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INCIDENTS INVOLVING THE 1992 FUND

ERIKA

Note by the Director

Summary:	Six thousand nine hundred and eighty-five claims for compensation have been submitted and 95% of the claims have been assessed. Compensation payments totalling €117.4 million (£77.4 million)[<1>] have been made in respect of 5636 claims. A proposal is made as to the approach to be used for the assessment of the French Government's claim for clean-up costs. Legal actions against the shipowner, his insurer and the 1992 Fund were taken by 796 claimants. Out-of-court settlements have been reached with 428 of these claimants. The courts have rendered judgements in respect of 57 actions. Eleven judgements have been rendered by the French courts since the Executive Committee's October 2005 session. The document contains a summary of these judgements. Information is also given on the developments in respect of six other judgements which had previously been reported to the Executive Committee.
Action to be taken:	Information to be noted.

1 Introduction

1.1 This document sets out the general situation in respect of the *Erika* incident which occurred off the coast of Brittany (France) on 12 December 1999 and deals with recent developments.

1.2 As regards the incident, the clean-up operations, the removal of the oil from the wreck of the *Erika* and the impact of the spill, reference is made to the Annual Report 2004 (pages 74-75).

[<1>] The French franc was replaced by the Euro on 1 January 2002. Although claims have generally been made in French francs and payments effected up to 31 December 2001 were made in French francs, the amounts in the document have, with a few exceptions, been given in Euros only. The rate of conversion is €1 = FFr6.55957. Conversion of Euros into Pounds sterling has been made on the basis of the rate at 30 January 2006 (€1 = £0.6847), except in the case of claims paid by the 1992 Fund where conversions have been made at the rate of exchange on the date of payment.

1.3 Since the Executive Committee's March 2005 session, no further developments have taken place in respect of court surveys for evaluation of damage, the investigations into the cause of the incident and various court actions, except as set out below.

2 Maximum amount available for compensation

2.1 The maximum amount available for compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention is 135 million SDR per incident, including the sum paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention). This amount shall be converted into national currency on the basis of the value of that currency by reference to the SDR on the date of the decision by the Assembly as to the first date of payment of compensation.

2.2 Applying the principles laid down by the Assembly in the *Nakhodka* case, the Executive Committee decided in February 2000 that the conversion should be made using the rate of the SDR as at 15 February 2000 and instructed the Director to make the necessary calculations (document 92FUND/EXC.6/5, paragraph 3.29). The Director's calculations gave 135 million SDR = FFr1 211 966 811 corresponding to €184 763 149 (£127 million).

3 Undertakings by Total SA and the French Government

3.1 Total SA undertook not to pursue against the 1992 Fund or against the limitation fund constituted by the shipowner or his insurer claims relating to its costs arising from operations in respect of the wreck, the clean-up of shorelines and the disposal of oily waste and from a publicity campaign to restore the image of the Atlantic coast 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.

3.2 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. However the French Government's claims would rank before any claims by Total SA if funds were available after all other claims had been paid in full.

4 Other sources of funds

4.1 The French Government introduced a scheme to provide emergency payments in the fishery sector, 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 stated that it based its payments on assessments made by Steamship Mutual and the 1992 Fund. OFIMER paid €4.2 million (£2.9 million) to claimants in the fishery sector and €2.1 million (£1.4 million) to salt producers.

4.2 The French Government also introduced a scheme to provide supplementary payments in the tourism sector. Payments totalling €10.1 million (£6.9 million) were made under that scheme.

5 Level of the 1992 Fund's payments

5.1 The Executive Committee has at several sessions considered the level of the 1992 Fund's payments in respect of the *Erika* incident.

5.2 In view of the uncertainty as to the total amount of claims arising from the *Erika* incident, the Executive Committee decided in July 2000 that the payments by the 1992 Fund should 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 decided in January 2001 to increase the level of the 1992 Fund's payments from 50% to 60% and in June 2001 to 80%.

5.3 In February 2003 the Executive Committee authorised the Director to increase the level of payments to 100% when he considered it safe to do so. After a careful assessment, the Director considered in April 2003 that there was a sufficient safety margin, in spite of the remaining uncertainties as to the total level of admissible claims, and decided to increase the level of payments to 100%.

5.4 At the Executive Committee's October 2003 session the Director stated that although there remained considerable uncertainties as to the total amount of the established claims, this uncertainty had been reduced since April 2003 and that it might therefore be possible in the near future to make payments in respect of the French Government's claim. The Committee authorised the Director to make such payments to the extent that he considered there was a sufficient margin between the total amount of compensation available and the Fund's exposure in respect of other claims.

