INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
42nd session
Agenda item 3

92FUND/EXC.42/4
1 October 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 24 September 2008, 7 130 claims for compensation had been submitted for a total of €211 million (£167 million)[<1>] and 99.7% of these claims have been assessed. Compensation payments totalling €129.7 million (£102.7 million) have been made in respect of 5 934 claims. Legal actions against the shipowner, his insurer and the 1992 Fund were taken by 796 claimants. Out-of-court settlements have been reached with a great number of these claimants (377 actions) and the courts have rendered judgements in respect of 140 claims. Thirty-seven actions by some 46 claimants are pending. The total amount claimed in the pending actions, excluding the claims by Total SA, is some €25.5 million (£20.2 million).
Recent developments:	A legal action was 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, under European law, a waste. The French Supreme Court had referred this question to the European Court of Justice. The European Court of Justice delivered its judgement on 24 June 2008. The Director, with the help of the 1992 Fund's French lawyer, has studied the judgement and a summary of the same is provided in this document. Six court judgements have been rendered since the last session of the Executive Committee in June 2008. Details of the judgements are provided.
Action to be taken:	Information to be noted.

[<1>] Conversion of currencies has been made on the basis of the exchange rate as at 24 September 2008 (€1 = £0.7916).

1 Summary of incident

Ship	*Erika*
Date of incident	12.12.99
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 (£10.2 million)
STOPIA/TOPIA applicable	No
CLC + Fund limit	€184 763 149 (£146.3 million)
Compensation:	Total amount paid: €129 659 307 (£102.8 million)
Standing last in the queue:	The French Government and Total SA undertook to stand last in the queue after all other claimants.
Legal proceedings:	37 actions by 46 claimants remain pending. The total amount claimed in court is €25 million (£20.2 million)

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*, the shipowner's limitation fund, maximum amount available for compensation, undertakings by TOTAL and the French Government and other sources of funds, reference is made to the Annual Report 2007 (pages 77-90).

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 24 September 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 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 5 934 claims for a total of €129.7 million (£102.79 million), out of which Steamship Mutual had paid €12.8 million (£10.2 million) and the 1992 Fund €116.9 million (£92.5 million).

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

Claims situation as at 24 September 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	3 693	457	3 207	76 094 076
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**	**7 112**	**1 014**	**5 934**	**129 659 307**

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 (£316.6 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 (£59 400) each. RINA and Total SA were sentenced to pay a fine of €375 000 (£296 700) 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 (£152.6 million), including €153.9 million (£121.8 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 and June 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.

4.10 The Director considers that it would be difficult at this stage to ascertain what implications the judgement would have since it is subject to appeal and that it would be more efficient for the Secretariat to examine the implications once the Court of Appeal had rendered its judgement.

4.11 At the June 2008 session the French delegation informed the Committee that the French State had reached an agreement with Total SA, whereby Total SA had paid, in full and final settlement, the French State €153.9 million (£121.8 million), ie the amount awarded by the Criminal Court, which took into account the compensation amounts already received from the 1992 Fund. That delegation also stated that, as a result of this payment, the French State had withdrawn all its civil actions, including those against the Fund.

4.12 It is not known when the Court of Appeal will deliver its judgement.

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 2007, pages 82-83.

5.2 Legal actions against the shipowner, Steamship Mutual and the 1992 Fund were taken by 796 claimants. By 24 September 2008 out-of-court settlements had been reached with a great number of these claimants (377 actions) and the courts had rendered judgements in respect of 140 claims. Thirty-seven actions by 46 claimants are pending. The total amount claimed in the pending actions, excluding the claims by Total SA, is some €25.5 million (£20.2 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

Food products merchant

6.1.1 A company selling frozen and vacuum-wrapped food products to restaurants, submitted a claim for €136 339 (£108 000) for economic losses allegedly suffered as a consequence of the *Erika* incident. The 1992 Fund rejected the claim on the grounds that the claimant did not deal directly with tourists but dealt instead with other businesses (so called 'second degree' claims), and that the claimant had not proved the existence of a sufficiently close link of causation between the loss and the pollution that arose from the *Erika* incident.

6.1.2 In a decision rendered in March 2006 the Commercial Court in Lorient appointed an expert to determine the possible losses suffered by the claimant and whether there was a causal link between those losses and the *Erika* incident.

6.1.3 The court expert issued his report in May 2007. The expert indicated that according to his investigations the *Erika* incident was not the only cause of the economic losses suffered by the claimant.

