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INCIDENTS INVOLVING THE 1992 FUND

ERIKA – CLAIMS SUBMITTED TO THE EXECUTIVE COMMITTEE FOR CONSIDERATION

Note by the Director

Summary:

Seventeen claims for reduction in tourism tax revenue are submitted for consideration, including four that were given a preliminary examination by the Executive Committee at its 14th session. The admissibility of a number of claims for pure economic loss from businesses located at some distance from the coast affected by the oil from the *Erika*, or located in the Department of Côtes-d'Armor which was not affected by the oil from the *Erika*, give rise to a question of principle and the Executive Committee is invited to consider this issue. A claim for a publicity campaign undertaken by the Department of Charente-Maritime to restore the image of the department as a tourism destination is also submitted for consideration.

Action to be taken:

- a) to consider the admissibility of claims for reduction in revenue from tourism tax (taxe de séjour) (paragraph 2);
- b) to consider the 1992 Fund's policy in respect of the admissibility of claims from businesses located some distance from the affected coast (paragraph 3);
- c) to consider whether claims from businesses in the Department of Côtes-d'Armor are admissible for compensation (paragraph 4); and
- d) to consider the admissibility of a claim from the Department of Charente-Maritime relating to a publicity campaign undertaken to restore the image of the department as a tourism destination (paragraph 5).

1 Criteria for the admissibility of claims for pure economic loss adopted by the IOPC Funds

- 1.1 The criteria for the admissibility of claims for pure economic loss were considered in 1994 by the 7th Intersessional Working Group of the 1971 Fund. The Working Group's Report (document FUND/A.17/23) was considered by the 1971 Fund Assembly at its 17th session, held in October 1994. The Assembly endorsed the Working Group's Report and thereby laid down certain criteria for the admissibility of claims for pure economic loss (document FUND/A.17/35, paragraph 26.8).
- 1.2 At its 1st session, the 1992 Fund Assembly adopted a Resolution (Resolution N°3) in which the Assembly resolved that the report of the 7th Intersessional Working Group of the 1971 Fund should form the basis of the policy of the 1992 Fund on the criteria for the admissibility of claims (document 92FUND/A.1/34, Annex III).
- 1.3 The criteria laid down by the Assemblies can be summarised as follows:

To qualify for compensation for pure economic loss, there must be a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant. A claim is not admissible for the sole reason that the loss or damage would not have occurred had the oil spill not happened. When considering whether the criterion of reasonable proximity is fulfilled, the following elements are taken into account:

- the geographic proximity between the claimant's activity and the contamination
- the degree to which a claimant was economically dependent on an affected resource
- the extent to which a claimant had alternative sources of supply or business opportunities
- the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.

The 1992 Fund also takes into account the extent to which a claimant was able to mitigate his loss.

The assessment of a claim for pure economic loss is based on the actual financial results of the individual claimant for appropriate periods during the years before the incident. The assessment is not based on budgeted figures. The 1992 Fund takes into account the particular circumstances of the claimant and considers any evidence presented. The criterion is whether the claimant's business as a whole has suffered economic loss as a result of the contamination.

Any saved overheads or other normal expenses not incurred as a result of the incident should be subtracted from the loss suffered by the claimant, for both consequential loss and pure economic loss.

2 Claims for reduction in tourism tax

- 2.1 Seventeen communes have submitted claims for reduction in revenue from tourism tax (taxe de séjour). The amounts claimed vary from FFr23 000 or €3 500 (£21 700) to FFr270 000 or €41 000 (£25 500). Eight claims are for tourism tax only, while nine claims include other losses of revenue from tourists staying in the commune, such as fees from municipal camping sites, mooring fees and car parking fees. Ten of these communes are located in Morbihan, four in Vendée, two in Loire Atlantique and one in Finistère.

