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COMPENSATION
FUND 1992

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Agenda item 3

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INCIDENTS INVOLVING THE 1992 FUND

ERIKA

Note by the Director

Summary:

About 19 800 tonnes of heavy fuel oil was spilled from the *Erika* as it sank, after breaking up in severe weather on 12 December 1999. The sunken bow section contained some 6400 tonnes of cargo and the stern section a further 4 700 tonnes. Operations to pump the remaining oil from the wreck were successfully completed by September 2000. The clean-up operations have been completed except for a few sites.

In view of the uncertainty as to the level of claims arising from the *Erika* incident, the 1992 Fund's payments are for the time being limited to 80% of the amount of the damage actually suffered by the respective claimants as assessed by the 1992 Fund's experts.

A number of public bodies and private entities have taken legal action in France against Total Fina, the owner of the *Erika*, the Steamship Mutual P & I Club, the vessel's management company and the classification society. The classification society has taken legal action in Italy against *inter alia* the 1992 Fund requesting a declaration that the society was not liable for the incident. The 1992 Fund has taken recourse action in France against the classification society.

Action to be taken: Information to be noted.

1 The 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 marine rescue services.

- 1.2 The tanker was carrying a cargo of 31 000 tonnes of heavy fuel oil of which some 19 800 tonnes was spilled at the time of the incident. The bow section floated vertically for several hours before sinking during the night of 12 December in about 100 metres of water. A French salvage company succeeded in attaching a line to the stern section and attempted to tow it further off shore. However, during the morning of 13 December the stern section sank to a depth of 130 metres about 10 nautical miles from the bow section.
- 1.3 Some 6400 tonnes of cargo remained in the bow section and a further 4700 tonnes in the stern section.
- 1.4 The *Erika* was entered in the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual).

2 Clean-up operations

- 2.1 As for the clean-up operations up to October 2000 reference is made to document 92/FUND/EXC.9/7.
- 2.2 The clean-up operations have been completed except in respect of a few sites in Loire Atlantique, the islands of Morbihan and Northern Vendée.
- 2.3 More than 200 000 tonnes of oily waste has been collected from shorelines and has been stockpiled. TotalFina SA has engaged a contractor to deal with the disposal of the recovered waste and the operation is underway. Initial estimates of the cost of the waste disposal are in the region of FFr200 million (£19 million).
- 2.4 The administrative courts in Nantes and Poitiers appointed experts to carry out an investigation into the condition of the beaches before the incident and the type and extent of the pollution caused. The experts have presented reports to the courts on the results of their examination. The 1992 Fund has followed these investigations through its technical experts.

3 Impact of the spill

- 3.1 As regards the impact of the spill in general reference is made to document 92FUND/EXC.9/7.
- 3.2 Oil affected several important oyster and mussel fisheries. As a result of the monitoring programme put in place by the French authorities and the guidelines issued by the Agence Française de Sécurité Sanitaire des Aliments (AFSSA), in numerous areas cultivated and natural stocks of shellfish were found to have accumulated hydrocarbons exceeding acceptable limits, and the marketing of produce in these areas was banned. No fishing bans were imposed in respect of offshore fishing for pelagic fish and crustacea in view of the low levels of contamination of catches.
- 3.3 The remaining shell fishing bans were lifted during the summer of 2000, and all areas are now open to fishing and harvesting of marine products.
- 3.4 Efforts were made to minimise the impact of the spill on coastal salt production in marshes in Loire Atlantique and Vendée, and a number of monitoring and analytical programmes were implemented. Salt production resumed in Noirmoutier (Vendée) in mid-May 2000 as a result of an improvement in sea water quality, and bans which were imposed to prevent the intake of sea water in Guérande (Loire Atlantique) were lifted on 23 May 2000. Since that date a group of independent producers in Guérande tried to resume salt production but were hampered from doing so. Members of a co-operative who account for some 70% of the salt production in Guérande decided not to produce salt in 2000 on the grounds of protecting market confidence in the product.
- 3.5 At the request of the 1992 Fund and Steamship Mutual a court expert has been appointed to examine whether it was feasible to produce salt in 2000 in Guérande that would meet the criteria

relating to quality and the protection of human health. Documentation is being submitted to the court expert, whose report is expected in the near future.

