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COMPENSATION  
FUND 1992

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Agenda item 3

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## INCIDENTS INVOLVING THE 1992 FUND

### ERIKA

#### Note by the Director

<b>Summary:</b>	The level of the 1992 Fund's payments is considered. An analysis is made of the admissibility of certain claims for pure economic loss, on the basis of the criteria for admissibility laid down by the governing bodies of the IOPC Funds.
<b>Action to be taken:</b>	a) to consider the level of the 1992 Fund's payments, and b) to decide on the admissibility of certain claims for compensation.

#### 1 Clean-up operations

Following storms at the end of September and in early October 2000, several areas were significantly re-oiled, in particular Belle Ile and the Le Pouliguen area. Clean-up operations resumed in these areas and on other more lightly oiled shorelines. It has been reported that in some cases the operations may extend into early 2001.

#### 2 Impact of the spill

Requests have been received from some fishing communities in Belle Ile that harvesting bans, which had been lifted during the summer, should be re-established in view of the extent of the re-oiling. Joint surveys have been carried out by the Fund/Club experts, the competent French authorities and representatives of the fishing community to assess the contamination and the need for the ban to be reinstated.

### **3 Claims for compensation**

- 3.1 A total of 1 518 claimants have presented claims totalling FFr245.7 million (£23 million). The claims of 840 claimants, mainly in the fishery and aquaculture sectors, totalling some FFr106.7 million (£10 million), have been assessed and approved for a total of FFr37.7 million (£3.6 million) and payments have been made to 448 of these claimants for a total of FFr15.9 million (£1.5 million). Most of the payments correspond to 50% of the approved amounts, but some hardship payments and payments made at an early stage were made in full or at percentages higher than 50%. Claims of 69 claimants, totalling FFr6.1 million (£561 000), have been rejected.
- 3.2 Payments to 185 claimants, totalling FFr4.2 million (£393 000), have been withheld pending clarification regarding payments made by OFIMER. Payments to a further 138 claimants, totalling FFr3 million (£280 000), have not yet been made as a result of 104 claimants not having not yet confirmed their acceptance of the assessed amounts, 20 having not yet signed receipt and release forms and 14 having rejected the assessments.
- 3.3 Claims from a further 684 claimants, totalling FFr139 million (£13 million), are either in the process of being assessed, or are awaiting further information from claimants in order to complete assessments. Some 195 of these claims, totalling FFr27 million (£18.2 million), have been received since 1 September 2000, mainly from the tourism sector.
- 3.4 Claims totalling FFr30.7 million (£2.9 million) in respect of clean-up costs have been submitted by 50 communes. So far, 21 of these claims totalling, FFr5.5 million (£514 000), have been assessed for a total of FFr5 million (£467 000). The assessments of many of the remaining claims in this category have been hampered by insufficient information in support of the claims.

### **4 Level of payments**

- 4.1 The Director has continued his efforts to collect information on the likely level of the claims. However, the uncertainty in this regard that existed at the time of the Executive Committee's 8th session in July 2000 remains.
- 4.2 As mentioned in paragraph 8.3.6 of document 92FUND/EXC.9/7, the claims by Total Fina and the French Government referred to in paragraphs 8.1.1 and 8.1.2 of that document can be disregarded for the purpose of the Executive Committee's consideration of the level of payments, since these claims will be pursued only if and to the extent that all other claims have been paid in full.
- 4.3 The cost for clean-up incurred by the communes will mainly be claimed under Plan Polmar, and to that extent these claims can also be disregarded for the purpose of establishing the level of the 1992 Fund's payments. However, claims have been presented under the 1992 Conventions by communes in respect of costs not covered by Plan Polmar, in particular so called fixed costs. Some communes may choose to submit their entire claims under the 1992 Conventions rather than under Plan Polmar. The total amounts of the claims to be presented under the Conventions by the communes are estimated to be in the region of FFr150 - 200 million (£14 - 19 million).
- 4.4 The total claims in the fishery and mariculture sector can be estimated at FFr125 million (£12 million).
- 4.5 The greatest uncertainty relates to claims in the tourism sector. As mentioned in paragraph 8.3.1 of document 92FUND/EXCC.9/7, an extensive study was carried out before the Executive Committee's 8th session by the French Ministry of Economy, Finance and Industry. In the study it was estimated that the total amount of the admissible claims in that sector would fall within the range of FFr 800 - 1500 million (£75 - 110 million). It was emphasised in the report, however, that there was extreme difficulty in predicting with precision the likely performance of the

tourism sector during the summer season of 2000. The French Government is pursuing its study but so far no further results have been presented.

