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COMPENSATION
FUND 1992

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Agenda item 3

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INCIDENTS INVOLVING THE 1992 FUND

ERIKA – CLAIMS SITUATION AND LEVEL OF PAYMENTS

Note by the Director

Summary: As at 23 April 2002, 6 157 claims had been received. 5 378 claims corresponding to 87% of all claims had been assessed. Payments totalling FFr259 million or €9 million (£24 million) had been made in respect of 4 141 claims.

The Director has reconsidered the likely total amount of all admissible claims arising from this incident. In the light of the remaining uncertainty in this regard he proposes that the level of the 1992 Fund's payments should be maintained at 80% of the loss or damage suffered by the respective claimants as assessed by the 1992 Fund's experts.

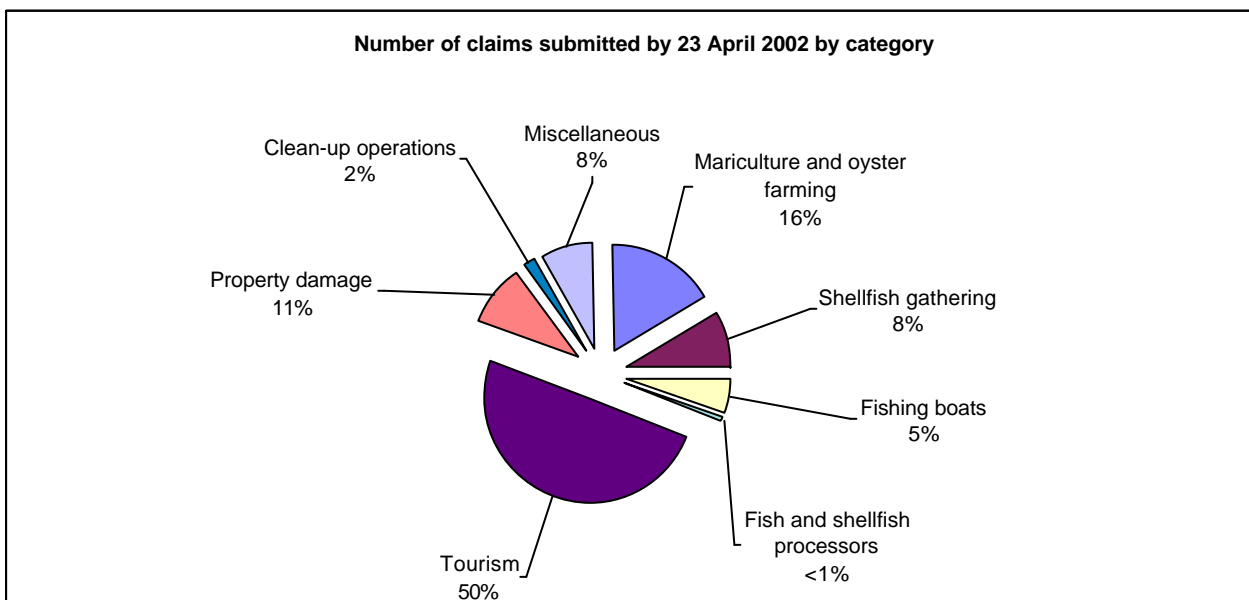
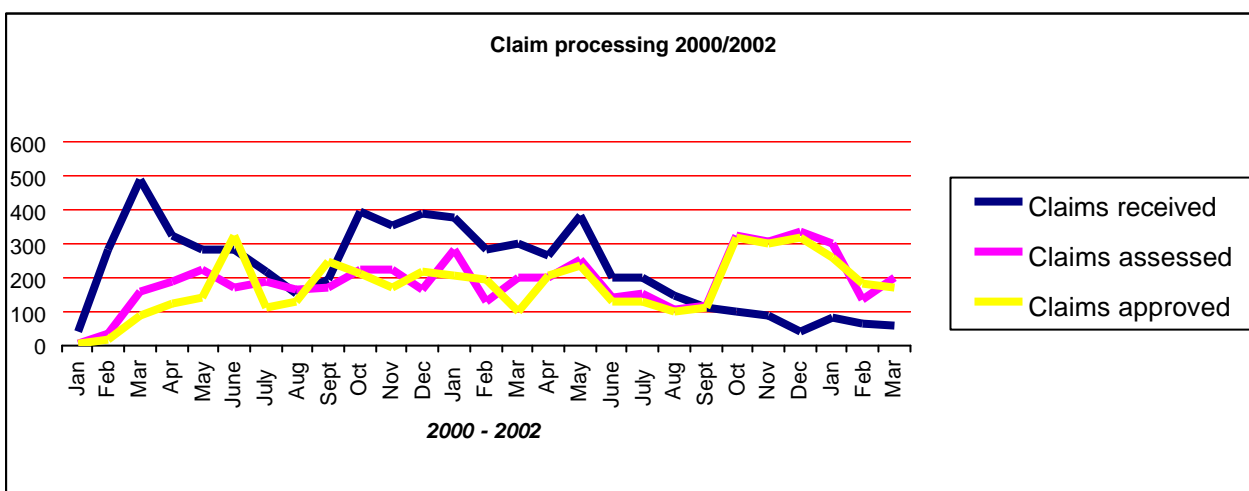
Action to be taken: To review the level of the 1992 Fund's payments.

