



## INCIDENTS INVOLVING THE 1992 FUND

### ERIKA

#### Note by the Director

**Summary:**

As of 23 January 2004, 6 892 claims for compensation have been submitted and 94% of the claims have been assessed. Compensation payments totalling FFr583million or €89 million (£61.5 million<sup><1></sup>) in respect of 5 436 claims have been made. Some 600 claimants have taken legal action against the shipowner, his insurer and the 1992 Fund. Since the actions were taken, out-of-court settlements have been reached with over 270 claimants.

In December 2003, the Commercial Court in Lorient rendered judgements in respect of four claims for pure economic loss which had been rejected by the 1992 Fund, since in the Fund's view they did not fulfil the criteria of admissibility laid down by the Fund's governing bodies. The Court held that the question of whether a claim was admissible would be decided in accordance with the criteria of French law and accepted the claims as admissible in principle. The Fund has appealed against the judgements.

**Action to be taken:**

To decide whether the 1992 Fund should pursue these appeals.

### 1 Introduction

- 1.1 This document sets out recent developments in respect of the *Erika* incident which occurred off the coast of Brittany (France) on 12 December 1999.
- 1.2 As regards the incident, the clean-up operations, the removal of the oil from the wreck of the *Erika* and the impact of the spill, reference is made to the Annual Report 2002 (pages 95-107).
- 1.3 Since the Executive Committee's February 2003 session, no developments have taken place with respect to the court surveys for evaluation of damages, the investigation into the cause of the incident and the various court actions, except as set out below.

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<1> The French franc was replaced by the Euro on 1 January 2002. Since 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 to a large extent been given in both currencies. The rate of conversion is €1 = FFr6.55957). Conversion of Euro into Pounds sterling has been made on the basis of the rate at 31 December 2003 (€1 = £0.70462) except in the case of claims paid by 1992 Fund where conversions have been made at the rate of exchange on the date of payment.

## **2 Shipowner's limitation fund**

- 2.1 At the request of the shipowner, the Commercial Court in Nantes issued an order on 14 March 2000 opening limitation proceedings. The Court determined the limitation amount applicable to the *Erika* at FFr84 247 733 corresponding to €12 843 484 (£9 million) and declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the shipowner's P & I insurer, Steamship Mutual Underwriting Association (Bermuda) Limited (Steamship Mutual).
- 2.2 In 2002, the limitation fund was transferred from the Commercial Court in Nantes to the Commercial Court in Rennes and a new liquidator was appointed.

## **3 Maximum amount available for compensation**

- 3.1 The maximum amount available for compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention is 135 million Special Drawing Rights (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.
- 3.2 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).
- 3.3 The Director's calculation gave 135 million SDR = FFr1 211 966 811 corresponding to €184 763 149 (£130 million), and the Executive Committee endorsed this calculation at its April 2000 and October 2001 sessions. In October 2000 and October 2001 the Assembly endorsed the Committee's decision.

## **4 Undertakings by TotalFinaElf and the French Government**

- 4.1 TotalFinaElf 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 disposal of oily waste and 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.
- 4.2 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 TotalFinaElf if funds were available after all other claims had been paid in full.

## **5 Other sources of funds**

- 5.1 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. As at 23 January 2004, OFIMER had paid €4.2 million (£3.0 million) to claimants in the fishery sector and €2.1 million (£1.5 million) to salt producers.

- 5.2 The French Government also introduced a scheme to provide supplementary payments in the tourism sector. Payments totalling €10.1million (£7.1 million) have been made under that scheme.

