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OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
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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 6 400 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.

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 6 400 tonnes of cargo remained in the bow section and a further 4 700 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, reference is made to document 92/FUND/EXC.9/7.
- 2.2 The clean-up operations have been completed.
- 2.3 More than 250 000 tonnes of oily waste has been collected from shorelines and has been temporarily stockpiled. Total Fina SA, the French oil company, has engaged a contractor to deal with the disposal of the recovered waste and the operation is underway. Estimates of the cost of the waste disposal are in the region of FFr300 million or €46 million (£30 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

As regards the impact of the spill in general, reference is made to documents 92FUND/EXC.9/7 and 92FUND/EXC.16/3.

4 Cause of the incident

- 4.1 Since the *Erika* was registered in Malta, the Malta Maritime Authority conducted a Flag State investigation into this incident. The Maltese Maritime Authority issued its report in September 2000.
- 4.2 An investigation was also carried out by the French Permanent Commission of Enquiry into Accidents at Sea (La Commission Permanente d'enquête sur les événements de mer, CPEM). The report of this investigation was published in December 2000.
- 4.3 The conclusion of these investigations are summarised in document 92FUND/EXC.14/5/Add.1.
- 4.4 The 1992 Fund's lawyers and the Fund's technical experts are studying the reports by the French Enquiry Commission and the Maltese authorities.
- 4.5 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 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 investigation has not yet been completed.
- 4.6 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. Most of the interested parties have participated in the proceedings.
- 4.7 With the permission of the Commercial Court in Dunkirk the experts have ordered an operation to recover two pieces of ship side from the No.2 starboard ballast tank and one piece of deck plate from over the No.2 port ballast and No.3 centre cargo tank. These pieces are located at the depth of 95 metres at a considerable distance from the two main portions of the wreck. There is therefore no risk of the recovery operation causing further pollution. The purpose of the operation

is to obtain evidence of the condition of these portions of the ship from a corrosion point of view at the time of the sinking. The recovery operation is scheduled to start on 22 September 2002.

- 4.8 The 1992 Fund is following the investigations carried out by the Court in Dunkirk through its French lawyers and technical experts.

5 Removal of the oil remaining in the wreck

- 5.1 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.
- 5.2 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.

6 Limitation proceedings

- 6.1 At the request of the shipowner, the Commercial Court in Nantes issued an order on 14 March 2000 opening the limitation proceedings. The Court determined the limitation amount applicable to the *Erika* at FF84 247 733^{<1>} (£8.1 million) and declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by Steamship Mutual.
- 6.2 A group of claimants 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.

7 Claims handling

Steamship Mutual and the 1992 Fund established a Claims Handling Office in Lorient, which opened on 12 January 2000. The Claims Handling Office, which has a staff of seven, serves as a focal point for the claimants and the technical experts engaged to examine the claims for compensation. The Office has a purely administrative role and does not carry out assessment of claims.

8 Attack on the Claims Handling Office in Lorient

- 8.1 Threats and allegations have been made more or less continually, mainly by one individual, against staff at the Claims Handling Office in Lorient, against experts engaged by Steamship Mutual and the 1992 Fund and against the Director.
- 8.2 Early in the morning of Saturday 15 December 2001, a person who had previously caused damage to the 1992 Fund's offices in Lorient and Brest drove a tractor with a front-end loader into the Claims Handling Office building in Lorient, demolishing a number of windows and destroying the door. The two police officers present outside the office were unable to prevent the attack, but arrested the attacker and took him into police custody. After being charged by the investigating judge (juge d'instruction) the person was released on 16 December. The judge issued an order prohibiting the person from visiting Lorient except to see his lawyer.
- 8.3 The 1992 Fund and the Steamship Mutual pressed charges against the attacker with the local police. The public prosecutor brought charges of causing serious damage to property belonging to another by breaking and entering ('dégradation ou détérioration grave du bien d'autrui avec entrée par effraction') against the attacker in the Criminal Court of Lorient. The case will be heard on 31 October 2002.

9 Claims for compensation

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

<1> This amount corresponds to €12 843 484.