1 Claims situation

- 1.1 As at 23 April 2002 6 157 claims for compensation had been submitted for a total of FFr1 004 million or €153 million (£94 million)^{<1>}.
- 1.2 Five thousand three hundred and seventy-eight claims totalling FFr772 million or €117 million (£73 million) had been assessed at a total of FFr406 million or €62 million (£38 million). Assessments had thus been carried out of 87% of the total number of claims received.
- 1.3 Six hundred and forty claims, totalling FFr107 million or €16 million (£10 million), had been rejected. Eighty-two claimants whose claims total FFr24 million or €3.6 million (£2.2 million) have contested the rejection and their claims are being reassessed in the light of additional documentation provided by the claimants.

<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.

- 1.4 Payments of compensation had been made in respect of 4 141 claims for a total of FFr259 million or €9 million (£24 million), out of which the shipowner's insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual), had paid FFr84 million or €3 million (£8 million) and the 1992 Fund FFr175 million or €27 million (£16 million). Payments had thus been made in respect of 67% of all claims.
- 1.5 Seven hundred and seventy-nine claims totalling FFr232 million or €5 million (£22 million) were either in the process of being assessed or were awaiting claimants providing further information necessary for the completion of the assessment.
- 1.6 The graphs below show the total number of claims received each month against those assessed and approved since January 2000 and the number of claims submitted by category.



- 1.7 The following tables give details of the processing of claims in various categories.

Claims submitted by 23 April 2002									
Category	Claims submitted	Claimed amount		Claims assessed		Claims for which payments have been made		Claims rejected	
		FFr	€						
Mariculture and oyster farming	983	91 408 661	13 894 116	968	98%	761	77%	77	7%
Shellfish gathering	507	20 466 449	3 110 900	478	94%	327	64%	93	18%
Fishing boats	312	16 371 549	2 488 478	304	97%	260	83%	23	7%
Fish and shellfish processors	37	20 581 849	3 128 441	32	86%	25	68%	6	16%
Tourism	3 061	701 485 567	106 625 806	2 778	91%	2 084	68%	405	13%
Property damage	670	37 607 259	5 716 303	288	43%	209	31%	15	2%
Clean-up operations	117	53 450 513	8 124 478	84	72%	62	53%	4	3%
Miscellaneous	470	62 869 618	9 556 182	446	95%	413	89%	17	4%
Total	6 157	1 004 241 466	152 644 704	5 378	87%	4 141	67%	640	10%

