



INTERNATIONAL  
OIL POLLUTION  
COMPENSATION  
FUND 1992

EXECUTIVE COMMITTEE  
20th session  
Agenda item 3

92FUND/EXC.20/3/Add.1  
27 January 2003  
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## INCIDENTS INVOLVING THE 1992 FUND

### ERIKA – CLAIMS SITUATION AND LEVEL OF PAYMENTS

#### Note by the Director

**Summary:**

As at 23 January 2003, 6 647 claims totalling FFr1 291 million or €197 million (£130 million) had been received at the Claims Handling Office in Lorient, of which 6 188 claims (93%) had been assessed. Payments totalling FFr372 million or €57 million (£37 million) had been made in respect of 5 009 claims. Further claims have been lodged against the shipowner's limitation fund and in various court proceedings.

The date from which the three year time bar period runs in respect of various types of claims is discussed.

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:**

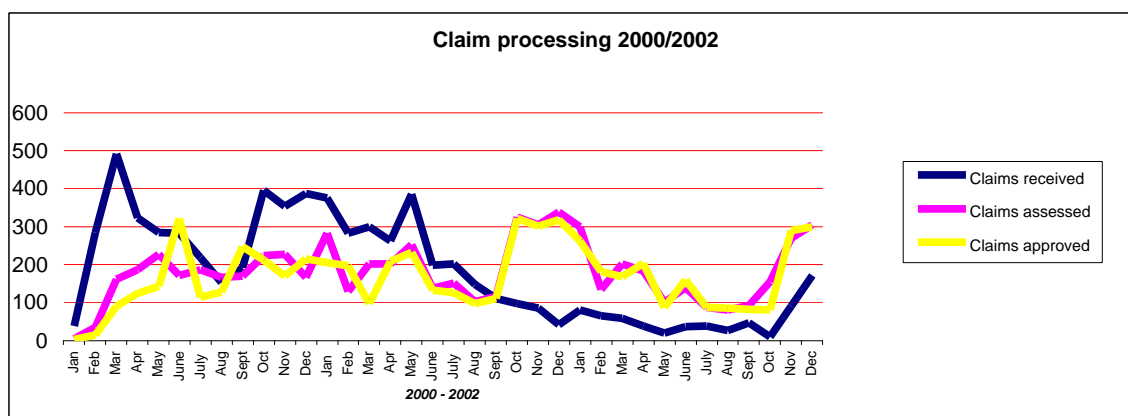
- (a) to take note of the information contained in this document;
- (b) to give instructions as to the date from which the three year time bar period runs; and
- (c) to review the level of the 1992 Fund's payments.

#### **1 Claims submitted to the Claims Handling Office**

- 1.1 As at 23 January 2003, 6 647 claims for compensation had been submitted to the Claims Handling Office in Lorient established by the 1992 Fund and the shipowner's P & I insurer, the Steamship

Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual), for a total of FFr1 291 million or €197 million (£121 million)<sup><1></sup>.