- 4.6 So far only a relatively low number of claims have been presented from the tourism sector. This is due to the fact that the main tourism season only ended in September 2000. It appears from reports in the media and from the meetings held with representatives of the tourism industry (cf document 92FUND/EXC.9/7, paragraph 5.6) that the tourism season was not as bad as feared but with great variations between areas and types of business. It is nevertheless expected that several thousand compensation claims will be received from this sector. In the Director's view it is not possible at this stage to make any more accurate predictions as to the total amount of these claims than those made in the above-mentioned study.
- 4.7 Another factor of uncertainty is that the estimates in the French Government study were based on the IOPC Funds' policy and criteria as regards the admissibility of claims for pure economic loss. However, as mentioned at the Executive Committee's 8th session, the Director has been advised that the French Courts may take a more extensive approach in their interpretation of the notion of pollution damage (cf paragraph 8.3.3 below).
- 4.8 One factor of major uncertainty has been eliminated as a result of the successful operation to recover the remaining oil from the *Erika*. However, reoiling of some beaches in Loire Atlantique and Morbihan in late September 2000 may have a negative effect on late season tourism.
- 4.9 It should be recalled that the Assembly has taken the view that - like the 1971 Fund - the 1992 Fund should exercise caution in the payment of claims if there is a risk that the total amount of the claims arising out of a particular incident might exceed the total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention, since under Article 4.5 of the 1992 Fund Convention all claimants have to be given equal treatment. It is further recalled that the Assembly has expressed the view that it is necessary 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.
- 4.10 In view of the remaining uncertainty as to the total amount of the claims arising from the *Erika* incident the Director is unable to recommend at this stage an increase of the level of the 1992 Fund's payments set by the Committee at 50% of the proven loss or damage suffered by an individual claimant.

## **5 Cause of the incident**

The report on the investigation carried out by the Maltese authorities was published in October 2000. The Director is studying this report with the assistance of the 1992 Fund's lawyers and technical experts.

## **6 Nomination of court experts for evaluation of the damage**

On 30 September 2000 the Tribunal Administratif in Poitiers appointed, at the request of the communes referred to in paragraph 14.6 of document 92FUND/EXC.9/7, the same experts as appointed by the Tribunal de Grande Instance in les Sables d'Olonne to assess the damage.

## **7 Actions in France against Total Fina, the shipowner and others**

In September 2000 a group of persons who had participated as volunteers in the clean-up operations (l'Association des Bénévoles de l'*Erika*) brought legal action in the Court in les Sables d'Olonne against the Group Total Fina and requested that the experts appointed by that Court in May 2000 (cf document 92FUND/EXC.9/7, paragraph 14.1) should be instructed to analyse the product removed from the wreck of the *Erika* of which the Association had kept some samples.

**8 Claims submitted to the Executive Committee for consideration**

8.1 The issue

8.1.1 A number of claims have been submitted for pure economic loss, *viz* loss of earnings sustained by persons whose property has not been contaminated. The majority of these claims do not give rise to any new questions of principle. However, the Director submits the claims set out below to the Executive Committee for consideration as to whether the criteria for admissibility are fulfilled.

8.1.2 In his consideration of the admissibility of these claims the Director has based himself solely on the criteria for admissibility laid down and the practice developed by the governing bodies of the 1971 and 1992 Funds over the years.

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

8.2.1 The criteria for the admissibility of claims for pure economic loss was considered in 1994 within the 1971 Fund by the 7th Intersessional Working Group. 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). These criteria can be summarised as follows.

Claims for pure economic loss are admissible only if they are for loss or damage caused by contamination. The starting point is the pollution, not the incident itself.

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.

8.2.2 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).

8.2.3 The 7th Intersessional Working Group emphasised that a uniform interpretation of the definition of 'pollution damage' was essential for the functioning of the regime of compensation established

by the Civil Liability Convention and the Fund Convention. It was considered important that there was consistency in the decisions taken by the Executive Committee regarding the payment of compensation arising from incidents in different Member States. The Working Group took the view that, for this reason, the 1971 Fund should be guided, when taking decisions on individual claims, by the criteria developed within the Fund concerning the admissibility of claims, on the basis of the interpretation of the definitions of the terms 'pollution damage' and 'preventive measures' as adopted by the Assembly or the Executive Committee. It was recognised, however, that it would not be realistic for the 1971 Fund, when negotiating out-of-court settlements, to disregard the position which the competent court might take with regard to whether or not the damage covered by the claims fell within the scope of the definition of 'pollution damage'. The point was made that, although the 1971 Fund was established to pay compensation to victims of oil pollution, it was important that the Fund should exercise a certain caution in accepting claims beyond those admissible under the general principles of law in Member States (document FUND/A.17/23, paragraph 7.1.3).