5.5 After having reviewed his earlier assessment of the total level of admissible claims, the Director decided in December 2003 that there was a sufficient margin to enable the 1992 Fund to commence payments to the French State. The 1992 Fund initially paid €10.1 million (£7.0 million) to the French State, corresponding to the French Government's subrogated claim in respect of the supplementary payments to claimants in the tourism sector. In October 2004 the 1992 Fund paid a further €6.0 million (£4.2 million) to the French State relating to the French Government's supplementary payments made under the scheme to provide emergency payments to claimants in the fishery, mariculture and salt producing sectors administered by OFIMER. In December 2005 the 1992 Fund made a payment on account to the French State of €15 million (£10.3 million) towards the costs incurred by the French authorities in the clean-up response. As regards the assessment of this claim reference is made to section 7 below.

6 Claims situation

6.1 As at 31 January 2006, 6 985 claims for compensation had been submitted for a total of €208 million (£142 million). By that date 95% of the claims had been assessed. Some 800 claims, totalling €22.7 million (£15.5 million), had been rejected.

6.2 Payments of compensation had been made in respect of some 5 636 claims for a total of €117.4 million (£77.4 million), out of which Steamship Mutual had paid €12.8 million (£8.8 million) and the 1992 Fund €104.6 million (£68.6 million).

6.3 The following table gives details of the situation in respect of claims in various categories.

Situation as at 31 January 2006					
Category	**Claims submitted**	**Claims assessed**	**Claims rejected**	**Payments made**	
				Number of claims	**Amounts €**
Mariculture and oyster farming	1 006	1 001	89	844	7 758 232
Shellfish gathering	530	527	109	370	889 189
Fishing boats	319	318	29	282	1 099 551
Fish and shellfish processors	51	50	6	43	976 832
Tourism	3 692	3 670	440	3 200	76 415 724
Property damage	711	440	98	330	2 059 060
Clean-up operations	148	141	12	122	21 605 370
Miscellaneous	528	481	30	446	6 659 618
Total	**6 985**	**6 628**	**813**	**5 636**	**117 463 576**

7 Assessment of the French Government's claim for clean-up

7.1 The total claim by the French State in respect of costs incurred by French authorities in the clean-up response is for €178.8 million (£122 million). The claim comprises some 250 000 pages of documentation. If the claim were to be assessed by the Fund's experts in the normal way, it would take at least two years to complete the work. Furthermore, the same experts are already fully occupied in assessing the claim by the French State in respect of clean-up costs arising from the *Prestige* incident. So far the payments made to claimants (except the payment on account to the French State for clean-up costs) total €102.4 million (£67.1 million). The Director estimates that the payments to be made to claimants (other than the French Government) will total at least some €120 million (£82 million)[<2>]. The amount available for compensation for this incident is €184.8 million (£127 million). The amount which will be available for payment to the French Government for clean-up operations will therefore in any event not exceed some €65 million (£45 million). For this reason the Director has sought a more pragmatic way of assessing the French Government's claim up to that amount. The approach followed by the Director was to carry out a broad assessment of three major components of the claim in order to establish the lowest conceivable admissible amount of the Government's claim.

7.2 The largest component of the claim, for €128 million (£88 million), comprises shoreline clean-up costs incurred by the Prefectures of the five affected departments in support of the coastal communes. Since the claims by the individual communes have already been assessed, the experts have assessed the claims by the Prefectures on the basis of the same proportions as the assessed claim by the communes in their respective departments. The Director considers this to be a satisfactory approach on the grounds that the reasonableness of the clean-up response by the communes would be expected to mirror the reasonableness of the response by the departments operating on the same shorelines. On the basis of this approach the claim relating to the costs incurred by the Prefectures has been assessed at €64 million (£44 million).

7.3 Another major component of the claim, for €23 million (£15.7 million), is for the costs of providing military personnel to assist with beach cleaning. The Fund's experts have stated that these resources played an important part in the removal of bulk oil from many beaches across all departments. The experts have also confirmed that the charges made for personnel, vehicles, fuel and food were reasonable. However, the experts have made the observation that the military units were changed every seven days and that each new unit required training before it could commence operations. The experts consider that the lost days resulting from this cycle led to a loss of efficiency and excessive mobilisation and de-mobilisation costs. They have therefore assessed this component of the claim at €16 million (£11 million).

7.4 The third major component of the claim, for €18.4 million (£12.6 million), relates to the cost of at sea operations, including towing the casualty, monitoring the wreck, aerial surveillance of the oil and clean-up operations. The experts consider that these activities were all necessary and have assessed this component at €1.0 million (£680 000), on the basis of the cost of the minimum resources that would have been necessary to fulfil them, although they anticipate that a more detailed assessment would inevitably increase this amount to some €9 million (£6.2 million).

7.5 On the basis of the assessment of the three major components of the claim by the French State, the minimum total admissible amount is some €81 million (£55.5 million), which is well in excess of the maximum amount that is likely to be available (some €65 million) to the French Government after all other claims arising from the incident (except that of Total SA) have been settled and paid. Whilst a full assessment of the claim by the French State (including items other than the three main components dealt with in paragraph 7.2-7.4) would inevitably result in the admissible amount increasing substantially, the Director is of the view that such a full assessment

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<2> That amount includes the payments made to the French State in December 2003 and October 2004 totalling €16.1 million (£13.0 million) which related to the Government's subrogated claims but not the payment on account of €15 million (£10.3 million) made to the State in December 2005 (cf paragraph 5.5 above).

is not justified given the enormous amount of time that would be required to complete the work and the limited amount of money that will be available to pay the claim.

