INTERNATIONAL OIL POLLUTION COMPENSATION FUNDS

Agenda item: 3	IOPC/APR13/**3/3**
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1992 Fund Executive Committee	**92EC58**	●
1971 Fund Administrative Council	**71AC30**	
1992 Fund Working Group 6	**92WG6/5**	
1992 Fund Working Group 7	**92WG7/2**	

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. Compensation payments totalling €129.7 million have been made. As authorised by the Executive Committee, in October 2011 the Director signed on behalf of the 1992 Fund a global settlement with Steamship Mutual, Registro Italiano Navale (RINA) and Total SA. Under the agreement, the four parties undertook to withdraw all proceedings against each other and waived any rights which they might have in relation to the *Erika* incident against each other. The global settlement has been fully executed. In a judgement delivered in September 2012 the Court of Cassation confirmed the decision by the Criminal Court of First Instance and by the Court of Appeal which had held the following four parties 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.
Recent developments:	Six actions remain pending against the 1992 Fund involving a total of 20 claimants. The total amount claimed in these actions is €10.4 million. As instructed by the Executive Committee, the Director, with the help of the 1992 Fund's French lawyer, has studied the judgement of the Court of Cassation and his comments are included in this document.
Action to be taken:	1992 Fund Executive Committee Information to be noted.

1 Summary of incident

Ship	*Erika*
Date of incident	12.12.1999
Place of incident	France
Cause of incident	Breakage, sinking
Quantity of oil spilled	Approximately 19 800 tonnes of heavy fuel oil
Area affected	West coast of France
Flag State of ship	Malta
Gross tonnage	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 SA undertook to stand last in the queue after all other claimants. The French Government claim has been paid in full by Total SA. Total SA withdrew all its claims as part of a global settlement.
Legal proceedings	Six actions remain pending against the 1992 Fund involving a total of 20 claimants. The total amount claimed in these actions is €10.4 million.

2 Introduction

The background information to this incident is summarised above and provided in more detail at the Annex.

3 Legal proceedings involving the 1992 Fund

Six actions remain pending against the 1992 Fund involving a total of 20 claimants. The total amount claimed in these actions is €10.4 million.

4 Judgement by the Court of Cassation (Criminal section)

4.1 The 1992 Fund has not been a party in the criminal proceedings but has monitored their development with interest.

4.2 For information concerning the judgements of the Criminal Court of First Instance and the Court of Appeal, reference is made to the Annex to this document.

4.3 On 25 September 2012 the Criminal Section of the Court of Cassation rendered its judgement.

4.4 The Court of Cassation confirmed the amounts awarded by the Court of Appeal as follows:

Damage awarded	**Court of Cassation (million €)**
Material damage	165.4
Moral damage (loss of enjoyment, damage to reputation and brand image, moral damage arising from damage to the natural heritage)	34.1
Pure environmental damage	4.3
Total	**203.8 (£176 million)**

4.5 The Director, with the help of the Fund's French lawyer, has studied the judgement of the Court of Cassation and has summarised it as follows.

4.6 Jurisdiction of the French courts

4.6.1 The criminal jurisdiction of the French courts in this case was questioned by the Avocat Général, who had issued an opinion whereby the oil pollution in question had been committed within the French Exclusive Economic Zone (EEZ) and not within French territorial waters where the jurisdiction of the flag State (Malta) would have prevailed over that of the coastal State (France).

4.6.2 The Court of Cassation on the contrary recognised the jurisdiction of the French courts. The Court considers that although the status of the EEZ is not completely clear, there are two provisions which justify, in these circumstances, the jurisdiction of the French courts:

- Article 220 of the United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982, known as the Montego Bay Convention, which provides that where there is clear evidence that a vessel has committed an offence of pollution causing major damage to a coastal State, that State may 'institute proceedings'.
- Article 228 of the said Convention, which provides that if a coastal State has instituted proceedings for an offence committed beyond territorial waters for which the flag State has also instituted proceedings, the coastal State shall suspend its proceedings. Since in the present case the flag State (Malta) has not instituted such proceedings, the coastal State continues to have jurisdiction to impose any penalties for that offence.

