



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1992

EXECUTIVE COMMITTEE  
9th session  
Agenda item 3

92FUND/EXC.9/7  
28 September 2000  
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## INCIDENTS INVOLVING THE 1992 FUND

### ERIKA

#### Note by the Director

**Summary:**

About 19 800 tonnes of heavy fuel oil was spilled from the *Erika* as it sank, after breaking up in severe weather on 12 December 1999. The sunken bow section contained some 6 400 tonnes of cargo and the stern section a further 4 700 tonnes. Operations to pump the remaining oil to the surface were carried out during the period June - September 2000. Clean-up operations continue in some areas. The shipowner's P & I insurer has made payments to some 575 claimants totalling FFr14.7 million (£1.4 million). The likely level of claims for compensation is considered. A number of public bodies and private entities have taken legal action in France against Total Fina, the owner of the *Erika*, the *Erika*'s liability insurer and the vessel's management company, and the classification society. The classification society has taken legal action in Italy against inter alia the 1992 Fund requesting a declaration that the society was not liable for the incident. The 1992 Fund has taken recourse action in France against the classification society.

**Action to be taken:**

Information to be noted.

### 1 The incident

- 1.1 On 12 December 1999 the Maltese registered tanker *Erika* (19 666 GT) broke in two in the Bay of Biscay, some 60 nautical miles off the coast of Brittany, France. All members of the crew were rescued by the French marine rescue services.

- 1.2 The tanker was carrying a cargo of 31 000 tonnes of heavy fuel oil of which some 19 800 tonnes was spilled at the time of the incident. The bow section floated vertically for several hours before sinking during the night of 12 December in about 100 metres of water. A French salvage company succeeded in attaching a line to the stern section and attempted to tow it further off shore. However, during the morning of 13 December the stern section sank to a depth of 130 metres about 10 nautical miles from the bow section.
- 1.3 Some 6 400 tonnes of cargo remained in the bow section and a further 4 700 tonnes in the stern section.
- 1.4 The *Erika* was entered in the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual).

## **2 Clean-up operations**

- 2.1 The French Naval Command in Brest, Brittany, took charge of the response operations at sea in accordance with the national contingency plan, 'Plan Polmar Mer'. 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 initiated the national contingency plan, 'Plan Polmar Terre', and took charge of shoreline clean-up with assistance from the coastal local authorities, the Civil Defence Corps, local fire brigades, the army and volunteers. 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. Finalising cleaning was hampered by new oiling of previously cleaned beaches during storms over the Easter weekend and, on occasions, during subsequent months probably from accumulations of sunken oil close to the coast. Not all shorelines were completely cleaned before the main tourist season, July and August. In some cases the municipalities employed teams of locally available manpower to continue clean-up operations throughout the summer. The main focus was on the key tourist beaches. Total Fina SA organised clean up operations in some areas.
- 2.4 Some authorities 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. Cleaning of some areas, mainly in Loire-Atlantique, is expected to continue until early 2001.
- 2.5 Some 200 000 tonnes of oily waste have been collected from shorelines and have 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 evaluate different disposal options. One contractor has been engaged to deal with the disposal of the recovered waste. It is estimated that the cost of the waste disposal will be in the region of FFr200 million (£19 million).
- 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 team of local surveyors.
- 2.7 The administrative courts in Nantes and Poitiers appointed experts to carry out an investigation into the condition of the beaches before the incident and the type and extent of the pollution caused. The 1992 Fund follows 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 affected several important oyster and mussel fisheries. 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. No fishing bans were imposed in respect of offshore fishing for pelagic fish and crustacea in view of the low levels of contamination of catches.
- 3.4     The last remaining fishing bans were lifted during summer, and all areas are now open to fishing and harvesting of marine products.
- 3.5     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. Since that date a few producers in Guérande decided to resume salt production, although members of a cooperative who carry out some 70% of the salt production in Guérande decided not to produce salt in 2000. At the request of the 1992 Fund and the Steamship Mutual a court expert has been appointed to examine the feasibility of producing salt in 2000 which meets the criteria relating to quality and the protection of human health.
- 3.6     The affected coastline supports an important tourist industry during the summer months, which has been affected to varying degrees depending on location and type of activity.

