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FUND 1992

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Agenda item 3

92FUND/EXC.21/2
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INCIDENTS INVOLVING THE 1992 FUND

ERIKA

Note by the Director

Summary:

In view of the uncertainty as to the level of claims arising from the *Erika* incident, the 1992 Fund's payments were limited to 80% of the amount of the damage actually suffered by the respective claimants as assessed by the 1992 Fund's experts. At its February 2003 session, the Executive Committee authorised the Director to increase the payments to 100% when he considered it safe to do so. A large number of claimants have taken legal action against the shipowner, his insurer and the 1992 Fund. Since the actions were filed, out-of-court settlements have been reached in respect of a number of these claims. In view of the developments that have taken place since that session, the Director decided on 25 April 2003 to increase the payment level to 100%.

Action to be taken:

To give the Director instructions in respect of the various court proceedings.

1 Introduction

- 1.1 This document sets out the developments since the Executive Committee's February 2003 session in respect of the *Erika* incident which occurred off the coast of Brittany (France) on 12 December 1999.
- 1.2 As regards the incident, the clean-up operations, the Claims Handling Office set up in Lorient, the removal of the oil from the wreck of the *Erika* and the impact of the spill, reference is made to the Annual Report 2002 (pages 95-107).
- 1.3 Since the Executive Committee's February 2003 session, no developments have taken place with respect to the court surveys for evaluation of the damage, the cause of the incident and the various court actions (except as set out below). In this regard, reference is made to document 92FUND/EXC.20/3).

2 Claims submitted to the Claims Handling Office

- 2.1 As at 23 April 2003, 6 700 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 292 million or €197 million (£136 million)^{<1>}.

- 2.2 Six thousand three hundred and nine claims totalling FFr1 084 million or €165 million (£114 million) had been assessed at a total of FFr606 million or €92 million (£64 million). Assessments had thus been carried out of 94% of the total number of claims received.
- 2.3 Seven hundred and eighteen claims, totalling FFr135 million or €21million (£14 million), had been rejected. Fifty-two claimants whose claims total FFr23 million or €3.5 million (£2.4 million) have contested the rejection and their claims are being reassessed in the light of additional documentation provided by the claimants.
- 2.4 Payments of compensation had been made in respect of 5 184 claims (including interim payments) for a total of FFr419 million or €64 million (£44 million), out of which Steamship Mutual had paid FFr84 million or €13 million (£8 million) and the 1992 Fund FFr335 million or €51 million (£36 million). Payments had thus been made in respect of 77% of all claims.
- 2.5 Three hundred and ninety one claims totalling FFr207 million or €32 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.
- 2.6 The following tables give details of the processing of claims presented to the Claims Handling Office in various categories:

Claims submitted by 23 April 2003									
Category	Claims submitted	Claimed amount		Claims assessed		Claims for which payments have been made		Claims rejected	
		FFr	€						
Mariculture and oyster	989	91 225 318	13 907 210	989	100%	823	83%	87	9%
Shellfish gathering	507	16 395 809	2 499 525	507	100%	355	70%	91	18%
Fishing boats	318	16 778 668	2 557 891	316	99%	278	87%	26	8%
Fish and shellfish processors	36	21 096 371	3 216 121	36	100%	29	81%	5	14%
Tourism	3504	842 995 518	128 513 838	3456	99%	2876	82%	437	12%
Property damage	702	48 497 902	7 393 457	429	61%	306	44%	33	5%
Clean-up operations	138	72 124 654	10 995 333	113	82%	91	66%	11	8%
Miscellaneous	506	183 192 551	27 927 524	463	92%	426	84%	28	6%
Total	6 700	1 292 306 791	197 010 900	6 309	94%	5 184	77%	718	11%

Payments authorised and made by 23 April 2003						
Category	Payments authorised			Payments made		
	Number of claims	Amounts		Number of claims	Amounts	
		FFr	€		FFr	€
Mariculture and oyster farming	901	40 303 185	6 144 181	823	29 009 417	4 422 457
Shellfish gathering	408	4 631 026	705 995	355	3 342 644	509 583
Fishing boats	289	5 755 570	877 431	278	4 595 931	700 645
Fish and shellfish processors	30	4 543 090	692 590	29	4 320 293	658 624
Tourism	2 976	337 059 537	51 384 395	2 876	321 232 757	48 971 618
Property damage	327	10 407 330	1 586 587	306	8 943 725	1 363 462
Clean-up operations	100	26 888 730	4 099 160	91	24 755 480	3 773 949
Miscellaneous	432	30 121 631	4 592 013	426	23 247 348	3 544 035
Total	5 463	459 710 099	70 082 353	5 184	419 447 596	63 944 374

<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.