Payments authorised and made by 23 April 2002						
Category	Payments authorised			Payments made		
	Number of claims	Amounts		Number of claims	Amounts	
		FFr	€		FFr	€
Mariculture and oyster farming	877	35 131 088	5 339 925	761	25 312 630	3 847 520
Shellfish gathering	377	3 960 820	602 045	327	3 218 290	489 180
Fishing boats	278	4 855 797	738 081	260	4 227 428	642 569
Fish and shellfish processors	25	3 892 705	591 691	25	3 892 705	591 691
Tourism	2 233	197 238 188	29 980 205	2 084	182 584 155	27 752 792
Property damage	254	3 140 411	477 342	209	2 859 062	734 577
Clean-up operations	72	17 515 103	2 662 299	62	15 433 217	2 345 849
Miscellaneous	420	26 820 539	4 777 342	413	21 710 208	3 299 952
Total	4 536	292 554 650	44 468 307	4 141	259 237 694	39 404 130

- 1.8 As is shown in the tables, there is a significant difference between the various categories of claims as regards the progress made in the claims assessment. In five of the eight categories over 90% of all claims had been assessed, and for most categories payments had been made in respect of over 65% of claims. Although in the tourism sector a major part of the claims were presented relatively late, 91% of the claims in this sector had been assessed. There is still a delay between the time of approval and the time of payment, mainly as a result of claimants not having replied to the offer for settlement or not having accepted the assessed amounts.
- 1.9 As for the category "property damage" only 288 claims (43%) had been assessed. However, 328 claims in this category (49%) submitted by salt producers in Guérande and Noirmoutier cannot be assessed for the time being. The claims from salt producers in Guérande cannot be examined until the expert appointed by the Court in St Nazaire has completed his examination of whether it would have been feasible to produce salt in 2000 in Guérande that would meet the criteria relating to quality and the protection of human health (cf document 92FUND/EXC.16/3, paragraph 3.5). The claims from salt producers in Noirmoutier cannot be assessed until technical evidence is submitted.
- 1.10 In the clean-up sector there are still some communes which have not replied to repeated requests by the 1992 Fund to provide additional information and documentation. An added difficulty as regards this sector is the necessity to establish to what extent the communes have also claimed compensation under the French national contingency plan (Plan POLMAR) so as to ensure that no duplication of payments will take place.
- 1.11 As regards the tourism sector, the claimants have contested the assessments in respect of only 12.5% of the claims. The claims where assessments have been contested are or will be re-examined in the light of any observations made by the claimant.

2 Level of payments

2.1 The Executive Committee's previous decisions on the level of payments

- 2.1.1 An extensive study was carried out within the French Ministry of Economy, Finance and Industry in June 2000 on the extent of the damage caused by the *Erika* incident in respect of the tourism industry. In this study the estimated total amount of the admissible claims in the tourism industry fell within the range of FFr800 – 1 500 million or €22 – €29 million (£70 – 144 million).
- 2.1.2 In the view of the uncertainty as to the total amount arising from the *Erika* incident, the Executive Committee decided, at its 8th session held 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 (document 92FUND/EXC.8/8, paragraph 3.38).
- 2.1.3 A further study was carried out within the Ministry of Economy, Finance and Industry in January 2001 ('the January 2001 study'). In that study the maximum amount of admissible claims in the tourism sector was assessed at between FFr1 100 million (£103 million) and FFr1 200 million (£112 million).
- 2.1.4 In the light of the January 2001 study and the opinion of the 1992 Fund's experts, the Executive Committee decided, at its 11th session held in January 2001, to increase the level of the 1992 Fund's payments from 50% to 60% of the amount of the damage actually suffered by the respective claimants (document 92FUND/EXC.11/6, paragraph 3.58).
- 2.1.5 A new study was carried out within the Ministry of Economy, Finance and Industry in June 2001 ('the June 2001 study'). In this study the total amount of the losses admissible for compensation in the tourism industry was estimated at between FFr363 million (£34 million) and FFr503 million (£47 million).
- 2.1.6 In the light of the June 2001 study and the opinion of the 1992 Fund's experts the Executive Committee decided at its 13th session, held in June 2001, to increase the level of the 1992 Fund's payments to 80% of the amount of the damage actually suffered by the respective claimants, as assessed by the 1992 Fund (document 92FUND/EXC.13/7, paragraph 3.2.42).
- 2.1.7 A supplementary study was carried out in October 2001 within the French Ministry of Economy, Finance and Industry ("the October 2001 study"). The October 2001 study confirmed the estimate of FFr500 million (£47 million) of admissible losses from the tourism sector made in the June 2001 study. By adding a provision of FFr50 million (£4.7 million) for "out of area claims" and adding an estimate of FFr300 million (£28.3 million) for claims from other sectors outside tourism, the study arrived at a total of FFr850 million (£81 million). The October 2001 study concluded that compensation at 100% was therefore possible with a safety margin of FFr350 million or €33 million (£33 million).
- 2.1.8 The 1992 Fund's experts broadly agreed with the overall estimate made in the October 2001 study.
- 2.1.9 The observations made by a variety of tourism organisations confirmed the experts' view that the *Erika* incident had not had a significant impact on the 2001 season and that there were other factors that might have impacted on 2001 performance. However the Claims Handling Office had received requests for claim forms for the 2001 tourism season and, in the experts' view, claims for losses during the 2001 season might be admissible in a limited number of cases where the claimant's business was located in an area where the shoreline had remained contaminated.
- 2.1.10 In the evaluation of the likely level of admissible tourism losses at FFr500 million (£47 million), the October 2001 study had not taken into consideration that claims might be presented by tourist organisations for exceptional spending on promotional campaigns in 2001. The Fund's experts suggested that whilst such claims might not be admissible for compensation, such claims might be

