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ERIKA INCIDENT

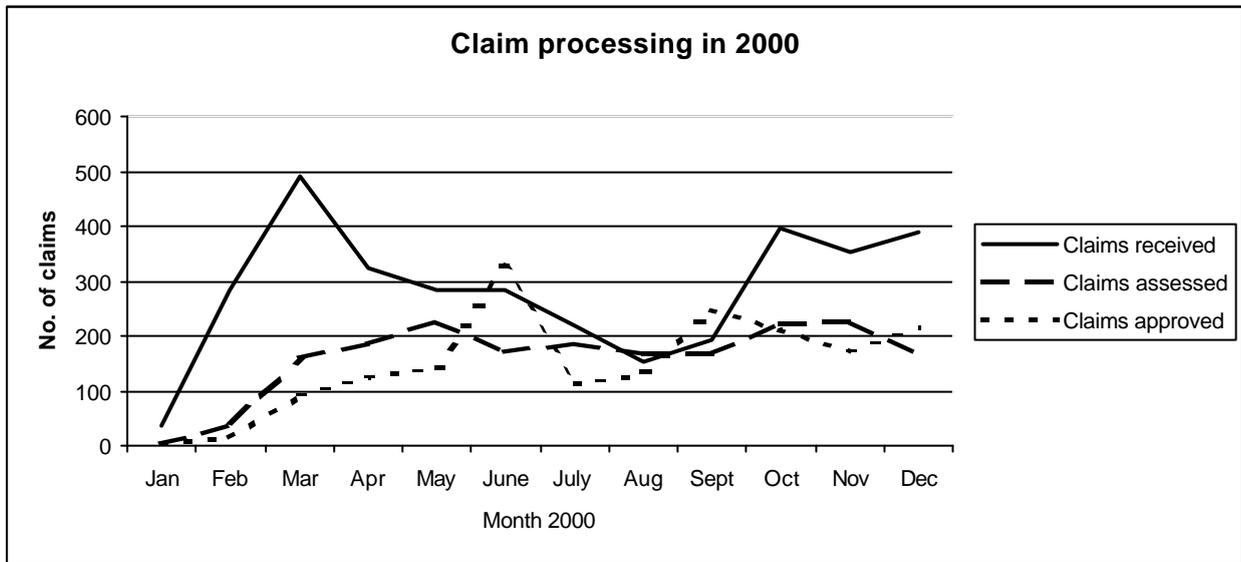
Note by the Director

Summary:	Updated information on the claims situation is given. One claim by a commune is submitted to the Executive Committee for consideration. Reference is made to the criticism in France against the 1992 Fund and the international compensation regime. Information is given on certain recent difficulties faced by the 1992 Fund in France.
Action to be taken:	(a) Decide on the admissibility of a claim by a commune; (b) Give the Director such instructions as the Executive Committee may deem appropriate in respect of the claims handling.

1 Claims situation

- 1.1 As at 24 January 2001, 3 543 claims for compensation had been submitted for a total of FFr412 million (£39 million). Of these claims 872 were presented during the months of November 2000 - January 2001.
- 1.2 Some 2 090 claims totalling FFr184 million (£18 million) had been assessed at a total of FFr123 million (£12 million)]. Assessment had thus been carried out of 59% of the total number of 3 543 claims received and of 79% of the claims which had been received by 31 October 2000.
- 1.3 One hundred and forty-five claims, totalling FFr11 million (£1.1million), had been rejected. Many of the rejected claims are being reassessed in the light of additional documentation provided by the claimant.
- 1.4 Payments had been made by Steamship Mutual in respect of 912 claims for a total of FFr36 million (£3.5 million). Most of these payments correspond to 50% of the approved amounts, but some hardship payments made at an early stage were made in full or at percentages higher than 50%.

- 1.5 Approved payments in respect of a further 621 claims, totalling FFr22 million (£2.1 million), had not been made. This is due to the fact that confirmation and acceptance of the assessed amount had not been received in respect of 391 claims, the receipt and release form had not been signed in respect of 65 claims and the assessment had been rejected by the claimants in respect of 165 claims of which 152 are undergoing re-assessment.
- 1.6 A further 1 445 claims, totalling FFr227 million (£21.7 million), were either in the process of being assessed or were awaiting claimants providing further information necessary for the completion of the assessment.
- 1.7 The graph below shows the number of claims received each month against those assessed and approved during 2000. It can be seen that the rate at which claims have been assessed has kept in step with the rate at which claims are received.



2 Claim submitted to the Executive Committee for consideration

- 2.1 A commune has presented a claim for FFr622 550 (£60 000) for the cost of the repairs to four minor country roads within a few kilometres of the coast. According to the commune these roads were damaged as a result of traffic having been diverted from the main coastal road which had been closed to normal traffic in order to facilitate the clean-up operations.
- 2.2 In the Director's view the damage to the four country roads should be considered as damage caused by the clean-up operations and the cost of the repairs should therefore in principle be admissible for compensation.

