

 <p style="text-align: center;">INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS</p>	Agenda item: 3		IOPC/JUN10/3/1	
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	1992 Fund Executive Committee	92EC48	•	
1992 Fund Working Group	92WG6/1			

INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

ERIKA

Note by the Director

Objective of document:	To inform the 1992 Fund Executive Committee of the latest developments regarding this incident.
Summary:	<p>On 12 December 1999 the <i>Erika</i> 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.</p> <p>As at 17 May 2010, 7 131^{<1>} claims for compensation have been submitted for a total of €388.9 million. Compensation payments totalling €29.7 million have been made in respect of 5 939 claims. One thousand and sixteen claims have been rejected.</p> <p>Seventeen legal actions against the shipowner, his insurer and the 1992 Fund are still pending. The total amount claimed in the pending actions, excluding the claims by Total, is some €20.9 million.</p> <p>The Commune of Mesquer brought a legal action against Total, where it was argued that the cargo on board the <i>Erika</i> was, under European law, a waste. The Court of Appeal in Bordeaux will decide whether or not Total contributed to the occurrence of the pollution caused by the <i>Erika</i> incident.</p> <p>In a judgement, delivered in January 2008, the Criminal Court in Paris held the representative of Tevere Shipping, the president of Panship Management and Services, Registro Italiano Navale (RINA) and Total criminally liable for the damage caused by the incident and awarded claimants damages in the amount of €192.8 million. The four parties have appealed against the judgement.</p> <p>The Court of Appeal delivered its decision in March 2010 (cf section 4).</p>
Recent developments:	Three court judgements involving the 1992 Fund have been rendered since October 2009. Details of these judgements are provided in section 6.
Action to be taken:	<p><u>1992 Fund Executive Committee:</u></p> <p>Information to be noted.</p>

<1>

This number includes the French State's claim for clean-up operations.

1 Summary of incident

Ship	<i>Erika</i>
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
STOPIA/TOPIA applicable	No
CLC + Fund limit	€184 763 149
Compensation	Total amount paid: €129.7 million
Standing last in the queue	The French Government and Total undertook to stand last in the queue after all other claimants. The French Government claim has been paid in full by Total.
Legal proceedings	Seventeen actions remain pending. The total amount claimed in these actions is €20.9 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 also 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 IOPC Funds' Annual Report 2008 (pages 77-90).

3 Claims situation

- 3.1 As at 17 May 2010, 7 131 claims for compensation had been submitted for a total of €388.9 million. Payments of compensation had been made in respect of 5 939 claims for a total of €129.7 million, out of which Steamship Mutual, the shipowner's insurer, had paid €12.8 million and the 1992 Fund €16.9 million. Some 1 016 claims, totalling €31.8 million, had been rejected.

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

Claims situation as at 17 May 2010					
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	3 211	76 113 602
Property damage	711	711	250	460	2 556 905
Clean-up operations	150	145	12	128	31 907 991
Miscellaneous	663	655	55	595	8 387 521
Total	7 131	7 112	1 016	5 939	129 699 042

4 Criminal proceedings

4.1 Criminal Court of First Instance in Paris

4.1.1 On the basis of a report by an expert appointed by a magistrate in the Criminal Court of First Instance 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 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, three companies of the Total Group (Total SA, and two subsidiaries, Total Transport Corporation (TTC), voyage charterer of the *Erika*, and Total Petroleum Services LTD (TPS), the agent of TTC) and some of its senior staff. A number of claimants, including the French Government and several local authorities, joined the criminal proceedings as civil parties, claiming compensation totalling €400 million.

4.1.2 The Criminal Court of First Instance delivered its judgement in January 2008.

Criminal liabilities

4.1.3 In its judgement, the Criminal Court of First Instance held the following four parties criminally liable of the offense of causing pollution: 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, as follows:

- The representative of the shipowner and the president of the management company were found guilty for a lack of proper maintenance, leading to general corrosion of the ship.
- RINA was found guilty for its imprudence in renewing the *Erika's* classification certificate on the basis of an inspection that fell below the standards of the profession.
- Total SA was found guilty of imprudence when carrying out its vetting operations prior to the chartering of the *Erika*.

4.1.4 The representative of the shipowner and the president of the management company were sentenced to pay a fine of €75 000 each. RINA and Total SA were sentenced to pay a fine of €375 000 each.

Civil liabilities

- 4.1.5 Regarding civil liabilities, the judgement held the four condemned parties jointly and severally liable for the damage caused by the incident.
- 4.1.6 The judgement considered that Total SA could not avail itself of the benefit of the channelling provision of Article III.4 (c) of the 1992 Civil Liability Convention (CLC) since it was not the charterer of *Erika*. The judgement considered that the charterer was one of Total SA's subsidiaries.
- 4.1.7 The judgement considered that the other three parties, RINA in particular, were not protected by the channelling provisions of the 1992 CLC either, since they did not fall into the category of persons performing services for the ship. The judgement concluded that French internal law should be applied to the four parties and that therefore the four parties had civil liability for the consequences of the incident.

