



INCIDENTS INVOLVING THE 1992 FUND

ERIKA – CLAIMS SITUATION AND LEVEL OF PAYMENTS

Note by the Director

Summary:

As at 15 September 2002, 6 248 claims totalling FFr1 058 million or €161 million (£102 million) had been received at the Claims Handling Office in Lorient, of which 5 714 claims (91%) had been assessed. Payments totalling FFr308 million or €47 million (£27million) had been made in respect of 4 912 claims. Further claims have been lodged against the shipowner's limitation fund and in various court proceedings.

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.

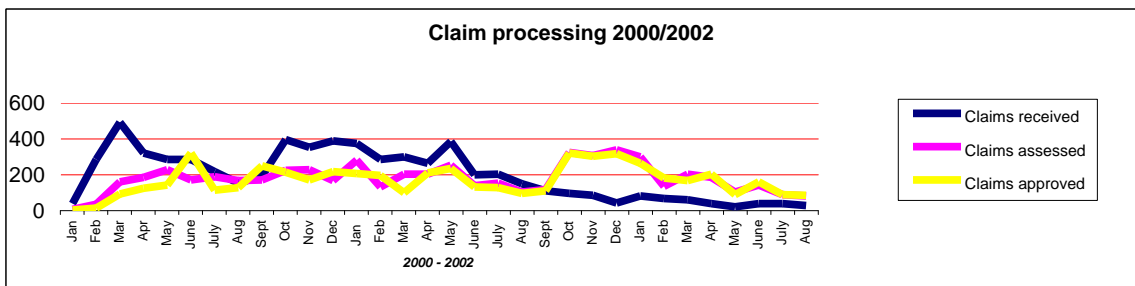
Action to be taken: To review the level of the 1992 Fund's payments.

1 Claims situation

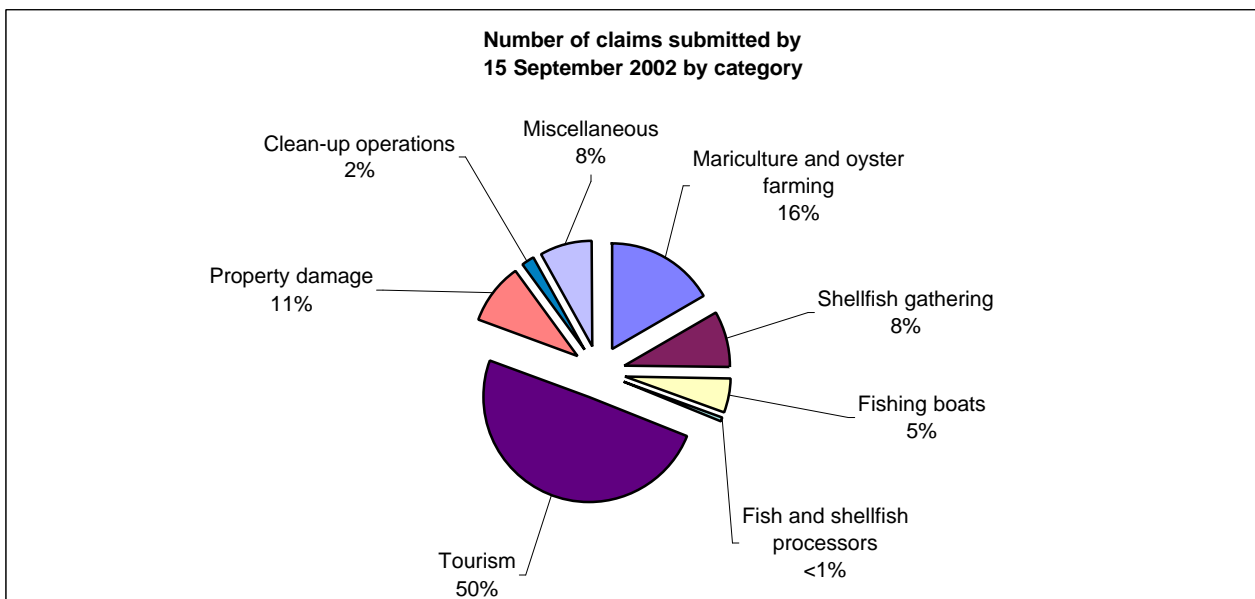
- 1.1 As at 15 September 2002, 6 284 claims for compensation had been submitted to the Claims Handling Office in Lorient established by the 1992 Fund and the shipowner's P & I insurer, the Steamship Mutual Underwriting Association (Bermuda) Ltd (Steamship Mutual), for a total of FFr1 058 million or €161million (£102 million)^{<1>}.
- 1.2 Five thousand seven hundred and fourteen claims totalling FFr883 million or €135 million (£85 million) had been assessed at a total of FFr454 million or €69 million (£44 million). Assessments had thus been carried out of 91% of the total number of claims received.

