INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
41st session
Agenda item 3

92FUND/EXC.41/3
22 May 2008
Original: ENGLISH

INCIDENTS INVOLVING THE 1992 FUND

ERIKA

Note by the Director

Objective of document:	To inform the Executive Committee of the latest developments regarding this incident.
Summary of the incident so far:	On 12 December 1999 the *Erika* sank in the Bay of Biscay, some 60 nautical miles off the coast of Brittany, France. Some 400 kilometres of shoreline were polluted by the oil, causing a considerable impact in particular on businesses in the fisheries and tourism sector. As at 12 May 2008, 7 130 claims for compensation had been submitted for a total of €211 million (£167.3 million)[<1>] and 99.7% of these claims have been assessed. Compensation payments totalling €129.5 million (£86.9 million) have been made in respect of 5 932 claims (section 3). 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 134 judgements and 43 actions involving 52 claimants remain pending. (section 5).
Recent developments:	A legal action was brought by the Commune de Mesquer against Total before the French Courts, where it had argued that the cargo on board the *Erika* was, under European law, a waste. The French Supreme Court had referred this question to the European Court of Justice. In March 2008 the Advocate General delivered her legal opinion stating *inter alia* that heavy fuel oil must be treated as a waste when it is discharged as a result of an incident and becomes mixed with water and sediments. In her opinion this provision of European law is compatible with the provisions of the 1992 Civil Liability and Fund Conventions (section 7). Seven court judgements have been rendered since the last session of the Executive Committee in March 2008. Details of the judgements are provided (section 6).
Action to be taken:	Information to be noted.

[<1>] Conversion of currencies has been made on the basis of the exchange rate as at 12 May 2008 (€1 = £0.7929), except in respect of payments made by the 1992 Fund where the conversion has been made at the rate of exchange on the date of payment.

1 Summary of incident

Ship	*Erika*
Date of incident	12.12.1999
Place of incident	France
Cause of incident	Breakage, sinking
Quantity of oil spilled	Approximately 19 800 tonnes of heavy fuel oil
Area affected	West coast of France
Flag State of ship	Malta
Gross tonnage (GT)	19 666 GT
P&I insurer	Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual)
CLC Limit	€12 843 484 (£10 million)
STOPIA/TOPIA applicable	No
CLC + Fund limit	€184 763 149 (£146.5 million)
Compensation:	Reference is made to the table in paragraph 3.3
Standing last in the queue:	The French Government and Total SA undertook to stand last in the queue after all other claimants.
Legal proceedings:	43 actions involving 52 claimants remain pending.

2 Introduction

2.1 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.

2.2 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).

2.3 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.

3 Claims situation

3.1 As at 12 May 2008, 7 130 claims for compensation, other than those made by the French Government and Total SA, had been submitted for a total of €211 million (£167.3 million). By that date 99.7% of these claims had been assessed. Some 1 014 claims, totalling €31.8 million (£25.2 million), had been rejected.

3.2 Payments of compensation had been made in respect of 5 932 claims for a total of €129.5 million (£86.9 million), out of which Steamship Mutual had paid €12.8 million (£10 million) and the 1992 Fund €116.7 million (£76.9 million).

3.3 The table below gives details of the situation in respect of claims in various categories:

Claims situation as at 12 May 2008

Category	Claims submitted	Claims assessed	Claims rejected	Payments made	
				Number of claims	Amounts €
Mariculture and oyster farming	1 007	1 004	89	846	7 763 339
Shellfish gathering	534	534	116	373	892 502
Fishing boats	319	319	29	282	1 099 551
Fish and shellfish processors	51	51	7	44	977 631
Tourism	3 695	3 692	457	3 206	75 982 818
Property damage	711	711	249	460	2 556 905
Clean-up operations	150	145	12	127	31 887 782
Miscellaneous	663	655	55	595	8 387 521
Total	**7 130**	**7 111**	**1 014**	**5 933**	**129 548 049**

3.4 For details regarding the assessment of the claim for clean-up costs submitted by the French State and the payments to the French State, reference is made to the Annual Report 2006, pages 83-85.

4 Criminal proceedings

4.1 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.

4.2 A number of claimants, including the French Government and several local authorities, joined the criminal proceedings as civil parties, claiming compensation totalling €400 million (£317 million).

4.3 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 French lawyers.

4.4 In its judgement, delivered in January 2008, the Criminal Court held the following four parties criminally liable: the representative of the shipowner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the classification society (RINA) and Total SA. The representative of the shipowner and the president of the management company were sentenced to pay a fine of €75 000 (£59 500) each. RINA and Total SA were sentenced to pay a fine of €375 000 (£297 000) each. All the other accused parties were acquitted.