## **6 Level of the 1992 Fund's payments**

- 6.1 At its 20th session, held in February 2003, the Executive Committee authorised the Director to increase the level of payments from 80% to 100% of the amount of the loss or damage actually suffered by the respective claimants as assessed by the 1992 Fund's experts when he considered it safe to do so. After a careful assessment, the Director considered in April 2003, in spite of the remaining uncertainties as to the total level of admissible claims, that there was a significant safety margin and decided to increase the level of payments to 100% (document 92FUND/EXC.20/7, paragraph 3.2.48).
- 6.2 At the Executive Committee's 22nd session in October 2003, 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 (document 92FUND/EXC.22/14, paragraph 3.4.11). After having reviewed his earlier assessment of the total level of admissible claims, the Director decided that there was a sufficient margin to enable the 1992 Fund to commence payments to the French State. On 29 December 2003, the 1992 Fund paid €10 106 004 (£6 973 146) to the French State, corresponding to the French Government's subrogated claim in respect of the supplementary payments to claimants in the tourism sector.

## **7 Claims situation**

- 7.1 As at 23 January 2004, 6 892 claims for compensation had been submitted for a total of FFr1 354 million or €206million (£145 million). Six thousand four hundred and eighty-two claims totalling FFr1 179 million or €180 million (£127 million) had been assessed at a total of FFr653 million or €99 million (£70 million). Assessments had thus been carried out of 94% of the total number of claims received.
- 7.2 Seven hundred and ninety-five claims, totalling FFr154 million or €23 million (£16 million), had been rejected.
- 7.3 Payments for compensation had been made in respect of 5 436 claims for a total of FFr583 million or €88.9 million (£61.5 million), out of which the Steamship Mutual had paid FFr84 million or €12.8 million (£8.9million) and the 1992 Fund FFr499 million or €76.1 million (£52.6 million).
- 7.4 The tables below give details of the processing of claims in various categories.

Claims submitted by 23 January 2004							
Category	Claims submitted	Claims assessed	Claims for which payments have been made	Claims rejected			
Mariculture and oyster farming	998	994	99%	829	83%	88	9%
Shellfish gathering	525	508	97%	361	69%	94	18%
Fishing boats	318	317	99%	279	88%	28	9%
Fish and shellfish processors	51	47	92%	37	73%	6	12%
Tourism	3 630	3 590	99%	3 087	84%	441	12%
Property damage	705	433	61%	322	46%	97	14%
Clean-up operations	144	124	86%	94	65%	12	8%
Miscellaneous	521	469	90%	427	82%	29	6%
<b>Total</b>	<b>6 892</b>	<b>6 482</b>	<b>94%</b>	<b>5 436</b>	<b>79%</b>	<b>795</b>	<b>12%</b>

Payments authorised and made by 23 January 2004				
Category	Payments authorised		Payments made	
	Number of claims	Amounts FFr	Number of claims	Amounts FFr
Mariculture and oyster farming	907	50 816 876	829	29 630 370
Shellfish gathering	409	5 707 672	361	3 373 661
Fishing boats	289	7 225 430	279	4 662 461
Fish and shellfish processors	41	6 322 944	37	6 291 440
Tourism	3 140	476 865 300	3 087	471 687 201 <sup>&lt;2&gt;</sup>
Property damage	334	14 137 421	322	12 660 943
Clean-up operations	111	36 827 709	94	30 771 428
Miscellaneous	438	35 680 039	427	23 948 361
<b>Total</b>	<b>5 669</b>	<b>633 583 392</b>	<b>5 436</b>	<b>583 051 145</b>

## 8 Actions in France against TotalFinaElf, the shipowner and others

8.1 In April and May 2000 the Conseil Général de la Vendée and a number of other public and private bodies brought actions in various courts in France against the following parties and requested that the Court should hold the defendants jointly and severally liable for any damage not covered by the 1992 Civil Liability Convention:

TotalFinaElf SA (holding company)  
 Total Raffinage Distribution SA (shipper)  
 Total International Ltd (seller of cargo)  
 Total Transport Corporation (voyage charterer of the *Erika*)  
 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*)  
 RINA (Registro Italiano Navale) (classification society)

8.2 The plaintiffs have maintained that Tevere Shipping Company Ltd and Panship had unlimited liability, due to the fact that the *Erika* was unseaworthy. It has been argued that RINA had not fulfilled its obligations to survey and monitor the *Erika* and, by allowing the vessel to go to sea on

<2> Of this amount FFr66 291 039 or €10 106 003 (£6 973 146) represents reimbursement to the French Government in respect of payments made to claimants in the tourism sector.

