



INCIDENTS INVOLVING THE 1992 FUND

ERIKA

Note by the Director

Summary:

As there have been no significant developments in respect of most aspects of this incident since the June 2007 session, only those issues requiring the attention of the Executive Committee are set out in this document.

As at 30 August 2007, 6 997 claims for compensation have been submitted for a total of €388.5 million (£264 million)^{<1>} and 99.7% of the claims have been assessed. Compensation payments totalling €29 million (£85.1 million) have been made in respect of 5 751 claims.

Four hundred and twenty legal actions against the shipowner, his insurer and the 1992 Fund have been taken by 796 claimants. The courts have rendered 113 judgements and 64 actions involving 150 claimants remain pending.

Action to be taken: Information to be noted.

1 Introduction

- 1.1 This document sets out the general situation in respect of the *Erika* incident, which occurred off the coast of Brittany (France) on 12 December 1999, and deals with recent developments.
- 1.2 As regards details about the incident, the clean-up operations, the removal of the oil from the wreck of the *Erika* and the impact of the spill, reference is made to the Annual Report 2006 (pages 82-94).
- 1.3 As regards the investigations into the cause of the incident and recourse actions by the 1992 Fund reference is made to document 92FUND/EXC.34/6/Add 1.

<1> The rate of conversion of Euros into Pounds sterling has been made on the basis of the rate at 28 August 2007 (€1 = £0.6804), except in the case of claims paid by the 1992 Fund where conversions have been made at the rate of exchange on the date of payment.

2 Claims situation

- 2.1 As at 30 August 2007, 6 997 claims for compensation had been submitted for a total of €388.5 million (£264 million), which included a claim for a total of €179 million (£121.8 million) by the French State for clean-up operations carried out as a result of the incident. By that date 99.7% of the claims had been assessed. Some 1 048 claims, totalling €32 million (£21.7 million), had been rejected.
- 2.2 Payments of compensation had been made in respect of 5 751 claims for a total of €129 million (£85.1 million), out of which Steamship Mutual had paid €12.8 million (£8.6 million) and the 1992 Fund €16.2 million (£76.5 million).
- 2.3 The following table gives details of the situation in respect of different categories of claims.

Situation as at 30 August 2007					
Category	Claims submitted	Claims assessed	Claims rejected	Payments made	
				Number of claims	Amounts €
Mariculture and oyster farming	1 007	1 004	90	846	7 763 339
Shellfish gathering	534	534	114	370	889 189
Fishing boats	319	319	30	282	1 099 551
Fish and shellfish processors	51	51	7	43	976 832
Tourism	3 694	3 690	452	3 206	75 930 210
Property damage	711	711	290	416	2 452 680
Clean-up operations	150	145	12	125	31 871 530
Miscellaneous	532	523	53	463	7 945 619
Total	6 998	6 977	1 048	5 751	128 928 950

3 Payments to the French State

- 3.1 At the Executive Committee's October 2003 session the Director stated that, although there remained considerable uncertainties as to the total amount of the established claims, this uncertainty had been reduced since April 2003 and it might therefore be possible in the near future to make payments in respect of the French Government's claim. The Committee authorised the Director to make such payments to the extent that he considered there was a sufficient margin between the total amount of compensation available and the Fund's exposure in respect of other claims.
- 3.2 After having reviewed his earlier assessment of the total level of admissible claims, the Director decided in December 2003 that there was a sufficient margin to enable the 1992 Fund to commence payments to the French State. The 1992 Fund initially paid €10.1 million (£6.8 million) to the French State, corresponding to the French Government's subrogated claim in respect of the supplementary payments made by the Government to claimants in the tourism sector. In October 2004 the 1992 Fund paid a further €6 million (£4 million) to the French State relating to the French Government's supplementary payments made under a scheme to provide emergency payments to claimants in the fishery, mariculture and salt producing sectors. In December 2005 the 1992 Fund made a payment on account to the French State of €15 million (£10 million) towards the costs incurred by the French authorities in the clean-up response. In October 2006 the 1992 Fund made a further payment of €10 million (£6.7 million) to the French State towards the costs incurred by the French authorities in the clean-up response.

The Director continues to monitor the situation and will consider, in the light of the developments of the court proceedings involving the Funds, as well as the outcome of the criminal proceedings mentioned in paragraph 5, whether a further payment can be made to the French State.