- 3.6 Claims for lost salt production due to delays to the start of the 2000 season caused by the imposed ban on water intake have been received from producers (both independent and members of the co-operative) in Guérande and Noirmoutier.
- 3.7 The affected coastline supports an important tourist industry, particularly during the summer months, which was affected to varying degrees depending on location and type of activity during the 2000 tourism season. The indications are that the 2001 season was not affected to any significant degree. Nevertheless some claims may be submitted for losses incurred during the 2001 season in areas which remain contaminated.

4 Operations to prevent further oil escaping from the wreck

- 4.1 The oil remaining in the two sections of the wreck was removed during the period 6 June - 15 September 2000. No significant quantities of oil escaped during the operations.
- 4.2 With respect to the oil removal operations reference is made to documents 92FUND/EXC.7/4, 92FUND/EXC.8/2 and 92FUND/EXC.9/7.

5 Claims handling

- 5.1 Steamship Mutual and the 1992 Fund established a Claims Handling Office in Lorient, which opened on 12 January 2000.
- 5.2 The Claims Handling Office has at present a staff of nine persons. More staff will be recruited as required.
- 5.3 The Claims Handling Office serves as a focal point for the claimants and the technical experts engaged by the 1992 Fund and Steamship Mutual to examine the claims for compensation.
- 5.4 Claims for clean-up are examined by French surveyors located in Brest. A team of French surveyors are examining claims relating to fishing and mariculture. Experts from the International Tankers Owners Pollution Federation Ltd (ITOPF) are also giving advice on various groups of claims. Claims from the tourism sector are examined by a team of French assessors, supported by a firm in Liverpool with great expertise in the tourism sector which assisted the Funds in the assessment of tourism claims arising from the *Braer*, *Sea Empress* and *Nakhodka* incidents. In order to speed up the handling of the tourism claims the number of assessors has recently been increased from 15 to 30.
- 5.5 Due to the volume of claims for compensation presented as a result of the *Erika* incident, particularly in the tourism sector, the 1992 Fund, with support from the firm of tourism experts engaged in France by the Fund and Steamship Mutual, has developed a computer programme to assist the experts in the assessment of claims for compensation. This programme became operational in May 2001. The programme makes it possible to compare data relating to new claims with data relating to claims previously assessed. If the data provided in respect of the claim under assessment are consistent with those in respect of previously-assessed similar claims in the same sector and geographical location, the time spent on the assessment process can be substantially reduced.

6 Claims for compensation

Information on the claims situation will be given in an addendum to this document.

7 Level of payments

7.1 Undertakings by Total Fina and the French Government

7.1.1 In a letter to the Director, Total Fina undertook not to pursue against the 1992 Fund or against the limitation fund constituted by the shipowner or his insurer, the claims relating to the cost of any inspections and the operations in respect of the wreck of the *Erika*, 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 under the 1992 Conventions, ie 135 million Special Drawing Rights (SDR). Total Fina made a corresponding undertaking in respect of the cost of the collection and disposal of the oily waste generated by the clean-up operations, of the cost of its participation in the beach clean-up up to a maximum of FFr40 million and of the cost of a publicity campaign to restore the tourist image of the Atlantic coast up to a maximum of FFr30 million.

7.1.2 The French delegation informed the Committee at its 6th session that 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. The delegation stated that this undertaking covered all the expenses incurred by the French State in combating the pollution, *inter alia* those expenses falling within the framework of Plan Polmar, including expenses incurred by local authorities paid or reimbursed through Plan Polmar. That delegation stated that the undertaking covered also all measures which the State might take in different sectors to reduce the consequences of the incident, including any publicity campaigns to this effect. That delegation made the point that the French Government's claims would rank before any claims by Total Fina if funds were available after all other claims had been paid in full.

7.2 Consideration by the Executive Committee at its previous sessions

7.2.1 At its 8th session, held in June 2000, the Executive Committee considered estimates of the total amount of the established claims. The Committee took note of the result of an extensive study carried out within the French Ministry of Economy, Finance and Industry on the extent of the damage caused by the *Erika* incident on the tourism industry. It was noted that in the study the estimated total amount of the admissible claims in the tourism sector fell within the range of FFr800 - 1 500 million (£80 - 150 million).