3 Criticism of the 1992 Fund

- 3.1 As reported to the Executive Committee at its 8th session, the 1992 Fund and the international compensation regime have been subject to severe criticism in France. This criticism has continued. The criticism has been aired by cabinet ministers, by other politicians and by various bodies and individuals. The criticism can be summarised as follows.
- 3.2 It has been stated that the total amount of compensation of 135 million SDR (FFr1 200 million) fixed in the 1992 Conventions is unacceptably low and that the Fund should take steps to ensure that more money is available. It has been maintained that it is unacceptable that early claimants have their payments pro-rated and that the problem of equal treatment of early and late claimants is for the 1992 Fund to solve. The 1992 Fund has been described as a mutual insurance company

of the oil industry and as a body protecting the oil industry. It has been maintained that the claims settlement is far too slow, as evidenced by the very low amount paid. The Fund's policy of requiring claimants to substantiate their losses by supporting documents or other evidence has also been criticised, and it has been argued that the criteria applied by the Fund are too strict.

3.3 In his contacts with the media and representatives of the public and private sectors the Director has explained the main features of the international regime based on the 1992 Conventions. He has stated that the 1992 Conventions have been agreed between a number of States, including France, that the Conventions have been approved by the Assemblée Nationale and the Senate and that they form part of French domestic law. He has made the point that the maximum amount available was decided by Governments when the Conventions were adopted and that the 1992 Fund has no legal possibility of increasing this amount for the *Erika* incident. He has pointed out that the 1992 Fund has a legal obligation to ensure that, to the extent possible, all claimants are treated equally and that, if the total amount of all established claims exceeds the total amount available for compensation, all claimants will have to receive the same percentage of the approved amounts of their respective claims. The Director has referred to the fact that pro-rating had been made in a number of previous cases in various incidents by the 1971 Fund and, most recently, by the 1992 Fund in the *Nakhodka* case. It has been explained that the 1992 Fund is governed by the Governments of Member States and that the oil industry does not take any part in the decisions. The Director has emphasised that the policy of the 1992 Fund has been laid down by the representatives of the Governments of Member States. He has also explained that the criteria for the admissibility of claims have been determined by the representatives of the Governments of Member States, including the requirement that claimants should substantiate their losses by the production of supporting documents and other evidence.

3.4 It will be recalled that the IOPC Funds' governing bodies have consistently taken the view that claims can only be admitted if and to the extent that they fulfil certain criteria. The policy of the 1992 Fund on the admissibility of claims for compensation had been established by the Governments of Member States. It follows that the IOPC Funds will have to make a thorough examination of each claim. The Claims Manual, which has been adopted by the Assemblies of the IOPC Funds, sets out the following criteria which apply to all claims.

- any expense/loss must actually have been incurred
- any expense must relate to measures which are deemed reasonable and justifiable
- a claimant's expense/loss or damage is admissible only if and to the extent that it can be considered as caused by contamination
- there must be a link of causation between the expense/loss or damage covered by the claim and the contamination caused by the spill
- a claimant is entitled to compensation only if he has suffered a quantifiable economic loss
- a claimant has to prove the amount of his loss or damage by producing appropriate documents or other evidence.

A claim is thus admissible only to the extent that the amount of the loss or damage is actually demonstrated.

3.5 It should be recalled that at its 9th session, in connection with the consideration of certain claims arising from the *Erika* incident, the Executive Committee confirmed that the 1992 Fund should consider the admissibility of claims solely on the basis of the criteria for admissibility laid down and the practice developed by the governing bodies of the 1971 Fund and the 1992 Fund over the years (document 92FUND/EXC.9/12, paragraph 3.6.29).

- 3.6 The examination of the claims arising from the *Erika* incident has been carried out on the basis of the criteria set out in the Claims Manual. Subject to any instructions which the Executive Committee may wish to give him, the Director intends to pursue the examination of the claims on that basis.
- 3.7 It has been maintained in France that it is unacceptable that of the total amount of FFfr1 200 million available for compensation only a very modest amount has been paid. Although only a relatively small amount has been paid so far, the total amount claimed to date is also relatively low. However, it is the complexity of a claim and the extent to which it is properly documented, not the quantum, which determines the speed with which it is assessed and approved.
- 3.8 It has also been suggested that the 1992 Fund's assessment of claims in the *Erika* incident is inconsistent, since some claims are approved for the full amount claimed or close to that amount, whereas other claims are approved for only part of the amount claimed.
- 3.9 The main reasons why claims are often assessed at lower amounts than the claimed amounts are as follows:
- (a) the claimant has not submitted any documentary evidence supporting the claim;
 - (b) the claimant has ignored or has been selective in applying financial records of his business for the years preceding the incident;
 - (c) the claimant has failed to take into account saved costs resulting from the downturn in business;
 - (d) the claimant has not made deduction for any substitute income during the period covered by the claim.
- 3.10 It may also be appropriate to note a difference in this regard between various categories of claims. In the fishery and mariculture sectors economic loss claims have on average been approved at 59% of the claimed amounts, with a range of 27% to 100%, whereas in the tourism sector the approved amounts correspond on average to 89% of the amounts claimed, with a range of 62% to 100%.
- 3.11 As the Executive Committee is aware it is not unusual that claims in the fishery sector are approved only at a fairly low percentage of the amounts claimed. As has been reported to the governing bodies of the 1971 and 1992 Funds this has been the case in respect of fishery claims arising from incidents in for example Japan, the Republic of Korea, Spain and the United Kingdom.

