



INCIDENTS INVOLVING THE 1992 FUND

ERIKA

Note by the Director

Summary:

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. Further information on the likely level of claims will be given in an addendum to this document so as to enable the Executive Committee to review the level of payments.

In 2000, a number of public bodies and private entities took legal actions in France against Total Fina, the owner of the *Erika*, the Steamship Mutual P & I Club, the vessel's management company and classification society. There have been no developments in respect of these actions.

The classification society (RINA) took legal action in Italy against *inter alia* the 1992 Fund requesting a declaration that the society was not liable for the incident. The Italian Supreme Court of Cassation decided in October 2002 that the Italian courts do not have jurisdiction over this action.

In December 2002, the 1992 Fund took legal action in France against the owner of the *Erika*, his P & I insurer, the manager, the time charterer and the voyage charterer of the *Erika*, companies belonging to the Total Fina Group and the classification societies RINA and Bureau Veritas which had inspected the *Erika*, to recover any amounts paid by the Fund in compensation. These actions were taken as protective measures pending the results of the various investigations into the cause of the incident which have not yet been completed.

Action to be taken:

- (a) consider the level of the 1992 Fund's payments; and
- (b) give the Director instructions in respect of the legal action taken by the Fund and the other court proceedings.

1 Introduction

- 1.1 This document sets out the developments since the Executive Committee's October 2002 session in respect of the *Erika* incident which occurred off the coast of Brittany (France) on 12 December 1999.
- 1.2 As regards the incident, the clean-up operations, the Claims Handling Office set up in Lorient, the removal of the oil from the wreck of the *Erika* and the impact of the spill, reference is made to the Annual Report 2001 (pages 108-122).

2 Limitation proceedings

- 2.1 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 FFfr84 247 733^{<1>} (£8.4 million) and declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the shipowner's P & I insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual).
- 2.2 In 2002, the limitation fund was transferred from the Commercial Court in Nantes to the Commercial Court in Rennes and a new liquidator was appointed.

3 Attack on the Claims Handling Office in Lorient

- 3.1 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.
- 3.2 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.
- 3.3 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 public prosecutor requested that the attacker should be given a prison sentence of 18 months, of which six months should be served in prison and the remaining on probation.
- 3.4 The Court rendered its judgement in December 2002. The Court qualified the attacker's act as 'simple damage to property' ('simple détérioration du bien d'autrui') and held that since the act formed part of the activities of a trade union ('action syndicale'), it fell within the scope of a law on amnesty adopted by Parliament on 3 August 2002.
- 3.5 The prosecutor appealed against the judgement. The 1992 Fund and the Steamship Mutual have joined in the appeal.

4 Claims for compensation

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

5 Level of the 1992 Fund's payments

- 5.1 The Executive Committee decided at its 18th session, held in October 2002, 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% of the amount of the loss or damage actually suffered by the individual claimants, as assessed by the 1992 Fund's experts (document 92FUND/EXC.18/14, paragraph 3.4.18).
- 5.2 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.

6 Court surveyors for evaluation of the damage

- 6.1 Under French law a person who has suffered damage is entitled to a court survey (expertise judiciaire) for the purpose of assessing his loss.
- 6.2 At the request of a number of regional bodies and communes, the courts in Sables d'Olonne, Nantes and Poitiers appointed court experts to make an evaluation of the damage suffered by the

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

respective claimants. The court experts have held several meetings. It is expected that the experts will present their reports during 2003.

- 6.3 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.
- 6.4 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.
- 6.5 At the request of the 1992 Fund and Steamship Mutual a court expert was 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 has been submitted to the court expert. It is not possible to predict when his report will be presented.

7 Cause of the incident

- 7.1 Since the *Erika* was registered in Malta, the Malta Maritime Authority conducted a Flag State investigation into this incident. The Authority issued its report in September 2000.
- 7.2 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.
- 7.3 The conclusion of these investigations are summarised in document 92FUND/EXC.14/5/Add.1.
- 7.4 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.
- 7.5 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.
- 7.6 With the permission of the Commercial Court in Dunkirk the experts 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. The purpose of the operation was 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 was carried out in October 2002.
- 7.7 The 1992 Fund is following the investigations carried out by the Court in Dunkirk through its French lawyers and technical experts.