7.6 The Executive Committee is invited to consider whether it agrees with the approach proposed by the Director as regards the assessment of the French Government's claim.

7.7 It should be added that, should the Executive Committee agree with this approach, the assessment set out above would be without prejudice to the French Government's position in any recourse action against third parties.

8 Cause of the incident

8.1 Since the *Erika* was registered in Malta, the Malta Maritime Authority conducted a Flag State investigation into this incident. The Authority issued its report in September 2000. An investigation was also carried out by the French Permanent Commission of Enquiry into Accidents at Sea (La Commission permanente d'enquête sur les événements de mer (CPEM)). The report of this investigation was published in December 2000. The conclusions of these investigations are summarised in the Annual Report 2001, pages 118 and 119.

8.2 A criminal investigation into the cause of the incident is being carried out by an examining magistrate in Paris. During 2000 charges were brought against the master of the *Erika*, the representative of the registered owner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the management company itself, the deputy manager of Centre Régional Opérationnel de Surveillance et de Sauvetage (CROSS), three officers of the French Navy who were responsible for controlling the traffic off the coast of Brittany, the classification society (Registro Italiano Navale (RINA)) and one of RINA's managers. In December 2001 charges were brought against Total SA and some of its senior staff on the basis of a report by an expert appointed by the magistrate. In June 2003 charges were brought against the Malta Maritime Authority and against its Director. The trial is expected to take place in the course of 2006.

8.3 At the request of a number of parties, the Commercial Court (Tribunal de Commerce) in Dunkirk appointed experts to investigate the cause of the incident ('expertise judiciaire'). The experts submitted their report in late November 2005. The experts concluded that the fate of the *Erika* was the inevitable consequence of the serious corrosion of the internal structures of the vessel's N°2 ballast tanks, which resulted in their collapse as soon as the vessel encountered sustained heavy seas. The experts stated that the level of corrosion was well beyond acceptable standards for a classification society and contradicted the thickness measurements made of tank internals in 1997 and in particular in 1998, which were carried out by the classification society RINA. The experts stated that once the longitudinal deck stiffeners and the upper parts of the transverse bulkheads in the N°2 ballast tanks had failed in the prevailing sea conditions, there was nothing anyone could have done to influence the fate of the vessel.

8.4 The experts expressed the view that it would not have been possible to detect the level of corrosion when the ship was vetted by Total SA, nor at the time of loading the vessel in Dunkirk prior to the final voyage, and that the vetting procedures of other major oil companies or a survey by a port state would also have not revealed the problem. In contrast, the experts stated that this was not the case with Tevere Shipping (the registered owner), Panship (the management company), which monitored the vessel's fifth special survey in Bijela (Croatia) in 1998, and RINA, which undertook the surveys in Bijela and in Augusta in 1999.

8.5 The Director is studying the report by the court experts with the assistance of the 1992 Fund's own experts and will report to the Executive Committee at a later session in 2006.

9 Recourse actions by the 1992 Fund

9.1 Although it is not possible for the 1992 Fund to take a final position as to whether the Fund should take recourse actions to recover the amounts paid by it in compensation and, if so, against which parties, until the investigations into the cause of the incident have been completed, the Executive Committee considered in October 2000 whether the Fund should take such actions as were necessary to prevent its rights becoming time-barred. The Committee decided to authorise the Director to challenge the shipowner's right to limit his liability under the 1992 Civil Liability Convention and to take recourse actions, as a protective measure before the expiry of the three-year time bar period, against the following parties:

Tevere Shipping Co Ltd (the registered owner of the *Erika*)
Steamship Mutual (P&I insurer of the *Erika*)
Panship Management and Services Srl (manager of the *Erika*)
Selmont International Inc (time charterer of the *Erika*)
TotalFinaElf SA (holding company)
Total Raffinage Distribution SA (shipper)
Total International Ltd (seller of cargo)
Total Transport Corporation (voyage charterer of the *Erika*)
RINA Spa/Registro Italiano Navale (classification society)

9.2 On 11 December 2002 the 1992 Fund brought actions in the Civil Court (Tribunal de Grande Instance) in Lorient against the parties listed above.

9.3 After the Committee's October 2002 session the Director was made aware of the fact that the classification society Bureau Veritas had inspected the *Erika* prior to the transfer of class to RINA. He decided that the 1992 Fund should take recourse action, as a protective measure, against Bureau Veritas, and this action was also brought in the Civil Court in Lorient on 11 December 2002.

9.4 There have been no developments in respect of these actions during 2005 or 2006.

9.5 As mentioned above, criminal charges were brought against, *inter alia*, the deputy manager of CROSS and three officers of the French Navy. If they were to be found guilty there might be grounds for the 1992 Fund to take recourse action against the French State, but it is not possible for the 1992 Fund to decide whether there are grounds for such an action until the trial in the criminal proceedings has taken place.

