



INTERNATIONAL
OIL POLLUTION
COMPENSATION
FUND 1992

EXECUTIVE COMMITTEE
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Agenda item 3

92FUND/EXC.8/2
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ERIKA INCIDENT

Note by the Director

Summary: Some 14 000 tonnes of heavy fuel oil was spilled from the *Erika*. It is estimated that the sunken bow section still contains up to 8 300 tonnes of cargo and the stern section a further 6 300 tonnes. Operations to pump the remaining oil to the surface are commencing in June 2000. Clean-up operations continue in some areas. The shipowner's P & I insurer has made payments to some 138 claimants totalling FFr5.6 million (£500 000).

Action to be taken: Decide the level of the 1992 Fund's payments.

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 30 000 tonnes of heavy fuel oil of which some 14 000 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 It is estimated that up to 8 300 tonnes of cargo remains in the bow section and a further 6 300 tonnes in the stern section
- 1.4 The *Erika* is entered in the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual).

2 Clean-up operations

- 2.1 The French Naval Command in Brest, Brittany, took charge of the response operations at sea in accordance with the National Contingency Plan, 'Plan Polmar'. The French Navy mobilised a number of vessels for offshore oil recovery. The Governments of Germany, the Netherlands, Spain and the United Kingdom also provided oil recovery vessels to assist in the response. It was reported that some 1 100 tonnes of oil was collected at sea.
- 2.2 On 25 December 1999 heavy oiling of shorelines occurred in the region of St Nazaire, La Baule, Le Croisic and La Turballe. Widespread but intermittent oiling subsequently occurred over some 400 kilometres of shoreline between Finistère and Charente-Maritime. The Préfets of the five affected Départements took charge of shoreline clean-up with assistance from the coastal local authorities, the Civil Defence Corps, local fire brigades and the army. A total of some 5 000 people were engaged in shoreline clean-up.
- 2.3 Although the removal of bulk oil from shorelines was completed quite rapidly, considerable secondary cleaning was still required in many areas in early May 2000. Finalising cleaning was hampered by new oiling of previously cleaned beaches during storms over the Easter weekend, probably from accumulations of sunken oil close to the coast.
- 2.4 Some authorities have scaled up cleaning operations by supplementing their own resources with additional equipment purchased through Plan Polmar. Other authorities chose to use commercial contractors to complete the remaining clean-up.
- 2.5 Some 160 000 tonnes of waste has been collected from shorelines and has been temporarily stockpiled at three locations, much of it without any segregation according to oil content. Total Fina SA has undertaken to organise the disposal operations and is evaluating different disposal options. Tenders have been received from potential contractors.
- 2.6 The 1992 Fund has monitored the clean-up operations through experts from the International Tanker Owners Pollution Federation Ltd (ITOPF), assisted by a number of local surveyors.
- 2.7 The administrative courts in Nantes and Poitiers have 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 1992 Fund is following these investigations through its technical experts.

3 Impact of the spill

- 3.1 About 60 000 oiled birds (mainly guillemots) have been collected, some 48 000 of which were dead. Attempts were made to clean the remaining 12 000 collected birds, half at various centres in France and the rest in Belgium, the Netherlands and the United Kingdom. However, many of these birds died and only a few hundreds birds have been successfully cleaned and released.
- 3.2 Oil entered a number of coastal marinas contaminating many pleasure boats and moorings.
- 3.3 Oil also entered the Baie de Bourgneuf that supports an important oyster and mussel fishery. Large quantities of shellfish were harvested for the Christmas market before the oil reached the coast. Some shellfish were externally contaminated with spots of oil, as oil reached cultivation areas, and the authorities imposed a ban on the harvesting and sale of the products. 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), cultivated and natural stocks of shellfish in numerous areas were found to have accumulated hydrocarbons exceeding accepted limits, and the marketing of produce in these areas was banned. It has been reported that in a number of areas bottom living organisms such as spider crabs and some fish have been found stained by oil when brought to the surface and some nets are becoming oiled during some fishing operations. However, recent reports indicate that these problems have diminished and since mid-March 2000 most bans had been lifted in Finistère, Morbihan, Vendée and Loire Atlantique as a result of hydrocarbon levels decreasing to acceptable levels. No fishing bans have been imposed

in respect of offshore fishing for pelagic fish and crustacea in view of the low levels of contamination of catches.