10 Level of the 1992 Fund's payments

10.1 Consideration by the Executive Committee at its previous sessions

- 10.1.1 At its 8th session, held in July 2000, the Executive Committee decided that, in view of the uncertainty as to the total amount of the claims arising from the *Erika* incident, 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 3.38).
- 10.1.2 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).
- 10.1.3 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).
- 10.1.4 The Executive Committee decided at its 14th session, held in October 2001, that in the light of the uncertainties that remained as to the level of admissible claims arising out of the *Erika* incident, the level of payments should be maintained at 80% (document 92FUND/EXC.14/12, paragraph 3.4.49). This decision was confirmed at the 16th and 17th sessions (document 92FUND/EXC.17/10, paragraph 3.2.42).

10.2 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.

11 Court surveyors for evaluation of the damage

- 11.1 Under French law a person who has suffered damage is entitled to a court survey (expertise judiciaire) for the purpose of assessing his loss.
- 11.2 In April 2000 the Conseil Général de Vendée and a number of other regional bodies requested that the court in Sables d'Olonne should appoint experts who should make an evaluation of 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. The request was made not by the individual claimants in the fishery and tourism sectors but by regional public bodies.
- 11.3 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.
- 11.4 Similar requests were made by communes in Loire Atlantique and Charente Maritime to the administrative courts in Nantes and Poitiers. The Courts appointed the same experts as those already appointed by the Court in Sables d'Olonne to assess the damage suffered by the respective claimants.
- 11.5 The court experts have held several meetings.
- 11.6 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. A group of independent producers in Guérande tried to resume salt production but were unable to take in sufficient sea water to produce salt. 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.

- 11.7 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.
- 11.8 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. It is not possible to predict whether his report will be presented.

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

- 12.1 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)

- 12.2 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.
- 12.3 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.
- 12.4 In a judgement rendered on 6 December 2000, the Tribunal de Commerce de Saint Nazaire rejected the action referred to in paragraph 12.3. 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 appealed against the judgement. On 13 February 2002 the Court of Appeal in Rennes confirmed the judgement.
- 12.5 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 12.3 above, the Director considered that the 1992 Fund should not intervene in these proceedings.

- 12.6 The Director is studying the issues involved in the various court proceedings in co-operation with the 1992 Fund's French and Italian lawyers^{<2>}.

13 Action in Italy by RINA SpA/Registro Italiano Navale

- 13.1 In late April 2000 RINA SpA and Registro Italiano Navale^{<3>} brought legal action in the Court of Syracuse (Augusta section) (Italy) against the following defendants:

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

- 13.2 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.
- 13.3 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 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. They also requested that the Court should declare that this hypothetical liability would be limited as provided in the applicable Rules of the plaintiffs^{<4>}.
- 13.4 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). 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.
- 13.5 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 provides that a person domiciled in a Contracting State may in another Contracting State be sued in matters relating to tort, delict or quasi delict, in the courts of the place where the harmful event occurred.
- 13.6 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 that no such liability can lie with the classification society which is neither the guarantor nor the underwriter of the classed vessel.

^{<2>} Maître Jean-Serge Rohart (Paris) and Professor Nicola Balestra (Genoa).

^{<3>} According to the plaintiffs, RINA SpA replaced Registro Italiano Navale as the Italian classification society on 1 August 1999.

^{<4>} 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.

- 13.7 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 and that the Italian Courts did not have jurisdiction. Subsequently the French Government and the companies in the Total Group took corresponding actions. As a consequence of this procedure, the Tribunal of Syracuse suspended the proceedings on the merits pending the decision of the Court of Cassation. The hearing before the Court of Cassation took place on 11 July 2002. The Court's decision is expected to be rendered in late 2002.

14 Actions in France by the 1992 Fund against RINA SpA and Registro Italiano Navale

- 14.1 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 Commercial Courts in Vannes, La Roche sur Yon and 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 had 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.
- 14.2 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).
- 14.3 There has been no development in respect of the legal actions taken by the 1992 Fund.

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 give the Director such instructions in respect of the court proceedings referred to in sections 12-14 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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