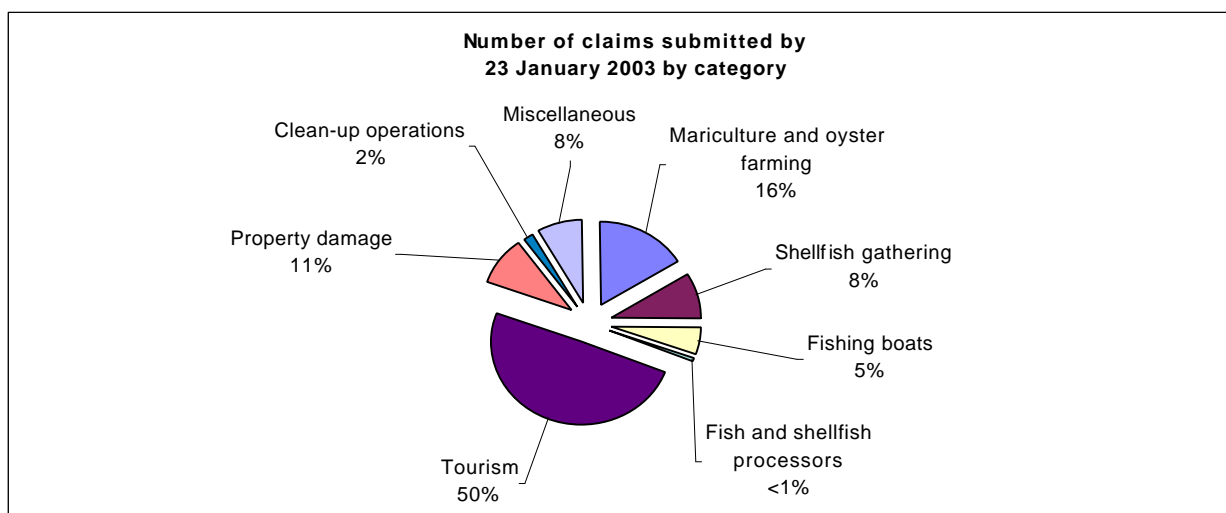
- 1.2 Six thousand one hundred and eighty-eight claims totalling FFr985 million or €150 million (£100 million) had been assessed at a total of FFr537 million or €82 million (£54 million). Assessments had thus been carried out of 93% of the total number of claims received.
- 1.3 Six hundred and ninety-six claims, totalling FFr126 million or €19million (£12 million), had been rejected. Sixty-one claimants whose claims total FFr23 million or €3.5 million (£2.3 million) have contested the rejection and their claims are being reassessed in the light of additional documentation provided by the claimants.
- 1.4 Payments of compensation had been made in respect of 5 009 claims (including interim payments) for a total of FFr372 million or €57 million (£37 million), out of which the Steamship Mutual had paid FFr84 million or €13 million (£8 million) and the 1992 Fund FFr288 million or €44 million (£27 million). Payments had thus been made in respect of 75% of all claims.
- 1.5 Four hundred and fifty-nine claims totalling FFr306 million or €47 million (£31 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 Three hundred and forty eight claims totalling FFr238 million or €36 million (£23 million) were submitted to the Claims Handling Office after 1 October 2002. Of these claims 273 related to the tourism sector.
- 1.8 Sixty-six claims were received after 12 December 2002 by the Claims Handling Office.

<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.



1.9 The following tables give details of the processing of claims presented to the Claims Handling Office in various categories.

Claims submitted by 23 January 2003									
Category	Claims submitted	Claimed amount		Claims assessed		Claims for which payments have been made		Claims rejected	
		FFr	€						
Mariculture and oyster farming	989	91 314 454	13 920 799	987	99.8%	812	82%	87	9%
Shellfish gathering	507	16 395 809	2 499 525	506	99.8%	352	69%	92	18%
Fishing boats	318	16 778 668	2 557 891	315	99%	270	85%	25	8%
Fish and shellfish processors	37	21 561 631	3 287 049	36	97%	28	76%	6	16%
Tourism	3456	841 072 061	128 220 609	3358	97%	2738	79%	423	12%
Property damage	699	49 149 462	7 492 787	420	60%	294	42%	29	4%
Clean-up operations	138	71 992 908	10 975 248	106	77%	89	64%	8	6%
Miscellaneous	503	182 852 627	27 875 703	460	91%	426	85%	26	5%
<b>Total</b>	<b>6 647</b>	<b>1 291 117 620</b>	<b>196 829 612</b>	<b>6 188</b>	<b>93%</b>	<b>5 009</b>	<b>75%</b>	<b>696</b>	<b>10%</b>

Payments authorised and made by 23 January 2003						
Category	Payments authorised			Payments made		
	Number of claims	Amounts		Number of claims	Amounts	
		FFr	€		FFr	€
Mariculture and oyster farming	898	39 966 534	6 092 859	812	28 190 441	4 297 605
Shellfish gathering	407	4 623 893	704 908	352	3 329 482	507 576
Fishing boats	293	5 749 170	876 455	270	4 536 317	691 557
Fish and shellfish processors	29	4 320 293	658 624	28	4 307 816	656 722
Tourism	2,858	290 802 828	44 332 605	2 738	275 589 195	42 013 302
Property damage	319	9 948 276	1 516 605	294	8 601 564	1 311 300
Clean-up operations	97	24 955 412	3 804 428	89	23 969 927	3 654 192
Miscellaneous	431	29 866 303	4 553 088	426	23 247 348	3 544 035
<b>Total</b>	<b>5,332</b>	<b>410 232 708</b>	<b>62 539 573</b>	<b>5 009</b>	<b>371 772 090</b>	<b>56 676 290</b>

1.10 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 at least 97% of all claims had been assessed and in one category 92%. 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.