24 November 1999 knowing that repairs were urgently needed, had deliberately taken a risk knowing that damage might 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*.

- 8.3 The 1992 Fund has requested to be allowed to intervene in the proceedings. So far only procedural hearings have been held.

## **9 Recourse actions by the 1992 Fund**

- 9.1 A criminal investigation into the cause of the incident is being carried out by an examining magistrate in Paris. During 2000 charges were brought against the master of the *Erika*, the representative of the registered owner (Tevere Shipping), the president of the management company (Panship Management and Services Srl), the management company itself, the deputy manager of Centre Régional Opérationnel de Surveillance et de Sauvetage (CROSS), three officers of the French Navy who were responsible for controlling the traffic off the coast of Brittany, the classification society (RINA) and one of RINA's managers. In December 2001 charges were brought against Total Fina and some of its senior staff on the basis of a report by an expert appointed by the magistrate. In June 2003 charges were brought against the Malta Maritime Authority and against its Director. The investigation has not yet been completed.

- 9.2 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 investigation is being carried out by a panel of four experts and has not yet been completed.

- 9.3 Pending the outcome of the ongoing investigations into the cause of the incident, the Executive Committee at its 18th session, held in October 2002, authorised the Director to take recourse actions, as a protective measure, before the expiry of the three-year time period against the following parties:

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

- 9.4 At its October 2002 session, the Executive Committee noted that the results of the investigations into the cause of the incident might give grounds for the 1992 Fund to take recourse action against parties other than those referred to above, but that the Director considered that no decision was required in this regard at that stage, since the three-year time bar period did not apply to such other parties.

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

- 9.6 After the Executive 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 (Tribunal de Grande Instance) in Lorient on 11 December 2002.

- 9.7 There have been no developments in respect of these actions during 2003.
- 9.8 As mentioned in paragraph 9.1 above, criminal charges have been brought against, *inter alia*, the deputy manager of CROSS and three officers of the navy. If they were found guilty there might be grounds for the 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 investigations into the cause of the incident have been completed.
- 9.9 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, such a claim should be notified to the French Administration by 31 December of the fourth year after the event giving rise to a claim, i.e. in the case of the *Erika* incident by 31 December 2003. At its 22nd session in October 2003, the Executive Committee instructed the Director to take the necessary steps to prevent possible future claims against the French State becoming time-barred (document 92FUND/EXC.22/15, paragraph 3.4.20). The 1992 Fund made a notification of its potential claim to the French Administration in December 2003 and the French State has accepted that this notification has the effect of interrupting the time bar.

## **10 Legal actions taken by the French State**

- 10.1 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 above and the 1992 Fund, claiming €190 553 427 (£134 million) (which could be increased at a later stage), plus interest at the legal rate, as follows:

€50 124 354 (£35 million) in respect of expenses occurred by the Ministries of Interior, Defence, Economy, Finance and Industry and Health;

€127 395 920 (£97 million) in respect of payments made under the French oil pollution contingency plan Plan Polmar;

€3 033 152 (£9.2 million) in respect of compensation payments made to victims.

- 10.2 The French State requested the Court to order the defendants, except the limitation fund and the 1992 Fund, to pay €190 553 427 (£134 million). The State further requested that the Court should declare that the limitation fund and the 1992 Fund should execute the judgement within the respective limits laid down in the 1992 Civil Liability Convention and the 1992 Fund Convention.

