



## INCIDENTS INVOLVING THE 1992 FUND

### ERIKA

#### Note by the Director

**Summary:**

Six thousand nine hundred and sixty-four claims for compensation have been submitted and 94.8% of the claims have been assessed. Compensation payments totalling €9.3 million<sup><1></sup> (£68.3 million) have been made in respect of 5 587 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 412 of these claimants. The Courts have rendered final judgements in respect of 14 actions, and 51 actions have been withdrawn. Actions by 318 claimants are pending.

The French Courts have rendered 32 judgements in respect of 28 cases. The document contains a summary of the judgements rendered since the Executive Committee's March 2005 Session.

**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).
- 1.3 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.

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<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 = FFfr6.55957. Conversion of Euro into Pounds sterling has been made on the basis of the rate at 31 May 2005 (€1 = £0.6874) 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.

## **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.
- 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 €84 763 149 (£127 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 €0.1million (£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 3.2.47).

- 5.2 At its 22nd session in October 2003, the Executive Committee authorised the Director to make payments to the French State 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 (£6 973 000) to the French State, corresponding to the French Government's subrogated claim in respect of the supplementary payments to claimants in the tourism sector (cf paragraph 4.2).
- 5.3 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. In October 2004 the French State was paid an amount of €964 338 (£4 145 000) 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 paragraph 4.1).
- 5.4 The Director is reviewing the situation in order to establish whether there is a sufficient margin to enable the 1992 Fund to make a further payment to the French State.

## **6 Claims situation**

- 6.1 As at 31 May 2005, 6 694 claims for compensation had been submitted for a total of €206 million (£142 million). By that date 94.8% of the claims had been assessed. Eight hundred and fifteen claims, totalling €22.4 million (£15.4 million), have been rejected.
- 6.2 Payments for compensation had been made in respect of 5 587 claims for a total of €99.3 million (£68.3 million), out of which Steamship Mutual had paid €12.8 million (£8.8 million) and the 1992 Fund €86.5 million (£59.5 million).
- 6.3 The following table gives details of the situation in respect of claims in various categories

<b>Claims situation as at 31 May 2005</b>					
<b>Category</b>	<b>Claims submitted</b>	<b>Claims assessed</b>	<b>Claims rejected</b>	<b>Payments made</b>	
				<b>Number of claims</b>	<b>Amounts €</b>
Mariculture and oyster farming	1 003	998	89	837	7 754 627
Shellfish gathering	530	526	109	366	888 313
Fishing boats	319	318	29	280	1 099 551
Fish and shellfish processors	51	50	6	43	976 832
Tourism	3 683	3 661	443	3177	73 896 458
Property damage	708	436	98	328	2 040 406
Clean-up operations	147	138	12	118	6 340 544
Miscellaneous	523	473	29	438	6 310 434
<b>Total</b>	<b>6 964</b>	<b>6 600</b>	<b>815</b>	<b>5 587</b>	<b>99 307 165</b>

## **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, Steamship Mutual, 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, Steamship Mutual, the 1992 Fund and others claiming compensation for €190.5 million (£131 million).
- 7.4 In December 2002, four companies in the Group TotalFinaElf took a legal action against the shipowner, Steamship Mutual, the 1992 Fund and others claiming €43 million (£98.3 million) (cf paragraph 7.7).
- 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 28th session in March 2005 in these proceedings which are described in detail in document 92FUND/EXC.24/2.
- 7.7 Claims totalling €497 million (£342 million) have been lodged against the shipowner's limitation fund constituted by the Steamship Mutual. This amount includes the claims by the French Government at €190.5 million (£131 million) and by TotalFinaElf SA at €170 million (£117 million) (cf paragraph 7.4). 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 31 May 2005 out-of-court settlements had been reached with 412 of these claimants. Fifty-one salt producers have withdrawn their actions in favour of three local and regional authorities (Conseil Général de la Vendée, the Syndicat Mixte d'Aménagement de Marais de Noirmoutier (SMAM) and the Conseil Regional des Pays de Loire) which have made provisional payments to these claimants. The Courts have rendered final judgements in respect of 14 claims. Actions by the remaining 318 claimants (including 161 salt producers) were pending. The total amount claimed in the pending actions, excluding the claims by the French State and TotalFinaElf, was €65 million (£45 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 survey relating to the claims by salt producers**

- 8.1 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 sea water 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.

