INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
44th session
Agenda item 3

92FUND/EXC.44/3
26 February 2009
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 February 2009, 7 131 claims for compensation had been submitted for a total of €388.9 million (£349.6 million)[<1>] and 99.7% of these claims have been assessed. Compensation payments totalling €129.7 million (£95.2 million) have been made in respect of 5 938 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 and the courts have rendered judgements in respect of a number of the other claims. Twenty eight actions by some 46 claimants are still pending. The total amount claimed in the pending actions, excluding the claims by Total, is some €25 million (£22.5 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 (ECJ) which delivered its ruling in June 2008. The French Supreme Court rendered its decision in December 2008, following the advice delivered by the ECJ. The Supreme Court concluded that fuel oil, once spilled and mixed with sea water and sediments became a 'waste' under European law and that the producer of the 'waste' could be required to bear the cost of disposal if it was established that it had contributed to the risk of pollution. The Supreme Court has transferred the case to the Court of Appeal in Bordeaux for a decision on whether or not

[<1>] Conversion of currencies has been made on the basis of the exchange rate as at 11 February 2009 (€1 = £0.8989), 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.

	Total contributed to the occurrence of the pollution caused by the *Erika* incident. Three court judgements involving the 1992 Fund have been rendered since the last session of the Executive Committee in October 2008. Details of these judgements are provided in section 6.
Action to be taken:	Information to be noted.

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 (£11.5 million)
STOPIA/TOPIA applicable	No
CLC + Fund limit	€184 763 149 (£166 million)
Compensation:	Total amount paid: €129.7 million (£95.2 million)
Standing last in the queue:	The French Government and Total undertook to stand last in the queue after all other claimants.
Legal proceedings:	28 actions by 46 claimants remain pending. The total amount claimed in court is €25 million (£22.5 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, the maximum amount available for compensation, the 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 12 February 2009, 7 131 claims for compensation, other than those made by the French Government and Total, had been submitted for a total of €210 million (£188.8 million). By that date 99.7% of these claims had been assessed. Some 1 016 claims, totalling €31.8 million (£28.6 million), had been rejected.

3.2 Payments of compensation had been made in respect of 5 938 claims for a total of €129.7 million (£95.2 million), out of which Steamship Mutual, the shipowner's insurer, had paid €12.8 million (£9.4 million) and the 1992 Fund €116.9 million (£85.8 million).

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

Claims situation as at 12 February 2009					
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	30	282	1 099 551
Fish and shellfish processors	51	51	7	44	977 631
Tourism	3 696	3 693	457	3 210	76 108 170
Property damage	711	711	250	460	2 556 905
Clean-up operations	150	145	12	128	31 904 886
Miscellaneous	663	655	55	595	8 387 521
Total	**7 131**	**7 112**	**1 016**	**5 938**	**129 690 505**

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 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. The representative of the shipowner and the president of the management company were sentenced to pay a fine of €75 000 (£67 400) each. RINA and Total were sentenced to pay a fine of €375 000 (£337 000) 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 (£173.3 million), including €153.9 million (£138.3 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 also 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 (cf document 92FUND/EXC.40/11, paragraphs 3.2.6-3.2.9).

4.10 At the June 2008 session the Director stated that it was difficult at that stage to ascertain what implications the judgement would have since it was 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 (cf document 92FUND/EXC.41/11, paragraph 3.1.9).

4.11 At that session the French delegation informed the Committee that the French State had reached an agreement with Total, whereby Total had paid, in full and final settlement, the French State €153.9 million (£138.3 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 (cf document 92FUND/EXC.41/11, paragraph 3.1.7).

4.12 A hearing is expected to take place during five weeks as from 5 October 2009.

5 Legal proceedings involving the 1992 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 12 February 2009 out-of-court settlements had been reached with a great number of these claimants and the courts had rendered judgements in respect of a number of the other claims. Twenty eight actions by some 46 claimants are still pending. The total amount claimed in the pending actions, excluding the claims by Total, is some €25 million (£22.5 million).