4.6.3 The Court of Cassation summarised its reasons in the following terms:

> 'By the combined application of Articles 220 and 228, when proceedings have been instituted by the coastal State with a view to imposing penalties for a violation of applicable laws and regulations or international rules and standards relating to the prevention, reduction and control of pollution from vessels committed beyond its territorial sea by a foreign vessel, that State shall have jurisdiction when it relates to a case of serious damage.'

4.7 Sovereign immunity

4.7.1 The second aspect of jurisdiction dealt with in the judgement of the Court of Cassation related to the sovereign immunity invoked by the Italian classification society, Registro Italiano Navale (RINA). This society alleged in effect that it had performed its services by delegation from the flag State (Malta) so that it was entitled to the benefit of the same sovereign immunity as the flag State itself.

4.7.2 The Criminal Court of First Instance had decided that if RINA was prosecuted, it was not for having issued, by delegation from the flag State, a certificate of seaworthiness for the ship, but it was for having issued class certificates for the ship after verifying the safety rules, this service being a purely private activity. The Court of Appeal had decided on the contrary that a classification society could, as a matter of principle, benefit from the same sovereign immunity as the flag State itself. However the Court of Appeal considered that in the present circumstances RINA had clearly renounced such immunity by participating in the criminal proceedings without ever invoking a right to sovereign immunity.

4.7.3 In its judgement the Court of Cassation avoided pronouncing upon this question and merely stated that 'the fact that RINA, which claims to benefit from sovereign immunity, took an active part in the preliminary steps of these proceedings is not compatible with any intention to invoke such immunity and unequivocally amounts to a waiver by this society of any right to rely upon it'.

4.7.4 The issue as to whether or not a classification society was entitled, as a matter of principle, to benefit from sovereign immunity has therefore not been settled in this judgement by the Court of Cassation.

4.8 Jurisdiction of the criminal courts to consider claims for compensation for pollution damage

4.8.1 Several of the appellants before the Court of Cassation had claimed that the criminal courts dealing with the proceedings for the offence of involuntary pollution had no jurisdiction to consider claims for compensation for the damage caused.

4.8.2 The Court of Cassation did not accept this thesis and held on the contrary that, by virtue of Article IX.2 of the 1992 Civil Liability Convention (1992 CLC) which provides that 'each Contracting State shall ensure that its courts possess the necessary jurisdiction to entertain such actions for compensation', the criminal courts had jurisdiction to pronounce upon the claims for compensation resulting from the offence of causing pollution.

4.8.3 The Court of Cassation took care to explain in this respect that:

> 'the only consequence for the IOPC Fund of not having been party to the proceedings before the criminal court is that it will not be bound by this court's decision, by application of Article 7 paragraph 5 of the 1992 Fund Convention'.

4.9 Compatibility of French law with MARPOL

4.9.1 The four parties found guilty by the Court of Appeal had submitted in their further appeals to the Court of Cassation that French law which created offences of voluntary and involuntary pollution conflicted with certain provisions of the 1973/1978 International Convention for the Prevention of Marine Pollution from Ships (MARPOL), to the extent that under this Convention only the voluntary discharge of oil constituted an offence which was applicable only to vessels, whereas the French law applied to any person who had control over a ship.

4.9.2 In its judgement the Court of Cassation dismissed this ground and held that:

> 'the very text of rule 9, now rules 15 and 34 of Annex I to the MARPOL Convention, prohibits discharge by any 'vessel', an entity with no legal personality, and does not refer to any physical person, so that one must deduce from this that the signatory parties did not intend to impose a restrictive list upon the national legislator in charge of incorporating the rules of the said Convention into the positive domestic law and of defining the categories of persons who may be criminally liable ;
>
> In light of these statements, which establish that the manner in which Article 8 of the MARPOL Convention of 5 July 1983 has been applied in this case is not contrary to the requirements of the MARPOL Convention the Court of Appeal has justified its decision without overlooking the jurisdiction conferred upon the coastal State by UNCLOS.'