6.1.4 The court delivered its judgement in May 2008. The Court made the statement that it was not bound by the Fund's criteria for admissibility of claims and that it was for the Court to interpret the concept of 'pollution damage' and 'preventive measures' in the 1992 Conventions and to apply it in each individual case. In its judgement the court noted that the claimant did not provide services directly to tourists but provided services to other businesses in the tourism sector, and also that the claimant's activity had suffered losses since 1998, before the occurrence of the *Erika* incident. The Court considered that the possible losses suffered by the claimant were of an indirect character, that the difficulty in selling the food products to the restaurants could not be considered with certainty as a direct consequence of the pollution, but that it could be linked to other causes. The Court concluded that the claimant had not proved to have suffered losses as a direct consequence of the *Erika* incident and for that reason rejected the claim.

6.2 Court of Appeal in Rennes

Claim by a co-operative of salt producers

6.2.1 In May 2007 the Civil Court in Saint Nazaire rendered a judgement in respect of a claim by a co-operative of salt producers in Guérande who had submitted a claim for commercial loss, loss of image and additional costs incurred as a result of the *Erika* incident.

6.2.2 The 1992 Fund had considered that salt production had been possible in Guérande in 2000 and that since the co-operative had a stock of salt available sufficient to maintain sales in 2000, the losses claimed by the co-operative were not admissible for compensation under the Conventions.

6.2.3 The Court made a similar statement as in other judgements that it was not bound by the Fund's criteria for admissibility of claims. The Court 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. The Court considered that the co-operative had had sufficient stock to be able to maintain sales at the normal level, even in the absence of salt production in 2000. The Court 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, for this reason, rejected this item claimed.

6.2.4 With regard to the claim for loss of image, the Court 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. For this reason the Court granted the co-operative the amount of €378 042 (£299 000).

6.2.5 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 decided that these measures were reasonable and had been taken to prevent pollution damage and granted the amount of €21 347 (£16 900). The Court rejected other additional costs incurred in the amount of €136 345 (£107 900) 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.

6.2.6 The Court granted the co-operative the amount of €12 000 (£9 500) to cover the legal and other costs incurred and ordered the provisional execution of the judgement.

6.2.7 Both the claimant and the 1992 Fund appealed against the judgement.

6.2.8 The Court of Appeal in Rennes delivered its judgement in June 2008. In its judgement, the Court considered that the commercial losses suffered by the co-operative were only due to its decision to put a quota on its sales in order to preserve its stock and that the available stock was sufficient to maintain the level of sales for at least two years. The Court considered therefore that the commercial losses suffered by the co-operative were a consequence of the sales quota self imposed by the co-operative, which was an administrative decision, and not a direct consequence of the *Erika* incident. The Court concluded that the claimant had not shown that there was a sufficiently close link of causation between the commercial losses and the pollution and therefore rejected that part of the claim.

6.2.9 Regarding the claim for the costs incurred in a marketing campaign, the Court considered expressly that the Fund's Claims Manual established that, in order to be admissible for compensation, a claim for the costs of marketing campaigns must be related to measures addressed to prevent or minimise losses that, if suffered, would have themselves been admissible for compensation under the Conventions. The Court also considered that since the commercial losses claimed by the co-operative were not eligible for compensation under the 1992 Conventions, it followed that the cost of the marketing campaign aimed at minimising those losses would not be admissible either. The Court further considered that the marketing costs claimed formed part of the regular budget apportioned for marketing purposes. For these reasons the Court decided to reject the claim for costs incurred in the marketing campaign and decided to reject also other additional costs claimed by the co-operative.

6.2.10 The claims and the judgements are summarised in the following table:

Item	**Claim (€)**	**Fund's assessment**	**Court of First instance (€)**	**Court of Appeal**
Commercial loss	7 148 164	Rejected	Rejected	Rejected
Loss of image/marketing campaign	378 308	Rejected	378 042	Rejected
Additional costs incurred	157 692	Rejected	21 347	Rejected
Procedural costs	75 000	Rejected	12 000	Rejected
Total	7 759 165	0	411 389	0

6.2.11 The claimant has appealed to the Court of Cassation.

Tour operator

6.2.12 A tour operator in the United Kingdom specialising in selling holidays in various European countries submitted a claim for £2 582 673 for losses suffered in 2000 and 2001 as a result of the *Erika* incident. The 1992 Fund assessed the claim for losses suffered in 2000 for the amount of £751 935 and this amount was paid to the claimant. The Fund, however, rejected the claim for losses in 2001 since it considered that the claimant had not established a link of causation between the alleged

damage and the contamination caused by the incident. The claimant brought proceedings before the Commercial Court in Lorient.

