim related only to the cost of the preparations in 1995 and the refloating operation (including clean-up) in 1996.

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

2 Consideration by the Executive Committee at its 56th session

2.1 At its 56th session the Executive Committee shared the Director's view that, although the lifting of the barge was carried out in 1996, those operations should be considered as being part of the incident which had started with the sinking of the barge in 1970. It was noted that "incident" was defined in the Conventions as any occurrence or series of occurrences having the same origin (Article 1.8 of the 1969 Civil Liability Convention and Article 1.2 of the 1971 Fund Convention).

2.2 It was recalled that a similar situation had been addressed by the 1971 Fund in the *Czantoria* case (Canada, 1988), where the Executive Committee had 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).

2.3 In the light of the Executive Committee's decision in the *Czantoria* case, the Committee decided that the claim presented by the Canadian Government did not fall within the scope of application of the 1971 Fund Convention (document 71FUND/EXC.56/2, paragraph 4.1.6).

3 Recent developments

3.1 In March 1998 the 1971 Fund submitted a note to the other parties involved in the court proceedings informing them that, in the Fund's view, the 1971 Fund Convention did not apply to this incident and giving the reasons therefor. The 1971 Fund requested the parties to acknowledge that the Fund had no involvement in this matter. However, the other parties were not prepared to make such an acknowledgement.

3.2 In the light of this situation, the 1971 Fund made a submission to the Court in September 1998 in which it requested the Court to declare by summary judgement that the 1971 Fund had no liability with regard to the *Irving Whale* incident.

3.3 At a Court hearing on 9 and 10 December 1998 the Canadian Government contested certain arguments put forward by the 1971 Fund, including the argument that the claim was time-barred but conceded that the 1971 Fund could not be liable for incidents occurring before the entry into force of the 1971 Fund Convention in respect of Canada.

3.4 In a decision dated 21 December 1998 the Court dismissed the action against the 1971 Fund. The Court held that the 1971 Fund could not be liable for events occurring prior to the date of the entry into force of the 1971 Fund Convention in respect of Canada. The Court also held that, although it was not strictly necessary to decide the question, the claim against the 1971 Fund was time-barred.

3.5 It is not expected that any party will appeal against the Court's decision.

4 Action to be taken by the Executive Committee

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