4.5 Regarding civil liabilities, the judgement made the four parties jointly and severally liable for the damage caused by the incident and awarded claimants in the proceedings economic losses, damage to the image of several regions and municipalities, moral damages and damages to the environment. The Court assessed the total damages in the amount of €192.8 million (£152.9 million), including €153.9 million (£121.2 million) for the French State.

4.6 The four parties held criminally liable and a number of civil parties have appealed against the judgement.

Consideration by the Executive Committee in March 2008

4.7 At the Executive Committee's 40th session, held in March 2008, the French delegation stated that this was the first judgement in France where a court had awarded compensation for damage to the environment in favour of some claimants, such as the Department of Morbihan, which had been able to show actual damage to sensitive areas the Department was responsible to protect. That delegation also stated that the judgement recognised the right of environmental protection organisations to claim compensation for material, moral and also environmental damage caused to the collective interest, which it was their purpose to protect. That delegation pointed out that the judgement was subject to appeal and that, for this reason, the Fund would have to await the decision by the Court of Appeal.

4.8 Several delegations expressed concern that the Criminal Court in Paris had awarded compensation for moral and environmental damages when Article I.6 (a) of the 1992 Civil Liability Convention (1992 CLC) restricts compensation for impairment of the environment to the costs of reasonable measures of reinstatement actually undertaken or to be undertaken. The point was made that the judgement had interpreted Article III.4 of the 1992 CLC in such a manner that parties which normally would have been covered by that provision were found not to fall within its scope. It was pointed out that the judgement could have serious consequences for the international compensation regime.

4.9 The Director stated that the Secretariat would have to study the judgement in detail to examine the implications it might have for the international compensation regime and for the 1992 Fund and that an examination of the possibilities of a recourse action against any of the parties found responsible for the damages caused by the incident would be part of such a study.

5 Legal proceedings involving the Fund

5.1 With regard to the legal proceedings brought as a result of the incident, reference is made to the Annual Report 2006, pages 88-89.

5.2 Legal actions against the shipowner, Steamship Mutual and the 1992 Fund were taken by 796 claimants. By 12 May 2008 out-of-court settlements had been reached with a great number of

these claimants (450 actions) and the courts had rendered judgements in respect of 134 claims. Forty-three actions by some 52 claimants are pending. The total amount claimed in the pending actions, excluding the claims by the French State and Total SA, is some €35 million (£27.8 million).

5.3 The 1992 Fund will continue the discussions with the claimants whose claims are not time-barred for the purpose of arriving at out-of-court settlements if appropriate.

6 Court judgements in respect of claims against the 1992 Fund

6.1 Commercial Court in Lorient

6.1.1 The Commercial Court in Lorient delivered five judgements in April 2008, a summary of which is provided in the paragraphs below:

Owner of rental apartments

6.1.2 An owner of rental apartments submitted a claim for economic losses totalling €5 751 (£4 550). The 1992 Fund had rejected the claim since the claimant had not proved to have suffered losses as a result of the contamination caused by the *Erika* incident.

6.1.3 The Court rendered its judgement in April 2008. The Court stated that it was not bound by the 1992 Fund's criteria for admissibility and that it was for the Court to interpret the concept of 'pollution damage' and to apply it to the individual claim by determining whether there was a sufficiently close link of causation between the event that lead to the damage ('le fait générateur') and the losses suffered. The Court, however, rejected the claim on the grounds that the claimant had not proved to have suffered losses.

6.1.4 At the date of publication of this document the claimant had not appealed against the judgement.

Estate Agent

6.1.5 An estate agent submitted a claim totalling €74 564 (£59 000) for economic losses allegedly linked to the *Erika* incident. The 1992 Fund had rejected the claim since the claimant had not proved to have suffered losses as a result of the contamination caused by the *Erika* incident.

6.1.6 The Court rendered its judgement in April 2008. After making the same statement as the one mentioned in paragraph 6.1.3, the Court rejected the claim on the grounds that the claimant had not proved to have suffered losses as a result of the *Erika* incident.

6.1.7 At the date of publication of this document the claimant had not appealed against the judgement.

Hotel-restaurant

6.1.8 A company exploiting a hotel-restaurant took legal action against the 1992 Fund in the Commercial Court of Lorient, claiming €74 892 (£59 400) for economic losses and €7 400 (£5 900) for moral damages and damage to its image. The 1992 Fund had rejected the claim on the grounds that the claimant had not proved the quantum of its loss and, in any event, because the claimed moral and image damages were not admissible under the 1992 Fund's criteria for admissibility of claims for compensation.

