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INCIDENTS INVOLVING THE 1992 FUND

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Note by the Director

Summary:

Six thousand nine hundred and seventeen claims for compensation have been submitted and 94.5% of the claims have been assessed. Compensation payments totalling FFr598 million or €91 million (£64 million^{<1>}) in respect of 5 501 claims have been made. Legal actions against the shipowner, his insurer and the 1992 Fund were taken by 795 claimants. Out-of-court settlements have been reached with 313 of these claimants. Actions by 482 claimants are pending.

In December 2003, a 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. A hearing took place in respect of one of these claims on 20 April 2004 before the Court of Appeal of Rennes which is expected to render its judgement on 25 May 2004.

In January 2004, another French court rejected a claim for pure economic loss by the owners of two hotels, stating that, in the circumstance of the case and in the light of criteria established by the 1992 Fund, which were, in the court's view, dictated by common sense, the claimant had not shown a link of causation between the alleged losses and the oil pollution caused by the *Erika* incident.

In April 2004, a French court rejected a claim by a travel agency/tour operator for pure economic loss, mainly on the grounds that it did not fulfil the criterion established by the Fund that there should be a reasonable degree of proximity between the oil pollution and the alleged loss.

Action to be taken: Information to be noted.

<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 26 April 2004 (€1 = £0.664) 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 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 2003 (pages 88-89).
- 1.3 Since the Executive Committee's February 2004 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.

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 (£8.5 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 = FFr1211 966 811 corresponding to €184 763 149 (£123 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 claims against the 1992 Fund or against the limitation fund constituted by the shipowner or his insurer 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 28 April 2004, OFIMER had paid €4.2 million (£2.8 million) to claimants in the fishery sector and €2.1 million (£1.4 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 (£6.7 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 28 April 2004, 6 917 claims for compensation had been submitted for a total of FFr1 355 million or €207 million (£137 million). Six thousand five hundred and thirty-six claims totalling FFr1 218 million or €88 million (£25 million) had been assessed at a total of FFr667 million or €102 million (£68 million). Assessments had thus been carried out of 94.5% of the total number of claims received.
- 7.2 Eight hundred and three claims totalling FFr135 million or €21 million (£14 million) had been rejected.
- 7.3 Payments for compensation had been made in respect of 5 501 claims for a total of FFr598 million or €91 million (£64 million), out of which the Steamship Mutual had paid FFr84 million or €12.8 million (£9 million) and the 1992 Fund FFr513.5 million or €78 million (£55 million).
- 7.4 The tables below give details of the processing of claims in various categories.

Claims submitted by 28 April 2004							
Category	Claims submitted	Claims assessed		Claims for which payments have been made		Claims rejected	
Mariculture and oyster farming	1 000	996	99%	832	83%	89	9%
Shellfish gathering	524	513	98%	364	69%	96	18%
Fishing boats	318	318	100%	279	88%	29	9%
Fish and shellfish processors	51	50	99%	39	76%	6	12%
Tourism	3 650	3 621	99%	3 121	86%	444	12%
Property damage	706	435	62%	326	46%	98	14%
Clean-up operations	146	132	90%	106	73%	12	8%
Miscellaneous	522	471	70%	434	83%	29	6%
Total	6 917	6 536	94.5%	5 501	79%	803	12%

Payments authorised and made by 28 April 2004				
Category	Payments authorised		Payments made	
	Number of claims	Amounts FFr	Number of claims	Amounts FFr
Mariculture and oyster farming	910	50 878 568	832	29 645 479
Shellfish gathering	414	5 750 605	364	3 395 243
Fishing boats	289	7 225 431	279	4 671 320
Fish and shellfish processors	44	6 415 152	39	6 387 848
Tourism	3 180	484 701 214	3 121	479 375 946 ^{<2>}
Property damage	338	14 256 115	326	13 348 847
Clean-up operations	119	39 932 723	106	34 512 357
Miscellaneous	441	39 715 546	434	26 389 312
Total	5 735	648 875 354	5 501	597 726 352