- 3.4 Efforts are continuing to minimise the impact of the spill on salt pans in Loire Atlantique and Vendée and a number of monitoring and analytical programmes have been developed and are being implemented. Water intake for salt production resumed in Noirmoutier in early May 2000 as a result of an improvement in water quality. The salt production process will be monitored on a regular basis throughout the summer. Water intake was prohibited at Guérande and Bassin du Mes but, as water quality had improved, on 24 May 2000 the Préfet lifted the ban on water intake, allowing operations to be resumed subject to adequate filtration of the water being undertaken. As at 31 May 2000 the operations had not commenced as the installation of filtration units was being undertaken by some salt producers.
- 3.5 The affected coastline supports an important tourist industry during the summer months, which could be seriously affected as a consequence of the beach cleaning not having been completed and the negative publicity.

4 Operations to prevent further oil escaping from the wreck

- 4.1 As mentioned above, the two sunken parts of the *Erika* contain significant quantities of oil. The French Navy carried out an underwater survey of these parts using a remote operated vehicle (ROV). Total Fina commissioned a further series of surveys during January and February 2000. These surveys gave a clear indication of how the parts of the wreck were lying on the seabed, the contours of the seabed and the extent of debris on the bottom of the sea, and indicated which of the tanks were intact.
- 4.2 The 1992 Fund followed the surveys through its technical experts.
- 4.3 At an early stage the Director offered to make available to the French authorities the IOPC Funds' experts who had been involved in the oil removal operations in the *Yuil N°1* and *Osung N°3* cases.
- 4.4 Further inspections of the sunken sections of the *Erika* were made using ROVs. Some minor leakages were plugged temporarily.
- 4.5 An agreement was entered into on 26 January 2000 between Total Fina and the French Government under which Total Fina undertook 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.
- 4.6 As reported to the Executive Committee at its 7th session Total Fina investigated the options available to prevent further oil from escaping from the wreck. Four options were studied:
- Confinement of the oil
 - Neutralisation of the oil
 - Refloating of the wreck with the oil on board
 - Removal of the oil by pumping
 - *sub-option 1* Hot water injection
 - *sub-option 2* Direct pumping
 - *sub-option 3* Hydrostatic transfer method
- 4.7 These options were analysed in paragraphs 4.6 - 4.10 of document 92FUND/EXC.7/4.

- 4.8 Following the studies carried out by Total Fina, the French Government decided that the oil removal operation should be carried out by using a pumping method. An invitation to tender was issued to four contractors. Bids were to be submitted by 21 March 2000.
- 4.9 The 1992 Fund's technical experts^{<1>} examined the various options available. As reported to the Executive Committee at its 7th session, they shared the French Government's view that removal of the oil by pumping was the preferable option, and in the experts' view this method would involve the least risk of further oil escaping.
- 4.10 At its 6th session the Executive Committee was informed that it had been decided to set up a group of three technical experts to advise the French Government and Total Fina on the technical merits of the operations, in particular on technical issues where there was disagreement between the Government and Total Fina. The Committee noted that the Director had been approached by Total Fina with a request that the 1992 Fund should nominate a technical expert as a member of the Group.
- 4.11 The Committee agreed with the Director that the 1992 Fund should accept Total Fina's request and nominate such an expert. The Committee also agreed with the Director that the expert nominated by the Fund would act solely as an adviser in his personal capacity and that he would not in any way engage or commit the 1992 Fund. It was emphasised that Total Fina's claim for reimbursement of the costs incurred for the removal of the oil from the wreck or to prevent further pollution would be assessed as any other claim, ie on the basis of the criteria of the technical reasonableness of the operations (document 92FUND/EXC.6/5, paragraph 3.7).
- 4.12 The Director informed the French Government of the position taken by the Committee and nominated Mr Alan Stanley, with Captain John Noble as substitute, to participate in the group of experts.
- 4.13 When the deadline for submitting tenders for the oil removal operation expired on 21 March 2000, tenders had been presented by two international consortia: Stolt/Commex/Conflexship and SMIT/Framo/Les Abeilles/DSND.
- 4.14 As specified in the invitation, the tenders of both consortia were based on the hydrostatic transfer method (cf document 92FUND/EXC.7/4, paragraph 4.10.3), as had been favoured by Total Fina. However, one consortium had also proposed an alternative method.
- 4.15 On 20 April 2000 the French Government decided to award the contract to the Stolt/Commex/Conflexship consortium.
- 4.16 The tender documents were made available to the Fund's experts before the contract was awarded. In the view of the Fund's experts the two tenders for using the hydrostatic transfer method were similar from a technical point of view. Since Stolt/Commex/Conflexship had offered a considerably lower contract sum, the Fund's experts agreed with the French Government's decision to award the tender to this consortium.
- 4.17 The hydrostatic transfer method relies on the pressure differential between the deepest part of the compartment of the wreck containing oil and the oil/water interface forcing the oil out of the cargo through valves. The oil in the tanks is forced through valves fitted at the top of the tank. Once outside the tank the oil will be mixed with a thinning agent to reduce the viscosity. The mixture will then be temporarily stored in a sealed pressure tank placed on the seabed before being pumped to the surface. This method has not been used previously for oil removal.
- 4.18 Field tests using the hydrostatic transfer method were carried out by Total Fina on 13 April 2000 and were attended by the 1992 Fund's experts. These tests showed that it was possible to pump the viscous cargo oil in the *Erika* by that method. A further test will be carried out on 7 June