6.1.9 The Court rendered its judgement in April 2008. After making the same statement as the one mentioned in paragraph 6.1.3, the Court found that the claimant had suffered economic losses as a result of the pollution in the amount of €27 600 (£21 900). The Court, however, rejected the claim for moral and image damages.

6.1.10 The Director, bearing in mind that the judgement has rejected the items claimed which were not admissible under the Fund's criteria for admissibility of claims and that there is not a question of

principle involved, considers that the assessment of the quantum by the Court is not unreasonable and therefore takes the view that the Fund should not appeal against the judgement.

6.1.11 At the date of publication of this document the claimant had not appealed against the judgement.

Twenty-seven claimants in the tourism sector

6.1.12 A group of 27 claimants in the tourism sector brought an action for compensation against the 1992 Fund claiming compensation in the amount of some €2 million (£1.6 million). Fourteen of these claimants had submitted claims to the 1992 Fund, but the Fund rejected their claims since they had not provided sufficient information in support of their claims, even after repeated requests by the Fund to do so. This group did not accept the Fund's decision and took legal actions against the Fund. Thirteen other claimants did provide the required information and their claims were assessed, settled and paid. These claimants, who were plaintiffs in the legal action, submitted an application to the Court to withdraw the proceedings.

6.1.13 In a judgement rendered in April 2008 the Court accepted the withdrawal of the claims by the 13 claimants and rejected the claims by the other 14 claimants since, under French law, an action is time barred (périmée) if there has been no activity by the plaintiffs for more than two years since the action was brought.

6.1.14 At the date of publication of this document the claimants had not appealed against the judgement.

Various communes

6.1.15 Twenty-two communes and a syndicate of communes brought an action against the 1992 Fund and other parties claiming compensation in the amount of some €13 million (£10.3 million). The claimants had submitted claims for compensation to the 1992 Fund and also in the criminal proceedings brought before the Criminal Court in Paris (section 4). The Fund settled the losses of 15 of these claimants, however only five of them withdrew their legal actions. The Fund rejected the claims by the other eight claimants, including the syndicate of communes, since they had not proved their losses.

6.1.16 In a judgement rendered in April 2008 the Court accepted the withdrawal of the actions by five claimants, rejected the claims by the ten claimants who had reached out-of-court settlements with the 1992 Fund but not withdrawn the legal actions and decided to stay the legal proceedings in respect of the eight other claimants pending the outcome of the appeal in the criminal proceedings.

6.1.17 At the date of publication of this document the claimants had not appealed against the judgement.

6.2 Commercial Court in Saint-Brieuc

Two estate agents

6.2.1 The operator of two estate agencies had submitted a claim totalling €2 420 095 (£1.9 million) for economic losses suffered in 2000, 2001 and 2002 allegedly as a result of the *Erika* incident. The 1992 Fund had assessed the claim for losses in 2000 at €280 503 (£222 400) and paid this amount to the claimants, but had rejected the losses for 2001 ad 2002 since, in its view, the claimants had not proved to have suffered losses as a result of the *Erika* incident.

6.2.2 In a judgement rendered in May 2008 the Court, after making a reference to a statement made by the Court of Appeal in Rennes in a previous judgement to the effect that the 1992 Conventions, approved by France, had priority over French national law but that it was for the French courts to interpret the notion of pollution damage contained in the 1992 Conventions, agreed with the assessment of the claims for losses in 2000 by the Fund and rejected the claims for 2001 and 2002 since the claimants had not proved to have suffered losses as a result of the *Erika* incident in those years.

6.2.3 At the date of publication of this document the claimants had not appealed against the judgement.

6.3 Commercial Court in Saint Nazaire

Shop selling boats and nautical accessories

6.3.1 A company selling, hiring and repairing boats and accessories had submitted a claim for €151 717 (£120 300) for losses suffered as a result of the *Erika* incident. The 1992 Fund had assessed the losses in respect of the sale of accessories at €35 835 (£28 200) and had paid this amount to the claimant. The Fund considered, however, that the purchase of boats was a long term investment and that it was unlikely to be permanently affected by the consequences of an oil spill since at most the decision to purchase a boat might be postponed. The 1992 Fund had therefore rejected the part of the claim related to the sale of boats since it considered that it had not been proved that there was a sufficiently close link of causation between this loss and the contamination caused by the *Erika* incident. The claimant did not agree with the 1992 Fund and brought a legal action claiming €73 512 (£58 000) for the losses related to the sale of boats.