8 Legal proceedings

- 8.1 A number of court actions for compensation have been brought in various jurisdictions in France.
- 8.2 The Conseil Général of Vendée and a number of other public and private bodies have brought actions in various courts against the shipowner, his insurer, companies in the Group TotalFinaElf and others requesting that the defendants should be held jointly and severally liable for any claims not covered by the 1992 Civil Liability Convention.
- 8.3 The French State has brought legal actions against the shipowner, his insurer, the 1992 Fund and others claiming compensation for €190.5 million (£126 million).
- 8.4 Four companies in the Group TotalFinaElf have taken actions against the shipowner, his insurer, the 1992 Fund and others claiming €143 million (£95 million).
- 8.5 Steamship Mutual has 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 €2 843 484 (£8.5 million) corresponding to the

<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.

limitation amount applicable to the shipowner, in agreement with and under the control of the 1992 Fund and its Executive Committee. Steamship Mutual has 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.

- 8.6 There have been no significant developments since the Executive Committee's 24th session in February 2004 in these proceedings which are described in detail in document 92FUND/EXC.24/2.
- 8.7 Claims totalling €484 million (£321 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 €190.5 million (£126 million) and by TotalFinaElf at €170 million (£112 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.
- 8.8 Legal actions against the shipowner, Steamship Mutual and the 1992 Fund were taken by 795 claimants. By 28 April 2004 out-of-court settlements had been reached with 313 of these claimants. Actions by the remaining 482 claimants (including 212 salt producers) were pending. The total amount claimed in the pending actions, excluding the claims by the French State and TotalFinaElf, was FF471 million or €72 million (£48 million).
- 8.9 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.

9 Court judgements in respect of claims against the 1992 Fund

Judgements by the Commercial Court in Lorient

- 9.1 In December 2003 the Commercial Court in Lorient rendered judgements in respect of four claims in the tourism and fisheries sectors which had been rejected by the shipowner/his insurer and the 1992 Fund.
- 9.2 One of these claims related to loss of income allegedly suffered by the owner of a property in the affected area which was to be let to other businesses (and not directly to tourists) but, according to the claimant, could not be let due to the negative effects of the *Erika* incident.
- 9.3 In its judgement 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 there is a sufficient link of causation between the event and the damage, and if 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. The Court stated that it was not bound by the criteria for admissibility laid down by the 1992 Fund. 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).
- 9.4 The three other judgements related to claims by a person selling and letting machines for the production of ice cream, by a hotel situated in Carnac and by an oyster grower in Morbihan. These claims had been rejected by the 1992 Fund on the grounds that the claimants had not shown that there was a sufficient link of causation between the alleged loss and the contamination caused by the *Erika* oil spill. 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, the Court appointed an expert to investigate whether there was a link of causation between the alleged loss and the oil pollution.

- 9.5 At its 24th session held in February 2004 the Executive Committee decided that the 1992 Fund should pursue appeals against the four judgments, considering the importance of the issue for the proper functioning of the compensation regime based on the 1992 Conventions (document 92FUND/EXC.24.8, paragraph 3.1.27).
- 9.6 A hearing took place on 20 April 2004 before the Court of Appeal of Rennes in respect of the claims referred to in paragraph 9.2.
- 9.7 The Court of Appeal is expected to render its judgement on 25 May 2004.

Judgement by the Civil Court in Nantes

- 9.8 On 29 January 2004 the Civil Court (Tribunal de Grande Instance) in Nantes rendered a judgement in respect of claims by the owners of two hotels in Nantes for pure economic loss. These claims had been rejected by the 1992 Fund since, in the Fund's view, they did not fulfill the criteria for admissibility laid down by the Fund's governing bodies in that there was not a reasonable degree of proximity between the alleged losses and the pollution. The Court rejected the claims in the light of the Fund's criteria which, in the Court's view, were dictated by common sense, on the grounds that the claimants had not shown a link of causation between the alleged losses and the oil pollution caused by the *Erika* incident (document 92FUND/EXC.24/2/Add.2).
- 9.9 It is not yet known whether the claimants will appeal against the judgement.

