



INCIDENTS INVOLVING THE 1992 FUND

ERIKA – RECOURSE ACTIONS

Note by the Director

Summary:	Although the investigations into the cause of the incident have not yet been completed, consideration is given as to whether the 1992 Fund should already at this stage take actions against certain parties in order to prevent the Fund's right to claiming recovery of the amounts paid by the Fund in compensation becoming time-barred.
Action to be taken:	To give instructions in respect of such actions.

- 1 In the *Erika* case as in other cases, the 1992 Fund will have to decide whether to take recourse actions to recover the amounts it has paid in compensation. The IOPC Funds' policy in respect of recourse actions as laid down by the governing bodies can be summarised as follows:

The policy of the Funds is to take recourse action whenever appropriate. The Funds should in each case consider whether it would be possible to recover any amounts paid by them to victims from the shipowner or from other parties on the basis of the applicable national law. If matters of principle are involved, the question of costs should not be the decisive factor for the Funds when considering whether to take legal action. The Funds' decision as to whether or not to take such action should be made on a case-by-case basis, in the light of the prospect of success within the legal system in question.

- 2 As set out in section 4 of document 92FUND/EXC.18/5, investigations to establish the cause of the *Erika* incident were carried out by the Malta Maritime Authority and the French Permanent Commission of Enquiry into Accidents at Sea. The reports on these investigations were summarised in document 92FUND/EXC.14/5/Add.1.
- 3 A criminal investigation into the cause of the incident is being carried out by an examining magistrate in Paris. During 2000, charges were brought against the master of the *Erika*, the representative of the registered owner (Tevere Shipping), the president of the ship management company (Panship Management and Services Srl), the management company itself, the deputy manager of Centre Régional Opérationnel de Surveillance et de Sauvetage (CROSS), three officers of the French Navy who were responsible for controlling the traffic off the coast of Brittany, the classification society (RINA) and one of RINA's managers. In December 2001

charges were brought against Total Fina and some of its senior staff on the basis of a report by an expert appointed by the magistrate. The investigations have not yet been completed.

- 4 At the request of a number of parties, the Commercial Court (Tribunal de Commerce) in Dunkirk appointed experts to investigate the cause of the incident ('expertise judiciaire'). The Court decided that the investigation should be carried out by a panel of four experts. This investigation is not yet completed.
- 5 A number of public and private bodies have brought actions in various courts in France against the following parties and requested that the courts 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)

The 1992 Fund has requested to be allowed to intervene in these proceedings.

- 6 In the Director's view it is not possible for the 1992 Fund to take a final position as to whether the Fund should take recourse actions and, if so, against which parties, until the investigations into the cause of the incident have been completed. However, the Director considers that the 1992 Fund should take such actions as are necessary to prevent its rights becoming time-barred.
- 7 Pending the outcome of the ongoing investigations into the cause of the incident, the 1992 Fund should, in the Director's view, in any event challenge the shipowner's right to limit his liability. He considers that the investigations carried out by the Malta Maritime Authority and the French Permanent Commission of Enquiry into Accidents at Sea give rise to doubts as to the quality of the ship at the time of the incident (cf document 92FUND/EXC.14/5/Add.1). It should be noted that under Article V.2 of the 1992 Civil Liability Convention the shipowner is deprived of the right to limit his liability if it is proved that the pollution damage resulted from his personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result. This test is considerably stricter than the test in the 1969 Civil Liability Convention which provides that the shipowner is not entitled to limit his liability if the incident occurred as a result of his actual fault or privity.
- 8 Under French law, the general time bar period in commercial matters is – subject to many exceptions - ten years. However, pursuant to Article VIII of the 1992 Civil Liability Convention, rights to compensation under that Convention shall be extinguished unless an action is brought thereunder within three years from the date when the damage occurred.
- 9 A recourse action by the 1992 Fund against Tevere Shipping Co Ltd (the registered owner of the *Erika*) would, in the Director's view, constitute an action under the 1992 Civil Liability Convention. This may also be the case in respect of some other potential defendants, namely Panship Management and Services Srl (manager of the *Erika*), Selmont International Inc. (time charterer of the *Erika*) and Total Transport Corporation (voyage charterer of the *Erika*).
- 10 It appears that in order to pursue successfully recourse actions against Panship Management and Services Srl, Selmont International Inc. and Total Transport Corporation, the 1992 Fund would have to prove that the pollution damage resulted from their personal act or omission, committed with the intent to cause damage, or recklessly and with knowledge that damage would probably result, since they may otherwise be entitled to the protection laid down in Article III.4 of the 1992

Civil Liability Convention. Actions against other companies belonging to the Total group would probably be subject to a time bar period of 10 years, but it would in the Director's view be preferable to take actions against all companies belonging to the same group at the same time.

- 11 An action against the *Erika's* P & I insurer, Steamship Mutual, might also be subject to a three-year time bar. As regards Steamship Mutual, attention should be drawn to Article VII.8 of the 1992 Civil Liability Convention. Under that Article, actions for compensation for pollution damage under the Convention may be brought directly against the insurer. It is provided, however, that the insurer is entitled to limit his liability to the amount prescribed in Article V.2 even if the shipowner is deprived of his right of limitation. The insurer may invoke the defence that the pollution damage resulted from the wilful misconduct of the shipowner.
- 12 In the light of the analysis made in paragraphs 8 - 11 above, the Executive Committee may wish to authorise the Director to take recourse actions, as a protective measure, before the expiry of the three-year time period against the following parties:

Tevere Shipping Co Ltd (registered owner of the *Erika*)
Steamship Mutual (P & I insurer of the *Erika*)
Panship Management and Services Srl (manager of the *Erika*)
Selmont International Inc. (time charterer of the *Erika*)
Total Fina Elf SA (previously Total Fina SA) (holding company)
Total Raffinage Distribution SA (shipper)
Total International Ltd (seller of cargo)
Total Transport Corporation (voyage charterer of the *Erika*)

- 13 The results of the investigations into the cause of the incident, once completed, may give grounds for the 1992 Fund to take recourse action also against parties other than those referred to in paragraph 12. However, the Director considers that no decision is required in this regard at this stage since the three-year time bar period laid down in the 1992 Civil Liability Convention would not apply to such other parties.
- 14 As mentioned in paragraph 14.1 of document 92FUND/EXC.18/5, the 1992 Fund has taken legal action against the classification societies RINA SpA and Registro Italiano Navale in the Commercial Courts in Nantes, Vannes, La Roche sur Yon and Lorient in order to protect its interests. If the Executive Committee were to authorise him to take recourse actions against some or all of the parties referred to in paragraph 12 above, it would, in the Director's view, be convenient, for procedural reasons, for the Fund to take actions also against RINA SpA and Registro Italiano Navale in the same court.

15 **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 consider whether the 1992 Fund should challenge the shipowner's right to limit his liability; and
- (c) to consider whether to authorise the Director to commence recourse actions against the parties referred to in paragraph 12 above.
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