8.2.4 The Working Group took the view that national courts should, when making decisions on the interpretation of the definitions of 'pollution damage' and 'preventive measures', take into account the fact that these definitions were laid down in international treaties. In this context it was argued by some delegations that the decisions taken by the 1971 Fund Assembly and Executive Committee should be considered as constituting agreements between the Parties to the Fund Convention on the interpretation of these definitions in accordance with Article 31.3(a) and (b) of the Vienna Convention on the Law of Treaties (document FUND/A.17/23, paragraph 7.1.4).

8.2.5 The 1971 Fund Assembly also endorsed these considerations.

### 8.3 Position of national jurisdictions

8.3.1 As stated above, the IOPC Funds have taken the position that it is important that there is consistency in the decisions taken by the Funds regarding the payment of compensation for claims arising from incidents in different Member States. It follows that the IOPC Funds should therefore apply the same criteria concerning the admissibility of claims (including those for pure economic loss) in all Member States. However, the Working Group and the 1971 Fund Assembly were aware of the fact that the approach to claims for pure economic loss differed between various jurisdictions (cf document FUND/A.17/23, paragraphs 7.2.19 – 7.2.28) and that some jurisdictions did not distinguish between 'consequential economic loss' (ie loss of earnings suffered by owners of property which had been contaminated as a result of an oil spill) and 'pure economic loss'. The Working Group noted that in some countries the courts apply the criteria of foreseeability and remoteness, or that of proximate cause, or required that the pure economic loss should be a direct result of the defendant's action, whereas in other jurisdictions there had to be a direct link of causation between the damage and the defendant's action, and the damage had to be certain and quantifiable in monetary terms. The Working Group also noted that in some jurisdictions a claim for pure economic loss was admitted if the claimant had a licence to carry out the activity in which the loss was suffered or if the loss was sustained in an established trade. The Working Group made the point that it would not be realistic for the 1971 Fund, when negotiating out-of-court settlements, to disregard the position which the competent court in the country concerned may take with regard to admissibility.

8.3.2 In general, it appears that the jurisdictions based on common law take a restrictive approach to the admissibility of claims for pure economic loss. This is in particular so as regards United Kingdom courts<sup><1></sup>. As regard the Scottish courts this is evidenced by several judgements relating to claims arising from the *Braer* incident, in particular the judgement by the Scottish Appeal Court in the Landcatch case<sup><2></sup>. Also the American courts have in general taken a restrictive

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<1> Colin de la Rue-Charles B Anderson: Shipping and the Environment, pages 443-445.

<2> Annual Report 1999, pages 57-58. See also the judgements by the Court of Session in the cases relating to claims presented by a number of salmon farmers for losses allegedly suffered as result of price depression and relating to a claim by P&O Ferries Ltd; Annual Report 1999, pages 58-59.

attitude concerning claims for pure economic loss<sup><3></sup>, except in respect of claims by commercial fishermen<sup><4></sup>. Common law jurisdictions other than the United Kingdom and the United States have generally been less restrictive in their approach to pure economic loss, for example those of Australia and Canada<sup><5></sup>.

8.3.3 As for French law it should first be noted that the notion of 'proximity' is not known. It appears that the French courts may take as a starting point whether the alleged losses would not have arisen if the *Erika* incident had not occurred. It would in any event be required that the loss resulted directly from the incident and that there is certainty that the damage resulted from the incident. In their interpretation of the definitions of 'pollution damage' and 'preventive measures' the French courts should, however, take into account the position taken by the Fund's Member States as to the importance of a uniform interpretation of the Conventions for the functioning of the international compensation regime. The courts may also note that the criteria for admissibility have been laid down by the IOPC Funds' governing bodies composed of representatives of the Governments of Member States.

#### 8.4 Fish trader in Spain

8.4.1 A claim for Pts 13 million (£4 800) has been presented by a seller of fish and shellfish located in the Basque country in Spain. The claimant has stated that he imports goose barnacles from one supplier in Brittany and sells them to customers (restaurants, hotels, markets) in Bilbao in Spain and that he has been deprived of his supply. He has maintained that the sales of the produce from Brittany represent some 80% of his turnover.

