



ERIKA INCIDENT

Note by the Director

Summary: Further surveys of the sunken parts of the *Erika* have been carried out. Clean-up operations continue along the polluted coastline. A number of claims have been submitted to the Claims Handling Office in Lorient. The Département de Vendée has requested that the 1992 Fund should pay the cost of a publicity campaign to mitigate the losses in the tourism industry.

Action to be taken: Consider the request by the Département de Vendée.

1 Clean-up operations

- 1.1 The use of greatly increased manpower and supporting mechanical equipment has now significantly reduced the quantity of oil remaining on shore in Loire Atlantique, and only residual contamination remains in Finistère Sud and Morbihan. Many shorelines in southern Vendée are now clean, but buried oil remains a problem in Île de Noirmoutier and extensive secondary cleaning of shorelines is necessary in the Baie de Bourgneuf.
- 1.2 Some 120 000 tonnes of waste has now been collected from shorelines and has been temporarily stockpiled at three locations, much of it without any segregation according to oil content. TotalFina SA has undertaken to carry out the disposal operations and is evaluating different disposal options.

2 Operations to prevent further oil escaping from the wreck

- 2.1 Further inspections of the sunken sections of the *Erika* have been made using Remote Operated Vehicles. On the basis of these inspections it is estimated that the stern section contains a maximum of 6700 tonnes of heavy fuel oil and the bow section a maximum of 8300 tonnes. Some minor leakages have been plugged temporarily.
- 2.2 The results of the inspections are being studied so as to enable the French authorities to consider which options are available to prevent further escape of oil from the wreck. If the results of the inspections show that an oil removal operation is technically feasible, it is expected that tenders

for the operation will be invited as soon as possible so as to allow the chosen contractors to carry out the oil removal during the summer of 2000.

- 2.3 The 1992 Fund's technical experts have attended the inspections.
- 2.4 An agreement was entered into on 26 January 2000 between Total Fina SA and the French Government under which Total Fina undertakes to carry out inspections of the two parts of the wreck and any operations to prevent further oil from escaping, including any oil removal operations, and to finance directly such inspections and operations.
- 2.5 The cost of the operation to prevent further oil from escaping will depend on the method chosen and the time lost due to bad weather. Experience from similar operations indicates that the cost of the operation to remove the oil from the *Erika* would be significant.

3 Claims handling

- 3.1 As mentioned in document 92FUND/EXC.6/2, the Claims Handling Office established in Lorient by the Steamship Mutual and the 1992 Fund opened to the public on 12 January 2000.
- 3.2 The Claims Handling Office has at present a staff of five persons. More staff will be recruited as required.
- 3.3 The Fund Secretariat has been closely involved in the establishment of the office and its operation. The Head of the Claims Department has visited the office twice. The Claims Officer in charge of the incident has spent the best part of four weeks in the office. Other staff members have assisted in the operation of the office. The Director has also visited the office.
- 3.4 Various claim forms have been prepared and are being made available to potential claimants.
- 3.5 The Claims Handling Office will serve as a focal point for the technical experts engaged to examine the claims for compensation.
- 3.6 The International Tanker Owners Pollution Federation Ltd (ITOPF) has overall responsibility for advising on the assessment of claims for costs in respect of clean-up operations and also for claims arising from pollution damage to fisheries and aquaculture. French fishery experts have also been engaged by the Steamship Mutual and the Fund to assist in the assessment of claims. French surveyors who are monitoring shoreline clean-up operations will also examine claims in respect of clean-up and property damage. Tourism experts have been appointed by the Steamship Mutual and the Fund to assess claims in respect of publicity campaigns and economic losses in the tourism sector.

4 Claims for compensation

- 4.1 As at 10 February 2000 the Claims Handling Office had received 124 claims for compensation, in the following categories:

Clean-up operations	5
Property damage	17
Fishing	30
Fishfarming and shellfish cultivation	7
Shellfish gathering	52
Fish processors and distributors	9
Tourism	9
Other loss of income	2

- 4.2 Most claimants have not presented sufficient information to allow an assessment of their claims to be made.