4 Claims by salt producers in Guérande

Considerations by the Executive Committee in June 2007

Claims by salt producers

- 4.1 At its 37th session, held in June 2007, the Executive Committee took note of the judgement rendered in May 2007 by the Civil Court in Saint Nazaire in respect of 136 claims from salt producers in Guérande for losses caused by a lack of production in 2000 as a result of an imposed ban on water intake as well as for losses caused by the late start of the 2001 season and for the costs of restoration of salt ponds in 2001.
- 4.2 The Committee noted that, with regard to the claim for loss of production in 2000, the Court, after reviewing the scientific analysis carried out by the court expert and considering the views expressed by other experts presented by the salt producers, had considered that there was no scientific consensus on the health risks and efficiency of the booms deployed. It was noted that the risk of pollution from the presence of oil in the vicinity of the salt ponds, the oil removal operations in the *Erika* and the oil remaining on the rocky shore nearby had made it reasonable to maintain a complete closure of the salt ponds to prevent the entry of oil that would have caused substantial damage to the ponds. For these reasons it was noted that the Court held that the decision not to produce salt in 2000 had been a reasonable measure to prevent or minimise pollution damage.
- 4.3 It was also noted that the Court had accepted that the loss of salt production in 2001 was also a consequence of the *Erika* incident since the oil in the vicinity of the salt ponds had only been removed during the spring of 2001 and clean-up operations were still carried out in 2001 on rocky shores nearby. It was noted, however, that the Court had decided to reduce the compensation amount by 50% to take into account the impact that the exceptional rainfall in 2001 had had on the salinity of the salt ponds. It was also noted that the Court had accepted that the costs incurred to restore the salt ponds in 2001 were an unavoidable consequence of the decision not to produce salt in 2000 but that it had decided to reduce the compensation amount by 50% due to the exceptional rainfall in 2001.
- 4.4 The Committee noted that the Court had granted the salt producers the amount of €1 494 257 (£1 016 000) and had ordered the provisional execution of the judgement. It was noted that so far none of the claimants had appealed against the judgements.
- 4.5 It was noted that the Director, with the help of the 1992 Fund's French lawyer and the Fund's experts, was examining the judgements to decide whether the 1992 Fund should appeal.

Claim by a Co-operative of salt producers

- 4.6 At its June 2007 session the Committee took note of the judgement rendered in May 2007 by the Civil Court in Saint Nazaire in respect of a claim by a Co-operative of salt producers in Guérande for commercial loss, loss of image and additional costs incurred as a result of the *Erika* incident.
- 4.7 It was noted that the Court had stated that it was not the Co-operative but the salt producers who actually produced salt, that the claim by the Co-operative could therefore not be for loss of production but for loss of sales and that it was for the Co-operative to prove that it had suffered a loss of profit as a result of the pollution. It was noted that the Court had considered that the Co-operative had had a stock of some 28 611 tons of salt and that it had therefore been able to maintain sales at the normal level, even in the absence of salt production in 2000. The Committee noted that the Court had decided that the Co-operative had not been able to demonstrate that it had

suffered a commercial loss as a result of the *Erika* incident and had for that reason rejected that item claimed.

- 4.8 The Committee noted that, with regard to the claim for loss of image, the Court had stated that the Co-operative's decision to inform the public that it had a substantial stock of salt available for sale and to run a marketing campaign to inform and reassure consumers had been a reasonable measure to mitigate its loss which had been effective since the Co-operative had not experienced a substantial reduction in sales. It was noted that for that reason the Court had granted the Co-operative the amount of €378 041.68 (£257 000) but had not granted the amount of €266.44 (£180) corresponding to VAT and non-justified costs.
- 4.9 It was noted that, with regard to the claim for additional costs incurred to minimise pollution damage (costs of monitoring the booms, filtration devices, analysis of the water, etc.), the Court had decided that those measures were reasonable and had been taken to prevent pollution damage and that it had granted the amount of €21 346.98 (£14 500). It was also noted that the Court had rejected other additional costs incurred in the amount of €136 345.46 (£92 600) since they referred to the time spent by the salt producers defending their interests and coordinating their activities, which were not directly linked to the *Erika* incident.
- 4.10 It was further noted that the Court had granted the Co-operative an amount of €12 000 (£8 150) to cover the legal and other costs incurred.
- 4.11 It was noted that the Director, with the help of the 1992 Fund's French lawyer and the Fund's experts, was examining the judgements to decide whether the 1992 Fund should appeal.