5.3 The 1992 Fund will continue 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 Court of Appeal in Paris

Oyster grower

6.1.1 An oyster grower in Carantec in Brittany, 50 km north of Brest, had submitted two claims, for €10 044 (£9 000) and €39 182 (£35 200) respectively, relating to reduction in sales as a result of the *Erika* incident. These claims had been rejected by the 1992 Fund on the ground that the claimant's business was located well outside the area affected by the *Erika* oil spill and that there was no link of causation between the alleged losses and the incident.

6.1.2 The claimant started an action before the Commercial Court in Paris. In a judgement rendered in January 2005, that Court rejected the claims. The Court stated that national courts were competent to interpret the notion of damage in the 1992 Conventions as well as to determine whether there was, in a particular case, a sufficient link of causation between the pollution and the alleged loss. The Court held that either the alleged losses did not exist, or had not been proven. The Court also held that there was no evidence of a direct or indirect link to the incident.

6.1.3 The claimant appealed against the judgement. By a decision rendered in October 2008, the Court of Appeal in Paris rejected the claim after considering that the claimant had neither proven the existence of the alleged losses nor a sufficient link of causation between the alleged losses and the pollution caused by the *Erika* incident.

6.1.4 As at the date of issue of this document the claimant had not appealed against the judgement.

Aerial advertiser

6.1.5 A claim for €142 185 (£127 800) had been submitted by a company whose main activity was construction and sales of ultra light aircraft and sales of equipment for such aircraft. As a secondary activity, the company undertook aerial towing of advertising banners in Loire-Atlantique. The claim related to loss of income from the latter activity allegedly suffered from 2000 to 2003 as a result of the *Erika* incident. This claim had been rejected by the 1992 Fund on the ground that the claimant supplied goods and services to other businesses in the tourism sector but not directly to tourists, and that therefore there was not a sufficiently close link of causation between the contamination and the alleged loss.

6.1.6 In a judgement rendered in September 2005, the Civil Court in Paris specifically referred to the Fund's criteria for admissibility of claims for pure economic loss. The Court noted that the 1992 Fund distinguished between, on the one hand, claimants who sold goods or services directly to tourists and whose businesses were directly affected by a reduction in visitors to the area affected by an oil spill and, on the other hand, those who provided goods or services to other businesses in the tourist industry, but not directly to tourists. The Court referred to the fact that in the latter case the 1992 Fund considered that there was generally not a sufficient degree of proximity between the contamination and the losses allegedly suffered by the claimants and that claims of this type would therefore normally not be admissible in principle. The Court stated that although the Fund's criteria for admissibility were not binding for the national courts, they nonetheless could be used as a reference and that in any event they did not constitute an obstacle to compensation if a link of causation between the alleged damage and the contamination resulting from the *Erika* incident was proven. The Court noted that the claimant had, as a basis for his claim, invoked cancellation of contracts for the aerial towing of advertising banners without providing any evidence of such cancellations. The Court considered that since the claimant did not sell its services directly to tourists but only to other businesses in the tourism sector (such as casinos and leisure parks), the claimant had not proven that there was a direct link of causation between the alleged decrease in aerial towing of such banners and the contamination and that the claimant had not shown that the pollution had had any impact on tourism beyond 2000. For these reasons the Court rejected the claim.

6.1.7 The claimant appealed against the judgement. The Court of Appeal in Paris delivered its judgement in October 2008. In its judgement the court acknowledged that the distinction made between claimants that deal directly with tourists and are therefore directly affected by a reduction in the number of tourists, and claimants that sell goods or provide services to other companies in the tourism sector but not directly to tourists, is justified in order to avoid that the victims more affected by the pollution, mainly claimants in the fisheries sector, receive a reduced compensation for their losses to the benefit of claimants whose claims had a more remote link with the resource affected by the pollution. The Court concluded that the claimant had neither proved to have suffered losses nor the existence of a link of causation between the alleged losses and the pollution caused by the *Erika* and for that reason rejected the claim.

6.1.8 As at the date of issue of this document the claimant had not appealed against the judgement.

6.2 Court of Appeal in Rennes

Tourist train operator

6.2.1 A tourist train operator had submitted a claim for economic losses suffered in 2000 and 2001. The 1992 Fund had accepted the claim related to losses in 2000 and the assessed amount had been paid to the claimant. The Fund had rejected the claim for 2001, totalling €69 625 (£62 600), considering that there was not a sufficiently close link of causation between the losses claimed for 2001 and the pollution caused by the *Erika* incident.