- 2.2 Tourism tax is a tax which may be levied by communes that are recognised tourism resorts and destinations. The level of the tax is fixed annually by the commune. The tax is levied at a fixed amount per visitor per night of stay, the amount varying dependent on the type of accommodation. It is understood that the tax may be waived in respect of certain categories of business visitors who hold an official sales representative card. The revenue from the tourism tax is used by the commune to support costs of activities and services which are related to levels of leisure-purpose tourism in the commune, *inter alia* beach cleaning, rubbish collection, information and local tourism offices.
- 2.3 Ten of the 17 claims indicate that the tourism tax is only collected during the peak summer season months (June to September/October or even in the case of some communes only during July and August), when the tourism activity is at its highest. All the 17 communes are coastal resorts. All these communes except two in Vendée have beaches which were contaminated by oil from the *Erika*. These two communes in Vendée are situated south of the directly affected coast.
- 2.4 A preliminary examination of the claims indicates that there was a reduction in tourism tax income from 1999 to 2000 of up to 40%. For nine claims the reduction was between 9% - 25% which is broadly comparable with estimated levels of decrease in the economic activity related to tourism in areas affected by the *Erika* incident.
- 2.5 As regards the question as to whether claims for reduction in tourism tax revenue are admissible for compensation reference should be made to some decisions taken by the 1971 Fund Executive Committee in previous cases.
- 2.6 In the *Tanio* case (France, 1980), the 1971 Fund Executive Committee rejected a claim from a commune for loss of tax revenue due to a reduction in the income of businessmen as a result of the incident. The Committee stated that it might be very difficult for a public authority to prove that a loss of tax revenue had actually occurred as a direct result of a pollution incident. The Committee considered that the documentation submitted in support of this claim was insufficient (documents FUND/EXC.10/5, paragraph 3.3.5 and FUND/EXC.10/WP.1, paragraph 2.3).
- 2.7 In the context of the *Haven* incident (Italy, 1991), claims were submitted for losses suffered by public bodies as a result of reduced tourism activity.
- 2.8 In the *Haven* case the City of Cannes (France) submitted a claim which, *inter alia*, related to loss of income resulting from a reduction of tourism during 1991. The claim listed various kinds of losses, as follows:

	FFr
(a) loss of professional tax	35 000 000
(b) loss of tax on casinos	11 000 000
(c) loss of tax on individual tourists	1 800 000
(d) loss of additional tax on registration	4 200 000
(e) loss of tax on various entertainments	<u>3 900 000</u>
	55 900 000
	(€8 385 000)

- 2.9 The Executive Committee took the view that the City of Cannes had not shown that the alleged loss of tax revenue from tourism resulted from the *Haven* incident. For this reason, the Committee considered that this claim should be rejected (document FUND/EXC.35/10, paragraph 3.2.18).
- 2.10 In the *Haven* case, a claim relating to alleged loss of tourist tax resulting from a reduction in tourist activity in the amount of FFr350 000 or €53 000 (£33 000) was submitted by the commune of Lavandou in France. The 1971 Fund Executive Committee considered that the commune had not shown that the alleged loss was caused by the *Haven* incident and that this claim should therefore be rejected (document FUND/EXC.35/10, paragraph 3.2.19).