7.2.2 In view of the uncertainty as to the total amount of the claims arising from the *Erika* incident, the Executive Committee decided that the payments by the 1992 Fund should for the time being be limited to 50% of the amount of the loss or damage actually suffered by the respective claimants, as assessed by the 1992 Fund's experts (document 92FUND/EXC.8/8, paragraph 3.3.38).

7.2.3 At its 11th session, held in January 2001, the Executive Committee decided to increase the level of the 1992 Fund's payments from 50% to 60% of the amount of the damage actually suffered by the respective claimants (document 92FUND/EXC.11/6, paragraph 3.58).

7.2.4 The Executive Committee decided at its 13th session, held in June 2001, to increase the level of payments to 80% (document 92FUND/EXC.13/7, paragraph 3.2.42).

7.3 Renewed evaluation of the likely level of claims

The Director is continuing his consideration of the likely level of claims and will provide further information on this issue in an addendum to this document in which he will also address the issue of the level of payments.

8 Other sources of funds

8.1 The French Government introduced a scheme to provide emergency payments in the fishery sector. This scheme is administered by OFIMER (Office national interprofessionnel des produits

de la mer et de l'aquaculture), a government agency attached to the French Ministry of Agriculture and Fisheries. OFIMER may make payments to claimants of up to FFr200 000 (£19 200) on the basis of its own assessment of the losses, without consultation with Steamship Mutual and the 1992 Fund. OFIMER has stated that it bases its assessments on the criteria laid down in the 1992 Fund's Claims Manual.

- 8.2 The Director has been informed that as at 12 September 2001 OFIMER had paid FFr26.7 million (£2.5 million) to claimants in the fishery sector and FFr13 million (£1.2 million) to salt producers.
- 8.3 The French Government has also introduced a scheme to provide supplementary payments in the tourism sector. The scheme is operational since 25 July 2001.

9 Limitation proceedings

- 9.1 At the request of the shipowner, the Tribunal de Commerce in Nantes issued an order on 14 March 2000 opening the limitation proceedings. The Court determined the limitation amount applicable to the *Erika* at FFr84 247 733 (£8.1 million) and declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by Steamship Mutual.
- 9.2 A group of claimants has lodged an objection to the Court's acceptance of Steamship Mutual's letter of guarantee, maintaining that the limitation fund should have been constituted in cash. A court hearing was held on 31 May 2001. In June 2001, the Court declined to take jurisdiction of this matter.

10 Nomination of court experts for evaluation of the damage

- 10.1 In April 2000 the Conseil Général de Vendée and 47 other claimants requested that experts appointed by the Tribunal de Grande Instance in Sables d'Olonne should be instructed to evaluate the damage by contamination of the affected sectors, in particular fisheries, the tourism industry, municipalities, départements and regions. They also requested that the Court should order the 1992 Fund to intervene in the proceedings.
- 10.2 Under French law a person who has suffered damage is entitled to a court survey (expertise judiciaire) for the purpose of assessing his loss. The request to the Court in Sables d'Olonne was made not by the individual claimants in the fishery and tourism sectors but by regional public bodies.
- 10.3 At a court hearing the 1992 Fund stated that it did not object in principle to being forced to intervene in the proceedings. However, the Fund did not agree to the proposed extended mandate for the court experts. The Fund made the point that if the Court were to give the experts the proposed mandate this would impose a considerable workload on them. The Fund informed the Court that the proposed task, ie to assess the losses suffered by all victims, was exactly the task carried out by the experts engaged by Steamship Mutual and the 1992 Fund. Attention was drawn to the Fund's established policy to endeavour to reach out-of-court settlements. The Fund requested that the proposed mandate of the experts should be modified to the effect that the experts should make an evaluation of the damage only at the specific request of the individual victims in order to avoid interference with the claims handling carried out through the Claims Handling Office in Lorient. In May 2000 the Court in Sables d'Olonne decided in accordance with the Fund's request.
- 10.4 In July 2000, the Département de Loire-Atlantique and 22 communes in Loire Atlantique requested that the Tribunal Administratif in Nantes should appoint experts to assess their damage. In September 2000 the Court appointed a panel of experts (the same as those already appointed by the Tribunal de Grande Instance in Sables d'Olonne - see paragraph 10.3) to assess the extent of the damage sustained by the claimants.
- 10.5 In August 2000, 23 communes of Charente-Maritime requested that the Tribunal Administratif in Poitiers should appoint court experts to assess their damage. In September 2000 the Court

decided to nominate the same experts as those appointed by the Tribunal de Grande Instance in Sables d'Olonne to assess the damage.