6.2.13 In a judgement rendered in February 2007 the Commercial Court, after making the same statement mentioned in paragraph 6.1.4, considered that other businesses in the area had not been affected and that the camping activity in 2001 was normal, bearing in mind the weather conditions. The Court decided that the claimant had not provided evidence of the alleged loss nor of a link of causation between the alleged loss and the incident and for these reasons rejected the claim.

6.2.14 The claimant appealed against the judgement.

6.2.15 The Court of Appeal delivered its judgement in July 2008. In its judgement, the Court agreed with the 1992 Fund. The Court considered that it was not proved that the *Erika* incident had negatively affected the number of tourists in 2001, when the incident had occurred in December 1999. The Court also considered that there were other factors explaining that in 2001 some businesses in the tourism sector may not have reached the results obtained before the *Erika* incident. For all those reasons the Court decided to reject the appeal.

6.2.16 The claimant has not appealed against the judgement.

Tour operator

6.2.17 A tour operator in the United Kingdom specialising in selling holidays in various European countries submitted a claim for £2 360 393 for losses suffered in 2000 and 2001 as a result of the *Erika* incident. The 1992 Fund had assessed the claim for losses suffered in 2000 in the amount of £756 052. This amount was paid to the claimant. The Fund had rejected the claim for losses in 2001 since it considered that the claimant had not established a link of causation between the alleged loss and the contamination. The claimant brought proceedings before the Commercial Court in Lorient.

6.2.18 In a judgement rendered in February 2007 the Commercial Court in Lorient, after making the statement that the Fund's criteria for admissibility of claims were not binding on the national courts, held that the claimant had not established that there was a link of causation between the loss and the incident and for this reason rejected the claim.

6.2.19 The claimant appealed against the judgement.

6.2.20 The Court of Appeal delivered its judgement in July 2008, confirming the judgement of the Commercial Court. In the judgement the Court of Appeal considered the Fund's criteria and rejected the claim for lack of proof of a link of causation between the loss and the *Erika* incident.

6.2.21 The claimant has not appealed against the judgement.

Fish wholesaler

6.2.22 A fish wholesaler had submitted a claim for €1 005 356 (£796 000) for alleged losses suffered in 2000. The claimant alleged that the pollution had spoiled the image of the quality of the products sold by the claimant. The 1992 Fund had rejected the claim since the claimant had not proved to have suffered any loss. The Fund had also argued that there was no link of causation between the alleged losses and the contamination since the claimant's business was located outside the affected area, there was no dependence on the affected resources and the claimant had alternative sources of supply.

6.2.23 In its judgement the Commercial Court in Quimper, after making the same statement as in paragraph 6.1.4, considered that even if the claimant's business was not strictly located in the area affected by the pollution, an official study had indicated that there had been a market disaffection towards sea produce and therefore a loss of income in the related sector. The Court concluded, however, that the claimant had not proved to have suffered any losses and for that reason rejected the claim.

6.2.24 The claimant appealed against the judgement.

6.2.25 The Court of Appeal delivered its judgement in July 2008, confirming the judgement of the Commercial Court. The Court of Appeal considered the criteria set out in the Fund's Claims Manual and stated that even if the Fund's criteria are not binding on national courts, the judge may use those criteria as a reference. The Court estimated that the claimant exercised its activities in areas outside those affected by the pollution (lack of geographic proximity), that the claimant's purchases came mainly from regions not affected by the pollution (weak degree of economic dependence) and that the claimant's clients were distributed over the whole of France (alternative business opportunities). The Court decided that there was not a sufficiently close link of causation between the alleged losses and the pollution and that the claimant was not entitled to receive compensation from the Fund.

6.2.26 The claimant has appealed to the Court of Cassation.

6.3 Court of Cassation

Cancellation of millennium party

6.3.1 An insurer had made a subrogated claim against the 1992 Fund for €630 000 (£499 000) in respect of a claim it had paid to a group of hotels in La Baule for losses incurred as a result of the cancellation of a major millennium party which was to have taken place on the local beach. This payment had been made pursuant to an insurance policy covering costs incurred in organising the cancelled party. The Mayor of La Baule had issued a decree on 27 December 1999 prohibiting all access to the beaches, as a result of which the party had to be cancelled.

6.3.2 The 1992 Fund rejected the claim on the grounds that the claimant had not submitted sufficient information to enable the Fund to assess the losses and that the insurer had not taken into account the income received by the hotels for the period of the millennium festivities, which should have been deducted from the amount claimed for losses due to the cancellation of the event.