<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.

- 1.3 Seven hundred and thirty two claims, totalling FFr124 million or €9million (£12 million), had been rejected. One hundred and thirty five claimants whose claims total FFr40 million or €6.1 million (£3.9 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 4 581 claims (including interim payments) for a total of FFr308 million or €47 million (£30 million), out of which the Steamship Mutual had paid FFr84 million or €13 million (£8 million) and the 1992 Fund FFr201 million or €31 million (£20 million). Payments had thus been made in respect of 73% of all claims.
- 1.5 Five hundred and seventy claims totalling FFr175 million or €27 million (£17 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 During the period 1 July – 15 September 2002 79 claims had been submitted to the Claims Handling Office totalling FFr20 million or €3 million (£1.9 million). Of these claims 62 related to the tourism sectors.
- 1.8 As is shown by the graph above, the number of claims assessed in recent months is lower than the number of claims assessed in the latter part of 2001. This has mainly been due to the complexity of the claims assessed in 2002 and to the need in many cases to seek additional supporting information from claimants in support of the alleged loss.



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

Claims submitted by 15 September 2002									
Category	Claims submitted	Claimed amount		Claims assessed		Claims for which payments have been made		Claims rejected	
		FFr	€						
Mariculture and oyster farming	985	92 257 569	14 064 712	980	99%	790	80%	85	9%
Shellfish gathering	505	18 468 554	2 815 531	491	97%	329	65%	103	20%
Fishing boats	313	16 376 802	2 496 644	308	98%	263	84%	25	8%
Fish and shellfish processors	37	21 478 310	3 274 368	35	95%	25	68%	7	19%
Tourism	3165	744 201 511	113 453 520	3033	96%	2 422	77%	460	15%
Property damage	682	39 010 369	5 947 131	318	47%	251	37%	21	3%
Clean-up operations	121	58 192 790	8 871 491	95	79%	81	67%	7	6%
Miscellaneous	476	68 210 358	10 398 673	454	95%	420	88%	24	5%
Total	6 284	1 058 196 263	161 320 980	5 714	91%	4 389	70%	732	12%

Payments authorised and made by 15 September 2002						
Category	Payments authorised			Payments made		
	Number of claims	Amounts		Number of claims	Amounts	
		FFr	€		FFr	€
Mariculture and oyster farming	891	38 258 516	5 832 473	790	26 365 998	4 019 470
Shellfish gathering	379	4 151 114	632 833	329	3 234 623	493 115
Fishing boats	280	5 095 634	776 824	263	4 371 679	666 458
Fish and shellfish processors	27	4 196 461	639 746	25	3 892 705	593 439
Tourism	2,536	236 298 723	36 023 508	2,422	222 641 768	33 941 519
Property damage	285	8 488 678	1 294 090	251	3 677 862	560 686
Clean-up operations	87	22 280 266	3 396 605	81	21 720 732	3 311 304
Miscellaneous	427	28 996 247	5 528 244	420	22 349 338	3 407 135
Total	4 912	347 765 638	53 016 523	4 581	308 254 704	46 993 127

- 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 as at 15 September 2002. In six of the eight categories at least 95% of all claims had been assessed. Although in the tourism sector the majority of the claims were presented relatively late, 96% of the claims in this sector had been assessed. Payments had been made in respect of over 70% of the total number of claims in all categories. 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 or are being examined in the light of the decision adopted 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 318 claims (47%) had been assessed. However, 328 claims in this category (49%) 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.16/3, paragraph 3.5).

- 1.13 In the clean-up sector 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 Claims totalling FFr124 million or €19 million (£12 million) have been lodged against the shipowner's limitation fund constituted by the shipowner's insurer, Steamship Mutual. Some 30 of these claims, totalling FFr46 million or €7 million (£4.5 million), have not been presented to the Claims Handling Office, the major part of this amount (FFr38 million or €5.8 million (£3.6 million) relating to claims presented by communes and other public bodies. The remaining claims lodged against the limitation fund, totalling FFr78 million or €12 million (£8 million), have also been submitted to the Claims Handling Office, but for a lesser amount (FFr44 million or €6.7 million (£4.3 million). However, most of the claims in this latter group 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.
- 1.15 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.18/5, section 11). It is not possible to ascertain the amounts which will be assessed as a result of these surveys.
- 1.16 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 the court surveys mentioned in paragraph 1.15. 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 neither been presented to the Claims Handling Office nor in the limitation proceedings.
- 1.17 Seven claimants have brought legal actions against the 1992 Fund for claims totalling €1 535 145 (£975 000). Six of them are in the tourism sector and one in the fisheries sector. These claims had been rejected by the 1992 Fund either because the claims were not admissible in principle or because the claimants had not proved that they had suffered losses as a result of the *Erika* incident.
- 1.18 At its 17th session held in July 2002, the Executive Committee examined 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 FFr69 335 000 (€10.6 million or £6.7 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). This claim is being examined. The claimant has been invited to provide 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.
- 1.19 It is expected that a number of claims will be submitted to the Claims Handling Office or filed in Court during the period 15 September – 12 December 2002 (cf. paragraph 4 below).