4 Recent difficulties faced by the 1992 Fund in France

- 4.1 As reported at the Executive Committee's 8th session, on 13 March 2000 a person who presented himself as president of a newly created entity, Confédération Maritime, forced himself into the Claims Handling Office in Lorient together with another person. A number of journalists from the press, radio and television also entered. The individual in question stated his demands and insulted the staff of the office. A senior police officer arrived and tried to persuade the intruders to leave the office but without success. A considerable number of policemen were called to the office and they managed to remove the intruder from the office without any violence.
- 4.2 As also reported at the Committee's 8th session, on 9 May 2000 four persons led by the same individual who had led the intrusion in the Claims Handling Office in March forced themselves into the office in Brest of the experts engaged by the 1992 Fund and Steamship Mutual to monitor the clean-up operations. The four persons climbed the wall and entered the office through a window on the first floor. The staff were threatened when they tried to stop the intruders. The

police were called. A number of journalists from television and press also entered the office. The intruders then left the office with the police. The intruders presented documents to the media repeating the allegations and containing threats against the surveyors and the staff at the Claims Handling Office, as well as against their families.

- 4.3 At its 8th session, while understanding the feelings of the people in the area affected by the *Erika* incident, the Executive Committee endorsed the position taken by the Director that attacks, threats or intimidation against the staff at the Claims Handling Office or other persons engaged by the Fund, as well as against their families, were unacceptable and that it would not be possible for the 1992 Fund to maintain the operations in France if such behaviour continued (document 92FUND/EXC.8/8, paragraph 3.7).
- 4.4 The marine experts referred to in paragraph 4.2 presented a complaint against the intruders to the public prosecutor. The prosecutor decided however not to pursue any action against the intruders without giving any reasons for his decision.
- 4.5 On 12 December 2000, ie on the anniversary of the *Erika* incident, a demonstration took place in front of the Claims Handling Office in Lorient in which participated some 12 persons led by the individual referred to in paragraph 4.1 above. The demonstration was generally peaceful. However, this individual and two other persons splashed the walls and windows of the Office with black paint and climbed on to the roof of the building. They were arrested by the police. The demonstration was given considerable media coverage. The Claims Handling Office made a formal complaint to the public prosecutor against the three persons in question.
- 4.6 It has been reported that the same individual has made a formal complaint to the public prosecutor against persons linked with the 1992 Funds' operations in France and in the United Kingdom. According to French press reports, it is maintained in the allegations that funds which should be used for payments to victims had been embezzled and that persons in Lorient and elsewhere had a personal interest in delaying payments, since they would profit from interest on the funds. The allegations were given wide media coverage. The Director gave information to the media in France on the operations of the compensation system showing that the allegations were groundless, but that information was not given the same coverage. Neither the 1992 Fund nor any person linked with the Fund's operations has been notified of these complaints.
- 4.7 It has also been reported that the individual concerned has filed several complaints with the public prosecutor in Lorient against the persons in charge of the Claims Handling Office. The latter have received from that individual threats to the effect that further accusations would be made in the media unless compensation was paid for the claim presented by that individual which had been rejected. The individual has also in general made a number of allegations against the Head of the Claims Handling Office, other staff of the Office and the Director and sent abusive and insulting letters to them.
- 4.8 It should be noted that the individual in question had submitted a claim for FFr134 925 (£13 000) in respect of losses allegedly suffered as a result of the *Erika* incident having prevented him running boat cruises for tourists around the Brittany coast. The claimant maintained that his business suffered a drop in reservations following the negative publicity on the incident. Tourism and maritime experts engaged by the Steamship Mutual and the 1992 Fund visited the claimant. The experts found that the claimant's boat was unsuitable for the purpose proposed. They noted that the licence to carry out the activity, which had been issued in January 1997, had lapsed after 18 months of inactivity and that the claimant had not applied to have the licence revalidated. They also noted that the claimant was unable to provide data on which to base an assessment of his losses because the boat had not been used since 1996. In the light of these findings, the 1992 Fund and Steamship Mutual decided in August 2000 to reject the claim.

5 **Action to be taken by the Executive Committee**

The Executive Committee is invited:

- a) to take note of the information contained in this document;
 - b) to consider the admissibility of the claim referred to in section 2 above;
 - c) to consider the criticism made against the 1992 Fund and the international compensation regime and give the Director such instructions in respect of the handling of claims arising out of the *Erika* incident as it may deem appropriate in the light of this criticism; and
 - d) to take note of the various difficulties faced by the 1992 Fund in France referred to in section 4.
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