Decision by the Executive Committee

- 4.12 At its June 2007 session the Executive Committee instructed the Director to examine the judgements and to report to the Committee at its October 2007 session with his proposal or decision in respect of lodging an appeal against the judgements.

Developments since the June 2007 session

- 4.13 In June 2007 the Director, together with the 1992 Fund's French lawyer, examined the judgements by the Civil Court in Saint Nazaire in order to decide whether the 1992 Fund should appeal.
- 4.14 With regard to the judgements in respect of the 136 claims by salt producers in Guérande, the Director considered that there was no matter of principle involved in the dispute since the Fund had agreed that the spill had caused pollution damage in Guérande and that the Court had arrived at a balanced judgement by considering that the costs incurred to restore the salt ponds in 2001 was an unavoidable consequence of the decision not to produce salt in 2000, which in the Court's view had been a reasonable decision under the circumstances, and by reducing the compensation amounts by 50% to take into account the impact of the exceptional rainfall in 2001. The Director also considered that the salt producers had informed the 1992 Fund that they were prepared not to appeal against the judgement provided the Fund took the same decision. The Director therefore decided that the best interest of the 1992 Fund would be protected by agreeing with the salt producers that the parties would not appeal against these judgements.
- 4.15 With regard to the judgement in respect of the Co-operative of salt producers, the Director noted that the court had agreed with the 1992 Fund and rejected the claim for commercial loss in the amount of €7.1 million (£4.8 million), but that the court had granted the claim for loss of image for some €378 000 (£257 000). The Director also noted that the Co-operative of salt producers had appealed against the judgement.

5 Criminal proceedings

- 5.1 On the basis of a report by an expert appointed by a magistrate in the Criminal Court in Paris, criminal charges were brought in that Court against the master of the *Erika*, the representative of the registered owner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the management company itself, the deputy manager of Centre Régional Opérationnel de Surveillance et de Sauvetage (CROSS), three officers of the French Navy who were responsible for controlling the traffic off the coast of Brittany, the classification society Registro Italiano Navale (RINA), one of RINA's managers, Total SA and some of its senior staff.
- 5.2 The trial lasted for four months and was concluded on 13 June 2007. The 1992 Fund, although not a party, followed the proceedings through its lawyer in France. The judgement is expected in January 2008.

6 Legal proceedings involving the Fund

- 6.1 The Conseil Général of Vendée and a number of other public and private bodies brought actions in various courts against the shipowner, Steamship Mutual, companies in the Group Total SA and others, requesting that the defendants should be held jointly and severally liable for any claims not covered by the 1992 Civil Liability Convention. The 1992 Fund requested to be allowed to intervene in the proceedings. As for the action brought by the Conseil Général of Vendée, the Commercial Court in Nantes has declared that the action has lapsed (*périmée*) since there has been no activity by the parties for more than two years.
- 6.2 The French State brought actions in the Civil Court in Lorient against Tevere Shipping Co Ltd, Panship Management and Services Srl, Steamship Mutual, Total Transport Corporation, Selmont International Inc, the limitation fund established by the shipowner and the 1992 Fund, claiming €190.5 million (£129.5 million).
- 6.3 Four companies in the Group Total SA took legal actions in the Commercial Court in Rennes against the shipowner, Steamship Mutual, the 1992 Fund and others claiming €143 million (£97.2 million).
- 6.4 Steamship Mutual brought action in the Commercial Court in Rennes against the 1992 Fund, requesting the Court, *inter alia*, to note that, in the fulfilment of its obligations under the 1992 Civil Liability Convention, Steamship Mutual had paid €2 843 484 (£8.7 million) corresponding to the limitation amount applicable to the shipowner, in agreement with the 1992 Fund and its Executive Committee. Steamship Mutual further requested the Court to declare that it had fulfilled all its obligations under the 1992 Civil Liability Convention, that the limitation amount had been paid and that the shipowner was exonerated from his liability under the Convention. Steamship Mutual also requested the Court to order the 1992 Fund to reimburse it any amount the shipowner's insurer will have paid in excess of the limitation amount.
- 6.5 Claims totalling €497 million (£337.8 million) were lodged against the shipowner's limitation fund constituted by Steamship Mutual. This amount includes the claims by the French Government and Total SA. However, most of these claims, other than those of the French Government and Total SA, have been settled and it appears therefore that these claims should be withdrawn against the limitation fund to the extent that they relate to the same loss or damage. The 1992 Fund received from the liquidator of the limitation fund formal notifications of the claims lodged against that fund.
- 6.6 Due to some disturbances by an individual during all hearings in the Commercial Court in Rennes relating to the *Erika* incident, all judges of that Court decided in January 2006 that they would no longer deal with any proceedings concerning that incident. This decision applies to ten actions involving 63 claimants, including the actions mentioned in paragraphs 6.3 and 6.4 above, and the proceedings relating to the shipowner's limitation fund. The President of the Court of Appeal in

Rennes decided on 12 January 2006 to transfer the actions and proceedings from the Commercial Court in Rennes to the Commercial Court in Saint-Brieuc. The Court in Saint-Brieuc accepted to deal with these actions and proceedings.