9.6 Under French law the general time bar period in commercial matters is – subject to many exceptions – ten years. In matters involving the liability of public bodies, in order to prevent a claim for compensation becoming time-barred, the French Administration should be notified of such a claim by 31 December of the fourth year after the event that gave rise to a claim, ie in the case of the *Erika* incident by 31 December 2003. The 1992 Fund made such a notification in December 2003 and the French State accepted that this notification had the effect of interrupting the time bar.

10 Claims by salt producers

10.1 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 had been imposed to prevent the intake of sea water in Guérande (Loire Atlantique) were lifted on 23 May 2000. A group of independent producers in Guérande tried to resume salt production but were unable to take in sufficient seawater to produce salt. Members of a co-operative who account for some 70% of the salt

production in Guérande decided not to produce salt in 2000 on the grounds of protecting market confidence in the product.

10.2 Claims for lost salt production due to delays to the start of the 2000 season caused by the imposed ban on water intake were received from producers (both independent and members of the co-operative) in Guérande and Noirmoutier as well as for losses caused by the late start of the 2001 season. Claims were also presented for costs of restoration of salt ponds in Guérande in 2001.

10.3 The experts engaged by the 1992 Fund and Steamship Mutual had considered that salt production had been possible in Guérande in 2000, but that as a result of the interruption caused by the ban on water intake, the maximum yield would have been 20% of that expected for the year. Interim compensation payments were therefore made to the claimants for the outstanding 80%.

10.4 As regards the salt producers in Noirmoutier, the 1992 Fund and Steamship Mutual had also considered that salt production had been possible in 2000, but that the maximum yield would have been 30% of that expected for the year. Compensation payments were made to the salt producers for the outstanding 70%. Eighty producers accepted the Fund's assessment whereas five pursued claims in court.

10.5 At the request of the 1992 Fund and Steamship Mutual, a court expert was appointed to examine whether it was feasible to produce salt in 2000 in Guérande that would meet the criteria relating to quality and the protection of human health. The court expert presented his report in late December 2004. The court expert concluded that salt production would have been feasible in 2000, but that as a result of the bans that were imposed, the maximum yield would have been between 4% and 11% of normal production.

10.6 In the light of the court expert's findings the 1992 Fund approached claimants with the objective of exploring the possibility of reaching out-of-court settlements. Such settlements have been reached with 22 of the salt producers in Guérande on the basis of a loss of production of 95%. Claims are being pursued in court by 140 salt producers from this area.

11 Time bar

11.1 Under the 1992 Civil Liability Convention rights to compensation from the shipowner and his insurer are extinguished unless legal action is brought within three years of the date when the damage occurred (Article VIII). As regards the 1992 Fund Convention, rights to compensation from the 1992 Fund are extinguished unless the claimant either brings legal action against the Fund within this three-year period or notifies the Fund within that period, in accordance with the formalities required by the law of the court seized, of an action against the shipowner or his insurer (Article 6). Both Conventions also provide that in no case should legal actions be brought after six years from the date of the incident.

11.2 During September 2002 the 1992 Fund wrote individually to all those who had submitted claims to the Claims Handling Office and with whom settlements had not been reached by that time informing them about the time bar issue. In addition, the 1992 Fund organised a series of presentations to the Chambers of Commerce and Industry in Quimper, St Nazaire and La Roche sur Yon to bring the time bar issue to the attention of a wider audience. Advertisements were also placed in the local press.

11.3 Since it may be uncertain from which date the three-year time-bar period started to run for an individual claimant (ie the date when the respective claimant's damage or loss occurred), the Director suggested that claimants should assume that the time bar period commenced on the date of the incident (ie 12 December 1999), in order to avoid any risk of the claims becoming time-barred. He also made it clear that even if a claimant took legal action, this would not prevent further discussions concerning his claim for the purpose of reaching an out-of-court settlement.

11.4 Despite these warnings a number of claimants who had presented claims to the Claims Handling Office and whose claims had not been settled had not taken legal action against the shipowner, Steamship Mutual and the 1992 Fund by 12 December 2002. A number of claimants commenced legal actions late in December 2002 or in the first half of 2003. The question arose whether these claims or some of them were time-barred.

11.5 In February 2003 the Executive Committee decided that the three-year time-bar period should be considered to start to run at the earliest from the beginning of the period of the loss suffered by the individual claimant. The Committee recognised that there could be claims in respect of which the starting point for the time bar period might be some time after the beginning of the period of the loss and that such claims would have to be considered in the light of the particular circumstances in each case.

11.6 As a result of this decision, some 160 claims which had not been the subject of legal actions, and for which the time bar period ended after the Committee's February 2003 session, were subsequently settled out-of-court.