- 2.7 In the clean-up sector 82% 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.
- 2.8 As for the category 'property damage' only 429 claims (61%) had been assessed. However, 328 claims in this category (47%) 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).

3 Limitation proceedings

- 3.1 At the request of the shipowner, the Commercial Court in Nantes issued an order on 14 March 2000 opening the limitation proceedings. The Court determined the limitation amount applicable to the *Erika* at FFr84 247 733 (£8.4 million)^{<2>} and declared that the shipowner had constituted the limitation fund by means of a letter of guarantee issued by the shipowner's P & I insurer.
- 3.2 In 2002, the limitation fund was transferred from the Commercial Court in Nantes to the Commercial Court in Rennes and a new liquidator was appointed.

4 Claims presented in various courts against the shipowner, Steamship Mutual and the 1992 Fund

- 4.1 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 (£132 million) and by Total Fina Elf at €170 million (£117 million). However, most of these claims, 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. The 1992 Fund received formal notification of the claims lodged against the limitation fund only on 31 January 2003.
- 4.2 A number of claimants, almost all of which are public bodies, have presented claims for alleged loss or damage in various courts for the purpose of court surveys (expertises judiciaires), the object of which is to assess the level of damages prior to the court action being pursued. The current court surveys have not yet been completed and it is therefore not possible to determine the total amount of these claims. It is estimated, however, that the total amount of these claims represents FFr168 million or €26 million (£18 million), including one for FFr59 million or €9 million (£6.2 million) for damage to the environment. Some of these claims have been presented to the Claims Handling Office. Court actions are also being pursued in respect of most of these claims.
- 4.3 By 12 December 2002, some 400 claimants had taken court action in various courts against the shipowner, Steamship Mutual and the 1992 Fund. Some 200 other claimants have taken actions after that date. The total amount claimed, excluding the claims by the French State and Total Fina Elf, is FFr655 million or €100 million (£69 million).
- 4.4 The French State has in its court action claimed €191 million (£132 million). Four companies in the Group Total Fina Elf have in their court action claimed €143 million (£99 million) compared with €170 million (£105 million) in their claim against the shipowner's limitation fund. As regards details of these claims reference is made to document 92FUND/EXC.20/3, paragraph 12.

- 4.5 Most of the claims covered by the court actions had previously been submitted to the Claims Handling Office. However, 28 claims for a total of FFr5.4 million or €820 000 (£570 000) had not been presented to the office. 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.
- 4.6 As regards the claims pursued in the court proceedings, settlements have been concluded in respect of 113 claimants. The amounts claimed totalled FFr65 million or €9.9 million (£6.8 million), whereas the settlement amounts totalled FFr43 million or €6.5 million (£4.3 million).
- 4.7 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.

5 Legal action taken by Steamship Mutual

Steamship Mutual filed action in the Commercial Court in Rennes against the 1992 Fund, requesting *inter alia* the Court to note that, in the fulfilment of its obligations under the 1992 Civil Liability Convention, Steamship Mutual had paid €12 843 484 (£8.4 million) corresponding to the limitation amount applicable to the shipowner, in agreement with and under the control of the 1992 Fund and its Executive Committee. Steamship Mutual further requested the Court to declare that it had fulfilled all its obligations under the 1992 Civil Liability Convention, that the limitation amount had been paid and that the shipowner was exonerated from his liability under the Convention. Steamship Mutual also requested the Court to order the 1992 Fund to reimburse it any amount it will have paid in excess of the limitation amount.

6 Maximum amount available for compensation

- 6.1 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.
- 6.2 Applying the principles laid down by the Assembly in the *Nakhodka* case, the Executive Committee decided in February 2000 that the conversion should be made using the rate of the SDR as at 15 February 2000 and instructed the Director to make the necessary calculations (document 92FUND/EXC.6/5, paragraph 3.29).
- 6.3 The Director's calculation gave 135 million SDR = FFr1 211 966 811^{<3>} (£117 million), and the Committee endorsed this calculation at its April 2000 session. The Committee's decision was endorsed by the Assembly at its October 2000 and October 2001 sessions.

7 Other sources of funds

- 7.1 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. OFIMER has paid approximately FFr30 million or €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.
- 7.2 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 FFr66.5 million or €10.5 million (£6.3 million) have been made.

<3> This amount corresponds to €184 763 149.