- 2.11 At the 1971 Fund Executive Committee's 35th session when the claims arising from the *Haven* incident were considered, the French observer delegation expressed the view that the rejection of these claims could only be justified by the fact that the losses in respect of which the City of Cannes and the commune of Lavandou claimed compensation could not be accepted, on the basis of the supporting documents, as losses caused by contamination, ie that the losses resulted from a reduction in tourism significantly greater than the normal fluctuation from one year to another. That delegation noted that, if this was not the reason for rejection, the rejection was at variance with the position taken by the 1971 Fund in previous cases. It was maintained by that delegation that communes which depended only on beach tourism and which could not offset the losses of taxes on tourism by other income would suffer an economic loss which should be compensated if there was a reasonable proximity between the contamination and loss (document FUND/EXC.35/10, paragraph 3.2.20).
- 2.12 In his submission to the 1992 Fund Executive Committee's 14th session relating to four of the claims which had been submitted by the French municipalities in the *Erika* case at that time (document 92FUND/EXC.14/5/Add.3), the Director took the view that, contrary to what was the case in respect of the claims rejected in the *Tanio* and *Haven* cases, it was clear that the reduction in tourism tax revenue was largely as a result of the reduction in tourism caused by the *Erika* incident. The Director considered therefore that there was a reasonable degree of proximity between the reduction in tourism tax revenue and the *Erika* incident. For this reason the Director took the view that these claims should be considered admissible in principle.
- 2.13 In his submission the Director expressed the view that, if the Committee were to consider claims for tourism tax admissible in principle, it would be necessary for the purpose of assessing the quantum of the loss to consider to what extent the reduction was greater than normal fluctuations in tourism tax revenue from one year to another and to take into account also any potential savings made by the communes as a result of the decrease in the number of tourists. He mentioned that some of the claims indicate that the reduction experienced in 2000 was several times greater than year-on-year variations in previous recent years.
- 2.14 During the discussion at the Committee's 14th session, a number of delegations expressed the view that the circumstances relating to the claims by the communes for loss of revenue from tourism tax arising from the *Erika* incident were different to those examined in previous cases, and that there was a sufficient degree of proximity between the losses suffered by the communes and the contamination. Those delegations agreed with the Director that the claims were admissible in principle.
- 2.15 A number of other delegations expressed general reservations concerning the acceptance of claims relating to a reduction in tax revenues. It was pointed out that whilst the tourism taxes in question were levied to cover certain specific expenses related to tourism, other countries would rely on their general taxation system or on VAT to cover expenses of this kind. Those delegations pointed out that different taxation systems could give rise to different treatment between Member States.
- 2.16 Some delegations expressed concerns that, in assessing claims in respect of losses due to reduction in revenue from tourism tax, it would be difficult to determine any potential savings that might have resulted from a downturn in tourism.
- 2.17 The Executive Committee decided to postpone its decision on the admissibility of the claims for reduction in tourism tax revenue to its 16th session (document 92FUND/EXC.14/12, paragraph 3.4.63).
- 2.18 The French delegation urged the Committee to give the claims further consideration since these claims represented a special situation in that the communes had suffered genuine economic losses and had no other means of recovering those losses. That delegation considered that the claims met all of the IOPC Fund's criteria on admissibility.
- 2.19 The Executive Committee is invited to continue its consideration of the admissibility of these claims.

3 Claims from businesses located at some distance from the coast

3.1 Background

- 3.1.1 A significant number of claims have been submitted by businesses within the tourism industry which allege a dependence on coastal tourism but which are situated at some distance inland. The businesses include campsites, hotels, restaurants, historical buildings, museums and other tourist attractions.
- 3.1.2 The 1992 Fund has in the *Erika* case (as in some previous cases, eg the *Sea Empress* and *Nakhodka* cases) accepted claims from tourism businesses located some distance from the coast. However, as regards the *Erika* incident, the Fund has in general restricted its acceptance to businesses located within approximately 25 kilometres of the coast in the four departments whose coasts were affected by the oil pollution, namely Finistère, Morbihan, Loire Atlantique and Vendée, as well as Charente-Maritime where only a minor part of the coastline (Ile de Ré) was affected by the oil. All claims from businesses located within that distance of the coast have been assessed individually in order to establish whether the reduction in tourism resulting from the oil pollution had affected their business and whether the accounts or other supporting documents showed a downturn resulting from the reduction in tourism. The location of the departments is shown on the map reproduced at the Annex.
- 3.1.3 As regards businesses located more than some 25 kilometres from the coast, it has been considered that there is in general not a reasonable degree of proximity between the pollution and the alleged loss or damage. The Director feels however that it might be appropriate to reconsider the issue of geographic proximity in the context of the *Erika* incident and submits for the Executive Committee's consideration how the criterion of a reasonable degree of proximity should be applied in respect of businesses situated somewhat further from the polluted coastline.
- 3.1.4 By 10 April 2002 some 120 claims in the tourism sector had been submitted from businesses located more than 25 kilometres from the affected coast.
- 3.1.5 An analysis of various types of claims from these businesses shows that the downturn in the economic activity in 2000 compared with 1999 varies from one type of business to another, probably due to the fact that there is a difference in dependency on beach tourism from one category to another. It appears, for example, that the reduction in revenue in 2000 compared with 1999 is considerably greater for businesses operating camp sites or for rented self-catering holiday cottages (gîtes) than for hotels. By contrast the reduction in revenue for restaurants is generally much lower, probably due to restaurants benefiting to a large extent from local trade.