### **4     Operations to prevent further oil escaping from the wreck**

- 4.1     Various ways to prevent further oil from escaping from the wreck were studied by the French Government and Total Fina. An analysis of these options was set out in paragraphs 4.6 - 4.10 of document 92FUND/EXC.7/4.
- 4.2     Following these studies, the French Government decided that the oil should be removed from the two sections of the wreck. After a tendering procedure the French Government decided on 20 April 2000 to award the contract for the oil removal operation to an international consortium, Stolt/Commex/Coflexship.
- 4.3     The oil removal operations were carried out during the period 6 June - 15 September 2000 and were completed three weeks ahead of schedule. No significant quantities of oil escaped during the operations.
- 4.4     The oil removal operation was carried out using a 'hydrostatic transfer' method. This 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 tanks through valves fitted at the top of the tanks. Once outside the tank the oil was mixed with a thinning agent to reduce the viscosity. The mixture was then temporarily stored in a sealed pressure tank placed on the seabed before being pumped to the surface. A technical description of the operations is given in the Annex to document 92FUND/EXC.8/2.

- 4.5 During the entire oil removal operation French Navy vessels and two vessels equipped with offshore recovery equipment were at stand by.
- 4.6 The 1992 Fund followed the operations closely through its technical experts<sup><1></sup>.
- 4.7 The disposal of the recovered oil will take place during 2000.

## **5 Claims handling**

- 5.1 The Steamship Mutual and the 1992 Fund established a Claims Handling Office in Lorient, which 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 claims forms have been prepared and are being made available to claimants.
- 5.4 The Claims Handling Office serves as a focal point for the claimants and 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. A special structure has been set up for the handling of claims relating to clean-up operations. These claims are examined initially by surveyors who were on site during the operations. Tourism experts have been appointed to assess claims in respect of economic losses and publicity campaigns in the tourism sector.
- 5.6 In mid-September 2000 1992 Fund representatives and experts engaged by the Fund and Steamship Mutual held a series of meetings with representatives of the tourism industry from the affected areas in order to establish a framework for the handling of the large number of claims expected in the tourism sector.

## **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. The operations to remove the oil from the wreck have resulted in substantial costs.
- 6.2 Some 1 550 claims have been received from the fishery 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 The incident has had 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 were reported significantly lower than normal. The Claims Handling Office has already received over 2 000 letters of intent regarding future claims in the tourism sector and over 1 600 letters of intent regarding future claims in the retailing sector linked to tourism in the affected area. It is

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

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 26 September 2000 the Claims Handling Office had received 1436 first claims and 813 supplementary claims for compensation in the following categories:

	First claims	Supplementary claims
Clean-up operations	53	15
Property damage	262	2
Fishing	193	108
Fish farming and cultivation	465	361
Shellfish gathering	189	220
Fish processors and distributors	15	2
Tourism	147	85
Other losses of income	112	20
Total	1436	813

- 6.6 As at the same date, the Steamship Mutual had made interim payments to 575 claimants for a total of FFr14 663 331 (£1 372 000) as follows:

	FFr
Clean-up operations	24 611
Property damage	1 367 479
Fishing	2 400 569
Fish farming and shellfish cultivation	4 476 503
Shellfish gathering	1 508 027
Fish processors and distributors	127 306
Tourism	4 727 452
Other loss of income	31 384
Total	14 663 331

- 6.7 As at 26 September 2000, the Steamship Mutual had authorised interim payments of a further FFr6 184 926 (£560 000) to 339 claimants. These payments will be made in the near future.
- 6.8 Up to 31 May 2000 the payments made by Steamship Mutual were made on an interim basis in appropriate cases. By the end of May a large number of claims had been approved by Steamship Mutual and the 1992 Fund, but since the claimants were not facing particular financial difficulties no interim payments had been made. In order to ensure that all claimants received compensation, Steamship Mutual decided to pay all claimants 50% of the approved amounts of their respective claims.
- 6.9 The 1992 Fund had approved the claims referred to in paragraphs 6.6 and 6.7 for the payment amounts.
- 6.10 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).