6.2.2 In a judgement delivered in September 2007 the Commercial Court in Lorient accepted the Fund's assessment for losses for 2000 and rejected the claim for 2001 since it considered that there was not a sufficiently close link of causation between the losses claimed and the contamination. The claimant appealed against the judgement.

6.2.3 The Court of Appeal in Rennes delivered its judgement in January 2009. The Court considered that the statistics published by official tourism bodies showed that factors other than the *Erika* incident were to blame if some businesses in the tourism sector had not recovered completely from the declined business results obtained in 1999. The Court concluded that the claimant had not proved the existence of a causal link between the reduction in its business turnover and the pollution caused by the *Erika* and for that reason rejected the claim.

6.2.4 As at the date of issue of this document the claimant had not further appealed against the judgement.

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 the Committee was informed 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. It was also mentioned that the French Supreme Court had referred this question to the European Court of Justice (ECJ) for an opinion. The Director was asked to explain what impact, if any, these legal proceedings would have on the 1992 Fund (cf document 92FUND/EXC.37/9, paragraph 3.1.48).

7.1.2 At the October 2007 session the Director informed the Committee that the French Supreme Court had referred three questions to the ECJ for an opinion (cf document 92FUND/EXC.38/12, paragraph 3.2.20), 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?

7.2 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 sea 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 (cf document 92FUND/EXC.41/11, paragraph 3.1.11).

7.3 Judgement by the European Court of Justice

7.3.1 The European Court of Justice delivered its judgement on 24 June 2008.

7.3.2 The ECJ concluded that the fuel oil transported as cargo on board the *Erika* did not constitute a waste within the meaning of Directive 75/442 on waste[<2>].

7.3.3 However the ECJ concluded that a cargo of fuel oil that accidentally escaped from a ship, once it had been mixed with seawater and sediments, should be considered as waste within the meaning of the Directive.

7.3.4 In its 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, the ECJ stated that a 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 the Directive on waste, and thereby as a 'previous holder' for the purposes of applying that directive, if that court reached the conclusion that the seller-charterer had contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he had failed to take measures to prevent such an incident, such as measures concerning the choice of ship.

7.3.5 The Director, after studying the judgement by the ECJ and discussing it with the 1992 Fund's French lawyer, considered that, although it might be too early to reach a conclusion on the possible consequences that the judgement by the ECJ could have for the 1992 Civil Liability and Fund Conventions, the judgement appeared to have taken into account all the relevant international commitments of the EU Member States, including the 1992 Civil Liability and Fund Conventions and that therefore it would appear that the judgement would not affect the applicability of these Conventions.

7.4 Judgement by the French Supreme Court

7.4.1 The French Supreme Court rendered its decision in December 2008. In its decision the Supreme Court followed the judgement of the ECJ of 24 June 2008. The Supreme Court quashed in part an earlier judgement by the Court of Appeal in Rennes in which, although the Court of Appeal had considered as 'waste' the fuel oil spilled mixed with sand and water, it had rejected the claim by the

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

Commune de Mesquer on the grounds that Total could not be considered as a previous holder or producer of that 'waste' within the meaning of Directive 75/442 on 'waste'. The Supreme Court concluded that the fuel oil spilled and mixed with sea water and sediment was a 'waste' and that the producer of the 'waste', could be required to bear the cost of disposing of the 'waste' if it was established that he had contributed to the risk that the pollution caused by the shipwreck would occur.

7.4.2 The Supreme Court transferred the case to the Court of Appeal in Bordeaux for a decision on whether or not Total contributed to the occurrence of the pollution caused by the *Erika* incident. As some questions related thereto will be examined by the Court of Appeal in Paris, which will decide on the appeal of the judgement delivered by the Criminal Court in Paris in January 2008 (cf section 4), it is likely that the Court of Appeal in Bordeaux will postpone its decision until the Court of Appeal in Paris has delivered its judgement.

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.