forthcoming. The October 2001 study had not made any assumption as to the approach of the French courts and their interpretation of the concept of pollution damage.

- 2.1.11 In the view of the 1992 Fund's experts, these factors might have led the October 2001 study to underestimate the overall level of claims, but this under-estimate might well be offset by a significant proportion of potential claimants deciding not to present claims. It appeared that many small tourism or tourism-related businesses considered the task and process involved in submitting a claim too complicated or laborious or that it might result in loss of commercial confidentiality. The increase in the level of payments from 60% to 80% and the introduction of the French Government's top-up scheme appeared not to have resulted in potential claimants changing their opinion in this regard.
- 2.1.12 The Executive Committee decided, at its 14th session held in October 2001, that in the light of the uncertainties that remained as to the level of admissible claims arising out of the *Erika* incident, the level of payments should be maintained at 80% of the amount of the damage actually suffered by the respective claimants as assessed by the experts engaged by the 1992 Fund and Steamship Mutual. It was also decided that the level of payments should be reviewed at the Committee's 16th session (document 92FUND/EXC.14/12, paragraph 3.4.49).

2.2 Other assessment of the total damage arising from the *Erika* incident

- 2.2.1 It will be recalled that at its 11th session, held in January 2001, the Executive Committee took note of a study of the damage resulting from the *Erika* incident carried out by a French consulting firm specialising in accounting (Mazars et Guérard) assisted by various groups of experts. The study had been commissioned by l'Association Ouest Littoral Solidaire (a group of three administrative regions: Bretagne, Pays de La Loire and Poitou-Charentes). According to the study the total amount of the damage could be estimated to be in the range of FFr5 460 - 6 340 million or €832 - 966 million (£528 - 594 million).
- 2.2.2 In February 2002 this study was submitted to the court survey (expertise judiciaire) carried out on the instruction of the Court in Les Sables d'Olonne (document 92FUND/EXC.16/3, paragraph 14.2).
- 2.2.3 The study gives the following estimates of the damage:

	FFr (million)	FFr (million)
1. TotalFina		
Oil removal from the wreck	500	
Disposal of oily waste	200	
Clean-up operations	220	
Reinstatement of image of the affected area	30	
Action fund	<u>50</u>	
		1 000
2. Plan Polmar		900
3. Regional and local authorities		190
4. Tourism industry (out of which FFr610-690 million (£57-65 million) is for losses in 2001 and 2002)		2 650 - 3 220
5. Maritime sector		340 - 480
6. Reinstatement of image		150 - 200
7. Environmental damage		
Damage to fauna	50	
Reinstatement of polluted areas	40 - 110	
Various studies	<u>140 - 190</u>	
		<u>230 - 350</u>
		FFr5 460 - 6 340

2.2.4 It is stated in the report that the assessment is not intended to form the basis of an estimate of losses suffered by individual claimants. It appears, in any event, that as regards the losses in the tourism sector (item 4) the assessment is based on a reduction in turnover and not on the loss of profit, the latter being the basis of the assessment of compensation. As regards the maritime sector (item 5), the Director believes that the amount indicated is exaggerated. It also appears that the amounts referred to in item 7 would fall outside the definition of 'pollution damage' laid down in the 1992 Conventions. It should be noted that items 1 and 2 in the table can be disregarded for the purpose of the Executive Committee's consideration of the 1992 Fund's level of payments, since these items relate to costs incurred by Total Fina and the French State (cf paragraph 2.3.2 below).

