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INCIDENTS INVOLVING THE 1992 FUND

ERIKA

Note by the Director

Summary:

As at 14 February 2007 6 997 claims for compensation have been submitted for a total of €387 million (£259 million) and 98.4% of the claims have been assessed. Compensation payments totalling €128 million (£79.8 million)^{<1>} have been made in respect of 5 665 claims.

Legal actions against the shipowner, his insurer and the 1992 Fund have been taken by 796 claimants. Out-of-court settlements have been reached with 440 of these claimants. The courts have rendered judgements in respect of 90 actions.

Six judgements have been rendered by the French courts since the Executive Committee's October 2006 Session. A summary of these judgements is given.

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 2005 (pages 73-74).
- 1.3 As regard the investigations into the cause of the incident and recourse actions by the 1992 Fund reference is made to document 92FUND/EXC.34/6/Add 1.

^{<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 Euros into Pounds sterling has been made on the basis of the rate at 14 February 2007 (€1 = £0.6693), 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 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 (£8.6 million) and declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the shipowner's liability insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual).
- 2.2 In 2002 the limitation fund was transferred from the Commercial Court in Nantes to the Commercial Court in Rennes. In 2006 the limitation fund was again transferred, this time to the Commercial Court in Saint-Brieuc.

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 SDR per incident, including the sum paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention). This amount was 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). The Director's calculations gave 135 million SDR = FFr1 211 966 811 corresponding to €184 763 149 (£123.6 million).

4 Undertakings by Total SA and the French Government

- 4.1 Total SA 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 the disposal of oily waste and from 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 Total SA if funds were available after all other claims had been paid in full.

5 Level of the 1992 Fund's payments

- 5.1 In view of the uncertainty as to the total amount of claims arising from the *Erika* incident, the Executive Committee decided in July 2000 that the payments by the 1992 Fund should be limited to 50% of the amount of the loss or damage actually suffered by the respective claimants, as assessed by the 1992 Fund's experts. The Committee decided in January 2001 to increase the level of the 1992 Fund's payments from 50% to 60% and in June 2001 to 80%.
- 5.2 In February 2003 the Executive Committee authorised the Director to increase the level of payments to 100% when he considered it safe to do so. After a careful assessment, the Director considered in April 2003 that there was a sufficient safety margin, in spite of the remaining uncertainties as to the total level of admissible claims, and decided to increase the level of payments to 100%.

6 Payments to the French State

- 6.1 At the Executive Committee's October 2003 session 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 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.
- 6.2 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. The 1992 Fund initially paid €10.1 million (£6.8 million) to the French State, corresponding to the French Government's subrogated claim in respect of the supplementary payments made by the Government to claimants in the tourism sector. In October 2004 the 1992 Fund paid a further €6 million (£4 million) to the French State relating to the French Government's supplementary payments made under a scheme to provide emergency payments to claimants in the fishery, mariculture and salt producing sectors. In December 2005 the 1992 Fund made a payment on account to the French State of €15 million (£10 million) towards the costs incurred by the French authorities in the clean-up response. In October 2006 the 1992 Fund made a further payment of €10 million (£6.7 million) to the French State towards the costs incurred by the French authorities in the clean-up response.
- 6.3 The Director continues to monitor the situation and will consider later in 2007, in the light of the developments of the court proceedings, whether a further payment can be made to the French State.

7 Claims situation

- 7.1 As at 14 February 2007, 6 997 claims for compensation had been submitted for a total of €387 million (£259 million), which included a claim for a total of €179 million (£120 million) by the French State for clean-up operations carried out as a result of the incident. By that date 98.4% of the claims had been assessed. Some 1 058 claims, totalling €24 million (£16 million), had been rejected.
- 7.2 Payments of compensation had been made in respect of 5 665 claims for a total of €128 million (£79.8 million), out of which Steamship Mutual had paid €12.8 million (£8.6 million) and the 1992 Fund €15.2 million (£71.2 million).
- 7.3 The following table gives details of the situation in respect of different categories of claims.