<1> Captain John Noble and Mr Alan Stanley of BMT Murray Fenton Edon Liddiard Vince Ltd, marine consultants.

2000 to demonstrate how the oil residues remaining in the tanks after the pumping will be removed from the tanks.

- 4.19 The chosen contractor is mobilising the necessary personnel, craft and equipment. It is expected that the operations will commence in early June 2000 and be completed by the end of October 2000, followed by the disposal of the recovered oil.
- 4.20 During the entire oil removal operation two vessels equipped with 'deep sea' oil booms, skimmers, absorbents and dispersants and French Navy vessels will be at stand by.
- 4.21 A description of the planned operations is given in the Annex.
- 4.22 The 1992 Fund will follow the operations through its technical experts.

5 Claims handling

- 5.1 In anticipation of a large number of claims, the Steamship Mutual and the 1992 Fund established a Claims Handling Office in Lorient. The office opened on 12 January 2000.
- 5.2 The Claims Handling Office has at present a staff of six persons. More staff will be recruited as required.
- 5.3 Various claim forms have been prepared and are being made available to potential claimants.
- 5.4 The Claims Handling Office serves as a focal point for the technical experts engaged to examine the claims for compensation.
- 5.5 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. A number of French fishery experts have also been engaged by the Steamship Mutual and the 1992 Fund to assist in the assessment of claims. French surveyors who have been monitoring shoreline clean-up operations will also examine claims in respect of clean-up and property damage. Tourism experts have been appointed to assess claims in respect of economic losses and publicity in the tourism sector.
- 5.6 On 13 March 2000 a person who presented himself as president of a newly created entity, Confédération Maritime, began camping on the pavement outside the Claims Handling Office and started a hunger strike as a reaction against a perceived prejudicial treatment of his claim by the Office. On the morning of 16 March he requested FFfr15 million to be paid by 14:30 the same day. At that time, this individual together with seven other persons arrived at the office. Following the advice of the Sous-Préfecture de Lorient, the door to the office was kept closed. When another claimant left the office, the individual in question forced himself into the office together with one of the individuals accompanying him, and a number of journalists from press, radio and television also entered. The individual in question stated his demands and insulted the staff of the office. A senior police officer arrived and tried to persuade the intruders to leave the office but without success. A considerable number of policemen were called to the office and they managed to remove the intruder from the office without any violence.
- 5.7 The Director informed the French Government of the intrusion.
- 5.8 Surveyors from the firm of marine surveyors J P Caradec-M Elain-L Morice in Brest have been engaged by the 1992 Fund and Steamship Mutual to monitor the cleaning operations. On 9 May 2000 four persons led by the same individual who had led the intrusion in the Claims Handling Office in March forced themselves into the office of these surveyors. Having been informed by the police that these persons intended to visit the office, the staff did not open the door to let them in. However, the four persons climbed the wall and entered the office through a window on the first floor. The staff were threatened when they tried to stop the intruders. The police were called. A number of journalists from television and press also entered the office.

- 5.9 At the request of the Sous-Prefet de Brest the Administrator of Maritime Affairs went to the office and began discussions with the intruders. The intruders stated that they represented many persons and complained that very little compensation had been paid. They alleged that the surveyors and some staff at the Claims Handling Office were making profit from holding the funds available for compensation by delaying compensation payments. They requested that the Claims Handling Office should be closed or alternatively placed under the control of the French authorities. The intruders then left the office with the police.
- 5.10 The intruders presented documents to the media repeating the allegations and containing threats against the surveyors and the staff at the Claims Handling Office, as well as against their families.
- 5.11 The intruders were given wide coverage in the media, including the allegations against the surveyors and the staff of the Claims Handling Office.
- 5.12 The Director informed the French Government of what had happened. He made the point that attacks, threats or intimidation against the staff at the Claims Handling Office or other persons engaged by the Fund, as well as against their families, were unacceptable and that it would not be possible for the 1992 Fund to maintain the operations in France if such behaviour continued.