8 Time bar

- 8.1 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.
- 8.2 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.
- 8.3 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 arose as to when the three-year time bar period expires for individual claimants. The governing bodies of the IOPC Funds had not addressed this question previously in any depth, since in the past there had not been any need to do so. In the *Erika* case, however, this has become an important issue.
- 8.4 The question of the time bar was considered by the Executive Committee at its February 2003 session on the basis of an analysis made by the Director as set out in section 5 of document 92FUND/EXC.20/3/Add1. The Committee decided that the three-year time bar period should be considered to start to run at the earliest from the beginning of the period of the loss suffered by the individual claimant. The Committee recognised that there may be claims in respect of which the starting point for the time bar period may be some time after the beginning of the period of the loss and that such claims would have to be considered in the light of the particular circumstances in each case (document 92FUND/EXC.20/7, paragraphs 3.2.36 and 3.2.37).
- 8.5 As a result of the Executive Committee's decision, a number of claims which had not been the subject of legal actions and for which the period of the loss had started after the Committee's February 2003 session, have been considered and out-of-court settlements have been reached in respect of some 50 of them.

9 Level of the 1992 Fund's payments

- 9.1 The Executive Committee decided at its 18th session, held in October 2002, 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 loss or damage actually suffered by the individual claimants, as assessed by the 1992 Fund's experts (document 92FUND/EXC.18/14, paragraph 3.4.18).
- 9.2 The level of payments was considered again at the Executive Committee's 20th session held in February 2003. In view of the remaining uncertainties as to the total amount of the established claims, the Committee decided 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, but that the Director should be authorised to increase the level to 100% when he considered it safe to do so (document 92FUND/EXC.20/7, paragraph 3.2.47).
- 9.3 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. The undertaking by the French Government not to pursue claims covers also subrogated claims in respect of payments made to claimants under the schemes established to provide supplementary payments to claimants referred to in section 7 above.

- 9.4 The Director has followed very carefully the development of the claims situation since the Committee's 20th session. As reported at that session, there was a considerable degree of uncertainty as to the total exposure of the 1992 Fund. A number of claims presented to the shipowner's limitation fund had been settled but not withdrawn. A number of claims filed in the court proceedings had not been previously presented to the Claims Handling Office. For a number of claims, the amounts claimed in the Claims Handling Office and the amount claimed in court were not the same. However, these uncertainties have to a large extent been eliminated. As set out above, after the February 2003 session, settlements have been reached with a number of claimants. With the passage of time it has become increasingly unlikely that a large number of additional claims for significant amounts will be pursued in court.
- 9.5 On the basis of the situation as at 23 April 2003 the Director made the following assessment as regards the 1992 Fund's exposure:

	FFr
<u>Settled claims</u>	
Claims in respect of which settlement had been reached (settlement amounts)	467 865 016
Less payments made under the schemes introduced by the French Government referred to in section 7	<u>107 657 973</u>
	360 207 043
<u>Non-settled claims submitted to the Claims Handling Office but not in court</u>	
Claims rejected and not contested; claimed amounts FFr69 000 857; maximum exposure estimated at 30%	20 700 257
Other claims for which assessment contested; claimed amounts FFr42 724 489; maximum exposure estimated at 60%	25 634 693
<u>Claims in court</u>	
Previously presented to the Claims Handling Office (100% of claimed amounts)	655 188 332
Not presented to the Claims Handling Office (100% of claimed amounts)	5 373 685
Legal interest (estimate)	40 000 000
Claims relating to only fees of a firm of loss assessors	5 000 000
Legal fees	20 000 000
<u>Limitation proceedings</u>	
Claims presented in the limitation proceedings not included above (100% of claimed amounts)	23 400 000
	<hr/>
	FFr1 155 504 010

- 9.6 As set out, above the maximum amount available for compensation is FFfr1 211 966 811. In spite of the remaining uncertainties as to the total level of admissible claims, the Director considered that there was a significant safety margin to make it possible to increase the level of payments to 100%. For this reason, as authorised by the Executive Committee, he decided on 25 April 2003 to increase the level of payments to 100% of the amount of damage actually suffered by the individual claimants as assessed by the 1992 Fund and the Steamship Mutual or decided by the French courts in final judgements.

10 Recourse actions by the 1992 Fund

- 10.1 At its 18th session, held in October 2002, the Executive Committee authorised the Director to take recourse actions against certain parties to recover the amounts paid by it in compensation.

- 10.2 On 12 December 2002, the 1992 Fund took legal action against the following parties:

Tevere Shipping Co Ltd (registered owner of the *Erika*)
Steamship Mutual (P & I insurer of the *Erika*)
Panship Management and Services Srl (manager of the *Erika*)
Selmont International Inc (time charterer of the *Erika*)
Total Fina Elf SA (previously Total Fina SA) (holding company)
Total Raffinage Distribution SA (shipper)
Total International Ltd (seller of cargo)
Total Transport Corporation (voyage charterer of the *Erika*)
RINA Spa (classification society)
Registro Italiano Navale (classification society)
Bureau Veritas (classification society)

- 10.3 There has been no development in respect of these actions.

11 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document; and
 - (b) to give the Director such instructions in respect of the handling of this incident and in particular as regards the various court proceedings as it may deem appropriate.
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