4.10 Criminal liabilities

4.10.1 The Court of Cassation confirmed the decision by the Criminal Court of First Instance and by the Court of Appeal with regard to the criminal convictions for the offence of involuntary pollution against the four persons who had 'power of control and of direction in the management or navigation of the vessel': 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.

4.10.2 The Court confirmed that:

- 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; and
- Total SA was found guilty of imprudence when carrying out its vetting operations prior to the chartering of the *Erika*.

4.11 Civil liabilities

4.11.1 The Court of Appeal held that the civil liability of the four parties prosecuted was only as follows:

- the representative of the shipowner, for gross negligence depriving him of the protection provided by Article III, paragraph 4 of the 1992 CLC;
- the President of the management company, likewise for gross negligence depriving him of the above protection; and
- the classification society RINA, but solely on the basis of French civil law and not by application of the 1992 CLC, the Court of Appeal emphasising that a classification society cannot be deemed to be a 'person performing services for the ship' and benefit in that capacity from the above protection.

4.11.2 The Court of Appeal also held that Total SA was entitled, in its capacity as charterer, to benefit from the above protection and that it was exonerated of any civil liability.

4.11.3 The Court of Cassation upheld these rulings by the Court of Appeal on the civil liability of the representative of the shipowner, the President of the management company and the classification society RINA. With regard to RINA it stated, contrary to the findings of the Court of Appeal, that a classification society may in principle benefit from the protection provided by the 1992 CLC, unless this society is found, as in the present case, to be guilty of 'recklessness' as defined by said Convention.

4.11.4 Finally the Court of Cassation quashed in part the decision of the Court of Appeal to the extent that it had exonerated Total SA of any civil liability. The Court of Cassation held, on the contrary, that in its capacity as charterer Total SA was guilty of 'recklessness' as defined by the 1992 CLC. The Court of Cassation therefore found that Total SA was jointly and severally liable with the three other parties prosecuted and ordered it to pay compensation for the damage caused.

4.12 Environmental and moral damage

4.12.1 Some of the appellants before the Court of Cassation had criticised the decision of the Court of Appeal for having awarded damages to a variety of local communities and associations for the protection of the environment in respect of pure environmental damage.

4.12.2 Upon rejecting this thesis the Court of Cassation on the contrary upheld the decision of the Court of Appeal and held that:

> 'The Court of Appeal has, both adequately and without contradiction, justified its awards of proper compensation to make good the environmental damage, consisting of direct or indirect damage to the environment arising from this offence.'

4.12.3 These types of damages had been defined by the Court of Appeal as 'all non-negligible damage to the natural environment, that means notably the air, the atmosphere, water, the soil, land, the countryside, natural sites, the biodiversity and interaction between these elements, which has no repercussions on any specific human interest but affects a legitimate public interest'. The Court of Cassation thus approved the principle under French law of the right to compensation for pure environmental damage.

4.12.4 The Court of Cassation has taken care to place on record that its decision was not binding upon the 1992 Fund since it had not been party to the criminal proceedings.

5 Director's considerations

5.1 The Court of Cassation judgement confirmed, almost entirely, the judgement by the Court of Appeal.

5.2 The decision by the Court of Cassation is not binding on the 1992 Fund, since the 1992 Fund was not a party to the proceedings. Therefore this judgement will not have any consequences for the 1992 Fund at present. However, some aspects of the judgement have the potential to have an impact for the international regime in the future. It must be noted in any event that, since compensation for purely environmental damage is henceforth laid down by French case law, this decision by the Court of Cassation is likely to have some influence in France and perhaps elsewhere. This might result in consequences for the international system of compensation for oil pollution damage as governed by the 1992 Conventions.

5.3 Even if the judgement is not enforceable against the 1992 Fund, there are two aspects which merit consideration, namely:

- Channelling of liability; and
- Environmental and moral damage.

5.4 Channelling of liability

5.4.1 Article III.4 of the 1992 CLC provides:

> 'No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against:
>
> (a) the servants or agents of the owner or the members of the crew;
>
> (b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
>
> (c) any charterer (howsoever described, including a bareboat charterer), manager or operator of the ship;
>
> (d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
>
> (e) any person taking preventive measures;
>
> (f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);
>
> unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.'