6 Claims for compensation

- 6.1 The clean-up operations at sea and on shore will result in claims for significant amounts from the French Government as well as from the préfectures and the local authorities concerned. The disposal of the collected oily waste will also give rise to large claims. Any operations to remove the oil from the wreck will result in substantial costs.
- 6.2 The fishery sector in several areas is facing serious difficulties. Some 1 040 claims have already been received from the fishery sector, and it is expected that there will be significant further claims from this sector. Claims for damage to yachts, other vessels and moorings have been received.
- 6.3 The Spanish delegation informed the Committee at its 6th session that claims might be submitted by Spanish fishermen who operated in the proximity of the area affected by the *Erika* incident.
- 6.4 It is unlikely that the clean-up on shore will be completed before the start of the main tourist season. The incident is expected to have a serious negative impact on the tourism industry in the affected area. It is difficult at this stage to assess the extent of this impact. However, hotels, owners of self catering holiday properties, letting agencies, restaurants, water sport activity centres and shops have already presented claims for compensation. Levels of booking enquiries and reservations at hotels, holiday apartments, guest houses and camping sites in the area for the summer of 2000 are reported significantly lower than normal. The Claims Handling Office has already received over 1 300 letters of intent regarding future claims in the tourism sector and over 900 letters of intent regarding future claims in the retailing sector linked to tourism in the affected area. It is therefore likely that claims for economic losses in the tourism industry will be very high. There may also be significant claims for the cost of publicity campaigns to mitigate losses.
- 6.5 As at 30 May 2000 the Claims Handling Office had received 1 062 first claims and 355 supplementary claims for compensation in the following categories:

	First claims	Supplementary claims
Clean-up operations	35	9
Property damage	206	0
Fishing	175	62
Fish farming and cultivation	376	106
Shellfish gathering	175	152
Fish processors and distributors	11	0
Tourism	48	21
Other losses of income	36	5
Total	1062	355

- 6.6 As at the same date, the Steamship Mutual had made interim payments to 138 claimants for a total of FFr5 564 933 (£500 000) as follows:

	FFr
Clean-up operations	0
Property damage	649 037
Fishing	1 677 299
Fish farming and shellfish cultivation	2 136 158
Shellfish gathering	1 360 091
Fish processors and distributors	0
Tourism	935 633
Other loss of income	30 715
Total	5 564 933

- 6.7 As at 30 May 2000, the Steamship Mutual had authorised interim payments of a further FFr538 646 (£490 000) to 45 claimants, and the payments will be made in the near future.
- 6.8 The 1992 Fund had approved the claims referred to in paragraphs 6.6 and 6.7 for the payment amounts.
- 6.9 At its 6th session the Executive Committee authorised the Director to make final settlements on behalf of the 1992 Fund of all claims arising out of this incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by the Committee (document 92FUND/EXC.6/5, paragraph 3.9). The Committee confirmed that decision at its 7th session, clarifying that the Director was authorised to make final settlements of all claims arising out of the *Erika* incident, to the extent that the claims did not give rise to questions of principle which had not previously been decided by one of the governing bodies of the 1971 Fund or the 1992 Fund, ie their Assemblies or Executive Committees (document 92FUND/EXC.7/5, paragraph 3.3.11).

7 Publicity campaigns

- 7.1 The French Government through the Ministry of Tourism has been carrying out a co-ordinated campaign to counteract the negative impact of the *Erika* incident on tourism in the affected area. The campaign has consisted mainly of press and television advertising and mail marketing activities directed at travel operators, and has been targeted at specific foreign markets. A television advertising campaign for the French domestic market has also been undertaken. In order to avoid internal competition, the campaigns have been aimed at restoring the image of the Atlantic coast as a whole. The purpose of these campaigns has also been to provide support for the various regions and Départements which are carrying out their own promotion activities targeting the French market.
- 7.2 The experts engaged by the 1992 Fund and the Steamship Mutual are liaising with the various national and regional authorities involved.

