



INCIDENT INVOLVING THE 1992 FUND

ERIKA

Note by the Director

Summary:

A further payment of € 964 338 (£4 145 215) has been made to the French State.

On 20 September 2004, the Commercial Court in Saint-Brieuc rendered a judgement in which it considered admissible a claim for €26 719 (£18 350) in respect of losses allegedly incurred in 2001, which had been rejected by the 1992 Fund on the grounds that there was not sufficient evidence that the claimant had suffered any losses that year as a result of the *Erika* incident.

On 5 October 2004, the Civil Court of first instance in Saintes rendered a judgement in which it rejected a claim brought by the owner of a restaurant in the department of Charente-Maritime on the grounds that the claim did not fulfil the criteria adopted by the 1992 Fund's governing bodies for the admissibility of claims relating to pure economic loss and that there was not a sufficient link of causation between the *Erika* incident and the alleged loss.

Action to be taken:

Information to be noted

1 Payments to the French State

- 1.1 As set out in paragraph 3.1 of document 92FUND/EXC.26/4 the French Government 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 of compensation available under the 1992 Conventions being exceeded, provided, however, that the French Government's claim would rank before any claim by TotalFinaElf.
- 1.2 As mentioned in paragraph 5.2 of document 92FUND/EXC.26/4, at its October 2003 session the Executive Committee authorised the Director to make payments in respect of the French Government's claim 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. 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. 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.

- 1.3 Having again reviewed the situation in the light of the developments during 2004, the Director decided that there was sufficient margin to enable the 1992 Fund to make a further payment to the French State of € 964 338 (£4 145 215) relating to the French Government's supplementary payments made under the scheme to provide emergency payments to claimants in the fishery, mariculture, oyster farming and salt producing sectors administered by OFIMER (cf document 92FUND/EXC.26/4, paragraph 4.1).
- 1.4 The amount of € 964 338 was paid to the French State on 14 October 2004.
- 1.5 The total amount paid to claimants as of 15 October 2004 (including the amounts paid to the French State) was €98.4 million or FFr645 million (£64.4 million), out of which the shipowner's insurer, Steamship Mutual, had paid €12.8 million or FFr84 million (£8.8 million) and the 1992 Fund €85.6 million or FFr561 million (£55.6 million).

2 Further court judgements

2.1 Judgement by the Commercial Court in Saint Brieuc

- 2.1.1 On 20 September 2004 the Commercial Court in Saint Brieuc rendered a judgement in respect of a claim for €33 265 (£22 850) by a person operating a campsite in Côtes d'Armor, which is located in the northern part of Brittany, in respect of losses allegedly suffered in 2001 as a result of the *Erika* incident.
- 2.1.2 The operator of this campsite had previously submitted a claim in respect of losses suffered during 2000. This claim was settled at €15 883 (£10 900) and that amount was paid by the 1992 Fund to the claimant in December 2002. The Fund had considered that, although this campsite was located in northern Brittany, ie outside the area directly affected by the *Erika* oil spill, the spill had resulted in loss of business for the season of 2000. However, with a few exceptions, there was no remaining contamination on the beaches in Brittany after the end of the season 2000. For this reason, the 1992 Fund rejected the claim for losses during the 2001 season on the grounds that any loss of business suffered by the operator of this campsite during that season did not result from the contamination of the beaches caused by the *Erika*.
- 2.1.3 The court nevertheless held that the claim was admissible since it considered that the reduction in turnover in 2001 compared to 1999 was caused by the *Erika* incident and ordered the shipowner, Steamship Mutual and the 1992 Fund to pay compensation of an amount of €26 719 (£18 350).
- 2.1.4 The Director intends to lodge an appeal on behalf of the 1992 Fund against this judgement.

2.2 Judgement by the Civil Court of first instance in Saintes.

- 2.2.1 The owner of a restaurant in Barzan in the Department of Charente-Maritime had presented a claim for €30 425 (£20 900) relating to losses allegedly suffered in 2000 as a result of the *Erika* incident. The claim was rejected by the Fund on the grounds that it did not fulfil the criteria for admissibility of claims relating to pure economic loss, in particular that of geographic proximity between the claimant's activity and the contamination, the restaurant being located more than 130 kilometres from the nearest polluted beach in Charente-Maritime.
- 2.2.2 The claimant brought action in the Civil Court of first instance in Saintes. The claimant maintained that the contamination of some beaches in Charente-Maritime had had the consequence of discouraging tourists from visiting any destinations in the department and that therefore the claim fulfilled the Fund's criteria of geographic proximity.

- 2.2.3 In its judgement, the Court noted that the governing bodies of the IOPC Funds had established uniform criteria for the application of the definition of 'pollution damage'. It also noted that among these criteria was the requirement of a reasonable degree of proximity, ie a sufficient link of causation, between the contamination and the alleged loss, and that in order to determine whether such sufficient link of causation existed, account should be taken of the geographic proximity between the claimant's activities and the contamination, the degree to which the claimant was economically dependent on the affected resource, the extent to which the claimant had alternative sources of supply or business opportunities and the extent to which the claimant's business formed an integral part of the economic activity of the area effected by the oil spill. The Court stated that it was appropriate to apply these criteria, adopted by the governing bodies, for the interpretation of the 1992 Conventions, and that this had not been contested by the claimant.
- 2.2.4 The Court made the point that the polluted beaches nearest to the claimant's restaurant were more than 100 kilometres away and the fact that these beaches were located in the same department was not sufficient for fulfilling the criterion of geographic proximity. The Court stated that there could not be any confusion in the minds of tourists between the polluted beaches and the part of the coast where the restaurant was located. In addition, the Court considered that the claimant could not be considered economically dependant on the affected resource. Furthermore, the Court stated that the claimant had not provided any evidence supporting the allegation that there was a link of causation between the contamination resulting from the *Erika* incident and a reduction in the number of tourists visiting the area where the restaurant was located or the reduction in the restaurant's turnover. For these reasons, the Court held that the claim did not fulfil the criteria of geographic proximity and economic dependency adopted by the Fund's governing bodies and that there was not therefore a reasonable degree of proximity nor a sufficient link of causation between the incident and the alleged loss. The claim was therefore rejected.

3 Action to be taken by the Executive Committee

The Executive Committee is invited to take note of the information contained in this document.