- 6.11 Claims have been presented by 53 communes for a total amount of FFr35 303 215 (£3.3 million) in respect of clean-up operations. A third of these claims, which relate mainly to fixed costs, have been examined. Additional supporting information is being sought through dialogue with the claimants. It is understood that most of these communes will also present claims to the French Government under Plan Polmar for their additional costs.

## **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 promotional activities targeting the French market.
- 7.2 The experts engaged by the 1992 Fund and the Steamship Mutual have been liaising with the various national and regional authorities involved.

## **8 Level of payments**

### **8.1 Undertakings by Total Fina and the French Government**

- 8.1.1 In a letter to the Director Total Fina undertook 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 section 4 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. Total Fina 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.
- 8.1.2 The French delegation informed the Committee at its 6th session 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.

### **8.2 Position of Steamship Mutual**

Steamship Mutual has confirmed that it is prepared to continue to pay 50% of the approved amounts of any claims until the total payments approach the limitation amount of some FFr84 million (£7.9 million).

### **8.3 Consideration by the Executive Committee at its 8th session**

- 8.3.1 The Committee took note of the result of an extensive study carried out within the French Ministry of Economy, Finance and Industry on the extent of the damage caused by the *Erika*

incident on the tourism industry, as summarised by the Director in Annex I to document 92FUND/EXC.8/2/Add.1. It was noted that in the study it was estimated that the total amount of the admissible claims would fall within the range of FF800 - 1 500 million (£80 - 150 million). The Committee also took note of the comments on the results of the study by the 1992 Fund's experts, L & R Consulting (L & R), as set out in Annex II of that document.

- 8.3.2 The Committee noted that there was great uncertainty following the *Erika* incident as to the effects of the pollution damage on the tourism sector. The Committee further noted that the study within the French Ministry of Economy, Finance and Industry emphasised the extreme difficulty in predicting with precision the likely performance of the tourism sector during the summer season of 2000. It was noted that it was mentioned in the report of the study that this uncertainty was reinforced by the media attention and the condition of the beaches as well as the risk associated with the operation to recover the remaining oil from the *Erika*.
- 8.3.3 The Committee considered that the conclusions of the study carried out within the Ministry provided the best estimate which could be obtained at this stage of the total amount of the potential admissible claims in the tourism sector. However, the Committee shared the concerns expressed in the report of the study and by L & R as to the uncertainty of the estimates. In particular, the Committee noted that the estimates in the report were based on the IOPC Funds' policy and criteria as regards the admissibility of claims for pure economic loss. It was noted that the Director had been advised that the French Courts might take a more extensive approach in their interpretation of the notion of pollution damage.
- 8.3.4 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. The point was made that the percentage at which claims were paid needed to be meaningful if claimants were to be encouraged to settle their claims out of court. A number of delegations supported this view in particular because it could be counter-productive if the Fund were to fix payment at too low a percentage of established claims.
- 8.3.5 The Executive 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 had to be given equal treatment. The Committee further 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.
- 8.3.6 The Executive Committee noted that for the purpose of its consideration of the level of the 1992 Fund's payments the claims by Total Fina and the French Government referred to in paragraphs 8.1.1 and 8.1.2 above could be disregarded, since these claims would be pursued only if and to the extent that all other claims had been paid in full. The Committee also noted that the estimated higher figures for the clean-up operation claims, the claims in the fishery and mariculture sector and the tourism sector totalled some FF2 000 million (£200 million), plus the costs of publicity campaigns in the fishery and tourism sectors to counteract the negative impact of the incident. The Committee noted the Director's view that if this figure was correct, it would be possible to fix the level of the 1992 Fund's payments at 50% of the proven loss or damage suffered by the individual claimants. The Committee further noted, however, that there were a number of significant uncertainties in these estimates, in particular as regards the claims in the tourism sector, the risk of further pollution as a result of an escape of oil during the pumping operation and the approach taken by the French Courts to the criteria for the admissibility of claims.
- 8.3.7 In view of the uncertainty as to the total amount of the claims arising from the *Erika* incident, the Executive Committee decided that the payments by the 1992 Fund should for the time being be