- 4.3 The French Government will submit claims for the cost of the clean-up operations at sea and onshore. Local authorities will also submit claims relating to onshore clean-up.
- 4.4 Total Fina SA will present claims for the cost of the inspection of the wreck and the operations to prevent further escape of oil from the wreck (including any oil removal operations) as well as for the cost of the disposal of the oily waste. In a letter to the Director Total Fina SA has undertaken, however, not to pursue these claims against the 1992 Fund or against the limitation fund relating to the *Erika* if and to the extent that the presentation of such claims would result in the maximum amount of compensation available under the international conventions being exceeded.
- 4.5 Claims for significant amounts are expected from the fishery and tourism sectors

5 Publicity campaigns

5.1 Request from the Département de Vendée

- 5.1.1 The Département de Vendée has informed the Director that it would like to undertake a publicity campaign in the beginning of April 2000 under the theme 'Come back on holiday to the Vendée, our beaches are clean'. The Département has stated that Vendée is one of the most important tourism areas in France and that, without such a campaign, the *Erika* incident would result in significant losses for the tourism industry which would by far exceed the costs of the campaign. The Département has requested that the 1992 Fund should pay the cost of this campaign.
- 5.1.2 The grounds for the request set out by the Département of Vendée can be summarised as follows:

The whole of the Département is a tourist area and has a recognised special identity for the quality of the environment, the sun and the excellent sandy beaches. It would be necessary to focus the campaign on Vendée in order to make it efficient. Only a television campaign would make a real impact, since Vendée is mainly a family holiday area and television is the best medium to reach this group. The campaign should focus on the quality of the environment in Vendée and on historical sites directly linked to the environment.

It would be appropriate to broadcast an advertisement of at least 20 seconds duration. The cost of the production of the film would be in the region of FFr2 million (£190 000). Showing the film 150 times on the two big national channels (TF1 and France 2) would cost some FFr13 million, resulting in a total cost of FFr15 million (£1.4 million).

The tourism industry in Vendée has an annual turnover of FFr12 000 million (£1 100 million). The industry employs 7 500 people on a permanent basis and 12 000 people on a seasonal basis. The tourism industry has been the driving force in the creation of jobs in recent years.

- 5.1.3 The Département de Vendée has informed the Director that it does not have funds to cover this exceptional campaign. It has stated that in view of the necessary preparations for such a campaign it is important that an agreement in principle could be reached with the 1992 Fund as soon as possible.

5.2 Other publicity campaigns

It is understood that the Minister of Tourism is considering carrying out a co-ordinated national publicity campaign covering the entire Atlantique coast. It has also been indicated that some Départements other than Vendée are considering carrying out such campaigns.

5.3 Admissibility of claims for costs of publicity campaign

5.3.1 Losses in the tourism sector would constitute so-called pure economic loss, ie losses suffered by persons who have not suffered damage to property. A publicity campaign of the type suggested by the Département de Vendée would therefore be measures to prevent pure economic loss. The Assemblies of the IOPC Funds have decided that the cost of measures to prevent pure economic loss may be admissible if they fulfil the following requirements:

- ? the cost of the proposed measures is reasonable
- ? the cost of the measures is not disproportionate to the further damage or loss which they are intended to mitigate
- ? the measures are appropriate and offer a reasonable prospect of being successful
- ? in the case of a marketing campaign, the measures relate to actual targeted markets.

5.3.2 The Claims Manual adopted by the 1992 Fund Assembly deals with the admissibility of claims for costs of measures to prevent pure economic losses as follows:

To be admissible, the costs should relate to measures to prevent or minimise losses which, if sustained, would qualify for compensation under the Conventions. Claims for the cost of marketing campaigns or similar activities are accepted only if the activities undertaken are in addition to measures normally carried out for this purpose. In other words, compensation is granted only for the additional costs resulting from the need to counteract the negative effects of the pollution.

The criterion of *reasonableness* is assessed in the light of the particular circumstances of the case, taking into account the interests involved. The assessment is made on the basis of the facts known at the time that the measures are taken. As for marketing campaigns, measures of too general a nature are not accepted.