8 Level of payments

8.1 6th session of the Executive Committee

- 8.1.1 At its 6th session, held in February 2000, the Executive Committee considered whether and, if so, to what extent the Director should be authorised to make payments.
- 8.1.2 It was noted that, in a letter to the Director, Total Fina had undertaken 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 referred to in paragraph 4.5 above, 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 SDR. The Committee also noted that Total Fina had 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 touristic image of the Atlantic coast up to a maximum of FFr30 million.
- 8.1.3 The French delegation informed the Committee 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. The French delegation mentioned that the French Government had taken steps to establish a procedure under which claimants whose claims had been assessed by the 1992 Fund's technical experts and approved by the Fund could obtain advance payments from the Banque du développement des petites et moyennes entreprises (Small and Medium Enterprise Development Bank).
- 8.1.4 The Committee recalled that the Assembly had taken the view that - like the 1971 Fund - the 1992 Fund should exercise caution in the payment of claims if there was 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. It was also recalled that the Assembly had expressed the view that it was 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).
- 8.1.5 The representative of the Steamship Mutual recognised that at that early stage it was not possible to predict the overall cost of clean-up and preventive measures and of economic losses resulting from the incident. He stated that, nevertheless, the Steamship Mutual would be prepared to make funds available for interim payments in appropriate cases. He mentioned that the Steamship Mutual was in the process of establishing a limitation fund reflecting the limitation of liability of the shipowner and the insurer under the 1992 Civil Liability Convention (approximately 9.15 million SDR or FFr82 million). He stated that the Steamship Mutual believed that the limitation amount would be sufficient to provide funds for interim payments in appropriate cases up to the Executive Committee's next session in April 2000. The representative stated that such payments would be made on the basis of the advice of the technical experts engaged jointly by the Steamship Mutual and the 1992 Fund, subject to the claims being properly documented and admissible in principle in accordance with the criteria laid down by the 1992 Fund.

8.1.6 The Executive Committee noted that the Director was authorised, pursuant to Internal Regulation 7.9, to make provisional payments to victims to mitigate undue financial difficulties not exceeding a total of 6 million SDR (£5.1 million) for any one incident.

8.1.7 The Executive Committee shared the Director's view that it was not possible at that session to make a meaningful estimate of the total amount of the established claims and that this applied in particular to the claims in the fishery and tourism sectors. In view of this uncertainty, the Committee decided, therefore, that the Director's authority to make payments should for the time being be limited to provisional payments under Internal Regulation 7.9 (document 92FUND/EXC.6/5, paragraph 3.16).

8.2 7th session of the Executive Committee

8.2.1 The level of the 1992 Fund's payments was re-examined by the Executive Committee at its 7th session, held in April 2000. It was noted that the total costs incurred by the French authorities and Total Fina had been estimated to be in the region of FFfr1 500 million (£137 million) but that these costs could be substantially higher.

8.2.2 The Executive Committee noted that it was not yet possible to estimate the losses in the fishery sector, since some fishing bans were still in force, and that it was not possible to estimate the magnitude of the losses in the tourism sector since the tourism season had not yet started. The Committee also noted the opinion of the French Government and the Director that in the light of this situation it was not possible to make a meaningful assessment of the total amount of the established claims.

8.2.3 During the discussions it was emphasised that the 1992 Fund should make all efforts to make compensation available to victims as soon as possible, in order to demonstrate that the regime of compensation established by the 1992 Conventions worked satisfactorily and that there was no need to create any alternative liability scheme.

8.2.4 The Committee noted that the Steamship Mutual was prepared to continue to make funds available for interim payments in appropriate cases.

8.2.5 In the light of the uncertainty as to the total level of the established claims, the Executive Committee decided that the Director's authority to make payments should for the time being remain limited to provisional payments under Internal Regulation 7.9 (document 92FUND/EXC.7/5, paragraph 3.3.12)

8.2.6 The Committee noted that it was expected that the claims situation would become clearer by mid-June 2000, since by then it would probably be possible to make an evaluation of the impact of the incident on the fishery sector and it should be possible to assess the potential impact on the tourism sector.

8.3 Emergency payments

In addition to the procedures for advance payments referred to in paragraph 8.1.3, the French Government has introduced a scheme to provide emergency funds up to FFfr200 000 to claimants in the fishery sector.

8.4 Likely level of claims

The Director is continuing his efforts to collect information on the likely level of the claims. Further information in this regard will be reported in an addendum to this document.