5.4.2 Concerning the classification society RINA, the Court of Appeal had considered that a classification society could not be deemed to be a person performing services for the ship and benefit in that capacity from the channelling provisions of the 1992 CLC. The Court of Cassation, however, has dissented with that consideration and has decided that a classification society could be included in Article III.4(b) of the 1992 CLC as 'any other person who, without being a member of the crew, performs services for the ship' and could therefore benefit from the channelling provisions of the 1992 CLC. The protection of Article III.4 is subject to the behaviour of the party in question and in this case the Court of Cassation decided that RINA was guilty of 'recklessness' as defined by the 1992 CLC, and therefore could not benefit from the channelling provisions.

5.4.3 The question of whether classification societies could benefit from the channelling provisions of the 1992 CLC has never been clear. However, the Court of Cassation has taken an extensive interpretation of the 1992 CLC to cover Classification Societies, giving them exemption from liability unless they committed the polluting act intently or with recklessness.

5.4.4 The Court of Cassation also found that the other three accused parties, namely the representative of the shipowner (Tevere Shipping), the President of the management company (Panship Management and Services Srl) and Total SA, by being reckless had lost the protection provided by the channelling provisions in the 1992 CLC.

5.4.5 After finding that the four accused parties were not protected by the 1992 CLC, applying French law, the Court of Cassation decided that these parties were liable to pay compensation.

5.5 Claims for environmental damage and moral damage

5.5.1 Concerning the question of claims for pure environmental damage, the Court of Cassation has, without giving further arguments, validated the decision of the Court of Appeal, which had decided that pure environmental damage was admissible for compensation in French law since it represented a non-negligible impairment of the natural environment even if it would not affect any particular human interest.

5.5.2 The Court of Appeal used a philosophical argument that due to the interdependence between the human being and nature, any damage to nature constitutes a damage to humankind and must be compensated since the final victim is the human being.

5.5.3 Compensation for environmental damage has serious difficulties of application since there is no identifiable victim, who has the right to claim, and its quantification.

5.5.4 Concerning entitlement to claim for compensation, the Court of Cassation approved the formula used by the Court of Appeal which proposed to give the right to claim for this type of damage to persons having the legal mission to maintain and improve the living environment of citizens: local and regional authorities who, under French law, have the mission to protect the environment and associations for the protection of the environment whose intrinsic mission is the protection of the environment.

5.5.5 However, the most important difficulty is the quantification of environmental damage when there is no market value to ascertain any economic loss. Whereas some jurisdictions try to assess this damage by using controversial abstract models to obtain a lump sum figure, these types of methods are not admissible under the 1992 Civil Liability and Fund Conventions. Article I.6 of the 1992 CLC limits carefully the concept of environmental damage and provides as follows:

> "Pollution damage' means:
>
> (a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;
>
> (b) the costs of preventive measures and further loss or damage caused by preventive measures.'

5.5.6 The Court of Cassation has approved the method used by the Court of Appeal to reach an award for environmental damage of €100 000 to €500 000 to the local authorities and €1 million to €3 million to the regions. The damage awarded for this concept was not documented, there was no proof of any damage additional to that already covered by other types of claims like clean up, and the damage awarded could not be quantified except using, as the Court did, a theoretical model.

5.5.7 The concept of pure environmental damage did not exist in French law at the moment of the occurrence of the *Erika* incident and it was generally assimilated to a moral damage ('prejudice moral'). The Court of Cassation has therefore created a new category of claim for environmental damage in cases of oil pollution under French law.

5.6 Conclusion

The judgement of the Court of Cassation is not binding on the 1992 Fund. While it could be argued that the Court of Cassation has created jurisprudence accepting claims for environmental damage by the use of abstract models that are not admissible under these Conventions, the Court of Cassation has in its judgement, as the Court of Appeal and the Court of First Instance had done, made it clear that it was applying French law and not the 1992 Civil Liability and Fund Conventions. In this sense it is premature to consider whether the judgement could have an influence on the international compensation regime.