- 1.11 As regards the tourism sector, some 120 claims have been examined in the light of the decision taken by the Executive Committee at its 16th session in April/May 2002 that claims by businesses located at some distance from the coast should be assessed on a case-by-case basis, normally after a visit by the 1992 Fund's expert to the claimant's business, in order to establish whether there was a link of causation between the alleged loss or damage and the contamination in accordance with the Fund's normal practice.
- 1.12 As for the category 'property damage' only 420 claims (60%) had been assessed. However, 328 claims in this category (48%) submitted by salt producers in Guérande and Noirmoutier cannot be assessed until the claimants submit technical evidence in support of these claims. In addition, claims from salt producers in Guérande cannot be examined until the expert appointed by the Court in St Nazaire has completed his examination as to whether or not 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.20/3, paragraph 6.5).
- 1.13 In the clean-up sector 77% of the claims had been assessed. Claims submitted by some communes cannot be assessed until the claimants have provided the additional information and documentation requested by the 1992 Fund. All the other pending claims in this category are being examined by the 1992 Fund. It is expected that assessments of several of these claims will be finalised in the near future. The French authorities are assisting the Fund in ensuring that compensation paid to the communes under the French national contingency plan (Plan POLMAR) is taken into account in the examination of the claims so as to ensure that no duplication of payment occurs.
- 1.14 At its 17th session held in July 2002, the Executive Committee considered a claim submitted by Brittany Ferries, a French company providing ferry services between England and France (Brittany and Normandy), between England and Spain (Santander) and between Ireland and France (Brittany). The claim which totals €11 010 727 (£7 million) is for economic loss and the cost of a marketing campaign to mitigate losses. The Committee decided that, since there was a link of causation as regards various items of the claim between the alleged loss and the contamination, the claim by Brittany Ferries was admissible in principle. The Committee authorised the Director to assess the admissible quantum of the claim, taking into account in particular whether the reduction in passenger numbers fell within the normal fluctuations. The Director was instructed to take into consideration all factors, including those raised during the discussion, that could have contributed to the losses (document 92FUND/EXC.17/10, paragraph 3.2.22). The claimant has provided further information to enable the 1992 Fund to establish the impact of various factors other than the *Erika* incident on the number of passengers transported by the company. This claim is being examined.

## **2 Claims previously presented in various courts against the shipowner, Steamship Mutual and the 1992 Fund**

- 2.1 Claims totalling €484 million (£300 million) have been lodged against the shipowner's limitation fund constituted by the shipowner's insurer, Steamship Mutual. This amount includes the claims by the French Government at €191 million (£125 million) and by Total Fina Elf at €170 million (£105 million). However, most of the claims in this latter group, other than those of the French Government and Total Fina Elf, 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. It appears that one claim has been mistakenly indicated by the claimant at €44 million (£29 million) but should be for €43 326 (£29 000). The 1992 Fund has not received any formal notifications of the claims lodged against the limitation fund.
- 2.2 A number of communes and other public bodies have made requests to various courts that court surveys (expertises judiciaires) should be carried out to establish the damage suffered by them (cf document 92FUND/EXC.20/3, section 6). It is not possible to ascertain the amounts, which will be assessed as a result of these surveys.