- 8.2 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 cases caused by the late start of the 2001 season. Claims were also presented for costs of restoration of salt ponds in Guérande in 2001. The experts engaged by the 1992 Fund and Steamship Mutual had considered that salt production was possible 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 made to the claimants on the basis of 20% lost production.
- 8.3 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 was 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.
- 8.4 The 1992 Fund has approached claimants with the objective to explore the possibility of reaching out-of-court settlements with claimants in light of the court expert's findings.

## **9 Court judgements in respect of claims against the 1992 Fund**

9.1 Twenty-one judgements in respect of claims against the 1992 Fund were reported to the Executive Committee's March 2005 session in documents 92FUND/EXC.28/4 (Section 9) and 92FUND/EXC.28/4/Add.1. The present document summarises the judgements made public since that session.

### **9.2 Judgement by the Commercial Court in Rennes**

- 9.2.1 A fisherman had submitted a claim for € 027 (£5 500) relating to loss of income due to the *Erika* incident. The claimant had accepted the assessment made by the 1992 Fund, the shipowner and Steamship Mutual for € 357 (£900). The claimant had received two provisional payments totalling € 085 (£740) and had signed full and final receipts and releases in respect of that amount, leaving an amount of € 272 (£160) outstanding. Before the last compensation payment was made, he brought proceedings against the Fund arguing that the agreement reached with the 1992 Fund was not valid, claiming compensation for losses totalling € 942 (£4 800).
- 9.2.2 A claimants' association joined in these legal proceedings supporting this claimant, who is one of its members. The association did not make a specific claim for loss or damage caused by the *Erika* incident, but claimed against the 1992 Fund the symbolic amount of € 1 (£0.7) for non-defined damages.
- 9.2.3 In a judgment rendered in March 2005, the Commercial Court rejected the claim by the individual claimant. The Court considered that by signing a full and final receipt and release the claimant had accepted the terms of the proposed agreement and entered into a valid settlement according to French law. The Court stated that receipts and releases were in all aspects valid settlement documents and were considered under the French Civil Code as contracts by which the parties ended an existing dispute or prevented a dispute to arise. The Court concluded therefore that the settlement between the individual claimant and the Fund was valid and dismissed the action, stating that the claimant was not entitled to further compensation for more than the balance of the settlement amount. It was stated that the claimants' association had not suffered any damage falling within the scope of the 1992 Civil Liability and Fund Conventions and held that its claim was inadmissible. The Court also stated that the actions of the individual claimant and the association were excessive and ordered them to pay a symbolic amount of € 1 to each of the shipowner, Steamship Mutual and the Fund.

- 9.2.4 The individual claimant and the association have indicated that they will appeal against the judgement.
- 9.3 Judgements by the Civil Court in Paris
- 9.3.1 An oyster grower in Loire Atlantique had brought action in respect of a claim for a total of €5 000 (£24 000), relating to a reduction in sales during the period October 2000 - April 2001 and the subsequent termination of his oyster growing activity as a result of the *Erika* incident. The 1992 Fund had rejected the claim on the ground that there was no link of causation between the *Erika* incident and the alleged losses, since the claim related to a period during which there were no administrative harvesting bans on mariculture in the area. The claimant had already been compensated by the Fund for a total amount of €46 148 (£32 000) corresponding to losses incurred during the period January to September 2000.
- 9.3.2 In a judgment rendered in February 2005, the Tribunal de Grande Instance (Civil Court) in Paris considered that the claimant had already been compensated for the losses originating from harvesting bans on mariculture and from a reduction in the number of visitors to the affected area due to the *Erika* incident resulting in a decrease in sales of the claimant's products. The Court held that the claimant could not prove that the reduction in sales after September 2000 and the subsequent termination of his oyster growing business were due to the *Erika* incident, since the evidence submitted showed that the claimant had decided to change his professional activity when the oyster market had, from October 2000, achieved a level of sales similar to that prior to the incident. For this reason the claim was rejected.
- 9.3.3 The claimant did not appeal against the judgment.
- 9.3.4 An organisation for the protection of birds had submitted a claim for €42 041 (£166 000), relating to the costs of clean up of birds contaminated by oil on the French Atlantic coast after the *Erika* incident. This claim had been rejected by the 1992 Fund on the grounds that the organisation had already been compensated by the French Government under the French National Contingency Plan (Plan POLMAR), by TotalFinaElf and by private donors.
- 9.3.5 In a judgment rendered in February 2005, the Court noted that the organisation had already received from the French Government, TotalFinaElf and private donors a total amount of €1 744 322 (£1 199 000). The Court held that the Fund had the obligation to compensate only for losses which had actually been incurred and concluded that the claimant had not proved any loss which had not been compensated and for this reason rejected the claim.
- 9.3.6 The claimant has appealed against the judgment.
- 9.3.7 A company selling postcards and posters in Brittany had submitted a claim for €23 572 (£16 000), relating to loss of income allegedly suffered as a result of the *Erika* incident. This claim had been rejected by the 1992 Fund on the ground that the claimant supplied goods and services to other businesses in the tourist sector but not directly to tourists, and that therefore there was not a sufficiently close link of causation between the contamination and the alleged loss.
- 9.3.8 In a judgment rendered in February 2005, the Court specifically referred to the Fund's criteria for admissibility of claims for pure economic loss. The Court considered in particular that the Fund had defined the admissibility criteria as requiring a reasonable degree of proximity between the contamination and the loss or damage incurred by the claimant and that account should be taken of the geographic proximity between the claimant's activity and the contamination, the degree to which the claimant was economically dependant on an 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 within the area affected by the spill.