The 1992 Fund does not normally accept claims for measures to prevent pure economic loss until they have been carried out. The 1992 Fund is cautious about advance payments for such measures, since it will not take on the role of a claimant's banker.

When considering the admissibility of claims for the cost of an organisation's marketing activities, the 1992 Fund takes into account the organisation's attitude towards the media after the incident and, in particular, whether that attitude increased the negative effects of the pollution.

5.3.3 The Executive Committees of the 1971 and 1992 Funds have in some previous cases accepted the costs for marketing campaigns. In the *Nakhodka* case the Executive Committees considered a claim by the National Federation of Fishery Co-operative Associations for the costs of a major publicity campaign aimed at preventing and mitigating losses in sales of fish from the area affected by the spill. The Committee took the view that the cost of the measures undertaken by the Federation was reasonable and was not disproportionate to the losses which could have been sustained by fishermen in the affected area if no action had been taken. The Committee also considered that the measures were appropriate in the circumstances and offered a reasonable prospect of success. It was noted that the measures related to targeted markets where the produce from the area was sold and that the costs were in addition to the Federation's normal marketing activities. The Committee took the view, therefore, that the marketing campaign undertaken by the Federation met the criteria for admissibility laid down by the 1992 Fund and that the claim was therefore admissible in principle (document 92FUND/EXC.3/7, paragraph 3.1.4).

5.4 Director's position

5.4.1 The Director has instructed consultants to study the likely impact of the incident on the tourism industry in the affected area, and some preliminary results of this assessment are expected shortly.

5.4.2 The Director is unable to make a proposal on the request by the Département de la Vendée before having been able to examine the study referred to in paragraph 5.4.1.

6 Level of payments

6.1 The Assembly has taken the view that - like the 1971 Fund - the 1992 Fund should exercise caution in the payment of claims, if there is a risk that the total amount of the claims arising out of a particular incident might exceed the total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention, since under Article 4.5 of the 1992 Fund Convention all claimants have to be given equal treatment. The Assembly has expressed the view that it is necessary to strike a balance between the importance of the 1992 Fund's paying compensation as promptly as possible to victims of oil pollution damage and the need to avoid an over-payment situation (document 92FUND/A.ES/2/6, paragraph 3.1.14).

6.2 It is very difficult at this stage to make any estimate of the total amount of the established claims. The Director is continuing his analysis of the information available.

7 Conversion of 135 million SDR into French Francs

As set out in paragraph 8.4 of document 92FUND/EXC.6/2, the Director proposes that the conversion of the maximum amount of compensation payable in respect of the *Erika* incident under the 1992 Conventions (135 million SDR) into French Francs should be made on the basis of the value of that currency *vis-à-vis* the SDR on the date of the adoption of the Executive Committee's Record of Decisions of its 6th session, ie 15 February 2000^{<1>}.

8 Funding of compensation payments

The Director considers that an extraordinary session of the Assembly should be convened during the week of 3 April 2000 to assess whether it would be appropriate to levy contributions payable during the second half of 2000 to enable the 1992 Fund to make prompt payments of compensation. It will be recalled that the 1971 Fund Assembly decided at an extraordinary session held in April 1997 to levy contributions to the *Nakhodka* Major Claims Fund (document 71FUND/A/ES.2/6, paragraph 4.5).

9 Cause of the incident

9.1 The French Permanent Enquiry Commission for Incidents at Sea (Commission Permanente d'enquête sur les événements de Mer) has carried out an investigation into the cause of the *Erika* incident. The Commission's preliminary report was published on 13 January 2000.

9.2 On the basis of the Commission's preliminary report and additional information available, the facts concerning the ship and the sequence of events leading to the incident can be summarised as set out in paragraphs 9.3 – 9.10.

9.3 The *Erika* was built in 1975 at the shipyard of Kasado Dock Ltd in Kudamatsu in Japan.

9.4 At the time of the incident the *Erika* was flying the Maltese flag.

<1> On 7 February 2000 1 Euro = 0.7323 SDR and 1 Euro = 6.5596 French Francs. A conversion on the basis of the rates applicable on 7 February 2000 would give 135 million SDR = 1 209 266 694 French Francs.