- 2.3 Some 70 claimants, almost all of which are public bodies, have presented claims for alleged loss or damage in various courts in the context of court surveys. These claims, which total FFr135 million or €21 million (£13 million), including one for FFr59 million or €9 million (£5.8 million) for damage to the environment, have not been presented to the Claims Handling Office. The purpose of a court survey is to assess the level of damages prior to pursuing an action on its merits.
- 2.4 By 12 December 2002, 456 claimants (including 180 salt producers) had taken court action against the shipowner, Steamship Mutual and the 1992 Fund. Some 200 other claimants have taken actions after that date up to 22 January 2003. The total amount claimed, excluding the claims by the French State and Total Fina Elf, is FFr705 million or €108 million (£66 million).
- 2.5 The French State has in its action claimed €191 million (£125 million). The companies in the Group Total Fina Elf have in their court action claimed €43 million (£93 million) compared with €170 million (£105 million) in their claim against the shipowner's limitation fund.
- 2.6 Most of the claims covered by the court actions had previously been submitted to the Claims Handling Office. However, 22 claims for a total of FFr36 million or €5.5 million (£3.5 million) had not been presented to the office, for instance claims by four public bodies totalling FFr30 million or €4.6 million (£2.9 million). In respect of a number of claimants the amount claimed in the Claims Handling Office and the amount claimed in the court action are not the same.
- 2.7 The 1992 Fund will continue the discussions with the claimants whose claims are not time barred for the purpose of arriving at out-of-court settlements if appropriate.

### **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 Special Drawing Rights (SDR) per incident, including the sum paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention). This amount shall be 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.
- 3.3 The Director's calculation gave 135 million SDR = FFr1 211 966 811<sup><2></sup> (£117 million), and the Committee endorsed this calculation at its April 2000 session.
- 3.4 As regard complaints concerning the conversion of the maximum amount payable in compensation, reference is made to document 92UND/EXC.16/3.

### **4 Others sources of funds**

- 4.1 The French Government introduced a scheme to provide emergency payments in the fishery sector. This scheme is administered by OFIMER (Office national interprofessionnel des produits de la mer et de l'aquaculture), a government agency attached to the French Ministry of Agriculture and Fisheries. Initially OFIMER made payments to claimants of up to FFr200 000<sup><3></sup> (£19 200) on the basis of its own assessment of the losses, without consultation with the Steamship Mutual and the 1992 Fund. Subsequently OFIMER stated that it used the assessment made by Steamship Mutual and the 1992 Fund and accepted by the claimant as a basis to supplement the compensation paid by them.

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<2> This amount corresponds to €184 763 149.

<3> This amount corresponds to €30 490.

- 4.2 The Director has been informed that OFIMER has paid approximately FFr30 million (€4.6 million) (£2.8 million) to claimants in the fishery sector and some FFr12 million or €1.8 million (£1.1 million) to salt producers.
- 4.3 The French Government has also introduced a scheme to provide supplementary payments in the tourism sector. The scheme has been operational since 25 July 2001, and payments totalling FFr61 million or €9.3 million (£6.0 million) have been made.

## 5 Time bar

- 5.1 Under the 1992 Civil Liability Convention, rights to compensation from the shipowner and his insurer are extinguished unless legal action is brought within three years of the date when the damage occurred (Article VIII). As regards the 1992 Fund Convention, rights to compensation from the 1992 Fund are extinguished unless the claimant either brings legal action against the Fund within this three-year period or notifies the Fund within that period, in accordance with the formalities required by the law of the court seized of an action against the shipowner or his insurer (Article 6). Both Conventions also provide that in no case should legal actions be brought after six years from the date of the incident.
- 5.2 During September 2002 the 1992 Fund informed individually all those who had submitted claims to the Claims Handling Office and with whom settlements had not been reached by that time about the time bar issue. In respect of the *Erika* incident it may be uncertain as to the date from which the three-year time bar period starts to run for the individual claimant (ie the date when the respective claimant's damage or loss occurred). In view of the uncertainty as to the starting point of the time bar period, the Director suggested that the claimants should assume that the time bar period commenced on the date of the incident (ie 12 December 1999), in order to avoid any risk of the claims becoming time-barred. He also made it clear that even if a claimant took legal action, this would not prevent further discussions concerning his claim for the purpose of reaching an out-of-court settlement.
- 5.3 Despite these warnings a number of claimants who have presented claims to the Claims Handling Office have not taken legal action against the shipowner, Steamship Mutual and the 1992 Fund, or have taken legal action later than 12 December 2002. The question arises as to when the three-year time bar period expires for individual claimants. The governing bodies of the IOPC Funds have not addressed this question previously in any depth, since in the past there has not been any need to do so. In the *Erika* case, however, this has become an important issue. The Director therefore invites the Executive Committee to consider the matter and to give such instructions as it may deem appropriate. As a starting point for the Executive Committee's consideration, the Director sets out below the main groups of the claims involved.