- 6.7 Four hundred and twenty legal actions against the shipowner, Steamship Mutual and the 1992 Fund have been taken by 796 claimants. By 30 August 2007 the courts had rendered 113 judgements in actions taken by 250 claimants. Sixty-four legal actions by 150 claimants were pending. The total amount claimed in the pending actions, excluding the claims by the French State and Total SA, was €57.7 million (£39 million).
- 6.8 The 1992 Fund will continue to hold discussions with the claimants whose claims are not time-barred for the purpose of arriving at out-of-court settlements if appropriate.

7 Legal proceedings by the Commune de Mesquer against Total

Considerations by the Executive Committee in June 2007

- 7.1 One delegation informed the Committee at its June 2007 session that a legal action had been brought by the Commune de Mesquer against Total before the French Courts, where it had been argued that the cargo on board the *Erika* was in fact a residue and that the French Supreme Court had referred this question to the European Court of Justice for an opinion. That delegation asked the Director to explain what impact, if any, these legal proceedings would have on the 1992 Fund. The French delegation informed the Committee that the legal action had been brought by a local authority and that the French Government was not party to these proceedings. That delegation pointed out that even if the European Court of Justice were to decide that the cargo on board the *Erika* was a residue, it was difficult to determine what implications the decision could have on the 1992 Fund.
- 7.2 The Director stated that he was not aware of these legal proceedings but that he would investigate the matter and report to the Executive Committee at its next session in October 2007.

Developments since the June 2007 session

- 7.3 The 1992 Fund's French lawyer has investigated the matter and informed the Director that the French Supreme Court has referred three questions to the European Court of Justice for an opinion, namely:
- Whether the fuel oil transported as cargo on board the *Erika* was in fact a residue under European law.
 - Whether a cargo of fuel oil that accidentally escaped from a ship could, since it has been mixed with seawater and sediments, be construed as a residue under European law.
 - If the cargo on board the *Erika* was not a residue but became a residue after accidentally escaping from the ship, would the companies of the Total group be considered as responsible for the residues even though the cargo was being transported by a third party?
- 7.4 In the Director's view it is unlikely that the European Court of Justice will find that the cargo on board *Erika* was not persistent oil. In his view therefore the Court's decision is not likely to have an effect on the applicability of the 1992 Civil Liability and Fund Conventions.
- 7.5 The 1992 Fund is following these legal proceedings and the Director will inform the Executive Committee of its outcome and of any consequences it might have for the 1992 Fund.

8 Court judgements in respect of claims against the 1992 Fund

Civil Court of Sables d'Olonne

Claim by four salt producers in Noirmoutier

- 8.1 Claims for lost salt production for the 2000 and 2001 seasons, caused by the imposed ban on water intake, were also received from producers in Noirmoutier (cf paragraphs 4.1 to 4.15). The 1992 Fund and Steamship Mutual had considered that salt production had been possible in 2000, but that the maximum yield would have been 30% of that expected for the year. Compensation payments were made to the salt producers for the outstanding 70%. The 1992 Fund and Steamship Mutual rejected the claim for losses in 2001. Eighty producers accepted the Fund's assessment whereas three pursued claims in court claiming losses of €40 869.18 (£27 800) for the 2000 session and €25 847.25 (£17 500) for the 2001 season.
- 8.2 In a judgement rendered in June 2007 the Court rejected the claims by the three salt producers in Noirmoutier. With regard to the claim for the 2000 season, the Court stated that the three producers had settled the claims by signing a full and final settlement agreement that was a binding document between the parties. With regard to the claim for the 2001 season, the Court stated that the salt producers had not presented any evidence in support of their allegations, that they had not adequately maintained the salt ponds in 2000 and that a report from an expert submitted by the 1992 Fund and Steamship Mutual had shown the impact that the exceptional rainfall in 2001 had had on the salinity of the salt ponds.

9 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document; and
 - (b) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.
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