- 10.6 The court experts referred to in paragraphs 10.3 - 10.5 held their first meetings in early December 2000. A further meeting was held in September 2001.

11 Actions in France against Total Fina, the shipowner and others

- 11.1 In April and May 2000 a number of public and private bodies brought actions in various courts in France against the following parties and requested that the Court should hold the defendants jointly and severally liable for any damage not covered by the 1992 Civil Liability Convention:

Total Fina SA
Total Raffinage Distribution SA
Total International Ltd
Total Transport Corporation
Tevere Shipping Co Ltd
Steamship Mutual
Panship Management and Services Srl
RINA (Registro Italiano Navale)

- 11.2 As regards these proceedings reference is made to section 15 of document 92FUND/EXC.9/7. There have been no developments in these proceedings since the Executive Committee's 9th session.
- 11.3 In June 2000 the commune of Mesquer in Loire-Atlantique brought legal proceedings against the Group Total Fina in the Tribunal de Commerce de Saint Nazaire on the ground that the product carried by the *Erika* was to be considered as waste and that Total Fina should therefore be liable for any damage caused by this product. The Director considered that, since this action fell outside the scope of the 1992 Conventions, the 1992 Fund should not intervene in the proceedings. As indicated at the Executive Committee's 8th session, the Director has nevertheless followed these proceedings.
- 11.4 In a judgement rendered on 6 December 2000, the Tribunal de Commerce de Saint Nazaire rejected the action referred to in paragraph 11.3. The Court held that in order to be considered as waste a substance or product must be intended for abandonment and that this was not the case in respect of the fuel oil N°2 carried on board the *Erika* which had been sold by Total International to an Italian company. The commune has appealed against the judgement.
- 11.5 In September 2000 a group of persons who had participated as volunteers in the clean-up operations (l'Association des Bénévoles de l'*Erika*) brought legal action in the Court in Sables d'Olonne against the Group Total Fina and requested that the experts appointed by that Court in May 2000 should be instructed to analyse the product removed from the wreck of the *Erika* of which the Association had kept some samples. For the reasons set out in paragraph 11.3 above, the Director considered that the 1992 Fund should not intervene in these proceedings.
- 11.6 The Director is studying the issues involved in the various court proceedings in co-operation with the 1992 Fund's French and Italian lawyers^{<1>}.

12 Action in Italy by RINA SpA/Registro Italiano Navale

- 12.1 In late April 2000 RINA SpA and Registro Italiano Navale^{<2>} brought legal action in the Court of Syracuse (Augusta section) (Italy) against the following defendants:

<1> Maître Jean-Serge Rohart (Paris) and Professor Nicola Balestra (Genoa).

<2> According to the plaintiffs, RINA SpA replaced Registro Italiano Navale as the Italian classification society on 1 August 1999.

Tevere Shipping Co Ltd
 Panship Navigational and Services Srl
 Steamship Mutual
 Conseil Général de la Vendée
 Total Fina SA
 Total Fina Raffinage Distribution SA
 Total International Ltd
 Total Transport Corporation
 Selmont International Inc
 The 1992 Fund
 The French State