11.7 A number of claimants did not take legal action against the 1992 Fund before the expiry of the three-year time bar period but only submitted claims against the shipowner and Steamship Mutual in the limitation proceedings. The Fund was formally notified by the liquidator of the limitation fund of theses actions. However, as stated above, in order to prevent such a claim from becoming time barred against the Fund, the claimant must take legal action against the Fund within six years of the date of the incident, ie by 12 December 2005. In early December 2005 the Fund wrote to all these claimants drawing their attention to the six-year time bar period. As a result, action was filed by a fisherman for a claim of some €50 000 (£34 000) for loss of earnings in 2000.

12 Legal proceedings

12.1 The Conseil Général of Vendée and a number of other public and private bodies brought actions in various courts against the shipowner, Steamship Mutual, companies in the Group Total SA and others requesting that the defendants should be held jointly and severally liable for any claims not covered by the 1992 Civil Liability Convention. The 1992 Fund requested to be allowed to intervene in the proceedings. So far only procedural hearings have been held.

12.2 The French State brought actions in the Civil Court in Lorient against Tevere Shipping Co Ltd, Panship Management and Services Srl, Steamship Mutual, Total Transport Corporation, Selmont International Inc, the limitation fund referred to in paragraph 11.7 above and the 1992 Fund, claiming €190.5 million (£130 million).

12.3 Four companies in the Group Total SA took legal actions in the Commercial Court in Rennes against the shipowner, Steamship Mutual, the 1992 Fund and others claiming €143 million (£98 million).

12.4 Steamship Mutual brought action in the Commercial Court in Rennes against the 1992 Fund, requesting the Court, *inter alia*, to note that, in the fulfilment of its obligations under the 1992 Civil Liability Convention, Steamship Mutual had paid €12 843 484 (£8.8 million) corresponding to the limitation amount applicable to the shipowner, in agreement with the 1992 Fund and its Executive Committee. Steamship Mutual further requested the Court to declare that it had fulfilled all its obligations under the 1992 Civil Liability Convention, that the limitation amount had been paid and that the shipowner was exonerated from his liability under the Convention. Steamship Mutual also requested the Court to order the 1992 Fund to reimburse it any amount the shipowner's insurer will have paid in excess of the limitation amount.

12.5 Claims totalling €497 million (£340 million) were lodged against the shipowner's limitation fund constituted by Steamship Mutual. This amount includes the claims by the French Government and Total SA. However, most of these claims, other than those of the French Government and

Total SA, have been settled and it appears therefore that these claims should be withdrawn against the limitation fund to the extent that they relate to the same loss or damage. The 1992 Fund received from the liquidator of the limitation fund formal notifications of the claims lodged against that fund.

12.6 Legal actions against the shipowner, Steamship Mutual and the 1992 Fund were taken by 796 claimants. By 31 January 2006 out-of-court settlements had been reached with 428 of these claimants. The courts had rendered judgements in respect of 57 claims. Actions by 311 claimants (including 145 salt producers) were pending. The total amount claimed in the pending actions, excluding the claims by the French State and Total SA, was €63 million (£43 million).

12.7 The 1992 Fund will continue the discussions with the claimants whose claims are not time-barred for the purpose of arriving at out-of-court settlements if appropriate.

13 Court Judgments in respect of claims against the 1992 Fund[3]

13.1 The document summarises eleven judgements in respect of claims against the 1992 Fund made public since the Executive Committee's October 2005 session and gives information on the developments in respect of six other judgements which have previously been reported to the Committee.

13.2 Commercial Court in Lorient

Supermarkets and hotel

13.2.1 The owner of a supermarket in Quiberon and the owner of a hotel in Carnac had submitted claims for €50 217 (£35 000) and €108 740 (£75 000) respectively relating to losses allegedly suffered in 2000 and 2001 as a result of the *Erika* incident. The Fund had assessed the claims at €27 088 (£19 000) and €50 414 (£35 000) respectively relating to the losses in 2000 but had rejected the claims for losses in 2001 on the ground that there had not been a sufficient link of causation between the alleged losses and the oil pollution resulting from the *Erika* incident.

13.2.2 The owner of a supermarket in Belle-Ile had submitted claims for €127 949 (£87 900) and €68 000 (£46 700) respectively for losses allegedly suffered in 2000 and 2001 as a result of the *Erika* incident. The 1992 Fund had assessed the losses for 2000 at €77 159 (£53 000) and the losses for 2001 at €11 840 (£8 100).

13.2.3 In October 2005 the Court rendered judgements in respect of these claims. In its judgements the Court stated that it was not bound by the Fund's criteria for admissibility and that it was for the Court to interpret the concept of 'pollution damage' in the 1992 Conventions and to apply it in each individual case by determining whether there was a sufficient link of causation between the event and the damage. The Court ordered the Fund to pay the amount of compensation assessed by the Fund to the claimants. Since the facts had not been established, the Court appointed a court expert to establish whether there had been a reduction in turnover in 2000 and 2001 compared with previous years and to determine whether there was a sufficient link of causation between the claimed losses and the *Erika* incident.