9 Legal actions against the shipowner/Steamship Mutual and Total Fina

9.1 The owner of a taxi boat in Concarneau took legal action by way of summary proceedings against the shipowner, the management company of the *Erika*, the Steamship Mutual and Total Fina in

the Tribunal de Commerce in Dunkirk, claiming compensation of FFr1 million (£100 000) for loss of income for three years as a result of the incident. In his submission to the Court he stated that the Claims Handling Office had offered him insufficient, if not 'ridiculous', compensation.

- 9.2 It should be noted that this claimant had not presented a claim to the Claims Handling Office.
- 9.3 The 1992 Fund intervened in the proceedings on 31 March 2000, pursuant to Article 7.4 of the 1992 Fund Convention, in order to protect the Fund's interests (cf Article 7.6).
- 9.4 In its submission to the Court the 1992 Fund drew attention to the fact that, according to the documents presented to the Court by the owner of the taxi boat (in particular auditors' reports on previous years' accounts), the boatowner did not have a good arguable case, which was the condition under the French Code of Civil Procedure for a claimant to be able to use summary proceedings. The Court was therefore requested to decline jurisdiction.
- 9.5 In a decision rendered on 28 April 2000 the Court declined jurisdiction on the ground that the claimant had not presented a good arguable case. The Court also referred to the fact that the claimant had not previously presented any claim to the Claims Handling Office.
- 9.6 The boatowner subsequently brought legal action in the Tribunal de Grande Instance des Sables d'Olonne against the four defendants referred to in paragraph 9.1 above, claiming compensation of FFr1 million (£100 000).
- 9.7 The 1992 Fund will oppose also this action at a hearing to be held on 20 June 2000.

10 Limitation proceedings

- 10.1 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 (£8.4 million) and declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the Steamship Mutual.
- 10.2 The liquidator appointed by the Court issued a public notice inviting claimants to present their compensation claims within 30 days from the date of the notice (24 March 2000).
- 10.3 The reference to the 30-day period was made in accordance with Article 72 of a Decree of 27 October 1967 which specifies the procedures to be followed by a shipowner when constituting a limitation fund. This provision does not however affect the three-year period for bringing legal action under Article VIII of the 1992 Civil Liability Convention.

11 Maximum amount payable under the 1992 Fund Convention

At its 6th session the Executive Committee decided that the conversion of 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 that session, ie 15 February 2000. At its 7th session, the Executive Committee endorsed the Director's calculation of the conversion on the basis of the rates applicable on 15 February 2000, giving 135 million SDR = FFr1 211 966 881 (document 92FUND/EXC.7/5, paragraph 3.3.23).

12 Cause of the incident

- 12.1 The French Permanent Enquiry Commission for Incidents at Sea (Commission Permanente d'enquête sur les événements de Mer) is carrying out an investigation into the cause of the *Erika* incident. The Commission's preliminary report was published on 13 January 2000.
- 12.2 A summary of certain facts concerning the *Erika* and the sequence of events leading to the incident, based on the Commission's preliminary report and additional information available, was given in paragraphs 9.3 – 9.10 of document 92FUND/EXC.6/2/Add.1.

12.3 The Commission drew the following preliminary conclusions as to the cause of the incident:

The incident was most likely attributable to the 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 were 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.

12.4 The shipowner and the Steamship Mutual have expressed reservations in respect of several points of these preliminary conclusions.

12.5 The Maltese authorities are also carrying out an investigation into the cause of the incident.

12.6 A criminal investigation into the cause of the incident is being carried out at the Tribunal de Grande Instance in Paris. Charges have been brought against the master of the *Erika*, against the representative of the registered owner (Tevere Shipping) and against the president of the management company (Panship Management and Services Srl), as well as against three officers of the French Navy who were responsible for controlling the traffic off the coast of Brittany.

12.7 At the request of a number of parties, the 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.

12.8 The Tribunal de Commerce in Dunkirk decided that, since Total Fina had requested the expertise judiciaire, it should make an advance payment to cover the ensuing costs. Total Fina requested that the 1992 Fund should contribute to the advance payment. The Director informed Total Fina that the Fund was not prepared to do so.

12.9 The Tribunal de Grande Instance in Sables d'Olonne also appointed experts to investigate the cause of the incident and to assess the extent of the damage caused. Attempts were made to get all parties to agree that only one investigation should be made into the cause of the incident, ie that in Dunkirk, and this was finally accepted by the parties concerned. By a judgement of 16 May 2000 the Court in Sables d'Olonnes decided that the investigation should be limited to the assessment of the damage caused in the affected area.