8 Actions taken in France in 2000 against Total Fina, the shipowner and others

- 8.1 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)

- 8.2 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, held in October 2000.

9 Action in Italy by RINA SpA/Registro Italiano Navale

- 9.1 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:

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

- 9.2 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.
- 9.3 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^{<3>}.
- 9.4 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.
- 9.5 The plaintiffs 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

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

<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.

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.

- 9.6 The plaintiffs 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 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.
- 9.7 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 the Italian Courts did not have jurisdiction. The Fund argued that, although the plaintiffs requested a negative declaration, their actions should be considered as actions for compensation under Article IX of the 1992 Civil Liability Convention, or alternatively, that Article 5.3 of the Brussels Convention did not apply to the plaintiffs' actions, since the actions related to a declaration of non-liability. 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. A hearing was held before the Court of Cassation on 11 July 2002.
- 9.8 The Court of Cassation rendered its decision in October 2002. The Court declared that the Italian Courts lacked jurisdiction as regards the parties having used the special procedure on the grounds that Article IX of the 1992 Civil Liability Convention conferred exclusive jurisdiction on the Courts of the State where the pollution damage was caused.

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

- 10.1 In order to protect the 1992 Fund's position, in May and June 2000 the Fund 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 a number of public bodies and private entities referred to in paragraph 8.1. 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. The 1992 Fund's actions were of a protective nature. 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. 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.
- 10.2 At its 8th session, held in July 2000, the Executive Committee endorsed the Director's position and the steps taken by him to protect the 1992 Fund's interests (document 92FUND/EXC.8/8, paragraph 3.49).
- 10.3 There has been no development in respect of the legal actions taken by the 1992 Fund.

11 Recourse actions by the 1992 Fund

- 11.1 At its 18th session, held in October 2002, the Executive Committee considered a document presented by the Director (document 92FUND/EXC.18/5/Add.2) in which he raised the question as to whether the 1992 Fund should take recourse actions against certain parties to recover the amounts paid by it in compensation.
- 11.2 The Director expressed the view that it was 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 had been completed. However, the Director considered that the 1992 Fund should take such actions as were necessary to prevent its rights becoming time-barred.
- 11.3 The Executive Committee noted that in order to pursue successfully recourse actions against Tevere Shipping Co. Ltd (registered owner of the *Erika*), Panship Management and Services Srl (manager of the *Erika*), Selmont International Inc (time charterer of the *Erika*) and Total

Transport Corporation (voyage charterer), 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 might otherwise be entitled to the protection laid down in Article III.4 of the 1992 Civil Liability Convention.

- 11.4 The Committee also noted that under Article VII.8 of the 1992 Civil Liability Convention an action for pollution damage may be brought directly against the insurer, but that the insurer was entitled to limit his liability to the amount prescribed in Article V.1 even if the shipowner was deprived of his right of limitation, and that the insurer would be entitled to invoke the defence that the pollution damage resulted from the wilful misconduct of the shipowner. It was further noted that an action against the *Erika's* insurer, the Steamship Mutual, might also be subject to a three-year time bar.
- 11.5 The Executive Committee decided to authorise the Director to challenge the shipowner's right to limit his liability under the 1992 Civil Liability Convention and to take recourse actions, as a protective measure, before the expiry of the three-year 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*)
- 11.6 The Committee noted that the results of the investigations into the cause of the incident might give grounds for the 1992 Fund to take recourse action against parties other than those referred to above, but that the Director considered that no decision was required in this regard at this stage, since the three-year time bar period did not apply to such other parties.
- 11.7 The Committee recalled that the 1992 Fund had 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. The Committee decided that the actions against RINA SpA and Registro Italiano Navale should be taken in the same court as the actions against the parties referred to in paragraph 11.7.
- 11.8 On 11 December 2002 the 1992 Fund brought actions in the Civil Court (Tribunal de Grande Instance) in Lorient against the parties listed in paragraph 11.7 and 11.9.
- 11.9 After the Executive Committee's October 2002 session, the Director was made aware of the fact that the classification Bureau Veritas had inspected the *Erika* prior to the transfer of class to RINA. He decided that the 1992 Fund should take recourse action, as a protective measure, against Bureau Veritas, and this action was also brought in the Civil Court in Lorient on 11 December 2002.