13.2.4 In January 2006 the Fund paid to the claimants the amounts it had assessed.

Meat wholesaler

13.2.5 A meat wholesaler had submitted a claim for €55 796 (£38 300) relating to losses allegedly suffered in 2000 as a result of the *Erika* incident. The Fund had rejected the claim on the ground

[3] The judgements were rendered also against the shipowner and Steamship Mutual. In order not to burden the text in paragraphs 13.2.1-13.6.4 reference is made only to the 1992 Fund.

that there had not been a sufficient link of causation between the alleged losses and the contamination resulting from the *Erika* incident.

13.2.6 In respect of this claim it should be noted that the 1992 Fund Assembly had previously decided that a distinction should be made between (a) claimants who sold goods or services directly to tourists (for example the owners of hotels, campsites, bars and restaurants) and whose businesses were directly affected by a reduction in visitors to the area affected by an oil spill; and (b) those who provided goods or services to other businesses in the tourist industry but not directly to tourists (for example wholesalers, manufacturers of souvenirs and postcards and hotel launderers). It was considered that in the case of category (b) there was not a sufficiently close link of causation between the contamination and any losses suffered by claimants. Claims of this type therefore normally do not qualify for compensation in principle.

13.2.7 In a judgement rendered in October 2005 the Court stated that it was not bound by the Fund's criteria for admissibility and that it was for the Court to interpret the concept of 'pollution damage' in the 1992 Conventions and to apply it in each individual case by determining whether there was a sufficient link of causation between the event and the damage. In particular the Court held that a distinction should not be made between claimants who provided goods or services directly to tourists and claimants who provided them indirectly to tourists. However, the Court rejected the claim on the ground that the claimant's turnover had increased in 2000 and that he had not therefore proved any loss.

13.2.8 When this document was issued, the claimant had not appealed against the judgement

Bar

13.2.9 The owner of a bar in Carnac, which had commenced business in June 2000 had submitted a claim for €12 552 (£8 600) relating to losses allegedly suffered in 2000 as a result of the *Erika* incident. The action had been brought before the Court on 8 September 2003. In accordance with the position taken by the Executive Committee in February 2003 the Fund argued that as regards losses before 8 September 2000 the claim was time barred under Article 6 of the 1992 Fund Convention. The Fund also maintained that the rest of the claim should be rejected on the ground that there had not been a sufficient link of causation between the alleged losses and the contamination resulting from the *Erika* incident, nor had the claimant proved that he had suffered any loss.

13.2.10 In December 2005 the Court rejected the claim on the ground the claimant had not proved that he had suffered any loss. The Court did not address the issue of the time bar.

13.2.11 The claimant has appealed against the judgement.

13.3 Commercial Court in Rennes

Property letting and crêperie

13.3.1 A claimant in Finistère had submitted a claim for €77 467 (£52 000) for loss of income of two commercial activities in 2000 and 2001, namely letting furnished property to tourists and running a crêperie. The 1992 Fund had assessed the claim for the year 2000 at €13 819 (£9 000), compared to the claimed amount of €29 367 (£19 893), and had rejected the claim for 2001 on the ground that the *Erika* incident had not had any negative impact on tourism in the area in 2001 and that there was not a link of causation between the loss allegedly suffered in 2001 and the contamination resulting from the *Erika* incident.

13.3.2 In a judgement rendered in June 2005, the Court agreed with the 1992 Fund's assessment of the losses in 2000. The Court considered, however, that although the claimed amount for 2001 appeared exaggerated, it was not unrealistic to believe that the psychological effect of the

pollution caused by the *Erika* incident could have influenced the 2001 tourist season. The Court stated, however, that it did not have sufficient information to be able to assess the quantum of the losses for 2001. The Court requested the Fund's experts to assess the claim for that year as regards both commercial activities. The 1992 Fund's experts have assessed the claim as requested by the Court and the Fund will make a settlement proposal to the claimant.

Fishing ports

13.3.3 A Chamber of Commerce had submitted a claim for €16 470 (£11 000) for additional costs incurred as a consequence of the *Erika* incident. Of the amount claimed, €1 703 (£1 151) related to a series of analyses of seawater for oil pollution in ports along the coast of South Finistère, and €13 589 (£9 184) related to the costs of increased consumption of fresh water used to clean up the stalls of a fish auction hall. The claim had been assessed by the 1992 Fund at €7 065 (£4 800), of which €1 093 (£740) was for the seawater analyses and €4 789 (£3 236) for the increased consumption of fresh water. In its assessment the Fund had excluded the cost of the seawater analyses that had been carried out in two ports located outside the area affected by the contamination.

13.3.4 In a judgement rendered in June 2005, the Court agreed with the 1992 Fund's assessment of the part of the claim relating to the increased consumption of fresh water. As regards the seawater analyses the Court noted, however, that the authorities had given instructions that such analyses should be carried out along the entire coast of South Finistère. The Court held that seawater analyses carried out in ports in the area should not be discarded even if the oil did not eventually affect them. The Court considered that the analyses in those ports had been justified and should have been included in the assessment. Therefore, the Court requested the parties to re-assess the claim accordingly.