6.3.2 In a decision rendered in December 2004 the Court appointed a court expert to assess the loss related to the sale of new boats. The court expert issued his report in August 2006 and assessed the claim in the amount of €42 504 (£33 700).

6.3.3 In a judgement rendered in May 2008 the Court, after making a reference to the statement by the Court of Appeal in Rennes in a previous case that it was for the Court to interpret the concept of 'pollution damage' in the 1992 Conventions and to apply it to the individual claim by determining whether there was a sufficiently close link of causation between the event that lead to the damage ('le fait générateur') and the losses suffered, accepted the assessment made by the court expert and awarded the claimant €42 504 (£33 700) for losses related to the sale of new boats. In addition, the court appointed the same court expert to assess the other items claimed, such as the losses incurred in the sale of second hand boats, trailers and electronic material.

6.3.4 The Director, after considering the arguments used by the Court, as well as the views of the 1992 Fund's experts and its French lawyer, has appealed against the judgement since he considers the method of calculation and the conclusions reached by the court expert to be questionable.

7 Legal proceedings by the Commune de Mesquer against Total

Considerations by the Executive Committee in June and October 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 argued that the cargo on board the *Erika* was in fact a waste under European law. That delegation also mentioned 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.

7.2 The Director informed the Committee that the French Supreme Court had 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 waste under European law.

- Whether a cargo of fuel oil that accidentally escaped from a ship would, once it had been mixed with seawater and sediments, become a waste under European law.

- If the cargo on board the *Erika* was not a waste but became a waste after accidentally escaping from the ship, should the companies of the Total group be considered responsible for the waste under European law even though the cargo was being transported by a third party?

7.3 The Committee noted that in the Director's view it was unlikely that the European Court of Justice would find that the cargo on board the *Erika* was not persistent oil and that therefore the Court's opinion was not likely to have an effect on the applicability of the 1992 Civil Liability and Fund Conventions.

7.4 One delegation requested a clarification from the Secretariat as to whether, if the European Court of Justice were to consider that the cargo on board the *Erika* was a waste, that finding would make the cargo owner liable and whether this decision would be in contravention of the 1992 Civil Liability Convention, which does not allow a direct liability of the cargo owner.

7.5 The French delegation stated that the position of the French State was that the oil transported by the *Erika* had become a waste only when it had escaped from the ship and that it hoped that the European Court of Justice would arrive at the same conclusion.

Legal opinion by Advocate General Kokott

7.6 In March 2008 Advocate General Kokott of the European Court of Justice rendered her legal opinion on the case. The main conclusions are the following:

- Heavy fuel oil, being a product of a refining process, meeting the user's specifications and intended by the producer to be sold as combustible fuel, cannot be treated as waste within the meaning of European Council directive 75/442/CEE, dealing with waste[<2>].

- Heavy fuel oil must be treated as waste within the meaning of that directive, when it is discharged from a tanker as a result of an incident and becomes mixed with water and sediment.

- The 'polluter pays' principle embedded in that directive[<3>] does not contain a precise obligation and is thus not directly applicable against a private entity such as Total.

- French law incorporating the 1992 Conventions precludes any claim for compensation in France against anyone other than the owner of the ship, unless the damage was caused intentionally or recklessly, and does not allow claims for compensation against charterers such as Total[<4>]. This exemption of liability does not appear, however, to be incompatible with Article 15 of the directive relating to waste even when the recipients contributed to the chain of causality, since the 'polluter pays' principle leaves scope for the Member States in relation to the implementation of the directive. By channelling the liability towards the shipowner, the Civil Liability Convention fits well within the spirit of the ‘polluter pays’ principle.

- It results from this that the producer, seller and carrier of heavy fuel oil may be made to bear, under that directive, the cost of the disposal of oily waste following a shipping accident if he contributed personally to causing the spill of heavy fuel oil.

- The Directive is also compatible with the exemption of liability of the producer, seller and carrier of heavy fuel oil in accordance with the 1992 Civil Liability and Fund Conventions.

<2> Article 1 of directive 75/442/CEE of the Council of July 15 1975.
<3> Article 15 of directive 75/442/CEE.
<4> See Article 3 of 1992 Civil Liability Convention.

- The Advocate General also states that her conclusions are in accordance with the obligation, when interpreting Community legislation, to avoid as far as possible contradictions with other applicable international instruments, such as the Civil Liability Convention.

7.7 It is not known when the European Court of Justice will render its decision.

7.8 The 1992 Fund continues to follow these legal proceedings and will inform the Executive Committee of any developments in this matter.

8 Action to be taken by the Executive Committee

The 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.