12 Legal actions by the French State and Total Fina

- 12.1 The French State has brought actions in the Civil Court (Tribunal de Grande Instance) in Lorient against Tevere Shipping Co. Ltd, Panship Management and Services Srl, Steamship Mutual, Total Transport Corporation, Selmont International Inc., the limitation fund referred to in paragraph 2.1 above, and the 1992 Fund, claiming €190 553 427.44 (£126 125 million) (which could be increased at a later stage), plus interest at legal rate under Article 1153-1 of the Civil Code, as follows:
- €50 124 354.11 (£33 million) in respect of expenses occurred by the Ministries of Interior, Defence, Economy, Finance and Industry and Health;
 - €127 395 920.58 (£83 million) in respect of payments made under the French oil pollution contingency plan Plan Polmar;
 - €13 033 152.75 (£8.5million) in respect of payments made to victims.

- 12.2 The French State has requested the Court to order the defendants, except the limitation fund and the 1992 Fund, to pay €190 553 427.44. The State has further requested that the Court should declare that the limitation fund and the 1992 Fund should execute the judgment within the respective limits laid down in the 1992 Civil Liability Convention and the 1992 Fund Convention.
- 12.3 Four companies in the Group Total Fina, namely Total Fina Elf SA, Total Fina Elf France SA (in succession of Total Raffinage Distribution SA), Total International Limited and Total Transport Corporation, commenced actions in the Commercial Court in Rennes against Tevere Shipping Co Ltd, Panship Management & Services Srl, Steamship Mutual, the limitation fund, RINA, Registro Italiano Navale and the 1992 Fund. The claim is for €143 million (£93 million) (which could be increased at a later stage), allegedly admissible under the 1992 Fund Convention, and for €3 million (£2 million) for the cost of an 'expertise judiciaire' which, according to the Total Fina Group of companies, is not admissible under the 1992 Fund Convention. The Total Fina Group of companies have also claimed interest at the legal rate under Article 1154 of the Civil Code. As regards the action against the 1992 Fund, the Total Group of companies requested a declaration that the claim is admissible for €143 million but that the right to compensation will be exercised only if all victims (including the French State and the public bodies) are compensated in full.

13 Legal action taken by Steamship Mutual

Steamship Mutual filed action in the Commercial Court in Rennes against the 1992 Fund, requesting *inter alia* the Court to note that, in the fulfilment of its obligations under the 1992 Civil Liability Convention, Steamship Mutual had paid €12 843 484.10 (£8.4 million) corresponding to the limitation amount applicable to the shipowner, in agreement with and under the control of the 1992 Fund and its Executive Committee. Steamship Mutual further requested the Court to declare that it had fulfilled all its obligations under the 1992 Civil Liability Convention, that the limitation amount had been paid and that the shipowner was exonerated from his liability under the Convention. Steamship Mutual also requested the Court to order the 1992 Fund to reimburse it any amount it will have paid in excess of the limitation amount.

14 Action in France against RINA and Registro Italiano Navale

- 14.1 In December 2002, Societe Rina Spa and Registro Italiano Navale commenced legal action in the Commercial Court of Nanterre against Tevere Shipping Co Ltd, Panship Management and Services Srl., Steamship Mutual and the Total Fina Group of companies. Reserving their positions as regards the ongoing litigation in Italy, RINA and Registro Italiano Navale have requested that, in the event that any judgment should be rendered against them, the defendants should be held liable to reimburse them for any amount they have paid in compensation in respect of the pollution caused by the *Erika* incident.
- 14.2 The 1992 Fund has been notified of the action.

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 the level of the 1992 Fund's payments;
 - (c) to give the Director such instructions in respect of the various court proceedings referred to in sections 11-14 as it may deem appropriate; and
 - (d) to give the Director such instructions in respect of the handling of this incident and of claims arising therefrom as it may deem appropriate.
-