### *Clean-up operations*

- 5.4 Although most claims in respect of the costs of clean-up appear to have been protected by legal actions against the 1992 Fund taken on or before the third anniversary of the incident, at least one commune which undertook clean-up operations has failed to take legal action against the Fund.
- 5.5 In the past the IOPC Funds have taken the date when oil reached a particular stretch of coast as the date when the damage occurred and hence the date from which the three-year time bar period commenced. However, it has not been necessary to take a formal decision on this point, since action has always been taken or notification been made within three years of the incident if the claim had not been settled before the expiry of that period. However, shorelines are rarely polluted on a single day and this was certainly the case following the *Erika* incident where there was a tendency for oil to migrate along the coast over a period of several months. For this reason, some local authorities decided to postpone clean-up operations until the situation became stabilised. In such cases it would be difficult to decide on a precise date when the damage occurred and it could be argued that each successive oiling of a shoreline would constitute a new date from which the three-year time-bar period should run. Many shorelines that were cleaned promptly were subsequently re-oiled later in 2000 and in some cases 2001, and the Director

considers that such re-oiling would be regarded as a new damage. Although it has in the past been assumed that the date of oiling of a particular coastline should be taken as that from which the time bar should run, it could, in the Director's view, equally be argued that the date should be when the costs of clean-up were incurred or when the clean-up operations on a particular stretch of coast were completed.

#### *Fisheries and mariculture*

- 5.6 Most claims for pollution damage in the fishery and mariculture sectors were in respect of losses resulting from business interruption caused either by contamination of fishing gear/mariculture facilities or as a result of fishing and harvesting bans imposed by the French authorities due to elevated levels of hydrocarbons in seawater and in marine products, which may have rendered seafood inedible or unsafe to eat.
- 5.7 In the past the IOPC Funds have taken the date on which the contamination of the fishing gear/mariculture facilities took place or when a fishing ban was imposed as the date that the consequential losses occurred and have used that date for the commencement of the three-year time bar period. The date of the damage has therefore often been some considerable time after the date of the incident. In the *Sea Empress* case (15 February 1996) a number of angling associations took legal actions against the shipowner and his insurer on 11 February 1999 and notified the 1971 Fund of these actions on 2 March 1999. The 1971 Fund Executive Committee took the view that the damage allegedly suffered by the claimants had not been sustained until 20 March 1996, the date on which a Parliamentary Order closing river fishing took effect. The Committee decided therefore that the claimants had properly notified the 1971 Fund before the expiry of the three-year period and that these claims were not time barred (document 71FUND/EXC.51/14, paragraphs 4.6.14 and 4.6.15). The Committee did not need to address the issue as to whether a notification made within three years of the lifting of the ban on river fishing would have prevented the claims from becoming time barred.
- 5.8 A complication arises in cases where a claimant suffers economic losses prior to the occurrence of property damage or the imposition of a fishing ban, for example due to market resistance immediately following the incident. Although the overall losses could be ascribed to two different effects, with two different time bar periods, claimants are unlikely to distinguish between these effects when submitting their claims.
- 5.9 Whilst there is less uncertainty as regards the date of the start of the damage period in respect of fishery and aquaculture claims, it could, in the Director's view, be argued that the actual losses resulting from business interruption should be considered as having been suffered at the end of the period of the loss rather than at the beginning.

#### *Tourism*

- 5.10 Claims in the tourism sector were submitted by businesses that were open all year (eg bars, restaurants and shops) and businesses that were only open in the holiday season (eg campsites, holiday flats and some hotels). Whilst some of the former businesses claimed for losses over the whole of 2000, the majority of these businesses and all the seasonal businesses filed claims only in respect of losses that were incurred over the main tourist season (April – October 2000).
- 5.11 Whilst it can be argued that some of the losses incurred by seasonal businesses were due to potential tourists having made the decision not to visit the affected area as soon as the news of the incident broke out on or about 12 December 1999 or shortly thereafter, this is unlikely to be the case with most tourists. Indeed if it had been the case, there would have been little justification in tourist offices and local and central government authorities mounting any publicity campaigns to mitigate tourism losses. The decision not to visit the affected area was probably taken by the majority of the potential visitors during the spring or early summer 2000.
- 5.12 For claims in the tourist sector there appear to be two options as regards the date when the losses resulting from a reduction in the number of tourists was sustained, ie at the beginning of the

tourist season or the end of the period during which the losses were sustained. Many claims in the tourism sector were not submitted until April 2001, since only then could claimants accurately determine their losses and submit their claims on the basis of audited accounts.