6.3.3 In a judgement rendered in December 2004 the Commercial Court in Saint-Nazaire estimated the income over the period of the millennium festivities at €200 000 (£158 300). The Court ordered the shipowner, Steamship Mutual and the 1992 Fund to pay the insurer the balance of €430 000 (£340 000).

6.3.4 The 1992 Fund appealed against this judgement.

6.3.5 In November 2006 the Court of Appeal in Rennes overturned the judgement by the Commercial Court and rejected the claim. It stated that it was not bound by the criteria for admissibility laid down by the 1992 Fund but that they could provide a useful point of reference for national courts. The Court referred to the fact that the decision by the Municipal Council of La Baule in December 1999, before the oil spill occurred, to reduce the permitted area of the marquees under which the festivities were to be held from 1 400 m^2 to 800 m^2, which had reduced by some 50% the potential income from the festivities had made them non-profitable. The Court also stated that the severe storm which occurred on 26 and 27 December 1999 had made it impossible to erect the marquees and that the storm had caused damage to the roof of the hotel in front of which the festivities were to take place, which had constituted a risk to participants in the festivities. The Court considered it evident that, due to the damage caused by the storm, the festivities could not have been held on that beach for safety reasons. The Court held that, although in the Mayor's decision to prohibit access to the beach reference was made to the oil on the beach, this did not in itself constitute an obstacle to holding the festivities under the marquees and the fact that the marquees could not be erected was due to the storm. In the Court's view, the decision to cancel the festivities was due to the storm and not to the pollution. The Court of Appeal therefore considered that there was no link of causation between the cancellation of the festivities and the *Erika* incident and that

the insurer had not established any direct and certain relationship between his obligation to indemnify the hotel group and the *Erika* incident.

6.3.6 The claimant lodged an appeal before the Court of Cassation.

6.3.7 The Court of Cassation rendered its judgement in May 2008, rejecting the claimant's appeal. In its judgement the Court agreed with the reasons given by the Court of Appeal and concluded that the cancellation of the millennium party was due to the irreparable material damage caused by the storm that occurred on 26 and 27 December 1999, and that there was no link of causation between this cancellation and the pollution caused by the *Erika* incident.

7 Legal proceedings by the Commune de Mesquer against Total

7.1 Considerations by the Executive Committee in June and October 2007

7.1.1 At its June 2007 session, one delegation informed the Committee 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.

7.1.2 The Director informed the Committee that the French Supreme Court had referred three questions to the European Court of Justice (ECJ) 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?

7.1.3 The Committee noted that in the Director's view it was unlikely that the ECJ 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.

7.1.4 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 ECJ would arrive at the same conclusion.

7.2 Considerations by the Executive Committee in June 2008

At its June 2008 session the Committee took note of the legal opinion delivered by Advocate-General Kokott of the European Court of Justice, that stated, *inter alia*, that heavy fuel oil must be treated as a waste when it was discharged as a result of an incident and became mixed with water and sediments, but that, in her opinion, this provision of European law was compatible with the provisions of the 1992 Civil Liability and Fund Conventions (c.f. document 92FUND/EXC.41/3, paragraph 7.6).

7.3 Judgement by the European Court of Justice

7.3.1 The European Court of Justice delivered its judgement on 24 June 2008. The Director, with the help of the 1992 Fund's French lawyer, has studied the judgement and a summary of the same is provided in the paragraphs below.

Reply to the first question

7.3.2 On the first question of whether the fuel oil transported as cargo on board the *Erika* was in fact a waste under European law, the ECJ initially pointed out that Directive 75/442 on waste[<2>] defines as 'waste' any substance or any object which falls within the categories set out in Annex I of the Directive and which is discarded or intended to be discarded by the holder or which the holder has the obligation to discard. The ECJ endeavoured to give the term 'discard' an interpretation which takes account of the objective of the Directive, namely an elevated level of protection of human health and the environment. However, the heavy fuel oil sold as a combustible fuel in the *Erika* case is a substance which is residual, as obtained at the end of the oil refining process, but which is likely to be exploited commercially under advantageous economic conditions and to be actually used as combustible fuel without requiring preliminary operation or transformation. Its holder thus does not seek to discard it. The Court concludes therefore that this substance does not constitute a waste within the meaning of the directive.