3.2 Director's considerations

- 3.2.1 It has been argued by the French tourism industry that the whole region suffered a reduction in tourism as a result of the *Erika* incident, ie not only the five departments mentioned in paragraph 3.1.2 above but also the department of Côtes-d'Armor whose coastline was not affected by the oil spill (see section 4) and the department of Ille-et-Vilaine. It has also been maintained that, in any event, the repercussions on the tourism industry in the five departments whose coasts were affected were not limited to the area closest to the coast but were felt across the whole region.
- 3.2.2 In the Director's view, in the case of those departments whose coasts were affected to some degree by pollution from the *Erika*, it would not be appropriate to lay down a hard and fast rule as to the distance from the affected coast within which a claimant's activity would need to be located in order for the claim to fulfil the criterion of geographic proximity and the other criteria set out in paragraph 1.3 above.
- 3.2.3 The statistics available tend to show, not surprisingly, that businesses in the tourism industry are more dependent on beach tourism the closer to the coast they are located and that businesses situated

close to the coast suffered in general greater decline in tourism trading as a result of the *Erika* incident than businesses located further inland.

- 3.2.4 Nevertheless, the situation is more complex. There are businesses located a considerable distance inland (say 50 - 60 kilometres) which are heavily dependent on beach tourism, as evidenced from their marketing strategy, their client profile and the seasonal pattern of their trade, whereas other businesses in the same area which are located at the same distance from the coast are not, or are much less, dependent on beach tourism.
- 3.2.5 Having examined a large number of claims, the Director takes the view that the question under consideration is one of causation rather than one of a particular distance from the coast. For example, there appear to be tourist attractions located some distance inland which are mainly visited by tourists on beach holidays who make excursions to these attractions, especially on days when the weather is less suitable for going to the beach. There appear to be restaurants which, because of their reputation or their location close to a tourist attraction, are also used to a significant extent by tourists on a beach holiday although they are located some distance from the coast, whereas other restaurants located in the same area are not. Some hotels located inland appear to attract families on beach holidays due to the fact that they have rooms available, their rates are lower than those of hotels closer to the beach or their location allows easy access to a variety of beaches and attractions. However as a result of the *Erika* incident many families who might normally have used these hotels may have decided not to go to the area at all for summer holidays in 2000 or may have chosen hotels closer to the coast where rooms had become available due to reduced demand in 2000 after the *Erika* incident. Other hotels located inland on main roads leading to the coast may normally benefit from tourists stopping overnight on their way to the coast and again the *Erika* incident may have affected their business.
- 3.2.6 It should be noted that available statistical data show that the reduction in the number of foreign visitors to the area in 2000 was greater than the reduction in the number of French visitors. This suggests that overseas visitors may have assumed that the *Erika* incident affected a wider area than the French visitors, since foreign visitors very often consider the region as one single tourism destination.
- 3.2.7 In view of the variety of factors which may affect tourism businesses located some distance from the coast, the Director considers that the most equitable method would be to examine each claim in detail in order to establish whether there is a link of causation between the reduction in the number of tourists to the coastal areas affected by the pollution and the economic losses allegedly suffered by businesses located somewhat further away from the polluted coast. When considering the admissibility of these claims, the geographic criterion should not, in his view, be the primary one. The other criteria set out in paragraph 1.3 will also have to be taken into account.
- 3.2.8 If the Executive Committee were to agree with this approach, each claim in this category would be examined on its own merits, normally after a visit by the experts to the claimant's business, in order to establish whether there is such a link of causation.