*Director's considerations*

- 5.13 There is a distinction as regards the starting point between the three year time bar period which runs from the date of the damage and the six year time bar period which runs from the date of the incident. As regards the three-year period the Conventions refer to three years from the date when the damage occurred ("dans les trois ans qui suivent la date où le dommage est survenu"). This indicates in the Director's view that the starting point for the three-year time bar period is the date when the individual claimant suffered his or her loss or damage.
- 5.14 It is clear from a consideration of the main groups of claims arising from the *Erika* incident that there are various factors that need to be taken into account when deciding when the time bar period should commence for a particular claim or group of claims.
- 5.15 As mentioned above, the three-year time bar period runs from the date that the individual claimant suffered the damage. For claimants who have suffered consequential or pure economic losses, the pollution damage is loss of income, which is usually sustained some time after the date of an incident. The correct approach would, in the Director's view, be to take as the starting point for the three-year time bar period the date corresponding to the end of the period during which these losses were suffered by a claimant or group of claimants. In most cases only at the end of that period are claimants able to establish whether they have suffered losses. Furthermore, using the end of the period of the loss allows claimants a full three years to submit a properly documented claim and for the Fund to carry out an assessment of that claim, with sufficient time for negotiations between claimant and the Fund, should it be required. This would be of benefit to both claimants and the 1992 Fund since it could reduce the number of claims becoming the subject of legal actions.

## **6 Undertakings by Total Fina Elf and the French Government**

- 6.1 In a letter to the Director, Total Fina Elf undertook not to pursue against the 1992 Fund or against the limitation fund constituted by the shipowner or his insurer the claims relating to the cost of any inspections and the operations in respect of the wreck of the *Erika*, 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 Special Drawing Rights (SDR). Total Fina Elf made a corresponding undertaking in respect of the cost of the collection and disposal of the oily waste generated by the clean-up operations, of the cost of its participation in the beach clean-up up to a maximum of FFfr40 million and of the cost of a publicity campaign to restore the tourist image of the Atlantic coast up to a maximum of FFfr30 million.
- 6.2 The French delegation informed the Committee at its 6th session, held in April 2000, that 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. The delegation stated that this undertaking covered all the expenses incurred by the French State in combating the pollution, *inter alia* those expenses falling within the framework of Plan Polmar, including expenses incurred by local authorities paid or reimbursed through Plan Polmar. That delegation stated that the undertaking covered also all measures that the State might take in different sectors to reduce the consequences of the incident, including any publicity campaigns to this effect. That delegation made the point that the French Government's claims would rank before any claims by Total Fina Elf if funds were available after all other claims had been paid in full.