limited to 50% of the amount of the loss or damage actually suffered by the respective claimants, as assessed by the 1992 Fund's experts. The Committee also decided that the level of payments should be reviewed at its 9th session, to be held in October 2000, in the light of further information as to the likely level of the claims (document 92FUND/EXC.8/8, paragraph 3.3.38).

- 8.3.8 The French delegation stated that the French Government had instigated the study to ascertain the level of damage for its own purposes as well as for those of the 1992 Fund and intended to continue the process for as long as necessary. That delegation confirmed that further information resulting from the study would be made available to the Committee.

#### 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. The Director will also address the issue of the level of the 1992 Fund's payments in the addendum.

### 9 Other sources of funds

- 9.1 The French Government established a procedure under which claimants whose claims have been approved by the 1992 Fund and Steamship Mutual could obtain advance payments from the Banque du développement des petites et moyennes entreprises (BDPME) (Small and Medium Enterprise Development Bank). These advances would represent a certain percentage (at present set provisionally at 50%) of the amounts approved by the 1992 Fund and the Steamship Mutual and after deduction of any amount received from the Steamship Mutual and the 1992 Fund. The maximum advance would be FF30 000 (£3 000) for industry, commerce and service businesses, and FF200 000 (£20 000) in the fishery and mariculture sector. The amounts paid as advances would carry interest at 1.5% per annum. So far the Bank has not made any advances. It appears that since Steamship Mutual and the 1992 Fund pay 50% of the approved amount of the individual claims, it is unlikely that this procedure for advances will be used.
- 9.2 The French Government also introduced a scheme to provide emergency payments in the fishery sector. This scheme is administered by OFIMER (Office national interprofessionnel des produits de la mer et de l'aquaculture), a government agency attached to the French Ministry of Agriculture and Fisheries. OFIMER may make payments to claimants of up to FF200 000 (£20 000) on the basis of its own assessment of the losses, without consultation with the Steamship Mutual and the 1992 Fund. OFIMER has stated that it bases its assessments on the criteria laid down in the 1992 Fund's Claims Manual.
- 9.3 The Director has been informed that as at 20 September 2000 OFIMER had paid FF11 million (£1.1 million) to 458 claimants in the fishery sector, representing 50% of the amounts assessed by OFIMER.
- 9.4 In August 2000 the French Government established a procedure for extension of the periods for payment of taxes and social security charges and for advance payments through BDPME to claimants in the tourism sector facing financial difficulties. This scheme will be administered by special committees set up in each of the five departments affected by the oil spill.

### 10 Legal actions against the shipowner/Steamship Mutual and Total Fina

- 10.1 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 FF1 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.
- 10.2 It should be noted that this claimant had not presented a claim to the Claims Handling Office.



- 10.3 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).
- 10.4 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 boat owner 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.
- 10.5 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.
- 10.6 The boat owner subsequently brought legal action in the Tribunal de Grande Instance des Sables d'Olonne against the four defendants referred to in paragraph 10.1 above, claiming compensation of FFfr1 million (£100 000).
- 10.7 In a judgement rendered on 5 September 2000 the Court in Sables d'Olonne declined jurisdiction on the same grounds as those set out in paragraph 10.5. The Court appointed a court expert to assess the loss actually suffered by the claimant.

## **11 Limitation proceedings**

- 11.1 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 FFfr84 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.
- 11.2 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).
- 11.3 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.