## **11 Legal action taken by the Group TotalFinaElf**

Four companies in the Group TotalFinaElf, namely TotalFinaElf SA, TotalFinaElf France SA (in succession of Total Raffinage Distribution SA), Total International Ltd and Total Transport Corporation, commenced actions in the Commercial Court in Rennes against Tevere Shipping Co Ltd, Panship Management & Services Srl, Steamship Mutual, the limitation fund, RINA, Registro Italiano Navale and the 1992 Fund. The claim is for €43 million (£101 million) (which could be increased at a later stage), allegedly admissible under the 1992 Fund Convention, and for €3 million (£2.1 million) for the cost of an 'expertise judiciaire'. The TotalFinaElf Group of companies has also claimed interest at the legal rate. As regards the action against the 1992 Fund, the Group has requested a declaration that the claim is admissible for €43 million (£100 million) but that the right to compensation will be exercised only if all victims (including the French State and the public bodies) are compensated in full.

## 12 Legal action taken by Steamship Mutual

Steamship Mutual brought action in the Commercial Court in Rennes against the 1992 Fund, requesting *inter alia* the Court to note that, in the fulfilment of its obligations under the 1992 Civil Liability Convention, Steamship Mutual had paid €12 843 484 (£9.0 million) corresponding to the limitation amount applicable to the shipowner, in agreement with and under the control of the 1992 Fund and its Executive Committee. Steamship Mutual further requested the Court to declare that it had fulfilled all its obligations under the 1992 Civil Liability Convention, that the limitation amount had been paid and that the shipowner was exonerated from his liability under the Convention. Steamship Mutual has also requested the Court to order the 1992 Fund to reimburse it any amount it will have paid in excess of the limitation amount.

## 13 Actions by other claimants

- 13.1 Claims totalling €484 million (£340 million) have been lodged against the shipowner's limitation fund constituted by the shipowner's insurer, Steamship Mutual. This amount includes the claims by the French Government at €91 million (£135 million) and by TotalFinaElf at €70 million (£120 million). However, most of these claims, other than those of the French Government and TotalFinaElf, 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 has received formal notification from the liquidator of the limitation fund of the claims lodged against that fund.
- 13.2 By 23 January 2004, court actions taken by 499 claimants (including 212 salt producers) against the shipowner, Steamship Mutual and the 1992 Fund were pending. The total amount claimed, excluding the claims by the French State and TotalFinaElf, was FF553 million or €84.4 million (£59 million).
- 13.3 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.

## 14 Court judgements in respect of claims against the 1992 Fund

- 14.1 In December 2003, the Commercial Court in Lorient rendered judgements in respect of four claims in the tourism and fisheries sectors relating to "pure economic loss"<sup><3></sup> which had been rejected by the shipowner, Steamship Mutual and the 1992 Fund.
- 14.2 Pending the Executive Committee's consideration of the issues involved, the Director has appealed against the judgements to the Court of Appeal in Rennes. In order to enable the Committee to take a position as to whether the appeals should be pursued, details of the four judgements are given below.

### *Background information on the Fund's criteria for admissibility of claims*

- 14.3 It will be recalled that in view of the experience of the *Haven*, *Aegean Sea* and *Braer* incidents in the early 1990s, the 1971 Fund Assembly established in 1994 an intersessional Working Group to examine the general criteria for the admissibility of claims for compensation within the scope of the 1969 Civil Liability Convention, the 1971 Fund Convention and the 1992 Civil Liability and Fund Conventions, and to study, in particular, claims relating to 'pure economic loss'. In its report to the Assembly (document FUND/A.17/23), the Working Group emphasized that a uniform interpretation of the definition of 'pollution damage' was essential for the functioning of the regime of compensation established by these Conventions. The conclusions of the Working Group

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<3> The term 'pure economic loss' means loss of earnings sustained by persons whose property has not been polluted but who have nevertheless suffered economic loss as a result of an incident.

set out in its report to the 1971 Fund Assembly (document FUND/A.17/23) was endorsed by the Assembly at its 17th session held in October 1994 (document FUND/A.17/35, paragraph 26.8).

- 14.4 As regards pure economic loss, the criteria for admissibility adopted by the Working Group can be summarised as follows:

To qualify for compensation for pure economic loss, there must be a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant. A claim is not admissible for the *sole* reason that the loss or damage would not have occurred had the oil spill not happened. When considering whether the criterion of reasonable proximity is fulfilled, the following elements should be taken into account:

- the geographic proximity between the claimant's activity and the contamination
- the degree to which a claimant is economically dependent on an affected resource
- the extent to which a claimant has alternative sources of supply
- the extent to which a claimant's business forms an integral part of the economic activity within the area affected by the spill.