Situation as at 14 February 2007					
Category	Claims submitted	Claims assessed	Claims rejected	Payments made	
				Number of claims	Amounts €
Mariculture and oyster farming	1 007	1 002	89	846	7 763 339
Shellfish gathering	530	527	109	370	889 189
Fishing boats	319	318	29	282	1 099 551
Fish and shellfish processors	51	50	6	43	976 832
Tourism	3 692	3 672	441	3 207	76 467 238
Property damage	712	686	342	334	2 152 732
Clean-up operations	149	143	12	125	31 806 507
Miscellaneous	537	490	30	458	6 907 815
Total	6 997	6 888	1 058	5 665	128 063 203

8 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 seawater in Guérande (Loire Atlantique) were lifted in late May 2000. A group of independent producers in Guérande tried to resume salt production but were unable to take in sufficient seawater to produce salt. Members of a co-operative which accounts 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 losses caused by the late start of the 2001 season. Claims were also presented for costs of restoration of salt ponds in Guérande in 2001.
- 8.3 The experts engaged by the 1992 Fund and Steamship Mutual had considered that salt production had been possible in Guérande 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 therefore made to the claimants for the outstanding 80%.
- 8.4 As regards the salt producers in Noirmoutier, the 1992 Fund and Steamship Mutual had also considered that salt production had been possible in 2000, but that the maximum yield would have been 30% of that expected for the year. Compensation payments were made to the salt producers for the outstanding 70%. Eighty producers accepted the Fund's assessment whereas five pursued claims in court.
- 8.5 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 would have been 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.
- 8.6 In the light of the court expert's findings, the 1992 Fund approached claimants with the objective of exploring the possibility of reaching out-of-court settlements. Such settlements have been reached with 22 of the salt producers in Guérande. Claims are still being pursued in court by 140 salt producers from this area. The court proceedings are due to take place in March 2007.

9 Criminal proceedings

- 9.1 On the basis of a report by an expert appointed by a magistrate in the Criminal Court in Paris, criminal charges were brought in that Court 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 Registro Italiano Navale (RINA), one of RINA's managers, Total SA and some of its senior staff.
- 9.2 The trial, which started on 12 February 2007, is expected to last for four months.

10 Legal proceedings

- 10.1 The Conseil Général of Vendée and a number of other public and private bodies brought actions in various courts against the shipowner, Steamship Mutual, companies in the Group Total SA and others, requesting that the defendants should be held jointly and severally liable for any claims not covered by the 1992 Civil Liability Convention. The 1992 Fund requested to be allowed to intervene in the proceedings. So far only procedural hearings have been held.
- 10.2 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 in paragraph 2.1 above and the 1992 Fund, claiming €190.5 million (£127.5 million).
- 10.3 Four companies in the Group Total SA took legal actions in the Commercial Court in Rennes against the shipowner, Steamship Mutual, the 1992 Fund and others claiming €43 million (£95.7 million).
- 10.4 Steamship Mutual brought action in the Commercial Court in Rennes against the 1992 Fund, requesting the Court, *inter alia*, to note that, in the fulfilment of its obligations under the 1992 Civil Liability Convention, Steamship Mutual had paid €12 843 484 (£8.6 million) corresponding to the limitation amount applicable to the shipowner, in agreement with 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 also requested the Court to order the 1992 Fund to reimburse it any amount the shipowner's insurer will have paid in excess of the limitation amount.
- 10.5 Claims totalling €497 million (£332.7 million) were lodged against the shipowner's limitation fund constituted by Steamship Mutual. This amount includes the claims by the French Government and Total SA. However, most of these claims, other than those of the French Government and Total SA, 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 received from the liquidator of the limitation fund formal notifications of the claims lodged against that fund.
- 10.6 Due to some disturbances by an individual during all hearings in the Commercial Court in Rennes relating to the *Erika* incident, all judges of that Court decided in January 2006 that they would no longer deal with any proceedings concerning that incident. This decision applies to ten actions involving 63 claimants, including the actions mentioned in paragraphs 10.3 and 10.4 above, and the proceedings relating to the shipowner's limitation fund. The President of the Court of Appeal in Rennes decided on 12 January 2006 to transfer the actions and proceedings from the Commercial Court in Rennes to the Commercial Court in Saint-Brieuc. The Court in Saint-Brieuc accepted to deal with these actions and proceedings.
- 10.7 Legal actions against the shipowner, Steamship Mutual and the 1992 Fund have been taken by 796 claimants. By 14 February 2007 out-of-court settlements had been reached with 440 of these claimants and the courts had rendered judgements in respect of 90 claims. Actions by 266 claimants (including 144 salt producers) were pending. The total amount claimed in the pending actions, excluding the claims by the French State and Total SA, was €58.7 million (£39 million).
- 10.8 The 1992 Fund will continue to hold discussions with the claimants whose claims are not time-barred for the purpose of arriving at out-of-court settlements if appropriate.