12.10 The 1992 Fund is following the investigations through its French lawyers and technical experts.

12.11 The Italian observer delegation informed the Committee at its 7th session that the Registro Italiano Navale (RINA) had acted in respect of the *Erika* as the certifying registry in accordance with an agreement with the Maltese authorities. That delegation stated that the Italian Government had however decided to carry out an investigation into the cause and responsibilities of the incident. The Italian delegation also mentioned that the Italian Government shared the concern of the French Government on the need to deepen the analysis of the safety of navigation with regard to sea transport of dangerous or polluting substances.

13 Request for court evaluation of the damage

13.1 In April 2000 the Conseil Général de Vendée and 47 other claimants requested that the experts appointed by the Tribunal de Grande Instance in Sables d'Olonne should be instructed to evaluate the damage by contamination for the affected sectors, in particular fishermen, tourism operators, municipalities, départements and regions. They also requested that the Court should order the 1992 Fund to intervene in the proceedings.

- 13.2 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.
- 13.3 At a court hearing held on 2 May 2000 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.
- 13.4 By a judgement rendered on 16 May 2000 the Court decided that the experts should make assessments of the damage suffered by the categories referred to in paragraph 13.1 only in response to specific requests by individual claimants, in order to avoid interference with the claims handling through the Office in Lorient.

14 Position of the classification society

14.1 Action in France

- 14.1.1 On 12 April 2000 the Conseil Général de la Vendée brought action in the Tribunal de Commerce de Nantes against the following parties:

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)

- 14.1.2 The Conseil Général requested that the court should hold the defendants jointly and severally liable for any damage not covered by the 1992 Civil Liability Convention.
- 14.1.3 The Conseil Général has maintained that Tevere Shipping Company Ltd and Panship had unlimited liability, due to the fact that the *Erika* was unseaworthy. The Conseil Général has argued that RINA had not fulfilled its obligations to survey and monitor the *Erika* and, by allowing the vessel to go to sea on 24 November 1999 knowing that repairs were urgently needed, had deliberately taken a risk knowing that damage would occur. As for Total, the plaintiffs have stated that Total had chartered a vessel which was 25 years old and for which the class certificate had expired. They have also maintained that Total had failed to inspect the vessel properly and that ultimately Total had not taken the necessary measures during the 24 hours immediately preceding the incident to ensure salvage of the *Erika*.
- 14.1.4 A first procedural hearing will be held on 3 July 2000.

14.2 Action in Italy

14.2.1 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

14.2.2 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.

14.2.3 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 three first mentioned defendants in paragraph 14.2.1 should hold harmless and indemnify the plaintiffs for any amount which the plaintiffs may have to pay.

14.2.4 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 commenced on 16 August 1999 in Genoa (Italy) and had been completed on 24 November 1999 in Augusta (Italy).

14.2.5 The plaintiffs stated that since various parties had made public their intention to involve RINA, they had an interest in obtaining as soon as possible a judgement declaring them not liable for the incident and its consequences.

14.2.6 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.

<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.

14.2.7 The plaintiffs have argued that the channelling provisions in Article 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.

14.2.8 The first court hearing will be held on 4 December 2000.

14.3 Further action in France

14.3.1 On 22 May 2000, 18 communes, four fishery associations, three mussel farming associations, a tourism committee and a Chambre de Commerce, all in the Département de Vendée, brought action in the Tribunal de Commerce in La Roche sur Yon against the parties referred to in paragraph 14.1.1 above. The plaintiffs requested that the Court should hold the defendants jointly and severally liable to indemnify the plaintiffs for the damage suffered as a result of the *Erika* incident. The plaintiffs based their actions on the same grounds as those set out in paragraph 14.1.3.

14.3.2 The plaintiffs requested that the Court should order the 1992 Fund to intervene in the proceedings

14.3.3 A first procedural hearing will be held on 5 September 2000.

14.4 Action by the Director

The Director is studying the issues involved in the various court proceedings in co-operation with the 1992 Fund's French and Italian lawyers^{<4>}.

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 handling of this incident and of claims arising therefrom as it may deem appropriate;
- (c) to decide whether to authorise the Director to make payments of claims and to determine the level of such payments, and
- (d) to give the Director such instructions in respect of the court proceedings referred to in section 14 as it may deem appropriate.