Judgement by the Commercial Court in Rennes

- 9.10 On 29 April 2004 the Commercial Court in Rennes rendered a judgement in respect of a claim for €6 350 (£57 000) by a company in Rennes which carries out activities both as a tour operator selling hiking tours in Brittany, Ireland and the Channel Islands and as a traditional travel agency. The company claimed compensation for losses allegedly suffered during 2000 as a result of reduction of sales due to the *Erika* incident.
- 9.11 This claim had been rejected by the 1992 Fund on the grounds that it did not fulfil the Fund's criteria for admissibility. It was considered that as regards sales through other tour operators ('second degree tourism claims'), there was not a reasonable degree of proximity between the contamination and the alleged losses. As for sales direct to tourists, the Fund considered that no loss had been proven.
- 9.12 The Court also rejected the claim. The reasons for the judgement can be summarised as follows:

Under the French Constitution, international treaties ratified by France take precedence over French laws. Contrary to what the claimant argued, he cannot therefore base his claim on certain provisions of the Civil Code since under the 1992 Civil Liability Convention claims cannot be brought against the shipowner and his insurer otherwise than in accordance with the Convention. The criteria for admissibility were established by the Fund in order to achieve uniformity so as to ensure equal treatment of victims. For a claim to be admissible, there must under the Fund Convention be a sufficient link of causation between the contamination and the damage suffered by the claimant. This link of causation is determined by economic factors, such as the claimant's degree of dependence in relation to the incident, geographical proximity, diversity of the claimant's activities and historical economic results.

It has not been established that there is a sufficient degree of proximity between the contamination and the damage allegedly suffered. The claimant's activities were not carried out only in the area affected by the *Erika*, but also in other parts of France and abroad. The claimant was not greatly dependent on the affected area. A major part of the tours organised (between 76% and 92% for the years 1997-2000) were sold through tour operators. These sales must be considered as 'second degree' under the 1992 Fund Convention and are therefore not admissible. The sales of tours directly to tourists, which are the only sales to be taken into account for compensation purposes, represented for the years 1997-2000 between 6% and 20% of the turnover and these sales did not relate only to tours in the affected area. There is no evidence that these sales were affected by the incident.

For these reasons, and examined on the basis of the 1992 Convention and only on the basis of that Convention, the claim was rejected.

9.13 It is not yet known whether the claimant will appeal against the judgement.

10 Recourse actions by the 1992 Fund

As regards the recourse actions taken by the 1992 Fund as a protective measure in order to prevent potential claims against third parties to recover the amounts paid by the Fund in compensation, there have been no developments since the Executive Committee's February 2004 session (cf document 92FUND/EXC.24/2, section 9).

11 Attack on the Claims Handling Office in Lorient

- 11.1 Early in the morning of Saturday 15 December 2001, a person who had previously caused damage to the Claims Handling Office established by the 1992 Fund and Steamship Mutual in Lorient and to the office of some of their experts in Brest, drove a tractor with a front-end loader into the Claims Handling Office building in Lorient, demolishing a number of windows and destroying the door. The two police officers present outside the office were unable to prevent the attack, but arrested the attacker and took him into police custody. After being charged by the investigating judge (juge d'instruction) the person was released on 16 December.
- 11.2 The 1992 Fund and Steamship Mutual pressed charges against the attacker with the local police. The public prosecutor brought charges of causing serious damage to property belonging to another by breaking and entering ('dégradation ou détérioration grave du bien d'autrui avec entrée par effraction') against the attacker in the Criminal Court in Lorient. The public prosecutor requested that the attacker should be given a prison sentence of 18 months, of which six months should be served in prison and the remaining on probation. The 1992 Fund and Steamship Mutual presented a compensation claim in respect of the damage caused to the office.
- 11.3 The Criminal Court rendered its judgement in December 2002. The Court qualified the attacker's act as 'simple damage to property' ('simple détérioration du bien d'autrui') and held that since the act formed part of the activities of a trade union ('action syndicale'), it fell within the scope of a law on amnesty adopted by Parliament on 3 August 2002. The Court rejected the Fund's compensation claim, stating that the Fund had not title to take action in respect of the damage caused to the office.
- 11.4 The prosecutor appealed against the judgement. The 1992 Fund and the Steamship Mutual joined in the appeal.
- 11.5 On 30 March 2004 the Court of Appeal in Rennes rendered a decision confirming the judgement by the first instance Court that the attacker's act fell within the scope of the law on amnesty but ordered him to pay compensation of €9 000 (£46 000) to the 1992 Fund and Steamship Mutual for the damage caused to the office.

11.6 The attacker has appealed against this judgement before the Court of Cassation.

12 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 give the Director such instructions in respect of this incident as it may deem appropriate.
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