Assessment of damages

- 4.1.8 The compensation awarded to the civil parties by the Criminal Court of First Instance was based on national law. The Court held that the 1992 Conventions regime did not deprive the civil parties of their right to obtain compensation of their damage in the Criminal Courts and awarded claimants in the proceedings compensation for economic losses, damage to the image of several regions and municipalities, moral damages and damages to the environment. The Court assessed the total damages at the amount of €192.8 million.
- 4.1.9 The Criminal Court of First Instance recognised the right to compensation for damage to the environment for a local authority with special powers for the protection, management and conservation of a territory. The judgement also recognised the right of an environmental protection association to claim compensation, not only for the moral damage caused to the collective interests which it was its purpose to defend, but also for the damage to the environment which affected the collective interests which it had a statutory mission to safeguard.
- 4.1.10 The four parties held criminally liable and some 70 civil parties appealed against the judgement.
- 4.1.11 Following the judgement, Total made voluntary payments to the majority of the civil parties, including the French Government, for a total of €171.3 million.

4.2 Court of Appeal in Paris

- 4.2.1 The Court of Appeal in Paris rendered its judgement in March 2010.

Criminal liability

- 4.2.2 In its decision the Court of Appeal confirmed the judgement of the Criminal Court of First Instance who had held criminally liable for the offense of causing pollution: 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 Court of Appeal also confirmed the fines imposed (cf paragraphs 4.1.3 and 4.1.4).

Civil liabilities

- 4.2.3 In its judgement, the Court of Appeal ruled that:
- The representative of the registered owner of the *Erika* was an 'agent of the owner', as defined by Article III 4(a) and that, although he was, as such, theoretically entitled to benefit from the channelling provisions of the 1992 CLC, he had acted recklessly and with knowledge that damage would probably result, which deprived him of protection in the circumstances. Thus, the Court of Appeal confirmed the judgement on his civil liability.

- The president of the management company (Panship) was the agent of a company who performs services for the ship (Article III 4(b)) and as such was not protected by the channelling provisions of the 1992 CLC.
- The classification society RINA, cannot be considered as a 'person who performs services for the ship', as per the definition of Article III 4(b) of the 1992 CLC. Indeed the Court ruled that, in issuing statutory and safety certificates, the classification society had acted as an agent of the Maltese State (the flag State). The Court also held that the classification society would have been entitled to take advantage of the immunity of jurisdiction as would do the Maltese State, but that in the circumstances it was deemed to have renounced such immunity by not having invoked it at an earlier stage in the proceedings.
- Total SA was 'de facto' the charterer of the *Erika* and could therefore benefit from the channelling provision of Article III. 4(c) of the 1992 CLC since the imprudence committed in its vetting of the *Erika* could not be considered as having been committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. The Court of Appeal thus held that Total SA could benefit from the channelling provisions in the CLC and therefore did not have civil liability. The Court of Appeal also decided that the voluntary payments made by Total SA to the civil parties, including to the French Government (cf paragraph 4.1.8) following the judgement of the Criminal Court of First Instance were final payments which could not be recovered from the civil parties.

Reputation, image, moral and environmental damage

- 4.2.4 In its judgement, the Court of Appeal accepts not only material damages (clean up, restoration measures and property damage) and economic losses but also accepts moral damage resulting from the pollution, including loss of enjoyment, damage to reputation and brand image and moral damage arising from damage to the natural heritage. The Court of Appeal's judgement has confirmed the compensation rights for moral damage awarded by the Criminal Court of First instance to a number of local authorities and has in addition accepted claims for moral damage from other civil parties.
- 4.2.5 The Court of Appeal has also accepted the right to compensation for pure environmental damage, ie damage to non marketable environmental resources that constitute a legitimate collective interest. The Court of Appeal considered that it was sufficient that the pollution touched the territory of a local authority for these authorities to be able to claim for the direct or indirect damage caused to them by the pollution. The Court of Appeal has awarded compensation for pure environmental damage to local authorities and environmental associations.

Amounts awarded

- 4.2.6 The amounts awarded by the Court of Appeal are summarised in the following table.

Damage awarded	Criminal Court of First Instance (million €)	Court of Appeal (million €)
Material damage	163.91	165.4
Moral damage (loss of enjoyment, damage to reputation and brand image, moral damage arising from damage to the natural heritage)	26.92	34.1
Pure environmental damage	1.32	4.3
	€ 192.15 million	€ 203.8 million

- 4.2.7 Taking into account the amounts paid in compensation by Total SA following the judgement of the Criminal Court of First Instance (see 4.1.11), the balance remaining to be compensated by the representative of the shipowner (Tevere Shipping), the president of the management company (Panship Management and Services Srl) and the classification society (RINA) is €32.5 million.
- 4.2.8 Some fifty parties, including the representative of Tevere Shipping, RINA and Total SA, have appealed to the French Supreme Court (Court of Cassation.)