- 9.3.9 The Court noted that the 1992 Fund distinguished between, on the one hand, 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, on the other hand, those who provided goods or services to other businesses in the tourist industry, but not directly to tourists. The Court stated that in the latter case, the 1992 Fund had considered that there was generally not a sufficient degree of proximity between the contamination and the losses allegedly suffered by the claimants and that claims of this type would normally not be admissible in principle. The Court noted that the claimant belonged to the latter sector, since it did not sell its goods directly to tourists but only to other businesses in the tourist category. The Court further noted that the claimant did not sell its products only to businesses in Brittany but also to a large extent to businesses in several other parts of France. The Court held that the claimant did not fulfil the conditions determined by the 1992 Fund to be entitled to compensation and therefore rejected the claim.
- 9.3.10 The claimant has informed the Fund that he will not appeal against the judgement.
- 9.3.11 A real estate agent had submitted a claim for €15 036 (£79 000), relating to loss of income as a result of a reduction in annual and seasonal letting activities and for a reduction in property sales in the affected area allegedly due to the *Erika* incident. The 1992 Fund had rejected the claim as regards the reduction in the annual letting activity and the reduction in property sales on the ground that the *Erika* incident did not have a long term impact on the economic activity in the area and that the decision by prospective clients to rent on an annual basis or to purchase property was only postponed as a result of the clean-up operations. The claim for losses incurred in the seasonal letting activity following the incident had been assessed by the 1992 Fund at €129 (£6 000), and a payment of that amount had been made to the claimant.
- 9.3.12 In a judgment rendered in February 2005, the Court rejected the part of the claim relating to loss of income for a reduction in annual letting activities. The Court considered that it had not been established that the annual letting activity, which represented only 8% of the claimant's turnover, depended on the number of tourists visiting the affected area and that, therefore, this item was not admissible for compensation.
- 9.3.13 The Court also rejected the part of the claim relating to loss of income as a result of a reduction in property sales in the affected area, since the claimant had failed to prove that the *Erika* incident had had an enduring effect on property sales. The Court agreed with the 1992 Fund's view that the purchase of property was a long-term investment that may be affected in the short term by an event such as the *Erika* incident, but that its effect could only be to delay the decision to purchase property until the completion of the clean-up operations. The Court also considered that the decision to purchase property depended directly on other factors such as sale price, level of interest rates and the possibility to obtain loans.
- 9.3.14 The Court held that the claimant was entitled to compensation for losses resulting from the reduction in the seasonal letting activity for €129 (£6 000), but that no decision could be rendered in that regard since the Fund had already paid that amount to the claimant.
- 9.3.15 The claimant did not appeal against the judgement.

#### 9.4 Judgements by the Court of Appeal in Rennes

- 9.4.1 In December 2003 the Commercial Court in Lorient had rendered judgements in respect of four claims in the tourism and fisheries sectors which had been rejected by the shipowner, Steamship Mutual and the 1992 Fund. In these judgments the Commercial Court made statements concerning the effect of the criteria for admissibility laid down by the 1992 Fund.
- 9.4.2 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). The 1992 Fund appealed therefore against the four judgements.