Account should also be taken of the extent to which a claimant was able to mitigate his loss.

- 14.5 In connection with the *Sea Empress* incident, the 1971 Fund Executive Committee decided at its 53rd session, held in April 1997, that, as regards the tourism sector, the Funds should make a distinction between (a) claimants who sold goods or services directly to tourists 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. It was decided that in this second category there was generally not a sufficient degree of proximity between the contamination and the losses allegedly suffered by claimants. Claims of this type would therefore normally not be admissible in principle.
- 14.6 At its 1st session, held in June 1996, the 1992 Fund Assembly adopted a resolution on the admissibility of claims for compensation. In this Resolution the Assembly resolved that the report of the above-mentioned Working Group of the 1971 Fund should form the basis of the policy of the 1992 Fund on the criteria for the admissibility of claims and decided that the criteria hitherto laid down by the 1971 Fund Executive Committee should be applied by the 1992 Fund in its consideration of the admissibility of claims (document 92FUND/A.1/34, Annex III).

#### *Judgements against the 1992 Fund*

- 14.7 One of the judgements by the Commercial Court in Lorient relates to a claim in respect of loss of income allegedly suffered by a claimant whose property in the affected area was to be let to other businesses (and not directly to tourists) but which, according to the claimant, could not be let due to the negative effects of the *Erika* incident. Since this claim fell within the second category referred to in paragraph 14.5, the 1992 Fund rejected the claim. In addition, in the Fund's view the claimant had not proven that he had suffered any loss as a result of the incident.
- 14.8 In its judgement on the claim referred to in paragraph 14.7, the Commercial Court stated that its function was to establish whether there was damage and, if so, to assess it in accordance with the criteria of French law. The Court held that, under French law, a claim for compensation is admissible if the loss is direct and certain, provided there is a sufficient link of causation between the event and the damage, and it is shown that the damage would not have occurred if the event had not taken place. In the Court's view, the *Erika* incident was the sole cause of the pollution and its economic consequences, and the pollution had caused a reduction in tourism, a decrease in sales of products related to the sea in the affected area and generally a reduction in turnover of all activities linked to the sea. The Court stated that it was not bound by the criteria for admissibility

laid down by the 1992 Fund. The Court also considered that a letter from an estate agency showed that a contract for the lease of the property had been cancelled due to the *Erika* incident. The Court ordered the shipowner, Steamship Mutual and the 1992 Fund to pay compensation to the claimant for loss of rental income at €10 671 (£7 500).

- 14.9 The second judgement relates to a claimant selling and renting out machines for the production of ice cream. This claim was also rejected by the 1992 Fund since the claim falls within the second category referred to in paragraph 14.5 above. In this case, the Court made the same statement as regards the criteria to be applied and stated that it was not bound by the Fund's criteria (see paragraph 14.8). The Court considered that for claimants in this category there could exist damage caused by a 'domino effect' ('un préjudice par ricochet'), since it was clear that businesses directly affected by a decrease in tourism reduced their normal investments and purchases. The Court also considered that it was possible that the claimant's customers in the affected area had postponed or cancelled their orders for such machines resulting in the claimant suffering a loss in respect of which there was a direct link of causation between the incident and the damage. The Court held that, since these machines could be sold outside the affected area, the admissibility of the claim depended on the normal turnover of sales or rental of machines in the area affected by the oil spill but considered that the reduction in turnover resulting from sales within that area had not been shown. For this reason the Court appointed an expert to establish whether, and if so to what extent, the reduction in turnover resulted from a decrease in orders for such machines relating to the affected area.
- 14.10 The third judgement relates to a claim by a hotel situated in Carnac. The 1992 Fund had compensated the claimants for losses suffered in 2000 but had rejected a claim for further losses allegedly suffered in 2001 since the clean-up operations in the Carnac area had been completed in February 2000 and there was no indication that the *Erika* incident had had any negative impact on tourism beyond November 2000. After having made the same statement as regards the criteria to be applied and stating that it was not bound by the Fund's criteria (see paragraph 14.8), the Court appointed an expert to assess whether the hotel had suffered a loss in 2001 compared to previous and subsequent years and, if so, whether the loss was directly linked to the *Erika* incident.
- 14.11 The fourth judgement relates to a claim by an oyster grower in Morbihan who had received compensation for losses due to a reduction in sales suffered up to 30 September 2000 but whose claim for losses for the period 1 October to 31 December 2000 had been rejected by the Fund on the grounds that there was no reduction in sales in the shellfish sector after 30 September 2000, except as regards oyster growers located in the areas which remained affected after that date which was not the case in respect of this claimant. After having made the same statement in respect of the criteria to be applied and stating that it was not bound by the Fund's criteria (see paragraph 14.8), the Court appointed an expert to assess whether the claimant had suffered a loss during that period and, if so, whether there was a direct link between the loss and the *Erika* incident.