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 2008, pages 82-83.
- 5.2 Legal actions against the shipowner, Steamship Mutual and the 1992 Fund were taken by 796 claimants. By 17 May 2010, out-of-court settlements had been reached with a great number of these claimants and the courts had rendered judgements in respect of most of the other claims. Seventeen actions are still pending. The total amount claimed in the pending actions, excluding the claims by Total, is some €20.9 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 Cassation

Claim by a co-operative of salt producers

Court of First Instance

- 6.1.1 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 for commercial loss, costs incurred in a marketing campaign, and additional costs incurred as a result of the *Erika* incident.
- 6.1.2 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 1992 CLC and Fund Conventions.
- 6.1.3 The Court made a statement 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 the claim for this item.
- 6.1.4 With regard to the claim for costs incurred in a marketing campaign, 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.
- 6.1.5 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. The Court rejected other additional costs incurred in the amount of €136 345 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.

6.1.6 The Court granted the co-operative the amount of €12 000 to cover the legal and other costs incurred and ordered the provisional execution of the judgement.

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

Court of Appeal

6.1.8 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.

6.1.9 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 CLC and Fund 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.

6.1.10 The claimant appealed to the Court of Cassation.

Court of Cassation

6.1.11 The Court of Cassation delivered its judgement in March 2010.

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

Item	Claim (€)	Fund's assessment	Court of First Instance(€)	Court of Appeal	Court of Cassation
Commercial loss	7 148 164	Rejected	Rejected	Rejected	Rejected
Costs incurred in marketing campaign	378 308	Rejected	378 042	Rejected	Rejected
Additional costs incurred	157 692	Rejected	21 347	Rejected	Quashes Court of Appeal's decision and sends case back to Court of Appeal
Procedural costs	75 000	Rejected	12 000	Rejected	2 500
Total	7 759 164	0	411 389	0	2 500

6.1.13 In its judgement the Court rejected the claimant's appeal in respect of two items claimed, namely commercial loss and costs incurred in the marketing campaign, confirming the decision by the Court of Appeal.

6.1.14 The Court of Cassation has, however, quashed the decision of the Court of Appeal in relation to the additional costs incurred by the claimant, since the Court of Cassation was of the opinion that the Court of Appeal had failed to notice that those additional costs claimed were related to pollution prevention measures. The case has been sent back to the Court of Appeal for decision on that point.

6.1.15 In addition, the Court of Cassation has condemned the Fund and the Club to pay € 500 for procedural costs.

6.2 Court of Appeal in Rennes

Shop selling boats and nautical accessories

6.2.1 A company selling, hiring and repairing boats and accessories had submitted a claim for €151 717 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 €5 835 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 that related to the sale of boats, both new and second-hand, trailers and other material 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.

6.2.2 In a decision rendered in December 2004, the Commercial Court in Saint Nazaire 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.

6.2.3 In a judgement rendered in May 2008, the Commercial Court in Saint Nazaire accepted the assessment made by the court expert and awarded the claimant €42 504 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.

6.2.4 The 1992 Fund, after considering the arguments used by the Court, as well as the views of its experts and its French lawyer, appealed against the judgement since it considered the method of calculation and the conclusions reached by the court expert to be questionable.

6.2.5 The Court of Appeal delivered its judgement in October 2009. In its judgement the Court considered that the claimant had not suffered losses in the sale of new boats nor in the other items claimed and for that reason decided to reject the claims.

6.2.6 The claimant has not yet appealed against the judgement.

6.3 Civil Court in Saint Nazaire

Oyster grower

6.3.1 An oyster grower had submitted two claims totalling €12 796 for losses suffered in the period from December 1999 to February 2000 as a result of the *Erika* incident. The claimant received a payment of €4 048 from the 1992 Fund and payments totalling €12 796 from OFIMER (Office national interprofessionnel des produits de la mer et de l'aquaculture) and from the Conseil Général de Loire Atlantique. The claimant also submitted a claim totalling €8 030 for losses during the period of March and April 2000, in respect of which the claimant had received payments from OFIMER and Conseil Général de Loire Atlantique. The Fund rejected the claim since it considered that the claimant had already been compensated for all the losses suffered as a result of the incident.

6.3.2 The Civil Court in Saint Nazaire delivered a judgement in October 2009 in which it concluded that the claimant had not suffered any losses in addition to the losses already compensated and for that reason rejected the claim.

6.3.3 The claimant has not yet appealed against the judgement.

7 Legal proceedings by the Commune de Mesquer against Total

7.1 A legal action was brought by the Commune de Mesquer against Total before the French Courts, where it argued that the cargo on board the *Erika* was in fact a waste under European law. The Court of Cassation 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.

7.2 For details about considerations by the 1992 Fund Executive Committee in 2007 and 2008 and the decision rendered by the Court of Cassation in December 2008, reference is made to Annual Report 2008, pages 88 to 90.

7.3 The Court of Appeal in Bordeaux has not yet issued its decision.

8 Action to be taken

1992 Fund Executive Committee

The 1992 Fund 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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