4 Businesses in the department of Côtes-d'Armor

- 4.1 Claims have been received from ten businesses located in the department of Côtes-d'Armor which have maintained that they suffered economic losses during 2000 due to a reduction in tourism resulting from the *Erika* incident. Six of these claims have been rejected on the ground that there is not a sufficient degree of proximity between the contamination resulting from the *Erika* incident and the loss allegedly suffered by the claimant, mainly due to lack of geographic proximity. The remaining four claims are being examined.
- 4.2 As shown on the map reproduced at the Annex, the department of Côtes-d'Armor is situated in the northern part of Brittany, east of Brest. The department was not affected by the oil from the *Erika*.

- 4.3 In a letter to the 1992 Fund, one of the Vice-Presidents of the Departmental Council (Conseil Général) of Côtes-d'Armor has objected to the rejection of these claims. The Vice-President has stated that the 1992 Fund has interpreted the criterion of a reasonable degree of proximity too restrictively and has accepted only claims from businesses located directly on the polluted beaches. She has maintained that it is evident that the image of the whole of Brittany was affected and that losses in activities were suffered in the entire region. The Vice-President has made the point that on 27 January 2000 the Minister of Tourism had stated in Lorient that the whole of Brittany was affected and that all businesses would be compensated, and that the Prime Minister had confirmed this undertaking some days later. In the Vice-President's view, the 1992 Fund should respect this undertaking. Further letters to the same effect have been received from the President and another Vice-President of the Council.
- 4.4 As regards the letter from the Vice-President of the Departmental Council of Côtes-d'Armor, the Director would first like to point out that the statement that the 1992 Fund has accepted only claims from businesses located directly on the polluted beaches is incorrect. As in previous incidents (eg the *Sea Empress* and the *Nakhodka*), the 1992 Fund has in the case of the *Erika* incident accepted a large number of claims from businesses situated some distance from the polluted beaches. With regard to the reference in the letters to the undertakings by the Minister of Tourism and the Prime Minister, such undertakings should not in the Director's view have any influence on the Fund's decision on the admissibility of individual claims.
- 4.5 The Director takes the view that the same approach as the one proposed in paragraph 3.2.7 above should be applied to these claims and that each claim should, as is always the case, be examined individually in order to establish whether there is a link of causation between the losses allegedly suffered by the claimant and the contamination.

5 Publicity campaign in Charente-Maritime

- 5.1 A claim has been submitted by the department of Charente-Maritime for FFfr15.5 million or €2.4 million (£1.5 million) in respect of measures undertaken by the General Council (Conseil Général) to restore the image of the department as a tourism destination. The major part of the expenditure (FFfr15 million or €2.3 million (£1.4 million)) related to promotional campaigns, including newspaper and television advertising, over the periods March/June 2000, Christmas/New Year 2000/2001 and February/March 2001.
- 5.2 Charente-Maritime is a very important tourism area. Pollution of its coast was limited to light oiling of four beaches on the northern coast of Ile de Ré, and there was no contamination of the mainland. The beaches of Ile de Ré were cleaned within the first few days of January 2000.
- 5.3 Although there was no contamination of the mainland coast of Charente-Maritime, it was anticipated in the early stages of the incident that the bulk of the oil would land on its shorelines. As a consequence of these early predictions, the Préfet of Charente-Maritime was appointed by the French Government to co-ordinate the national contingency plan (Plan Polmar). A further consequence was that the department became the focus of considerable media attention suggesting that the department fell within the area affected by the oil. The claimant has mentioned that, even after it had been established that the oil had not seriously affected Charente-Maritime, the French and foreign media continued to make reference to the department as having been adversely affected.
- 5.4 Charente-Maritime suffered further misfortune in late December 1999 as a result of the severe storms on the Atlantic coast which felled vast numbers of trees leaving many of the department's campsites without shade, an important feature for holiday campers.
- 5.5 The Assemblies of the 1971 and 1992 Fund have taken the view that marketing campaigns should be considered as measures to prevent pure economic loss and that claims for such measures may be admissible if they fulfil the following requirements:

- the cost of the proposed measures is reasonable
- the cost of the measures is not disproportionate to the further damage or loss which they are intended to mitigate
- the measures are appropriate and offer a reasonable prospect of being successful
- in the case of a marketing campaign, the measures relate to actual targeted markets.