6 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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ANNEX

BACKGROUND INFORMATION – ERIKA

1 Incident

1.1 On 12 December 1999, the Maltese-registered tanker *Erika* (19 666 GT) broke in two in the Bay of Biscay, some 60 nautical miles off the coast of Brittany, France. All members of the crew were rescued by the French maritime rescue services.

1.2 The tanker was carrying a cargo of 31 000 tonnes of heavy fuel oil of which some 19 800 tonnes were spilled at the time of the incident. The bow section sank in about 100 metres of water. The stern section sank to a depth of 130 metres about ten nautical miles from the bow section. Some 6 400 tonnes of cargo remained in the bow section and a further 4 800 tonnes in the stern section.

2 Impact

Some 400 kilometres of shoreline were affected by oil.

3 Response operations

3.1 Although the removal of the bulk of the oil from shorelines was completed quite rapidly, considerable secondary cleaning was still required in many areas in 2000. Operations to remove residual contamination began in spring 2001. By the summer tourist season of 2001, almost all of the secondary cleaning had been completed, apart from a small number of difficult sites in Loire Atlantique and the islands of Morbihan. Clean-up efforts continued at these sites in the autumn and most were completed by November 2001.

3.2 More than 250 000 tonnes of oily waste were collected from shorelines and temporarily stockpiled. Total SA, the French oil company, engaged a contractor to deal with the disposal of the recovered waste and the operation was completed in December 2003. The cost of the waste disposal is believed to have been some €46 million.

3.3 The French Government decided that the oil should be removed from the two sections of the wreck. The oil removal operations, which were funded by Total SA, were carried out by an international consortium during the period June to September 2000. No significant quantities of oil escaped during the operations.

4 Applicability of the Conventions

4.1 At the time of the incident France was Party to the 1992 Civil Liability Convention (1992 CLC) and 1992 Fund Convention. In accordance with the 1992 CLC, the *Erika* was insured for oil pollution liability with the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual). At the request of the shipowner, the Commercial Court in Nantes issued an order on 14 March 2000 opening limitation proceedings. The Court determined the limitation amount applicable to the *Erika* at FFr84 247 733 corresponding to €12 843 484 and declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the shipowner's liability insurer, Steamship Mutual.

4.2 In 2002, the limitation fund was transferred from the Commercial Court in Nantes to the Commercial Court in Rennes. In 2006, the limitation fund was again transferred, this time to the Commercial Court in Saint-Brieuc.

4.3 The maximum amount available for compensation under the 1992 CLC and the 1992 Fund Convention for the *Erika* incident is 135 million SDR, equal to FFr1 211 966 811 or €184 763 149.

4.4 The level of payments by the 1992 Fund was initially limited to 50% of the amount of the loss or damage actually suffered by the respective claimants. The 1992 Fund Executive Committee decided in January 2001 to increase the level of payments from 50% to 60%, and in June 2001, to 80%. In April 2003, the level of payments was increased to 100%.

5 Claims for compensation

5.1 Undertakings by Total SA and the French Government

5.1.1 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.

5.1.2 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.

5.2 General claims

As of October 2012, 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 €116.9 million[<1>].

6 Criminal proceedings

6.1 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.

6.2 Judgement by the Criminal Court of First Instance in Paris

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

6.2.2 In its judgement, the Criminal Court of First Instance held the following four parties 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.

[<1>] For details of the assessment and payment of the claim by the French State in respect of costs incurred in the clean-up response, reference is made to the Annual Report 2008 (pages 79 and 80).

6.2.3 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; and Total SA was found guilty of imprudence when carrying out its vetting operations prior to the chartering of the *Erika*.

6.2.4 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.

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

6.2.6 The judgement considered that Total SA could not avail itself of the benefit of the channelling provisions of Article III.4(c) of the 1992 CLC since it was not the charterer of the *Erika*. The judgement considered that the charterer was one of Total SA's subsidiaries.