## **12 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 = FFfr1 211 966 881 (document 92FUND/EXC.7/5, paragraph 3.3.23).

## **13 Cause of the incident**

- 13.1 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.
- 13.2 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.

- 13.3 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.

- 13.4 The shipowner and the Steamship Mutual have expressed reservations in respect of several points of these preliminary conclusions.
- 13.5 The Maltese authorities have also carried out an investigation into the cause of the incident. It is expected that the report on this investigation will be published shortly.
- 13.6 A criminal investigation into the cause of the incident is being carried out by 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.
- 13.7 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.
- 13.8 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 in the affected area. 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.
- 13.9 The 1992 Fund is following the investigations through its French lawyers and technical experts.
- 13.10 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.

#### **14 Nomination of court experts for evaluation of the damage**

- 14.1 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.
- 14.2 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.

- 14.3 At a court hearing the 1992 Fund stated that it did not object in principle to being forced to intervene in the proceedings. However, the Fund did not agree to the proposed extended mandate for the court experts. The Fund made the point that if the court were to give the experts the proposed mandate this would impose a considerable workload on them. The Fund informed the court that the proposed task, ie to assess the losses suffered by all victims, was exactly the task carried out by the experts engaged by Steamship Mutual and the 1992 Fund. Attention was drawn to the Fund's established policy to endeavour to reach out-of-court settlements. The Fund requested that the proposed mandate of the experts should be modified to the effect that the experts should make an evaluation of the damage only at the specific request of the individual victims in order to avoid interference with the claims handling carried out through the Claims Handling Office in Lorient. In May 2000 the Court decided in accordance with the Fund's request.
- 14.4 In July 2000, the Département de Loire-Atlantique and 22 communes in Loire Atlantique requested that the Tribunal Administratif in Nantes should appoint experts to assess their damage. In September 2000 the Court appointed a panel of experts (the same as those already appointed by the Tribunal de Grande Instance in les Sables d'Olonne - see paragraph 14.1) to assess the extent of the damage sustained by the claimants.
- 14.6 In August 2000, 23 communes of Charente-Maritime requested that the Tribunal Administratif in Poitiers should appoint court experts to assess their damage. The Court has not yet rendered its decision.

## **15 Actions in France against Total Fina, the shipowner and others**

- 15.1 In 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)
- 15.2 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.
- 15.3 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*.
- 15.4 A first procedural hearing was held on 3 July 2000. At that hearing the 1992 Fund presented pleadings requesting it to be allowed to intervene in the proceedings.
- 15.5 In May 2000 actions were brought in several courts against the parties referred to in paragraph 15.1 above. Eighteen 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. The Conseil Général du Morbihan, eight communes in Morbihan, the Union of Ports (Union des Ports et Bases Nautiques) of

Morbihan and the Committee of Tourism in Morbihan brought legal action in the Tribunal de Commerce in Vannes. Nine communes in Morbihan brought legal action in the Tribunal de Commerce in Lorient. The plaintiffs requested that the Courts should hold the defendants jointly and severally liable to indemnify the plaintiffs for the damage suffered as a result of the *Erika* incident. In all these actions the plaintiffs based their actions on the same grounds as those set out in paragraph 15.3.

- 15.6 Procedural hearings have been held in September 2000 in the courts referred to in paragraph 15.5 above. The 1992 Fund intervened in these proceedings and brought action on a conservative basis against RINA SpA and Registro Italiano Navale (cf paragraph 17.3 below).
- 15.7 In June 2000 the commune of Mesquer in Loire Atlantic brought legal proceedings against the Group Total Fina in the Tribunal de Commerce de Saint Nazaire on the ground that the product carried by *Erika* was to be considered as waste and that Total Fina should therefore be liable for any damage caused by this product. The Director considered that, since this action fell outside the scope of the 1992 Conventions, he did not consider that the 1992 Fund should intervene in the proceedings. As indicated at the Executive Committee's 8th session, the Director intends nevertheless to follow these proceedings.
- 15.8 The Director is studying the issues involved in the various court proceedings in co-operation with the 1992 Fund's French and Italian lawyers<sup><2></sup>.