- 12.2 RINA SpA and Registro Italiano Navale requested that the Court should declare that they were not liable, jointly or severally or alternatively, for the sinking of the *Erika* and for the pollution of the French coast, or for any other consequence of the incident whatsoever.
- 12.3 The plaintiffs also requested that, in the event that they were to be held liable and that there was a link of causation between this hypothetical liability and the consequences of the incident, the Court should:
- (a) declare that they would not have any obligation to pay compensation towards any of the defendants on any ground whatsoever, either directly or indirectly or by way of recourse;
 - (b) declare that this hypothetical liability would be limited as provided in the applicable Rules of the plaintiffs^{<3>}; and
 - (c) declare that the first three defendants mentioned in paragraph 12.1 should hold harmless and indemnify the plaintiffs for any amount which the plaintiffs may have to pay.
- 12.4 In the submission to the Court the plaintiffs stated that Registro Italiano Navale classed the *Erika* in August 1998 and that RINA had carried out an annual survey of the *Erika* which had commenced on 16 August 1999 in Genoa (Italy) and had been completed on 24 November 1999 in Augusta (Italy).
- 12.5 The plaintiffs stated that since various parties had made public their intention to involve RINA for omissions during a survey on 24 November 1999, they had an interest in obtaining as soon as possible a judgement declaring them not liable for the incident and its consequences, maintaining that there was no link of causation between any conduct of the plaintiffs and the incident.
- 12.6 The plaintiffs have maintained that the Italian Courts are competent in accordance with Article 5.3 of the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, which reads:
- A person domiciled in a Contracting State may in another Contracting State be sued:
- 3) In matters relating to tort, delict or quasi delict, in the courts of the place where the harmful event occurred.
- 12.7 The plaintiffs have argued that the channelling provisions in Articles III.1 and III.4 of the 1992 Civil Liability Convention preclude any liability of classification societies. They have also maintained that it has been established by English and American leading cases that the shipowner is the only party responsible for the operation, maintenance and seaworthiness of the vessel and

<3> These Rules provide: In no case shall the liability of RINA, regardless of the amount of the claimed damages, exceed the value equal to five times the total of the fees received by RINA as consideration of the services rendered from which the damage derives.

that no such liability can lie with the classification society which is neither the guarantor nor the underwriter of the classed vessel.

- 12.8 The first court hearing was held on 4 December 2000. Only procedural issues were dealt with at the hearing. The Court ordered the parties to submit pleadings on a specific procedural issue, ie whether the plaintiffs' action was a nullity due to the fact that the plaintiffs had not given sufficient details on the grounds of their action. In February 2001 the Court rejected the defence of nullity.
- 12.9 In March 2001 the 1992 Fund commenced legal action under a special procedure directly before the Supreme Court of Cassation requesting that the Court should decide that Article 5.3 of the Brussels Convention did not apply to the plaintiffs' action, since it related to a declaration of non-liability. Subsequently the French Government and the four companies in the Total Group took corresponding actions.
- 12.10 If the actions before the Supreme Court of Cassation succeed, the actions on the merits of the case before the Court in Syracuse will be discontinued. Consequently the 1992 Fund requested that the latter Court should suspend the proceedings before it pending the Supreme Court's decision. On 31 July 2001 the Court in Syracuse granted the 1992 Fund's request.

13 Actions by the 1992 Fund against RINA SpA and Registro Italiano Navale

- 13.1 At its 8th session the Executive Committee was informed that in order to protect the 1992 Fund's position, the Director had filed legal actions against RINA SpA and Registro Italiano Navale in the Tribunal de Commerce in Vannes, the Tribunal de Commerce in La Roche sur Yon and the Tribunal de Commerce in Lorient, requesting the Courts to join the 1992 Fund in the proceedings commenced by the Conseil Général de Morbihan and others. It was further noted that the 1992 Fund had requested that the Courts should suspend the proceedings until the results of the various investigations into the cause of the incident had been completed. It was noted that the Director had emphasised that the 1992 Fund's actions were of a protective nature and that the Fund reserved its right to present at a later stage claims against the two defendants for reimbursement of any amounts which the Fund might have paid under the 1992 Conventions to victims of oil pollution damage and that the Fund had also reserved its right to take similar actions against any other party who might be liable in the light of the results of the investigations into the cause of the incident.
- 13.2 The Executive Committee endorsed the Director's position and the steps taken by him to protect the 1992 Fund's interests, in particular the actions taken against RINA SpA and Registro Italiano Navale (document 92FUND/EXC.8/8, paragraph 3.49).
- 13.3 There has been no development in respect of the legal actions taken by the 1992 Fund.

14 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
 - (b) to give the Director such instructions in respect of the court proceedings referred to in sections 10 – 13 as it may deem appropriate; and
 - (c) to give the Director such instructions in respect of the handling of this incident and of claims arising therefrom as it may deem appropriate.
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