Reply to the second question

7.3.3 On the second question, 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, the ECJ initially pointed out that Annex I of the Directive on waste proposes lists of substances or objects that may be considered as waste, but that this has only an indicative character, the qualification as waste resulting above all from the behaviour of the holder and the meaning of the term 'discard' in article 1(a) of that Directive. Proceeding in the same way as for the first question, the Court then analysed, in the case of the *Erika*, the behaviour of the holder, to note that hydrocarbons having been spilled into the sea following a shipwreck and subsequently having become mixed with water and sediments, were the origin of the pollution of the territorial waters and the coasts of a Member State and that these substances do not constitute a reusable product without undergoing previous transformation. The Court thus concluded that the holder of these substances did not intend to produce them and that it is thus 'discarded', albeit involuntarily, at the time of their transport, so that they must be considered as waste within the meaning of the Directive.

Reply to the third question

7.3.4 The Court's answer to the third question, namely whether, in the event of the sinking of an oil tanker, the producer of the heavy fuel oil spilled at sea and/or the seller of the fuel and charterer of the ship carrying the fuel may be required to bear the cost of disposing of the waste thus generated, even though the substance spilled at sea was transported by a third party, in this case a carrier by sea, is summarised in the following paragraphs.

7.3.5 The ECJ recalled that the European Community is not bound by the 1992 Civil Liability and Fund Conventions. On the one hand, the Community did not adhere to those Conventions and, on the other hand, it could not be regarded as having taken the place of its Member States, if only because not all of them are party to these Conventions, or as being indirectly bound by those Conventions as a result

---

[<2>] Directive 75/442/EEC of 15 July 1975 on waste, as amended by Commission Decision 96/350/EC of 24 May 1996.

of Article 235 of the United Nations Convention on the Law of the Sea (UNCLOS). The Court also pointed out that Directive 75/442 on waste does not contain a provision like Article 4(2) of Directive 2004/35 on Environmental Liability, which expressly states that that Directive is not to apply to an incident or activity in respect of which liability or compensation falls within the scope of any of a number of international conventions listed in Annex IV to that Directive, which mentions the 1992 Civil Liability Convention and the 1992 Fund Convention.

7.3.6 The ECJ also recalled that the Directive on waste provides that certain categories of people, in fact the 'former holders' or the 'producer of the generating product', can, in accordance with the polluter pays principle, be held liable for the cost of the waste disposal, because of their contribution to the generation of that waste and to the risk that results from it. In this respect, in accordance with European law, the Member States, while retaining the freedom to choose the form and the means of implementation of the Directive, are bound as to the result to be achieved by the Directive in terms of financial liability for the cost of disposing of waste. They are therefore obliged to ensure that their national law allows that cost to be allocated either to the previous holders or to the producer of the product from which the waste came.

7.3.7 The ECJ then ruled as follows:

> The national court may regard the seller of those hydrocarbons and charterer of the ship carrying them as a producer of that waste within the meaning of Article 1(b) of Directive 75/442, as amended by Decision 96/350, and thereby as a 'previous holder' for the purposes of applying the first part of the second indent of Article 15 of that directive, if that court, in the light of the elements which it alone is in a position to assess, reaches the conclusion that that seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship.

7.3.8 In addition, the ECJ stated that Article 15 of the Directive on waste does not preclude the Member States from laying down, pursuant to their relevant international commitments such as the 1992 Civil Liability and Fund Conventions, that the shipowner and the charterer can be liable for the damage caused by the discharge of hydrocarbons at sea only up to maximum amounts depending on the tonnage of the vessel and/or in particular circumstances linked to their negligent conduct. That provision also does not preclude a compensation fund such as the IOPC Funds, with resources limited to a maximum amount for each incident, from assuming liability, pursuant to those international commitments, in place of the 'holders' within the meaning of the Directive on waste, for the cost of disposal of the waste resulting from hydrocarbons accidentally spilled at sea.

7.3.9 However, the ECJ continued by stating that:

> If it happens that the cost of disposing of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by the International Oil Pollution Compensation Fund, or cannot be borne because the ceiling for compensation for that accident has been reached, and that, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the shipowner and/or the charterer, even though they are to be regarded as 'holders' within the meaning of Article 1(c) of Directive 75/442, as amended by Decision 96/350, such a national law will then, in order to ensure that Article 15 of that directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came. In accordance with the 'polluter pays' principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.

Director's considerations

7.3.10 The Director has studied the judgement by the European Court of Justice and discussed it with the 1992 Fund's French lawyer. On that basis, the Director considers that, although it might be too early to reach a conclusion on the possible consequences that the judgement by the European Court of Justice could have for the 1992 Civil Liability and Fund Conventions, it seems that the judgement has taken into account all the relevant international commitments of the EU Member States, including the 1992 Civil Liability and Fund Conventions and it would therefore appear that the judgement does not affect the applicability of these conventions.

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.