8.4.2 The question of the importance of the geographical location of the claimant's activity has been considered by the 1971 Fund Executive Committee in respect of a number of claims from fish processing and sales companies arising out of the *Sea Empress* incident (United Kingdom, 1996).

At its 49th session the Committee noted that, in the Director's view, the mere fact that a claimant's activities were located slightly outside the area immediately affected by the spill should not, by itself, disqualify the claimant from compensation. The Committee further noted that the Director was of the view that the further away from the affected area that the claimant's business was located, the greater the weight that would need to be given to the other criteria.

A claim had been submitted by a shellfish processor based some 80 kilometres by road to the north of the area covered by the fishing ban. The Executive Committee considered that as this processing plant was located close to the area covered by the fishing ban, this claim fulfilled the criterion of geographic proximity between the claimant's activity and the contamination. It was further noted by the Committee that the claimant was highly dependent on the supplies from the area and that it had limited possibilities of obtaining supplies elsewhere. The Committee took the view that the claimant's business should be considered as forming an integral part of the economic activity of the area. For these reasons, the Committee was of the opinion that there was a reasonable degree of proximity between the contamination and the alleged loss, and decided that this claim was admissible in principle.

A fish sales company located in Cornwall, some 400 kilometres by road from Milford Haven, had presented a claim for compensation. The Executive Committee considered that this claim did not fulfill the criterion of geographic proximity between the claimant's activity and the contamination. It was also noted that although this claimant had to some extent alternative sources of

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<3> Robins Dry Dock and Repair Co v Flint, [1990] 3 WLR414, HL.  
 <4> United Oil Co & Open, 501F.2d 558, 1978 A.M.C. 416, 9 Circuit 1974.  
 <5> Colin de la Rue-Charles B Anderson: Shipping and the Environment, pages 443-445.

supply, the claimant was somewhat dependent on supplies from the area. The Committee considered that the claimant's business did not form an integral part of the economic activity of the area affected by the spill. For these reasons, the Committee took the view that there was not a reasonable degree of proximity between the contamination and the loss suffered by the claimant. The Committee therefore rejected this claim.

As for the claim by a fish sales company located some 160 kilometres by road from Saundersfoot (the main whelk landing port affected by the fishing ban) the Executive Committee noted that this claimant's business operated some distance from the area affected by the contamination. It was considered, however, that the company was highly dependent on products from the area covered by the fishing ban and that this company had made a significant contribution to the development of the infrastructure of whelk fishery in the area. The Committee considered therefore that there was a reasonable degree of proximity between the contamination and the alleged loss, and decided that this claim was admissible in principle.

8.4.3 The Director makes the following assessment of the claim presented by the fishtrader in the Basque country referred to in paragraph 8.4.1. The claimant appears to be economically dependent to a high degree on the produce from the area affected by the oil spill, and he may have had only limited possibilities of replacing the supply from the affected area by other supplies. However, the claimants' business is located some 800 kilometres from the area affected by the pollution, and the business cannot be considered forming an integral part of the economic activity within the area affected by the *Erika* oil spill. For these reasons the Director considers that there is not a reasonable degree of proximity between the contamination and the alleged losses. He proposes therefore that the claim should be rejected.

#### 8.5 Fishmonger in Morbihan

8.5.1 A fishmonger located in Aray, Morbihan, within the affected area has presented a claim for FFr25 000 (£23 300) for losses allegedly suffered as a result of a reduction in demand caused by the *Erika* incident. The claimant receives his supplies of fish and shellfish from local suppliers and sells the product to the local population. The claimant did not encounter any particular difficulties in obtaining supplies during the period covered by the claim.

8.5.2 The Director makes the following assessment of this claim. The claimant's activity is located in the area affected by the oil spill and fulfils, therefore, the criterion of geographic proximity. The activity forms an integral part of the economic activity affected by the oil spill. The supply from this area was not particularly affected, and the reduction in sales was caused by a reduction in customer demand. The Director takes nevertheless the view that since the area had been affected by the spill, the market resistance and therefore the alleged loss should be considered as damage caused by contamination. The Director proposes therefore that this claim should be considered admissible in principle.

#### 8.6 Fish trader in Morbihan

8.6.1 A claim for FFr93 405 (£8 700) has been presented by a seller of fish and shellfish located in Etel, Morbihan, ie well within the area affected by the pollution. The claimant receives his supplies partly from the affected area and partly from outside the area (North Brittany, Normandy, Scotland). It appears that the claimant had no difficulty in obtaining supplies, although various bans had been imposed in respect of oysters and goose barnacles. The claimant has maintained that he had been unable to sell his products due to market resistance as a result of the *Erika* incident.