**7 Level of payments**

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

- 7.1.1 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. Further studies were carried out in January 2001, June 2001 and October 2001.
- 7.1.2 In the view of the uncertainty as to the total amount of claims 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).
- 7.1.3 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). At its 13th session, held in June 2001, the Committee decided to increase the level of payments to 80% (document 92FUND/EXC.13/7, paragraph 3.2.42).
- 7.1.4 At its 14th session held in October 2001, 16th session held in April/May 2002 and 17th session held in July 2002, the Executive Committee decided 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% (documents 92FUND/EXC.14/12, paragraph 3.4.49, 92FUND/EXC.16/6, paragraph 3.2.25 and 92FUND/EXC.17/10, paragraph 3.2.12).
- 7.1.5 The level of payments was reviewed again at the Executive Committee's 18th session, held in October 2002. The Committee's consideration was based on a document presented by the Director (document 92FUND/EXC.18/5/Add.1). In that document the Director expressed the view that on the basis of the claims presented so far to the Claims Handling Office and in the light of the experience of the settlement levels there would be a sufficient safety margin to enable the 1992 Fund to increase the level of payments to 100%. He stated however that there were other factors that gave rise to uncertainty and in view of this he proposed that level of payments should be maintained at 80% (document 92FUND/EXC.18/5/Add.1, paragraphs 6.3.1-6.3.7).
- 7.1.6 The French observer delegation reiterated the position it had taken at the July 2002 session of the Executive Committee and stated that whilst there was a need to be cautious to avoid overpayment, there was also a need to avoid being overcautious. In this regard that delegation pointed out that more than 5 700 claims, ie 91% of claims submitted, had been assessed for less than FFfr500 million leaving for the remaining claims, which stood at about 500, an amount of more than FFfr700 million. That delegation stated that the number of new claims submitted had decreased considerably and that as regards certain types of claims there were duplications. The French delegation concluded that there was already a sufficient safety margin to allow an increase of the level of payments to 100%.
- 7.1.7 A number of delegations expressed sympathy with the views expressed by the French delegation, but considered that in view of the remaining uncertainties regarding the claims situation mentioned by the Director, and since the three year time bar period would expire in December 2002, it would be prudent to defer any decision to increase the level of payments to early in 2003.
- 7.1.8 The Committee noted that the Director believed that the situation would be much clearer after the expiry of the three year period and that he hoped it would be possible to increase the level of payments to 100% at the Committee's February 2003 session.
- 7.1.9 In light of the uncertainties that remained as to the level of admissible claims the Executive Committee decided that the level of payments should be maintained at 80% (document 92FUND/EXC.18/14, paragraphs 3.4.18).

7.2 Other assessments of the total damage arising from the *Erika* incident

7.2.1 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. 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 €32 - 966 million (£538 - 624 million). 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. As regards the result of this study and the Director's observations thereon reference is made to document 92FUND/EXC.16/3, paragraph 14.2.

7.3 Director's considerations

7.3.1 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.

7.3.2 It should be recalled that the claims by Total Fina Elf 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 against the 1992 Fund and the shipowner's limitation fund only if and to the extent that all other claims have been paid in full (cf paragraphs 6.1 and 6.2 above). The undertaking by the French Government not to pursue claims covers also subrogated claims in respect of payments made under the schemes referred to in section 3 above.

7.3.3 As at 23 January 2003, settlement agreements had been concluded in respect of 5 075 claims. The claimed amounts totalled FFr513 million or €78 million (£49 million), whereas the settlement amounts totalled FFr462 million or €70.5 million (£44 million). The settlement amounts represent on average 71% of the claimed amounts, the settlement level varying between sectors from 63.4% to 77.6%.

7.3.4 Disregarding the claims against the limitation fund, the total amount of the claims against the 1992 Fund can be estimated as follows:

Total amount of claims settled	FFr462 082 753
Total claims in court	FFr704 575 956
Total pending claims presented to the Claims Handling Office not in court	FFr116 879 729
Interest on claims in court (estimate)	FFr50 000 000
Legal costs for claimants (estimate)	<u>FFr50 000 000</u>
Total 1992 Fund exposure	FFr1 383 538 438
	(€10 919 075)
	(£131 765 565)

7.3.5 It is recognised that this estimate may be on the pessimistic side. It is likely that a number of the claims submitted to the Claims Handling Office but not filed in court will not be pursued even if they would be considered as not time barred. It is also likely that a number of claims in court will be settled at amounts somewhat lower than the amounts claimed. On the other hand there are claims presented to the shipowner's limitation fund (other than those by the French Government and Total Fina Elf) totalling some €123 million (£81 million). Although these have not been notified to the Fund, it is likely that a number of these claims have also been filed in the court proceedings against the 1992 Fund. It is possible that some claimants will increase the amounts claimed in the court proceedings which under French procedural law is permitted. It cannot be ruled out that some further claims presented to the Claims Handling Office will be pursued in court and the question of time bar will then arise.

7.3.6 As set out above the total amounts of established claims could be at least FFr1 400 million or €251 million (£164 million). There are still a number of uncertainties in this regard. In view of

the remaining uncertainties, the Director proposes that 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 the Steamship Mutual. He also proposes that the level of payments should be reviewed at the Executive Committee's 21st session.

**8 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 give instructions in respect of the date from which the three year time bar period should be considered to run in cases referred to in paragraph 5.15; and
  - (c) to decide on the level of the 1992 Fund's payments.
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