- 9.5 The registered owner of the *Erika* was a single ship company, Tevere Shipping Corporation Ltd of Malta, which acquired the vessel in 1994. The technical management of the vessel was carried out by Panship Management and Services srl in Ravenna (Italy)
- 9.6 The *Erika* had been inspected by four different classification societies: Nippon Kaiji Kyokai (NK) from 1975 to 1980, American Bureau of Shipping (ABS) from 1980 to 1993, Bureau Veritas from 1993 to 1998 and Registro Italiano Navale (RINA) since 1998. All four societies are members of the International Association of Classification Societies.
- 9.7 The *Erika* had a crew of 26, all of Indian nationality. The master had been on board the vessel for one month when the incident occurred. The other officers had been on board for periods between one and five months.
- 9.8 The *Erika* was time chartered by a Swiss company and was voyage chartered by Total Transport Corporation at the end of November 1999. On 5 December she left La Coruña (Spain) for Dunkirk (France) where she loaded a cargo of heavy fuel oil on 7 and 8 December. She left Dunkirk on 8 December for Livorno (Italy). On 11 December the master reported problems with tanks at 12:40, and a first distress call was made at 14:08. During the afternoon an inspection revealed cracks and distortions in the deck plating at N°2 starboard tank. At 16:25 the distress message was downgraded to urgency. The vessel then changed course towards Donges. During the early hours of 12 December the situation on board deteriorated. The distress status was reimposed at 05:54, and a request for the crew to be evacuated was made. At 08:20 the ship broke in two. The crew was evacuated by helicopter. The bow section sank on 13 or 14 December and the stern section on 14 December.
- 9.9 The *Erika* had been subject to Port State controls seven times during the period April 1996 – 12 November 1999, most recently in Novorossysk (Russian Federation). Pre-charter inspections had been carried out by various oil companies on seven occasions during the period November 1998 - 7 December 1999, the latest in La Coruña on 3 December 1999 and at Dunkirk on 7 December 1999.
- 9.10 The ship was transferred for classification purposes from Bureau Veritas to RINA between June and 1 October 1998. RINA carried out an annual inspection on 17 August 1999 and an occasional inspection on 22 November 1999 at which further information was requested.
- 9.11 The Commission has drawn the following preliminary conclusions as to the cause of the incident:
- The incident was most likely attributable to failure of the ship structure, namely the rupture of the bulkhead between two tanks, the tearing or cracking of the deck plating and the tearing of the side shell plating. This failure led to the ship's bow buckling upwards and then breaking. The structural weakness was not detected by the classification society nor by the ship's operator or manager, notwithstanding that indication of these weaknesses was given by pre-charter vetting and during Port State controls. The crew was not to blame for the incident. The actions by the French authorities did not give rise to any observations. The actions taken by the shipowner during the crisis appear not to have been in conformity with the ISM Code.
- 9.12 The shipowner and Steamship Mutual have expressed reservations in respect of several points of these preliminary conclusions.
- 9.13 As mentioned in paragraph 9.2 of document 92FUND/EXC.6.2, the Tribunal de Commerce in Dunkirk had appointed an expert to investigate the cause of the incident ('expertise judiciaire'). The Court has recently decided that the investigation should be carried out by a panel of four experts. Most of the interested parties participate in the proceedings.

9.14 As for the investigation carried out in accordance with the decision of the Tribunal de Grande Instance in Sables d'Olonne, it seems that it will be limited to the assessment of the damage caused in the affected area.

10 Actions 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 handling of this incident and of claims arising therefrom as it may deem appropriate;
 - (c) to decide whether to authorise the Director to make final settlements of claims;
 - (d) to decide whether to authorise the Director to make payments of claims and to determine the level of such payments;
 - (e) to determine the date to be used for the conversion of 135 million SDR into French Francs; and
 - (f) to consider the request by the Département de Vendée that the 1992 Fund should pay the cost of a publicity campaign.
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