8.6.2 The Director makes the following assessment in respect of this claim. The claimant's activity is located in the area affected by the oil spill and the claim fulfills therefore the criterion of geographic proximity. His business forms an integral part of the economic activity affected by the spill. The claimant was only partly dependent on the affected resource for supplies and he did not have any difficulty in getting supplies. The alleged losses were therefore caused by customer resistance. For the reasons set out in paragraph 8.5.2 above, the Director proposes that the claim should nevertheless be considered admissible in principle.

8.7 Itinerant fish trader in Vendée

8.7.1 An itinerant fish trader based in La Barre de Monts, Vendée, has presented a claim for FFr24 622 (£2 300) for loss of income allegedly as a result of reduction in sales caused by the *Erika* incident. The claimant's supplies come entirely from the area affected by the oil spill. However, the supplies were not affected by the spill and the claimant had no difficulty in obtaining normal supplies. The claimant sells predominantly oysters at local markets.

8.7.2 The Director makes the following assessment. The claimant's activity is located in the area affected by the oil spill. Her business forms an integral part of the economic activity of the affected area. Her supplies were not affected by the spill, and the alleged losses were therefore caused by market resistance. For the reasons set out in paragraph 8.5.2 above, the Director proposes that this claim should nevertheless be considered admissible in principle.

8.8 Fish merchant in Vendée

8.8.1 A merchant in Bouin, Vendée, selling shellfish mainly to fish shops and restaurants and, to some extent to individuals, has claimed FFr27 656 (£2 600) for losses allegedly incurred as a result of the *Erika* incident, since his sales were reduced.

8.8.2 The claimant's business is located in the area affected by the oil spill. His supplies come from Vendée, Scotland and Ireland. It appears that the claimant did not face any difficulty in obtaining supplies of the products in question but that the decrease in sales was due to customer resistance.

8.8.3 The Director makes the following analysis. The claimant's business is located in the area affected by the oil spill, and the claim fulfills therefore the criterion of geographic proximity. The business forms an integral part of the economic activity of the area affected by the spill. However, the oil spill did not interfere with the supply of the products sold by him, and the alleged losses were caused solely by market resistance. For the reasons set out in paragraph 8.5.2 above, the Director proposes that this claim should nevertheless be considered admissible in principle.

8.9 Manufacturer of fishing equipment

8.9.1 A manufacturer of nets and other fishing equipment has presented a claim for FFr862 000 (£80 600) for reduction in sales. The claimant's business is located in Brie-sous-Montagne located some 100 kilometres north of the area affected by the oil spill. A considerable part of his sales are to businesses which in their turn sell nets and other fishing equipment to fishermen operating in the area affected by the oil spill. The claimant has maintained that his customers reduced their purchases during the period following to the *Erika* incident.

8.9.2 The Director makes the following assessment. There was no general ban imposed on fishing as a result of the incident which could have caused a reduction in the sales of the claimant's products. The claimant's activity is located some distance outside the area affected by the oil spill. His business can not be considered an integral part of the economic activity in the affected area. The Director takes the view therefore that there is not a reasonable degree of proximity between the alleged losses and the contamination. He proposes therefore that this claim should be rejected.



8.10 Oyster farm

8.10.1 A company producing oysters at a farm in Cancale (Northern Brittany) some 100 kilometres outside the affected area, but which carries out its trading activity in Crach (Morbihan), has claimed FFr2 000 000 (£188 000) for losses incurred due to a reduction in sales as a result of the *Erika* incident.

8.10.2 The Director makes the following analysis. The production activity of the claimant's business is located outside the area affected by the oil spill, whereas the trading activity is based within that area. Although the trading activity fulfils the criterion of geographic proximity, the production activity does not. The production of oysters did not therefore form an integral part of the area affected by the spill. The oil spill did not interfere with the production of oysters and the farming activity was not affected by any bans on production. The alleged losses were therefore caused solely by market resistance. In addition, the Director considers that the claimant should have been able to find alternative markets. For these reasons, the Director proposes that the claim should be rejected.