11 Court judgements in respect of claims against the 1992 Fund <2>

11.1 Six judgements in respect of claims against the 1992 Fund which have been made public since the Executive Committee's October 2006 session are summarised below.

11.2 Court of Appeal in Rennes*Cancellation of millennium party*

11.2.1 An insurer had made a subrogated claim against the 1992 Fund for €630 000 (£422 000) in respect of a claim it had paid to a group of hotels in La Baule for losses incurred as a result of the cancellation of a major millennium party which was to have taken place on the local beach. This payment had been made pursuant to an insurance policy covering costs incurred in organising the cancelled party. The Mayor of La Baule had issued a decree on 27 December 1999 prohibiting all access to the beaches in La Baule, as a result of which the party had to be cancelled.

11.2.2 The 1992 Fund rejected the claim on the grounds that the claimant had not submitted sufficient information to enable the Fund to assess the losses and that the insurer had not taken into account the income received by the hotels for the period of the millennium festivities, which should have been deducted from the amount claimed for losses due to the cancellation of the event.

11.2.3 In a judgement rendered in December 2004 the Court of first instance estimated the income over the period of the millennium festivities at €200 000 (£134 000). The Court ordered the shipowner, Steamship Mutual and the 1992 Fund to pay the insurer the balance of €430 000 (£288 000).

11.2.4 The 1992 Fund appealed against this judgement.

11.2.5 In November 2006 the Court of Appeal in Rennes overturned the judgement by the Court of first instance and rejected the claim. It stated that it was not bound by the criteria for admissibility laid down by the 1992 Fund but that they could provide a useful point of reference for national courts. The Court referred to the fact that the decision by the Municipal Council of La Baule in December 1999, before the oil spill occurred, to reduce the permitted area of the marquees under which the festivities were to be held from 1 400 m² to 800 m², which had reduced by some 50% the potential income from the festivities and had made them non-profitable. The Court also stated that the severe storm which occurred on 26 and 27 December 1999 had made it impossible to erect the marquees and that the storm had caused damage to the roof of the hotel in front of which the festivities were to take place which had constituted a risk to participants in the festivities. The Court considered it evident that, due to the damage caused by the storm, the festivities could not for safety reasons have been held on that beach. The Court held that, although in the mayor's decision to prohibit access to the beach reference was made to the oil on the beach, this did not in itself constitute an obstacle to holding the festivities under the marquees and the fact that the marquees could not be erected was due to the storm. In the Court's view, the decision to cancel the festivities was due to the storm and not to the pollution. The Court of Appeal considered therefore that there was no link of causation between the cancellation of the festivities and the *Erika* incident and that the insurer had not established any direct and certain relationship between his obligation to indemnify the hotel group and the *Erika* incident.

11.2.6 The claimant has appealed against the judgement before the Court of Cassation.

<2> The judgements were rendered also against the shipowner and Steamship Mutual. In order not to burden the text in paragraphs 11.1-11.5.3, reference is made only to the 1992 Fund.

Owner of a crêperie

- 11.2.7 The owner of a crêperie in Morbihan had submitted a claim for €2 806 (£35 000) relating to loss of income allegedly due to the *Erika* incident. The claim had been rejected by the 1992 Fund since the claimant had bought the crêperie on 31 May 2000, ie six months after the *Erika* incident took place, when he was fully aware of the consequences the incident could have on his commercial activity.
- 11.2.8 In its judgement, the Commercial Court in Vannes noted the position taken by the governing bodies of the 1992 Fund, ie that in order for a claim to be admissible there should be a sufficient link of causation between the pollution and the loss or damage allegedly suffered by the claimant. The Court referred to the admissibility criteria established by the governing bodies for claims for pure economic loss. The Court noted that the claimant had purchased the business with full knowledge that the incident had taken place and the consequences it could have on its activity. The Court held that the claimant had not proved that the reduction in turnover was a consequence of the pollution and, for this reason, rejected the claim.
- 11.2.9 The claimant appealed against this judgement
- 11.2.10 In January 2007 the Court of Appeal in Rennes confirmed the judgement rendered by the Commercial Court in Vannes. In its judgement the Court of Appeal held that the claimant had not established that he had suffered a loss. The Court stated that the claimant, when he decided to purchase the crêperie, was fully aware of the consequences of the pollution on the 2000 tourism season.
- 11.2.11 When this document was issued, the claimant had not appealed against the judgement before the Court of Cassation.

