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INCIDENTS INVOLVING THE 1992 FUND

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Note by the Director

Summary:

Six thousand nine hundred and forty-three claims for compensation have been submitted and 94.5% of the claims have been assessed. Compensation payments totalling FFr605 million or €2 million (£63 million^{<1>}) have been made in respect of 5547 claims. Legal actions against the shipowner, his insurer and the 1992 Fund were taken by 795 claimants. Out-of-court settlements have been reached with 393 of these claimants. Actions by 399 claimants are pending.

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. The Court of Appeal in Rennes rendered its judgement in respect of one of these claims on 25 May 2004. The Court stated that the Fund's criteria were not binding on national courts and that the courts had the competence to interpret the concept of pollution damage. The Court rejected the claim on the grounds that the claimant had not proven that there was a link of causation between the contamination and the alleged damage nor had the claimant proven that any damage existed.

In January 2004, the Civil Court of first instance in Nantes rejected claims 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.

<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.

In April 2004, the Commercial Court in Rennes 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 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 2003 (pages 88-89).
- 1.3 Since the Executive Committee's May 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 Amount available for compensation

- 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 FFfr84 247 733 corresponding to €12 843 484 (£8.8 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.
- 2.3 The maximum amount available for compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention (135 million SDR) was calculated by the Director at FFfr1 211 966 811 corresponding to €184 763 149 (£126 million). 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.

3 Undertakings by TotalFinaElf and the French Government

- 3.1 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.
- 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 TotalFinaElf 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 to claimants 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 has 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 to claimants in the tourism sector. Payments totalling €10.1million (£6.9 million) have been made under that scheme.

5 Level of the 1992 Fund's payments

- 5.1 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).
- 5.2 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.

6 Claims situation

- 6.1 As at 20 September 2004, 6 943 claims for compensation had been submitted for a total of FFfr1 355 million or €207 million (£142 million). Six thousand five hundred and sixty-four claims totalling FFfr1 223 million or €186 million (£127 million) had been assessed at a total of FFfr675 million or €103 million (£70 million). Assessments had thus been carried out of 94.5% of the total number of claims received.
- 6.2 Eight hundred and four claims totalling FFfr154 million or €24 million (£16 million) had been rejected.
- 6.3 Payments for compensation had been made in respect of 5 547 claims for a total of FFfr605 million or €92 million (£63 million), out of which the Steamship Mutual had paid FFfr84 million or €12.8 million (£8.8 million) and the 1992 Fund FFfr521 million or €79 million (£54 million).
- 6.4 Of the 379 claims to be assessed, 212 relate to claims by salt producers which cannot be assessed until the court expert appointed to examine these claims has submitted his report. The remaining claims are either in the process of being assessed or are awaiting claimants providing further information necessary for the completion of the assessment

6.5 The tables below give details of the processing of claims in various categories.

Claims submitted by 20 September 2004							
Category	Claims submitted	Claims assessed		Claims for which payments have been made		Claims rejected	
Mariculture and oyster farming	1 002	997	99%	833	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%	43	84%	6	12%
Tourism	3 674	3 644	99%	3 153	86%	445	12%
Property damage	706	435	62%	327	46%	98	14%
Clean-up operations	146	134	92%	112	77%	12	8%
Miscellaneous	522	473	91%	436	84%	29	6%
Total	6 943	6 564	94.5%	5 547	80%	804	12%

Payments authorised and made by 20 September 2004				
Category	Payments authorised		Payments made	
	Number of claims	Amounts FFr	Number of claims	Amounts FFr
Mariculture and oyster farming	912	50 892 584	833	30 185 056
Shellfish gathering	414	5 767 253	364	3 395 243
Fishing boats	289	7 225 431	279	4 671 320
Fish and shellfish processors	44	6 415 152	43	6 407 595
Tourism	3 202	486 433 757	3 153	481 589 057 ^{<2>}
Property damage	338	14 280 644	327	13 375 585
Clean-up operations	122	42 626 199	112	39 132 037
Miscellaneous	443	50 476 064	436	26 411 441
Total	5 764	664 117 084	5 547	605 167 334

7 Legal proceedings

- 7.1 A number of court actions for compensation have been brought in various jurisdictions in France.
- 7.2 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.
- 7.3 The French State has brought legal actions against the shipowner, his insurer, the 1992 Fund and others claiming compensation for €190.5 million (£130 million).
- 7.4 Four companies in the Group TotalFinaElf have taken actions against the shipowner, his insurer, the 1992 Fund and others claiming €143 million (£98 million).

