



## INCIDENTS INVOLVING THE 1992 FUND

### ERIKA

#### Note by the Director

<b>Summary:</b>	As of 7 October 2003, 6 785 claims for compensation have been submitted and 95% of the claims have been assessed. Compensation payments totalling FFr 457 million or €69.7 million (£50 million) in respect of 5 359 claims have been made. Some 600 claimants have taken legal action against the shipowner, his insurer and the 1992 Fund. Since the actions were taken, out-of-court settlements have been reached with over 200 claimants.
<b>Action to be taken:</b>	To give the Director instructions in respect of the various court proceedings and consider whether to instruct the Director to take the necessary steps to prevent a potential claim against the French State from becoming time barred.

### 1 Introduction

- 1.1 This document sets out the developments since the Executive Committee's May 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 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 damages, the investigation into 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 7 October 2003, 6 785 claims totalling FFr1 318 million or €201 million (£143 million) <sup><1></sup> had been submitted to the Claims Handling Office in Lorient established by the 1992 Fund and

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<sup><1></sup> 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

the shipowner's P & I insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual).

- 2.2 Six thousand four hundred and twenty claims totalling FFr1 145 million or €175 million (£124 million) had been assessed at a total of FFr637 million or €97 million (£69 million). Assessments had thus been carried out of 95% of the total number of claims received.
- 2.3 Seven hundred and thirty claims, totalling FFr138 million or €21 million (£15 million), had been rejected. Thirty claimants whose claims total FFr16 million or €2.5 million (£1.7 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 5 359 claims (including interim payments) for a total of FFr457 million or €70 million (£50 million), out of which Steamship Mutual had paid FFr84 million or €13 million (£8 million) and the 1992 Fund FFr373 million or €57 million (£40 million). Payments had thus been made in respect of 79% of all claims.
- 2.5 Three hundred and sixty-five claims totalling FFr174 million or €26.5 million (£18.8 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 7 October 2003									
Category	Claims submitted	Claimed amount		Claims assessed		Claims for which payments have been made		Claims rejected	
		FFr	€						
Mariculture and oyster	992	91 903 439	14 010 589	991	100%	826	83%	89	9%
Shellfish gathering	507	16 395 809	2 499 525	507	100%	355	70%	93	18%
Fishing boats	318	16 778 282	2 557 833	317	100%	279	88%	28	9%
Fish and shellfish processors	50	21 905 958	3 339 542	44	88%	36	72%	6	12%
Tourism	3 567	865 403 703	131 929 944	3 547	99%	3 029	85%	438	12%
Property damage	704	48 515 833	7 396 191	432	61%	315	45%	34	5%
Clean-up operations	140	74 544 149	11 364 182	117	84%	93	66%	12	9%
Miscellaneous	507	183 080 061	27 910 375	465	92%	426	84%	30	6%
<b>Total</b>	<b>6 785</b>	<b>1 318 527 234</b>	<b>201 008 181</b>	<b>6 420</b>	<b>95%</b>	<b>5 359</b>	<b>79%</b>	<b>730</b>	<b>11%</b>

Category	Payments authorised			Payments made		
	Number of claims	Amounts		Number of claims	Amounts	
		FFr	€		FFr	€
Mariculture and oyster farming	904	45 452 593	6 929 203	826	29 718 904	4 530 618
Shellfish gathering	407	4 954 276	755 275	355	3 347 637	510 344
Fishing boats	289	6 164 280	939 738	279	4 641 590	707 606
Fish and shellfish processors	39	6 055 373	923 136	36	6 035 414	920 093
Tourism	3 097	388 728 507	59 261 279	3 029	348 763 688	53 168 681
Property damage	396	12 956 387	1 975 188	315	11 176 523	1 703 850
Clean-up operations	105	34 195 175	5 213 021	93	29 767 896	4 538 086
Miscellaneous	433	30 730 709	4 684 866	426	23 618 980	3 600 690
<b>Total</b>	<b>5 670</b>	<b>529 237 300</b>	<b>80 681 706</b>	<b>5 359</b>	<b>457 070 632</b>	<b>69 679 969</b>

- 2.7 In the clean-up sector 84% 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 432 claims (61%) had been assessed. However, 267 claims in this category (38%) 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 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, section 6).

### **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 FFfr 84 247 733 (£8.4 million)<sup><2></sup> 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.
- 3.3 The Steamship Mutual filed action in the Commercial Court in Rennes against the 1992 Fund, requesting 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 may have paid in excess of the limitation amount.

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

- 4.1 Claims totalling €484 million (£343.6 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 (£136 million) and by Total Fina Elf at €170 million (£120.7 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.
- 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 some FFfr168 million or €26 million (£18 million), including one for FFfr59 million or €9 million (£6.4 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 210 other claimants have taken actions

<sup><2></sup> This amount corresponds to €12 843 484.

after that date. The total amount claimed, excluding the claims by the French State and Total Fina Elf, is FFr715 million or €109 million (£77 million).

- 4.4 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 (£580 000) 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.
- 4.5 As regards the claims pursued in the court proceedings, settlements have been concluded in respect of 209 claimants. The amounts claimed totalled FFr103 million or €15.7 million (£11 million), whereas the settlement amounts totalled FFr67.8 million or €10.3 million (£7.3 million).
- 4.6 The 1992 Fund will continue discussions with the claimants whose claims are not time barred for the purpose of arriving at out-of-court settlements if appropriate.