## **16 Action in Italy by RINA SpA/Registro Italiano Navale**

- 16.1 In late April 2000 RINA SpA and Registro Italiano Navale<sup><3></sup> 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

- 16.2 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.
- 16.3 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<sup><4></sup>; and

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

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

- (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.
- 16.4 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).
- 16.5 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.
- 16.6 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.
- 16.7 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.
- 16.8 The first court hearing will be held on 4 December 2000.

#### **17 Actions by the 1992 Fund against RINA SpA and Registro Italiano Navale**

- 17.1 The 1992 Fund's policy in respect of recourse actions can be summarised as follows. The 1992 Fund should take recourse action whenever appropriate and in each case consider whether it would be possible to recover any amounts paid by it to victims from the shipowner or from other parties on the basis of the applicable national law. Any decision by the 1992 Fund as to whether or not to take such action should be made on a case-by-case basis in the light of the prospect of success within the legal system in question.
- 17.2 At its 8th session the Executive Committee noted the Director's view that the 1992 Fund should as a matter of policy consider whether to take recourse action against any particular defendant only when the investigations into the cause of the incident had been completed, and that he had therefore decided that it was premature to consider any recourse action in the *Erika* case at this stage.
- 17.3 The Committee noted the Director's view that it would in any event be more natural if any action relating to the eventual liability of RINA SpA and Registro Italiano Navale were heard in the French Courts. It was also noted that in order to protect the 1992 Fund's position, the Director had therefore filed legal actions against RINA SpA and Registro Italiano Navale in the Tribunal de Commerce in Vannes, the Tribunal de Commerce in La Roche sur Yon and the Tribunal de Commerce in Lorient, requesting the Courts to join the 1992 Fund in the proceedings commenced by the Conseil Général de Morbihan and others. It was further noted that the 1992 Fund had requested that the Courts should suspend the proceedings until the results of the various

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<4> These Rules provide: In no case shall the liability of RINA, regardless of the amount of the claimed damages, exceed the value equal to five times the total of the fees received by RINA as consideration of the services rendered from which the damage derives.

investigations into the cause of the incident had been completed. It was noted that the Director had emphasised that the 1992 Fund's actions were of a conservatory nature and that the Fund reserved its right to present at a later stage claims against the two defendants for reimbursement of any amounts which the Fund might have paid under the 1992 Conventions to victims of oil pollution damage and that the Fund had also reserved its right to take similar actions against any other party who might be liable in the light of the results of the investigations into the cause of the incident.

- 17.4 The Italian observer delegation took the view that it would not be appropriate to comment on the points of the documents presented by the Director (documents 92FUND/EXC.8/2 and 92FUND/EXC.8/2/Add.1) which related to the court actions involving RINA while legal proceedings were pending. Nevertheless that delegation drew the attention of the Committee to the fact that the Registro Italiano Navale (RINA) had acted in the *Erika* case as the certifying registry in accordance with an agreement with the Maltese authorities. The Italian delegation requested that the 1992 Fund should note this information in the light of the actions taken by the Director against RINA before French Tribunals.
- 17.5 The Executive Committee endorsed the Director's position and the steps taken by him to protect the 1992 Fund's interests, in particular the actions taken against RINA SpA and Registro Italiano Navale (document 92FUND/EXC.8/8 paragraph 3.49).
- 17.6 The 1992 Fund will submit pleadings to the Italian Court before the hearing scheduled for 4 December 2000.

**18 Action to be taken by the Executive Committee**

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
  - (b) to give the Director such instructions in respect of the court proceedings referred to in sections 15 - 17 as it may deem appropriate; and
  - (c) to give the Director such instructions in respect of the handling of this incident and of claims arising therefrom as it may deem appropriate.
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