6.2.7 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.

6.2.8 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.

6.2.9 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 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.

6.2.10 The four parties held criminally liable and some 70 civil parties appealed against the judgement.

6.2.11 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**.**

6.3 Judgement by the Court of Appeal in Paris

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

6.3.2 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.

6.3.3 Regarding civil liabilities, 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, as such, he was 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 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; and
- 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.

6.3.4 Regarding reputation, image, moral and environmental damage, in its judgement, the Court of Appeal accepted not only material damages (clean up, restoration measures and property damage) and economic losses but also accepted 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 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.

6.3.5 The Court of Appeal 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 awarded compensation for pure environmental damage to local authorities and environmental associations.

6.3.6 The amounts awarded by the Court of Appeal are summarised in the table below.

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
Total	**192.15 (£155 million)**	**203.8 (£164 million)**

6.3.7 Taking into account the amounts paid in compensation by Total SA following the judgement of the Criminal Court of First Instance, the balance 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) was €32.5 million.

6.3.8 Some 50 parties, including the representative of Tevere Shipping, Panship Management and Services, RINA and Total SA, appealed to the French Supreme Court (Court of Cassation).

6.4 Judgement by the Court of Cassation

6.4.1 On 25 September 2012 the Criminal Section of the Court of Cassation rendered its judgement. In a 320-page judgement the Court decided as set out below. The judgement is available in its original French language version via the Incidents section of the IOPC Funds' website: www.iopcfunds.org.

Jurisdiction

6.4.2 The Court of Cassation decided that French courts had jurisdiction to determine both criminal and civil liabilities arising from the *Erika* incident even though the sinking of the vessel had taken place in the Exclusive Economic Zone (EEZ) of France and not within its territory and/or territorial waters. In its judgement, the Court, based on a number of dispositions of the United Nations Convention on the Law of the Sea (10 December 1982, Montego Bay), justified France exercising its jurisdiction to impose sanctions on those responsible for an oil spill from a foreign-flagged vessel in the EEZ of France causing serious damage in its territorial sea and to its coastline.

6.4.3 With respect to the classification society RINA, the Court of Cassation did not address the question of whether the classification society would have been entitled to take advantage of the immunity of jurisdiction, as would the Maltese State (the Flag State of the *Erika*), since RINA was deemed to have renounced such immunity by having taken part in the criminal proceedings.

6.4.4 The Court stated that, since the 1992 Fund had not taken part in the criminal proceedings, it would not be bound by any judgement or decision in the proceedings.

Criminal liabilities

6.4.5 The Court of Cassation confirmed the decision by the Criminal Court of First Instance and by the Court of Appeal which had held the following four parties 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.

Civil liabilities

6.4.6 Regarding civil liabilities, the Court of Cassation decided that under Article IX.2 of the 1992 CLC, it was entitled to exercise jurisdiction in respect of actions for compensation. In its judgement the Court held that RINA and Total SA were covered by the channelling provisions of the 1992 CLC. They could not, however, rely on this protection since the damage resulted from their personal acts or omissions, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result.

6.4.7 In relation to RINA, the Court of Cassation decided that the Court of Appeal had been wrong in deciding that a classification society could not benefit from the channelling provisions contained in Article III.4 of the 1992 CLC. The Court decided, however, that the damage had resulted from RINA's recklessness and that therefore RINA could not rely on the protection awarded by the 1992 CLC.

6.4.8 In relation to Total SA, the Court of Cassation quashed the decision by the Court of Appeal and decided that, since the damage had resulted from Total SA's recklessness, it could not rely on the protection awarded by the 1992 CLC.

Material, moral and pure environmental damages

6.4.9 The Court of Cassation confirmed the decision by the Court of Appeal which had awarded the amounts set out in the table in paragraph 6.3.6.

7 Civil proceedings involving the 1992 Fund

Legal actions against the shipowner, Steamship Mutual and the 1992 Fund were taken by 796 claimants. As of October 2012, 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. Five actions were still pending. The total amount claimed in the pending actions is some €9.9 million.