8.11 British holiday group

8.11.1 A British based holiday company, which is part of a major tour operator in the United Kingdom, has notified the 1992 Fund of its intention to submit a claim in respect of financial losses suffered as a result of the incident. The company owns mobile homes at various sites along the coastline affected by the *Erika* oil spill, as well as in other locations in continental Europe. The company has maintained that it had taken all opportunities to relocate business from the affected area, but that the incident had nevertheless resulted in a substantial loss in terms of holidays sold and margins achieved. The company has stated that the mobile home industry on the French Atlantic coast is a major part of its activity. The company has also stated that it employs a significant number of local people to install and maintain its facilities.

8.11.2 The Director makes the following analysis. Although the company is based in the United Kingdom, part of its business activity is undertaken in the affected area. Given that the company owns and operates the mobile homes in the affected area, the Director considers that there is a geographic proximity between the claimant's activity and the contamination. Furthermore, by employing significant numbers of local people, the part of the company's business to be covered by the claim should be considered to form an integral part of the economic activity of the area affected by the *Erika* oil spill. Although the company has alternative sources of income, it would appear that its sites on the French Atlantic coast represents a major part of its business and that it is economically dependent on this activity. The Director therefore proposes that a claim submitted by the company for losses suffered in the business carried out in the affected area should be considered admissible in principle.

**9 Request by a committee of shellfish producers for contribution to the cost of publicity campaign**

9.1 Le Comité National de la Conchyliculture (CNC) (a national committee of shellfish producers) has requested the 1992 Fund to contribute to the cost of a publicity campaign to restore the confidence of the French consumers in oysters, thereby preventing potential losses by the CNC's members as a result of market resistance, in particular during the critical period over Christmas and New Year 2000/2001.

9.2 The CNC maintained that if no action was taken, the losses due to market resistance could total some FFr 1 200 million (£125 million). The CNC proposed a publicity campaign costing some FFr 34 million (£3.5 million) and presented a request for a contribution by the 1992 Fund of FFr 14 million (£1.5 million). It should be noted that the figure of FFr34 million indicated in the request appears not to be based on any deeper analysis.

9.3 The 7th Intersessional Working Group set up by the 1971 Fund Assembly considered that claims for the costs of measures to prevent pure economic loss may be admissible if they fulfil the following criteria:

- 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.

9.4 The Director informed the CNC at an early stage that the 1992 Fund did not normally accept claims for measures to prevent pure economic loss until they had been carried out. He mentioned that the 1992 Fund was cautious about advance payments for such measures, since it would not take on the role of a claimant's banker.

9.5 In order to assess whether a publicity campaign of the type envisaged by the CNC was justified, the Director engaged a French consulting firm specialising in marketing and cost control of publicity campaigns. On the advice of this consultant, the Director commissioned Ipsos, one of the leading French institutes for opinion research, to investigate the attitude of French consumers to oysters in the aftermath of the *Erika* incident. The questions to be presented were drafted after consultation with the CNC. An opinion poll was carried out over the weekend of 7 and 8 October 2000 in the form of telephone interviews with 1 025 persons representative of the French population. The main result of the opinion poll was that 88% of those questioned who ate oysters considered generally that they would eat oysters as normal during the coming months, and in particular during the Christmas/New Year season. In addition, 89% of those questioned who ate oysters stated that they had confidence in the health control put in place by the authorities and that 78% of them considered that it was not risky to eat oysters.

9.6 The CNC was given access to the result of the poll and did not agree with the interpretation of the results of the poll, drawing attention to the fact that 50% of the persons who ate oysters had expressed the view that the *Erika* incident had had an impact on the quality of oysters and that 20% of those persons had stated that it was risky to eat oysters.

9.7 In the light of the result of the poll, on 11 October 2000 the Director informed the CNC that he did not consider the proposed publicity campaign to counteract market resistance was justified.

9.8 The Executive Committee is invited to take note of the Director's position in respect of this claim.

## **10 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 decide on the level of the 1992 Fund's payments (section 4);

- (c) to decide on the admissibility of the following claims:
  - (i) fish trader in Spain (paragraph 8.4);
  - (ii) fishmonger in Morbihan (paragraph 8.5);
  - (iii) fish trader in Morbihan (paragraph 8.6);
  - (iv) itinerant fish trader in Vendée (paragraph 8.7);
  - (v) fish merchant in Vendée (paragraph 8.8);
  - (vi) manufacturer of fishing equipment (paragraph 8.9);
  - (vii) oyster farm (paragraph 8.10); and
  - (viii) British holiday group (paragraph 8.11); and
  
- (d) to give the Director such instructions in respect of the handling of this incident and of claims arising therefrom as it may deem appropriate.

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