To be admissible, the costs should relate to measures to prevent or minimise losses which, if sustained, would qualify for compensation under the Conventions. Claims for the cost of marketing campaigns or similar activities are accepted only if the activities undertaken are in addition to measures normally carried out for this purpose. In other words, compensation is granted only for the additional costs resulting from the need to counteract the negative effects of the pollution.

The criterion of reasonableness is assessed in the light of the particular circumstances of the case, taking into account the interests involved. The assessment is made on the basis of the facts known at the time that the measures are taken. As for marketing campaigns, measures of too general a nature are not accepted.

- 5.6 It will be recalled that at its 9th session, held in October 2000, the Executive Committee considered a claim by the department of Vendée for FFfr10.2 million or €1.6 million (£960 000) in respect of the costs of a publicity campaign to restore the confidence of traditional Vendée tourists in the area following the clean-up of the polluted beaches and in response to extensive negative media coverage of the spill. The Committee noted that the beaches of Vendée had been contaminated by the oil spill and had been the subject of negative media coverage following the spill. The Committee considered that it was reasonable for the department to undertake a publicity campaign in an attempt to mitigate potential losses in the tourism industry. The Committee decided that this claim fulfilled the criteria for admissibility and that it should be considered admissible in principle (document 92FUND/EXC.9/13, paragraph 3.6.53).
- 5.7 As regards the department of Charente-Maritime, although a marked impact on tourism in 2000 in the department was anticipated, the results were much better than initially feared and the performance of tourism businesses was only marginally down on the previous year. In a study carried out in January 2001 within the Ministry of Economy, Finance and Industry (document 92FUND/EXC.16/3/Add.1, paragraph 3.1.5) it is indicated that there was an overall loss of 3.2% for all accommodation types. The report of the study states that a distinction needed to be drawn between the impact of the *Erika* and the impact of the heavy storm damage, which had been strongly felt in the camping sector.
- 5.8 As mentioned above the coastline of Charente-Maritime was only slightly affected by oil spilled from the *Erika*. The publicity campaign was therefore mounted primarily to prevent or minimise pure economic loss which would not be a result of the beaches in Charente-Maritime having been polluted to any significant extent, but by the media wrongly having given the public the impression that the beaches in Charente-Maritime had been seriously polluted. The Director considers therefore that the losses which the publicity campaign was intended to mitigate were not caused by contamination and that therefore the costs of the campaign would not in general be admissible for compensation. It should be noted that considerable expenditure was incurred for television campaigns over the Christmas/New Year period in 2000/2001 and in February/March 2001, by which time it had been established that the tourism industry in Charente-Maritime had not been seriously affected in the summer of 2000. The Director therefore considers that most of the claim is inadmissible in principle.
- 5.9 Two elements of the claim totalling FFfr203 974 or €31 000 (£19 200) relate to measures undertaken by the department to reassure the public that the beaches of Ile de Ré, some of which had been

polluted by oil from the *Erika*, were clean and safe to use for amenity purposes. The measures involved the recording of the conditions of the beaches by aerial photography, and the setting up of a web cam on the department's web site in order to demonstrate that the beaches were clean. The Director is of the view that in this case there was a link of causation between these expenses and the contamination and that these items of the claim are admissible in principle.

5.10 The Director also considers that any expenditure which may have been incurred in the March/June 2000 publicity campaign which related to measures to minimise economic losses on Ile de Ré should be admissible in principle.

6 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 claims for reduction in revenue from tourism tax (taxe de séjour) (paragraph 2);
- c) to determine the 1992 Fund's policy in respect of the admissibility of claims from businesses located some distance from the coast affected by the oil from the *Erika* (paragraph 3);
- d) to consider whether claims from businesses in the department of Côtes-d'Armor are admissible for compensation (paragraph 4);
- e) to consider the admissibility of a claim from the department of Charente-Maritime relating to a publicity campaign undertaken to restore the image of the department as a tourism destination (paragraph 5); and
- f) to give the Director such instructions on the issues dealt with in this document as the Committee may deem appropriate.

* * *

ANNEX