8 Civil proceedings by the Commune de Mesquer against Total SA

8.1 A legal action was brought by the Commune de Mesquer against Total SA before the French courts where it argued that the cargo onboard the *Erika* was in fact a waste product 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 SA contributed to the occurrence of the pollution caused by the *Erika* incident.

8.2 As of October 2012, the Court of Appeal in Bordeaux had not yet rendered its decision. It is expected that, in light of the decision by the Court of Cassation in relation to the criminal proceedings, these proceedings will now continue.

9 Global settlement

9.1 At its July 2011 session the 1992 Fund Executive Committee authorised the Director to reach a global settlement between the 1992 Fund, Steamship Mutual (acting on its own behalf and also on behalf of the shipowner's interests), RINA and Total in respect of the *Erika* incident.

9.2 The main objective of the global settlement was to ensure that civil parties who had been awarded compensation by the judgement of the Criminal Court of Appeal in Paris received compensation as soon as possible.

9.3 In October 2011, the Secretariat was informed that 47 out of 58 civil parties (81%) who had been awarded compensation had either signed a protocol with RINA or expressed their agreement to be paid by RINA the amounts awarded by the Criminal Court of Appeal in Paris. These civil parties represent 99% of the total amounts awarded by the Court of Appeal.

9.4 Since the vast majority of civil parties who had been awarded compensation by the Criminal Court of Appeal in Paris had agreed to receive compensation, on 14 October 2011 the Director signed on behalf of the 1992 Fund a global settlement with Steamship Mutual, RINA and Total.

9.5 The global settlement has been formalised in four agreements as follows:

9.6 General four party agreement

9.6.1 Under the general four party agreement, the 1992 Fund, Steamship Mutual, RINA and Total have undertaken to withdraw all proceedings against the other parties to the agreement and, in addition, they have waived any rights to bring any claim or action which they might have in relation to the *Erika* incident against any of the other parties to the agreement.

9.6.2 In accordance with the general agreement the parties have made the necessary submissions to withdraw their actions. It was expected that the judgements recording these withdrawals would be rendered by the end of 2012.

9.7 Settlement agreement between Steamship Mutual and the 1992 Fund

9.7.1 A bilateral agreement was signed between Steamship Mutual and the 1992 Fund whereby:

- Steamship Mutual undertook to pay to the 1992 Fund a lump sum of €2.5 million as a contribution to the agreement;
- the 1992 Fund undertook to waive and renounce all claims against Steamship Mutual and discontinue all pending actions against Steamship Mutual;
- Steamship Mutual undertook to waive and renounce all claims against the 1992 Fund; and

- the 1992 Fund undertook to meet any judgements against Steamship Mutual and/or the 1992 Fund and agreed to indemnify Steamship Mutual if the judgements were enforced against Steamship Mutual.

9.7.2 In accordance with that agreement, Steamship Mutual has paid the 1992 Fund a lump sum of €2.5 million.

9.8 Settlement agreement between RINA and the 1992 Fund

9.8.1 A bilateral agreement was signed between RINA and the 1992 Fund whereby:

- RINA undertook to pay to those civil parties who agree to settlement, the amounts awarded by the decision of the Criminal Court of Appeal in Paris;
- the 1992 Fund undertook to waive and renounce all claims against RINA. The 1992 Fund also undertook to discontinue all pending actions against RINA; and
- RINA also undertook to waive and renounce all claims against the 1992 Fund.

9.8.2 In accordance with that agreement, RINA paid all civil parties who agreed to settlement the amounts awarded by the decision of the Criminal Court of Appeal in Paris.

9.9 Settlement agreement between Total and the 1992 Fund

9.9.1 A bilateral agreement was signed between Total and the 1992 Fund whereby:

- Total undertook to waive and renounce all claims against the 1992 Fund and discontinue all pending actions against the Fund; and
- the 1992 Fund undertook to waive and renounce all claims against Total and discontinue all pending actions against Total.

9.9.2 Under the global settlement the 1992 Fund will continue to handle the five pending legal actions brought against it totalling some €9.9 million and will pay in accordance with judgements.