- 9.4.3 In its pleadings to the Court of Appeal the 1992 Fund argued that, although the criteria for admissibility adopted by the governing bodies of the 1992 Fund, composed of representatives of the Governments of the Member States, were not binding on national courts, they should be taken into account by those courts in order to ensure the uniform application of the 1992 Conventions.
- 9.4.4 One of the claims considered 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.
- 9.4.5 In its judgement the Commercial Court had 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 was admissible if there was a sufficient link of causation between the event and the damage, and if it were 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).
- 9.4.6 In a judgement rendered in May 2004 the Court of Appeal rejected this claim. The Court stated that although the 1992 Fund's criteria were not binding on national courts, 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. The reasons given by the Court of Appeal were summarised in paragraph 8.1.10 of document 92FUND/EXC.26/4. The claimant did not pursue his claim in the Court of Cassation.
- 9.4.7 The three other judgements related to claims which had been rejected by the 1992 Fund on the ground 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.
- 9.4.8 The first of these cases relates to a claimant selling and renting out machines for the production of ice cream claiming compensation for €52 858 (£36 000) in respect of loss of income allegedly suffered as a result of the *Erika* incident. This claim had been rejected by the 1992 Fund on the ground that the claimant supplied goods and services to other businesses in the tourist sector but not directly to tourists, and that therefore there was not a sufficiently close link of causation between the contamination and the alleged loss. The first instance 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 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 the 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. The Court stated that under French law, a claim for compensation was admissible if the loss was direct and certain, provided there was a sufficient link of causation between the event and the damage, and it was shown that the damage would not have occurred if the event had not taken place. After stating that it was not bound by the Fund's criteria, the Commercial 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.

- 9.4.9 In a judgement rendered in May 2005, the Court of Appeal also stated that the Fund's criteria for admissibility as set out in the Claims Manual were not binding on national courts. The Court stated that it was competent to interpret the notion of "pollution damage" under the 1992 Conventions and to apply it to the particular cases. The Court considered that the alleged damage was of an indirect character, and that there was no certainty that the difficulties to order and sell equipment to manufacture or distribute ice cream were directly caused by the contamination but, in view of the particular nature of the product to be sold, could be related to other causes, such as weather, geographic and market situations. The Court of Appeal held that the claimant had not proved a sufficient link of causation between the alleged loss and the *Erika* incident, nor had he proved that a loss had been incurred, and rejected the claim.
- 9.4.10 The second case related to a claim by a hotel situated in Carnac. The 1992 Fund had compensated the claimant for a total amount of €138 023 (£95 000) for the losses suffered in 2000 but had rejected a claim for further losses for a total of €72 644 (£50 000) 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, the first instance 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.
- 9.4.11 In a judgement rendered in May 2005, the Court of Appeal stated that the 1992 Fund's criteria for admissibility were not binding on the national courts, but could nonetheless serve as a reference ('une référence d'ordre indicatif') for the national judge. The Court stated that the dispute related to the question of whether the reduction in the number of guests and the ensuing loss in 2001 were due to the pollution, which had occurred towards the end of 1999, which was a question of fact necessitating a technical investigation on the basis of the evidence provided by the parties. The Court of Appeal confirmed the decision by the Commercial Court that the claim was admissible in principle and the appointment of an expert. The Court of Appeal amended the terms of reference of the expert to the effect that the expert should establish whether the loss for the 2001 season resulted from a decrease in visitors, in particular businessmen and foreign guests, due to the contamination caused by the *Erika* incident or to other causes. The Court of Appeal referred the case back to the Commercial Court in Lorient.
- 9.4.12 The third case related to a claim by an oyster grower in Morbihan who had received compensation for an amount of €70 262 (£48 000) for losses due to a reduction in sales suffered up to 30 September 2000 but whose claim for an amount of €71 593 (£49 000) for losses for the period 1 October to 31 December 2000 had been rejected by the 1992 Fund on the ground 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 by the contamination 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, the first instance 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.
- 9.4.13 In a judgement rendered in May 2005, the Court of Appeal stated that the 1992 Fund's criteria for admissibility were not binding on the national Courts, but could nonetheless serve as a reference ('une référence d'ordre indicatif') for the national judge. The Court stated that the dispute related to the question of whether the loss in 2001 was due to the pollution which had occurred towards the end of 1999, which was a question of fact necessitating a technical investigation on the basis of the evidence provided by the parties. The Court of Appeal confirmed the decision by the Commercial Court that the claim was admissible in principle and the appointment of an expert. The Court of Appeal amended the terms of reference of the expert to the effect that the expert should establish whether the loss for the period 1 October – 31 December 2000 had resulted from an enduring loss of confidence by consumers in respect of seafood, in particular oysters, due to

the contamination caused by the *Erika* incident, or to other causes. The Court of Appeal referred the case back to the Commercial Court in Lorient.

9.5 Other court cases

A number of other cases have been heard during the period March to June 2005 by various Courts in France, but the Courts have not yet rendered their judgements.

**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 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.
-