*Director's considerations*

- 14.12 The Director makes the following observations in respect of these judgements.
- 14.13 The Commercial Court stated that it should apply the criteria under French law. The Court held that it was not bound by the Fund's criteria and it did not take any account of these criteria. The issue of whether the Funds' criteria should be taken into account by national courts is the major issue in a large number of other court actions in relation to the *Erika* incident. The governing bodies of the 1992 and 1971 Funds have repeatedly emphasized the importance of a uniform application of the 1992 Conventions for the proper functioning of the international compensation regime. The Funds' criteria were developed and adopted by the 1971 and 1992 Funds' governing bodies in order to promote a uniform application of the Conventions. In this regard, reference is made to the conclusions of the above-mentioned intersessional Working Group of the 1971 Fund (document FUND/A.17/23, paragraphs 7.13 and 7.14) and 1992 Fund Resolution No. 3 on

admissibility of claims for compensation adopted in June 1996 by the 1992 Fund Assembly referred to above.

- 14.14 This question was most recently addressed by the 1992 Fund Administrative Council at its 1st session in May 2003 when the Council adopted a Resolution (1992 Fund Resolution N<sup>o</sup>. 8). In the Resolution, it was recognised that under Article 31.3 of the 1969 Vienna Convention on the Law of Treaties, for the purpose of the interpretation of treaties there shall be taken into account any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. The Resolution drew attention to the fact that the governing bodies of the 1971 and 1992 Funds had taken a number of important decisions on the interpretation and application of the 1969, 1971 and 1992 Conventions for the purpose of ensuring equal treatment of all those who claimed compensation for oil pollution damage. The Council emphasised that it was vital that the decisions taken by the governing bodies of the 1971 Fund and the 1992 Fund were given due consideration when national courts in Member States took decisions on the interpretation and application of the 1992 Conventions and considered that such decisions by the Fund's governing bodies should be taken into account by the courts. It should also be noted that the application of uniform criteria for the admissibility of claims becomes especially important in respect of incidents causing pollution damage in several States, such as the *Prestige* incident which has affected France, Spain, Portugal and the United Kingdom.
- 14.15 Although only the judgement referred to in paragraph 14.8 held that the claim was admissible and ordered the 1992 Fund to pay a certain amount in compensation, the Court did not in any of the four judgements take the 1992 Fund's criteria into account. The 1992 Fund's French lawyers have advised the Director that if the Fund wishes to bring the issue of the importance of uniform application of the Conventions before the Court of Appeal, it should appeal against all four judgements.
- 14.16 In view of the importance which this issue has for the proper functioning of the compensation regime based on the 1992 Conventions, the Director takes the view that the 1992 Fund should pursue the appeals against all four judgements.

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

The Executive Committee is invited:

- (a) to take note of the information contained in this document; and
  - (b) to decide whether to pursue the appeals against the four judgements referred to in section 14.
-