



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUNDS

Agenda item: 3	IOPC/OCT11/3/5	
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1992 Fund Assembly	92A16	
1992 Fund Executive Committee	92EC53	•
Supplementary Fund Assembly	SA7	
1971 Fund Administrative Council	71AC27	

INCIDENTS INVOLVING THE IOPC FUNDS – 1992 FUND

ERIKA

Note by the Secretariat

Objective of document: To inform the 1992 Fund 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 6 June 2011, compensation payments totalling €129.7 million have been made.

Thirteen 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 €19.9 million.

The Commune of Mesquer brought a legal action against Total, where it was argued that the cargo on board the *Erika* 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 *Erika* incident.

In a judgement delivered in March 2010 the Court of Appeal in Paris confirmed the judgement of the Criminal Court of First Instance who had held criminally liable for the offence 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 held that Total SA could benefit from the channelling provisions in the 1992 Civil Liability Convention (1992 CLC) and was therefore exempt of civil liability. However, the Court of Appeal confirmed the civil liability imposed on the other three parties. The Court of Appeal assessed the total damages at the amount of €203.8 million.

The four parties and a number of claimants have appealed against the judgement to the French Supreme Court (Court of Cassation). The Court of Cassation is expected to deliver its judgement in 2012.

A proposal for a possible global settlement between the 1992 Fund, the Steamship Mutual P&I Club, RINA and Total was discussed in a session held in private at the March 2011 session of the Executive Committee. At that session the 1992 Fund Executive Committee authorised the Acting Director to continue exploring the possibility of a global settlement and instructed him to return to a future meeting of the Executive Committee with a proposal.

At the July 2011 session the 1992 Fund Executive Committee authorised the Acting Director to reach a global settlement between the 1992 Fund, Steamship Mutual, RINA and Total on the terms described in a meeting held in private.

Recent developments: The Acting Director will report on the progress regarding the global settlement.

Action to be taken: 1992 Fund Executive Committee:

Information to be noted.

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	Thirteen actions remain pending. The total amount claimed in these actions is €19.9 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 Annual Report 2008, pages 77-90.

3 Undertakings by Total SA and the French Government

- 3.1 Total SA undertook not to pursue claims against the 1992 Fund or against the limitation fund constituted by the shipowner or his insurer relating to its costs arising from operations in respect of the wreck, the clean up of shorelines, the disposal of oily waste and from a publicity campaign to restore the image of the Atlantic coast, if and to the extent that, the presentation of such claims would result in the total amount of all claims arising out of this incident exceeding the maximum amount of compensation available for this incident under the 1992 Conventions, ie 135 million SDR.

- 3.2 The French Government also undertook not to pursue claims for compensation against the 1992 Fund or the limitation fund established by the shipowner or his insurer, if and to the extent that, the presentation of such claims would result in the maximum amount available under the 1992 Conventions being exceeded. However the French Government's claims would rank before any claims by Total SA if funds were available after all other claims had been paid in full^{<1>}.

4 **Claims situation**

As at 23 September 2011, 7 131 claims for compensation had been submitted for a total of €388.9 million. Payments of compensation had been made 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.

5 **Criminal proceedings**

5.1 **Criminal Court of First Instance in Paris**

- 5.1.1 Criminal charges were brought in the Criminal Court of First Instance in Paris, 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.

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

Criminal liabilities

- 5.1.3 In its judgement, the Criminal Court of First Instance held the following four parties criminally liable of the offence 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*.

- 5.1.4 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

- 5.1.5 Regarding civil liabilities, the judgement held the four condemned parties jointly and severally liable for the damage caused by the incident.

<1> The claims by the French Government have been paid by Total, minus the payments already made by the 1992 Fund (cf paragraph 5.1.10).

- 5.1.6 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 (1992 CLC) since it was not the charterer of the *Erika*. The judgement considered that the charterer was one of Total SA's subsidiaries.
- 5.1.7 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

- 5.1.8 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 for their damage in the Criminal Courts and, in the proceedings, awarded claimants 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.
- 5.1.9 The four parties held criminally liable and some 70 civil parties appealed against the judgement.
- 5.1.10 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.

5.2 Court of Appeal in Paris

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

Criminal liability

- 5.2.2 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.

Civil liabilities

- 5.2.3 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) of the 1992 CLC 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) of the 1992 CLC) 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 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 1992 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 following the judgement of the Criminal Court of First Instance were final payments which could not be recovered from the civil parties.

Amounts awarded

5.2.4 The amounts awarded by the Court of Appeal are summarised in the following table:

Damage awarded	Criminal Court of First Instance (million €)	Criminal 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

- 5.2.5 Taking into account the amounts paid in compensation by Total SA following the judgement of the Criminal Court of First Instance, 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.
- 5.2.6 Some 50 parties, including the representative of Tevere Shipping, RINA and Total SA, have appealed to the French Supreme Court (Court of Cassation).
- 5.2.7 The Court of Cassation is expected to deliver its judgement in 2012.

6 Legal proceedings involving the 1992 Fund

- 6.1 With regard to the legal proceedings brought as a result of the incident, reference is made to the Annual Report 2008, pages 82-83.
- 6.2 Legal actions against the shipowner, Steamship Mutual and the 1992 Fund were taken by 796 claimants. By 26 September 2011, 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. Thirteen actions are still pending. The total amount claimed in the pending actions, excluding the claims by Total, is some €19.9 million.
- 6.3 The 1992 Fund has continued discussions with the claimants whose claims are not time-barred for the purpose of arriving at out-of-court settlements if appropriate.

7 Legal proceedings by the Commune de Mesquer against Total

- 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 There has been no development on the legal proceedings since the 1992 Fund Executive Committee session in March 2009.

8 Possible global settlement

8.1 The total amount available to pay compensation for this incident under the 1992 Civil Liability and Fund Conventions is €184 763 149. Payments of compensation have been made for a total of €29.7 million, out of which Steamship Mutual paid €12.8 million (ie the liability limit for the shipowner under the 1992 CLC) and the 1992 Fund €16.9 million. Therefore, there now remains some €55 million available for compensation.

8.2 The amount the 1992 Fund would have to pay if the 1992 Fund were to lose all the legal actions brought against it would be €9.9 million.

8.3 In accordance with the decision by Total to 'stand last in the queue' after the French Government, and since Total has already paid the losses suffered by the French Government, the amount left after having paid all other victims in these legal proceedings would have to be paid by the 1992 Fund to Total.

8.4 A proposal for a possible global settlement between the 1992 Fund, the Steamship Mutual P&I Club, RINA and Total was discussed in a closed session at the March 2011 session of the Executive Committee. At that session the 1992 Fund Executive Committee authorised the Acting Director to continue exploring the possibility of a global settlement between the 1992 Fund, Steamship Mutual, RINA and Total, and instructed him to return to a future meeting of the Executive Committee with a proposal.

8.5 At the July 2011 session of the 1992 Fund Executive Committee, the Executive Committee authorised the Acting Director to reach a global settlement between the 1992 Fund, Steamship Mutual, RINA and Total on the terms described in a meeting held in private and instructed him to report to the Executive Committee once the settlement had been formalised.

8.6 The Acting Director will report on the progress regarding the global settlement.

9 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 Acting Director such instructions in respect of the handling of this incident as it may deem appropriate.
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