13.3.5 The 1992 Fund's experts have reassessed the claim for seawater analyses taking into account the Court's decision in this regard and a settlement has been reached with the claimant.

Taxi boats

13.3.6 The owner of a company operating taxi boats had submitted a claim for loss of income due to the *Erika* incident. At the claimant's request the Civil Court in Sable d'Olonne had appointed a court expert to determine the amount of the claimant's loss. In accordance with the expert's report the Fund had offered to pay the claimant €67 840 (£46 000) as compensation for his loss during the period 25 December 1999 - 13 August 2001. The claimant had signed a settlement agreement in August 2001 and had received the settlement amount. However, in the same month the claimant had requested the Civil Court in Sables d'Olonne to reappoint the same expert to determine his loss in 2001 which had not been covered by the settlement agreement. In January 2002 that Court had appointed that expert to determine the possible loss which had not been covered by the settlement agreement. Further to the expert's second report, the claimant had filed a claim for loss of income in 2001 at €12 653 (£8 700) in January 2004, but the Court had rejected this claim in May 2004.

13.3.7 The claimant re-submitted his claim for €13 385 (£9 200) to the Commercial Court in Rennes maintaining that the settlement agreement did not preclude him from claiming for losses which the settlement had covered. The Fund argued that in the settlement agreement signed in August 2001 the claimant had acknowledged that the Fund had paid the settlement amount in full for the economic losses suffered during the period 25 December 1999 - 13 August 2001.

13.3.8 In a judgement rendered in October 2005 the Court rejected all claims for the period 25 December 1999 - 13 August 2001. However, the Court accepted the claim for losses suffered during the period 14 August 2001 - 31 October 2001 which was not covered by the settlement agreement and assessed that loss at €8 884 (£6 100). The 1992 Fund did not appeal against the judgement and paid the amount determined by the Court in November 2005.

Union of salt producers

13.3.9 A salt producers union had submitted a subrogated claim for €16 327 (£11 200) relating to advance payments made by the union to 51 members for exceptional expenses for the restoration of salt marshes in 2001 which had become necessary as a result of the *Erika* incident. The union had argued that the commencement of the salt production had been delayed for two months compared to normal seasons due to the necessity to restore the salt marshes which, as a result of the incident, had suffered from the proliferation of harmful animals and plants. A report by a professor at the Laboratory of Marine Biology in Nantes had concluded that this proliferation had not been caused by the *Erika* incident but by the exceptionally heavy rain between the harvesting seasons of 2000 and 2001. The claim had therefore been rejected by the Fund.

13.3.10 In a judgement rendered in October 2005 the Court held that, in the light of the expert's reports, the claimant had not established a sufficient link of causation between the alleged loss and the oil pollution resulting from the *Erika* incident and rejected the claim.

13.3.11 The claimant has not appealed against the judgement.

13.4 Civil Court in Saint-Nazaire

Bar/hotel/restaurant

13.4.1 The owner of a bar/hotel/restaurant in la Baule-Ecoubliac had submitted a claim for €33 074 (£22 700) relating to loss of income in 2000 due to the *Erika* incident. The Fund had assessed that claim at €17 775 (£12 200) and had paid the claimant that amount. In January 2002 the claimant submitted a second claim for €130 968 (£90 000) for losses allegedly suffered as a result of the closure of their business at the end of 2000 due to the *Erika* incident. Since the claimants had admitted that they had decided to close their business well before the incident, the Fund had argued that there had not been a sufficient link of causation between the alleged loss and the oil pollution resulting from the *Erika* incident and had rejected that claim.

13.4.2 In a judgement rendered in December 2005, the Court, referring to the fact that the Fund had recognised that the Fund's criteria were not binding in respect of the Contracting States, held that it should apply Article 1382 of the Civil Code in order to determine whether the claimant had established a sufficient link of causation between the alleged loss and the pollution resulting from the *Erika* incident. Since the Court did not have sufficient information to enable it to determine whether the alleged losses had been caused by the oil spill the Court appointed a court expert to determine whether the reduction in turnover had made it impossible for the claimant to continue the business and, if so, assess the amount of the losses.

Take-away business

13.4.3 The owner of a company letting commercial premises to a take-away business had submitted a claim for €6 329 (£4 340) for loss of income allegedly suffered in 2000, 2001 and 2002 due to the *Erika* incident. The Fund had rejected the claim on the ground that the claimant provided services to other businesses in the tourist industry but not directly to tourists, a 'second degree' claim, and that, for this reason, there was not a sufficient link of causation between the contamination and the alleged loss.