## **5 Maximum amount available for compensation**

- 5.1 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.
- 5.2 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).
- 5.3 The Director's calculation gave 135 million SDR = FFr1 211 966 811<sup><3></sup> (£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.

## **6 Other sources of funds**

- 6.1 The French Government introduced a scheme to provide emergency payments in the fishery sector. This scheme was 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 FFr27.6 million or €4.2 million (£3 million) to claimants in the fishery sector and some FFr13.6 million or €2.1 million (£1.5 million) to salt producers.
- 6.2 The French Government has also introduced a scheme to provide supplementary payments in the tourism sector. The scheme has been operational from 25 July 2001 to the end of April 2003, and payments totalling Fr66.5 million or €10.5 million (£6.3 million) have been made.

## **7 Level of the 1992 Fund's payments**

- 7.1 The Executive Committee, at its 20th session, held in February 2003, authorised the Director to increase the level of payments from 80% to 100% of the amount of the loss or damage actually suffered by the respective claimants as assessed by the experts engaged by the 1992 Fund and the Steamship Mutual (document 92FUND/EXC.20/7, paragraph 3.2.47).

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

- 7.2 After examining carefully the development of the claims situation, the Director 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 judgments (document 92FUND/EXEC.21/2, section 9).

## **8 Recourse actions by the 1992 Fund**

- 8.1 In the *Erika* case as in other cases, the 1992 Fund has had to decide whether to take recourse actions to recover the amounts it has paid in compensation. The IOPC Funds' policy in respect of recourse actions as laid down by the governing bodies can be summarised as follows:

The policy of the Funds is to take recourse action whenever appropriate. The Funds should in each case consider whether it would be possible to recover any amounts paid by them to victims from the shipowner or from other parties on the basis of the applicable national law. If matters of principle are involved, the question of costs should not be the decisive factor for the Funds when considering whether to take legal action. The Funds' decision as to whether or not to take such action should be made on a case-by-case basis, in the light of the prospect of success within the legal system in question.

- 8.2 A criminal investigation into the cause of the incident is being carried out by an examining magistrate in Paris. During 2000, charges were brought against the master of the *Erika*, the representative of the registered owner (Tevere Shipping), the president of the ship management company (Panship Management and Services Srl), the management company itself, the deputy manager of Centre Régional Opérationnel de Surveillance et de Sauvetage (CROSS), three officers of the French Navy who were responsible for controlling the traffic off the coast of Brittany, the classification society (RINA) and one of RINA's managers. In December 2001 charges were brought against Total Fina and some of its senior staff on the basis of a report by an expert appointed by the magistrate. The investigations have not yet been completed.
- 8.3 At the request of a number of parties, the Commercial Court (Tribunal de Commerce) in Dunkirk appointed experts to investigate the cause of the incident ('expertise judiciaire'). The Court decided that the investigation should be carried out by a panel of four experts. This investigation is not yet completed.
- 8.4 Pending the outcome of the ongoing investigations into the cause of the incident, the Executive Committee at its 18th session, held in October 2002, authorised the Director to take recourse actions, as a protective measure, before the expiry of the three-year time period 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)

- 8.5 At its October 2002 session, the Executive Committee noted that the results of the investigations into the cause of the incident might give grounds for the 1992 Fund to take recourse action against parties other than those referred to above, but that the Director considered that no decision was required in this regard at that stage, since the three-year time bar period did not apply to such other parties.

- 8.6 After the Executive Committee's October 2002 session, the Director was made aware of the fact that the classification society Bureau Veritas had inspected the *Erika* prior to the transfer of class to RINA. He decided that the 1992 Fund should take recourse action, as a protective measure, against Bureau Veritas, and this action was also brought in the Civil Court (Tribunal de Grande Instance) in Lorient on 11 December 2002.
- 8.7 As mentioned in paragraph 8.2 above, charges have been brought against, *inter alia*, the deputy manager of CROSS and three officers of the navy. If they were found guilty there might be grounds for the Fund to take recourse action against the French State, but it is not possible for the Fund to decide whether there are grounds for such an action until the investigations into the cause of the incident have been completed.
- 8.8 Under French law the general time bar period in commercial matters is – subject to many exceptions – ten years. The 1992 Fund's French lawyer has advised the Fund that, in matters involving the liability of public bodies, in order to prevent a claim for compensation becoming time-barred, such a claim should be notified to the French Administration by 31 December of the fourth year after the event giving rise to a claim, i.e. in the case of the *Erika* incident by 31 December 2003. Unless the French Administration accepts liability within two months of being notified, the Fund would have to take legal action against the French State in the administrative courts within two months in order to prevent a potential claim against the State becoming time-barred. In view of the uncertainty of the outcome of the above-mentioned investigations into the cause of the incident, the Director considers that the 1992 Fund should take the necessary steps to prevent a possible claim against the French State from becoming time-barred. He invites therefore the Executive Committee to consider whether to instruct him to take such steps.

9 **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 whether the Director should be instructed to take the necessary steps to prevent a claim against the French State from becoming time barred; and
  - (c) 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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