* * *

<4> Maître Jean-Serge Rohart (Paris) and Professor Nicola Balestra (Genoa).

ANNEX

Operation to remove the oil from the *Erika*

1 General outline of the operation

- 1.1 It has been decided that the cargo oil from the two parts of the wreck of the *Erika* will be removed by using a pumping method involving a hydrostatic transfer system.
- 1.2 To carry out the pumping operation within the envisaged timescale a considerable number of craft and quantity of equipment are required.
- 1.3 The main components used under water will be:
 - a) a manifold and mixing skid
 - b) a pumping and transfer skid
 - c) tank connection valves and hoses
 - d) power and control systems
- 1.4 The following units will be available on the surface:
 - a) a diving support vessel over each part of the wreck
 - b) pumping and oil recovery vessels
 - c) a shuttle tanker
 - d) two anti-pollution vessels on stand-by at the site
- 1.5 In the initial stage of the operation, holes will be drilled into the ship's hull at each tank and the pumping connections will be fitted. This work will generally be carried out by remote operated vehicles (ROV's). However, it will be necessary to use divers to clear debris and obstructions from the working area, particularly on the deck areas of the aft section of the wreck.
- 1.6 Two anti-pollution ships fitted with 'deep sea' oil booms, skimmers, absorbents and dispersants will be on stand-by throughout the operation to be immediately available should any oil escape during the operations. French Navy vessels will also be on site.
- 1.7 The manifold and mixing skid and the pumping and transfer skid will be lowered to the seabed. These skids will be connected to the wreck and the oil recovery ship by flexible hoses. The pumping operation will then be carried out.
- 1.8 Due to the high viscosity of the cargo oil, some oil will be trapped by the internal tanks' structure at the top of the cargo tanks. To remove this oil a low viscosity diesel oil will be pumped into the cargo tanks. This diesel oil will initially displace the high viscosity cargo oil beneath the internal structure of the cargo tanks. The cargo oil will then be pumped out using a pipe extended below the tank structure. Finally, the diesel oil, together with some diluted cargo oil, will be pumped out of the tanks. This diluted cargo oil will be of such low viscosity that it will flow through the small holes in the structure to the point where the valves and the discharge hoses are connected to the tank. These hoses make it possible for the oil mixture to pass from the cargo tank to the pumping and transfer skid from where it will be pumped to the tanks in the oil recovery vessel.
- 1.9 The recovered oil will be stored and heated in tanks on an oil recovery ship. It will then be transferred to a shuttle tanker for transportation to shore tanks and from there to Total Fina's oil refinery for final disposal.
- 1.10 When the oil removal operation has been completed, all connections will be removed and the valves will be closed, before the craft and equipment are decommissioned.

- 1.11 The attached diagrams show a layout of the craft and equipment to be used in the transfer of the oil from the *Erika*.

2 Hydrostatic transfer method

- 2.1 Due to the very high viscosity of the oil cargo in the two halves of the wreck of the *Erika*, at the ambient sea temperature of about 9 to 12°C, it will be difficult to pump the oil out of the wreck.
- 2.2 Holes are drilled through the hull of the ship into the *Erika's* cargo tanks. The holes are fitted with valves. Each tank is fitted with an oil outlet connection hose and a sea water inlet connection, to allow sea water to enter the tank and displace the cargo oil.
- 2.3 A manifold and mixer skid will be mounted adjacent to the tank connections. At this point green diesel oil, a low viscosity product, will be mixed with the cargo oil to reduce the viscosity of the cargo oil in order to make it easier to pump the cargo oil to the surface.
- 2.4 The oil mixture will be drawn from the mixer skid into a pressure transfer vessel (PTV) by the pressure differential between the ship's tanks and the PTV. In order to make the oil flow from the tanks at an underwater pressure of about 10 to 12 kg/cm², the pressure in the PTV can be reduced down to atmospheric pressure by firstly filling the PTV with nitrogen, then venting the nitrogen out of the system through the vent valve to the surface ship so that there is no sea water induced pressure in the chamber. The PTV chamber is thus at pressure lower than that at the seabed. There will be a pressure difference of 10 to 12 kg/cm², causing the oil to flow from the cargo tanks into the PTV via the mixer skid.
- 2.5 When the oil mixture in the PTV reaches a predetermined level, the transfer pump will commence pumping the oil to the surface where the oil will be stored in tanks where it can be heated, before being transferred to a shuttle tanker.