^{<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.

- 7.5 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 €12 843 484 (£8.8 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 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.
- 7.6 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.
- 7.7 Claims totalling €484 million (£331 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 (£130 million) and by TotalFinaElf at €170 million (£116 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.
- 7.8 Legal actions against the shipowner, Steamship Mutual and the 1992 Fund were taken by 795 claimants. By 20 September 2004 out-of-court settlements had been reached with 393 of these claimants. Actions by the remaining 399 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 FFfr451 million or €69 million (£47 million).
- 7.9 The 1992 Fund will continue the discussions with the claimants whose claims are not time-barred and are admissible in principle for the purpose of arriving at out-of-court settlements.

8 Court judgements in respect of claims against the 1992 Fund

- 8.1 Judgements by the Commercial Court in Lorient and the Court of Appeal in Rennes
- 8.1.1 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.
- 8.1.2 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.
- 8.1.3 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 (£7 300).
- 8.1.4 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.

- 8.1.5 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).
- 8.1.6 The 1992 Fund appealed against the four judgements.
- 8.1.7 A hearing took place on 20 April 2004 before the Court of Appeal of Rennes in respect of the claim referred to in paragraph 8.1.2. The cases relating to the other three claims have not yet been heard.
- 8.1.8 In its pleadings relating to the claims referred to in paragraph 8.1.2 the 1992 Fund maintained that the claim in question did not fulfil the criteria for admissibility, since it was a "second degree tourism claim". The Fund also made the point that the claimant derived the majority of his income from activities other than letting the property in question and that therefore the claimant did not have a sufficient dependency on the affected resource. Finally, the 1992 Fund maintained that the claimant had not shown that he would in fact have been able to let the property for the period covered by the claim.
- 8.1.9 In a judgement rendered on 25 May 2004 the Court of Appeal rejected the claim. Although the Court considered that the 1992 Fund's criteria were not binding on national courts, the Court held that the claimant had not shown that there was a sufficient link of causation between the event in question and the alleged damage, nor had the claimant proven that any damage existed.
- 8.1.10 The reasons given by the Court of Appeal can be summarised as follows:

The 1992 Fund Convention does not determine the conditions under which internal Fund decisions would have direct effects in respect of Member States and their courts, and it is not recognized therefore that the Fund had legislative powers. These criteria are only a guide as regards the Fund's policy but are not binding on Member States. Resolution N°8 adopted by the Fund Administrative Council in May 2003 states that the courts in States Parties to the Fund Convention should take into account the decisions of the governing bodies on the application and interpretation of the 1992 Conventions; the Resolution simply encourages the national courts to take such decisions into account, recognizing that the final decision in this regard rests with the courts. Reference was made to the Fund's position in the Landcatch case in relation to the *Braer* incident and to the *Sea Empress* case. Even if the national courts should take into account the provisions of the 1992 Conventions as having a legal force over and above French law under Article 55 of the French constitution, the courts are nevertheless not bound by the Fund's criteria, in particular not the criterion relating to "second degree tourism claims". The Court has the total competence to interpret the concept of "pollution damage" in the 1992 Convention and apply it to the particular case, and to establish whether there is a sufficient link of causation between the contamination and the damage.

In the case under consideration the claimant had not proven that such a link of causation existed, nor had he proven that any damage existed. The claimant had only presented a letter from an estate agent indicating that the tenant had

informed the agency of the cancellation of the lease due to the *Erika* incident, but this statement had not been supported by any other document. No information had been given of the identity of the tenant.

8.2 Judgement by the Civil Court in Nantes

8.2.1 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 fulfil 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).

8.2.2 The claimants have not appealed against the judgement.

8.3 Judgement by the Commercial Court in Rennes

8.3.1 On 29 April 2004 the Commercial Court in Rennes rendered a judgement in respect of a claim for €6 350 (£59 000) 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.

8.3.2 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.

8.3.3 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.

8.3.4 The claimant has appealed against the judgement.

8.4 Other court cases

A number of other cases have been heard during the period June/September 2004 by various courts of first instance but the courts have not yet rendered their judgements.

9 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).

10 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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