13.4.4 In its judgement rendered in December 2005 the Court stated that it was not bound by the criteria for admissibility laid down by the 1992 Fund which are internal to the Organisation and do not have a supranational character. The Court held that, under French law, a claim for compensation was admissible if the claimant could prove that there was a sufficient link of causation between the event and the damage. The Court decided that, as far as the claim for loss of income in 2000, there was a reduction in the letting of the premises and that this loss should be considered as

directly related to the *Erika* incident. As far as the claim for loss of income in 2001 and 2002, the Court agreed with the Fund's view that there was no link of causation between the loss and the contamination. The Court ordered the shipowner, Steamship Mutual and the 1992 Fund to pay compensation to the claimant for loss of rental income in 2000 at €1 618 (£1 100) plus €1 300 (£880) for costs and rejected the claim for losses in 2001 and 2002.

13.4.5 The judgement is at variance with the criteria for admissibility of claims adopted by the 1992 Fund governing bodies with regard to 'second degree' claims. The 1992 Fund has rejected a number of other second degree claims arising from the *Erika* incident. In order to respect the principle of equal treatment of claimants, the 1992 Fund will appeal against the judgement in spite of the very low amount involved, unless the Executive Committee instructs the Director to the contrary.

13.5 Commercial Court in Vannes

Hotel/restaurant

13.5.1 An owner of a hotel/restaurant had submitted a claim €50 063 (£34 400) relating to loss of income for the period 25 December 1999 - 30 September 2000 due to the *Erika* incident. The Fund had assessed the claim at €27 701 (£19 000). However, the claimant did not accept this assessment and brought legal action, including an additional claim for €27 509 (£18 900) relating to bank charges for the period 2000 - 2003. The Fund had rejected the additional claim on the ground that there had not been a sufficient link of causation between the alleged loss and the oil pollution resulting from the *Erika* incident.

13.5.2 In a judgement rendered in November 2005 the Court endorsed the Fund's assessment and rejected the additional claim on the ground invoked by the Fund.

13.5.3 The claimant has not appealed against the judgement.

Fish merchant

13.5.4 A fish merchant had submitted a claim for €5 182 (£3 600) relating to loss of income in January and February 2000 due to the *Erika* incident. The Fund had assessed the claim at €5 132 (£3 500), and that amount was paid to the claimant. The claimant submitted an additional claim for €8 062 (£5 500) relating to loss of income for the period from 1 March to 31 October 2000. The Fund had assessed that claim at €476 (£330) on the basis that the Fund had not taken into account the additional labour force recruited by the claimant only in August 2000 for the calculation of the loss of income in 2000. The claimant rejected this offer and subsequently filed a claim in the Commercial Court in Vannes for €9 088 (£6 200) relating to 20% of the settlement amount of his initial claim and loss of income for the period from 1 March - 31 October 2000 due to the *Erika* incident.

13.5.5 In a judgement rendered in December 2005 the Court accepted the claimant's calculation of the loss. The Fund will not appeal against the judgement.

13.6 Commercial Court in La Roche sur Yon

Seasonal letting activities

13.6.1 In September 2005 the Court rendered four judgements relating to claims by estate agencies in Vendée for losses suffered in their activity of seasonal lettings of furnished apartments and villas in the year 2000, allegedly as a consequence of the reduction in the number of tourists in the affected area due to the *Erika* incident. The Fund had as regards three of the claims assessed the losses at amounts lower than those claimed. The fourth daim was rejected by the 1992 Fund since, in the Fund's opinion, the claimant had not proven any losses.

13.6.2 In the four judgements, the Court stated that it was not bound by the 1992 Fund's criteria for admissibility. The Court held that it was for the Court to interpret the concept of 'pollution damage' in the 1992 Conventions and to apply it to the individual claim by determining whether there was a sufficient link of causation between the event that lead to the damage ('le fait générateur') and the losses suffered, and by assessing the extent of the damage suffered by the victims according to the criteria of French law. The Court stated that no doubt had been raised as to the existence of a link of causation between the contamination caused by the *Erika* incident and the losses suffered. The Court considered that the assessment of the loss could not be calculated only on the basis of the number of property owners' requests for lettings received by the agent, but that account should also be taken of the number of weeks that the apartments or houses were let. The Court therefore awarded the full claimed amounts to three of the four claimants and decided that the judgements were immediately enforceable, whether or not appeals were lodged. In the case of the claimant whose claim had been rejected by the 1992 Fund, the Court awarded the claimant an amount of €11 696 (£8 000), compared to the claimed amount of €25 383 (£17 400).

13.6.3 At its October 2005 session, the Executive Committee endorsed the Director's intention to instruct the 1992 Funds' experts to examine the judgements and advise him as to whether the amounts awarded by the Courts, or some of them, were not unreasonable, in order to enable him to decide whether the Fund should lodge appeals (document 92FUND/EXC.30/10, paragraph 3.4.44).

13.6.4 After having examined the judgements, the Fund's experts expressed the view that the amounts awarded were unreasonable. The Fund therefore appealed against all four judgements.

14 Action to be taken by the Executive Committee

The Executive Committee is invited:

(a) to take note of the information contained in this document;

(b) to consider the Director's proposal as regards the assessment of the French Government's claim (section 7); and

(c) to give the Director such instructions in respect of the handling of this incident as it may deem appropriate.