11.3 Commercial Court in La Roche sur Yon

Property letting

- 11.3.1 An estate agent based in Saint Jean de Monts submitted a claim for €37 068 (£25 000) for losses in his commercial activity in 2000 and 2001, namely letting property to tourists, allegedly as a consequence of the *Erika* incident. The 1992 Fund had rejected the claim on the grounds that the claimant had failed to establish that there was a link of causation between the reduction in income and the incident.
- 11.3.2 In a judgement rendered in December 2006, the Court stated that the Fund's criteria for admissibility of claims were not binding on the judge who should determine in each individual case whether there was a sufficient link of causation between the event and the damage. The Court agreed with the Fund that the reduction in the claimant's income was as a result of factors unrelated to the incident such as a reduction in the number of property owners letting their properties through the claimant and an increase in the number of estate agents operating in the area. The Court held that the claimant had not proved that there was a link of causation between the reduction in income and the incident and for this reason rejected the claim.
- 11.3.3 When this document was issued, the claimant had not appealed against the judgement.

Restaurant owner

- 11.3.4 The owner of a restaurant in Noirmoutier submitted a claim in the amount of €19 803 (£13 000) in respect of losses suffered during 2000. The 1992 Fund considered that the claimant had not suffered a loss and rejected the claim. In taking its decision, the 1992 Fund considered that the claimant's turnover in 2000 had increased in relation to 1999 and that the claimant had obtained a benefit from the incident as a result of the additional meals provided to the fire brigade personnel who carried out clean-up operations in the area.

11.3.5 In a judgement rendered in December 2006, the Court, after stating that the Fund's criteria for admissibility of claims were not binding on the judge, held that it had not been demonstrated that the claimant had suffered a loss as a result of the incident and for this reason rejected the claim.

11.3.6 When this document was issued, the claimant had not appealed against the judgement.

11.4 Commercial Court in Quimper

Tourist boat operator

11.4.1 The owner of a company operating sailing boats for tourists in Concarneau submitted claims to the amount of €18 260 (£79 000) for losses between January and September 2000 and €104 757 (£70 000) for losses between October 2000 and September 2001. The claimant and the 1992 Fund agreed that the losses between January to September 2000 were €55 378 (£37 000). The 1992 Fund, however, rejected the claim for losses between October 2000 and September 2001 since it considered that the claimant had not suffered an economic loss.

11.4.2 In a judgement rendered in February 2007, the Commercial Court made a similar statement to that of the Commercial Court of La Roche sur Yon (paragraph 11.3.2), that the Fund's criteria for admissibility of claims were not binding on the national judge. The Court held that the claimant had not established a link of causation between the alleged loss and the contamination and had not demonstrated that it had suffered a loss as a result of the incident either and for these reasons rejected the claim.

11.4.3 When this document was issued, the claimant had not appealed against the judgement.

11.5 Civil Court in Saint Nazaire

Fisherman

11.5.1 A fisherman had submitted six claims totalling €36 593.86 (£24 000) relating to loss of income suffered between January and June 2000 due to the *Erika* incident. The 1992 Fund assessed the claim for January 2000 in the amount of €1 280.57 (£850). The Fund also assessed the losses suffered during February to June 2000, however it was informed that the claimant had already received compensation from the French Government through 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, for these losses under a scheme to provide emergency payments to claimants in the fishery and mariculture sectors. Since the French Government had acquired the claimant's rights by subrogation, the Fund paid the French Government the monies advanced by OFIMER. The claimant brought proceedings against the Fund claiming compensation to the amount of €3 212.29 (£35 600) in respect of loss of income, additional bank and social charges and mental suffering ('préjudice moral').

11.5.2 In a judgement rendered in February 2007 the Court held that, after taking into account the amounts received from OFIMER, the 1992 Fund should pay compensation to the claimant in the amount of €2 821.65 (£1 900). The Court considered that the claimant had failed to prove that he had suffered additional bank and social charges. With regard to the claim for mental suffering ('préjudice moral'), the Court considered that the claimant could not justify the reason or the quantum of the claim.

11.5.3 When this document was issued, the claimant had not appealed against the judgement.

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 the handling of this incident as it may deem appropriate.
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