2.3 Director's considerations

2.3.1 The Executive Committee will again have to consider how to strike a balance between the importance of the 1992 Fund's paying compensation as promptly as possible to victims of oil pollution damage and the need to avoid an over-payment situation. In the Committee's consideration of how to strike this balance the following elements may be of assistance.

2.3.2 It should be recalled that the claims by Total Fina and the French Government can be disregarded for the purpose of the Executive Committee's consideration of the level of payments, since these claims will be pursued only if and to the extent that all other claims have been paid in full (document 92FUND/EXC.16/3, paragraph 11).

2.3.3 Although the uncertainties inherent in the October 2001 estimates have been reduced considerably, there still remain in the Director's view some uncertainties as to the total amount of admissible claims from the tourism sector. Only 23% of businesses known to have sustained a reduction in turnover on the basis of VAT declarations have submitted claims.

2.3.4 There have been no reports of re-oiling of the coastline during the winter 2001/2002. In the Director's view it is in any event unlikely that there will be any further significant shoreline impact.

2.3.5 The October 2001 study is based on the criteria for admissibility applied by the 1992 Fund. As previously reported to the Executive Committee, the Director has been advised, however, that the French courts might adopt a more extensive approach in their interpretation of the notion of 'pollution damage', and it is not possible to predict the consequences of such an approach.

2.3.6 Although the outcome of the 2001 tourism season is not yet known in any detail, it appears that it was relatively good. It is unlikely therefore that the 2001 tourism season has been affected by the *Erika* incident to any significant degree, but there may nevertheless be admissible claims relating to that season from areas where clean-up was still being carried out. A major part of the tourism claims relating to the 2000 tourism season were submitted during the period April to June. Thirty-four claims for losses during the 2001 tourism season totalling FFr3.8 million or €570 000 (£358 000) have been submitted and it is possible that further claims will be presented during late spring/early summer 2002. There may also be claims for publicity campaigns in 2001, and the October 2001 study did not make any allowance for such claims. It should be noted that claims can be brought against the 1992 Fund up to the end of the time bar period, ie within three years of the date when the damage occurred or within six years of the date of the incident, and the time bar period will expire on 12 December 2002 at the earliest.

2.3.7 As mentioned above, the claims in the sectors other than tourism have been estimated at some FFr275 - 325 million or €42 - €50 million (£26 - 31 million). The Director maintains his view that the estimate in the October 2001 study for the tourism claims of FFr500 million or €76 million (£47 million) may be on the low side and would consider that a figure of FFr700 million or €107 million (£66 million) would be prudent. He takes the view that it is advisable to include an amount of FFr100 million or €15 million (£9.4 million) for losses in the tourism sector during 2001. He considers that it is also necessary to make an additional allowance for marketing campaigns of some FFr100 million or €15 million (£9.4 million). As

stated at the Executive Committee's 14th session, the Director believes that it would be prudent to add a general safety margin of FFfr200 million or €30 million (£18.8 million). The estimated total admissible claims would then be in the region of FFfr1 400 million or €13 million (£131 million), ie the same figure as the one given by the Director at the Executive Committee's 14th session.

- 2.3.8 In the light of the remaining uncertainties as to the level of claims arising out of the *Erika* incident, the Director proposes that the level of payments should be maintained for the time being at 80% of the amount of the damage actually suffered by the respective claimants as assessed by the experts engaged by the 1992 Fund and Steamship Mutual. He also proposes that the level of payments should be reviewed at the Committee's 17th session.

3 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 decide on the level of the 1992 Fund's payments.
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