2 Maximum amount available for compensation

- 2.1 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.

- 2.2 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.
- 2.3 The Director's calculation gave 135 million SDR = FFfr1 211 966 811^{<2>} (£117 million), and the Committee endorsed this calculation at its April 2000 session.
- 2.4 As regard complaints concerning the conversion of the maximum amount payable in compensation reference is made in document 92UND/EXC.16/3.

3 Others sources of funds

- 3.1 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 FFfr200 000^{<3>} (£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.
- 3.2 The Director has been informed that OFIMER has paid approximately €3.8 million (£2.4 million) to claimants in the fishery sector and some €2 million (£1.2 million) to salt producers.
- 3.3 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 €7.15 million (£4.5 million) have been made.

4 Time bar

- 4.1 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 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.
- 4.2 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 commences 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 takes legal action, this will not prevent further discussions concerning his claim for the purpose of reaching an out-of-court settlement.

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

<3> This amount corresponds to €30 490.

5 Undertakings by Total Fina and the French Government

- 5.1 In a letter to the Director, Total Fina 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 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 FFr40 million and of the cost of a publicity campaign to restore the tourist image of the Atlantic coast up to a maximum of FFr30 million.
- 5.2 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 which 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 if funds were available after all other claims had been paid in full.

6 Level of payments

- 6.1 The Executive Committee's previous decisions on the level of payments
- 6.1.1 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.
- 6.1.2 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).
- 6.1.3 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).
- 6.1.4 At its 14th session held in October 2001 and 16th session held in April/May 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 and 92FUND/EXC.16/6, paragraph 3.2.25).
- 6.1.5 The level of payments was reviewed at the Executive Committee's 17th session, held in July 2002. The Committee's consideration was based on a document presented by the Director (document 92FUND/EXC.17/3/Add1). 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.17/10, paragraphs 3.2.31-3.2.34).

- 6.1.6 The French delegation accepted that there was an additional exposure in respect of the claims submitted in the limitation proceedings but considered that there was nevertheless a safety margin of FFr300 million and that it would therefore be reasonable to increase the level of payments to 100% (document 92FUND/EXC.17/10, paragraphs 3.2.35-3.2.38)
- 6.1.7 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.17/10, paragraphs 3.2.42)
- 6.2 Other assessments of the total damage arising from the *Erika* incident
- 6.2.1 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.
- 6.3 Director's considerations
- 6.3.1 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.
- 6.3.2 It should be recalled that the claims by Total Fina 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 only if and to the extent that all other claims have been paid in full (document 92FUND/EXC.16/3, paragraph 11). 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.
- 6.3.3 There have been no reports of re-oiling of the coastline during the winter 2001/2002. In the Director's view it is in any event unlikely that there will be any further significant shoreline impact.
- 6.3.4 As at 15 September 2002 settlement agreements had been concluded in respect of 4 385 claims. The claimed amounts totalled FFr513 million or €78 million (£49 million), whereas the settlement amounts totalled FFr364 million or €55 million (£35 million). The settlement amounts represent on average 71% of the claimed amounts, the settlement level varying between sectors from 63.4% to 77.6%.
- 6.3.5 Although the uncertainties inherent in the estimates of admissible losses from the tourism sector (FFr500 million) set out in the October 2001 study carried out within the French Ministry of Economy, Finance and Industry have been reduced considerably, there still remain in the Director's view some uncertainties as to the total amount of admissible claims from that sector. Only 21% of the businesses in the affected departments that are known to have sustained a reduction in turnover on the basis of VAT declarations have submitted claims.
- 6.3.6 On the basis of the claims submitted to the Claims Handling Office and in the light of the 1992 Fund's experience of settlement levels, the Director maintains the estimates as to the total amount of the admissible claims presented to the July 2002 session of the Executive Committee as follows. He estimates that the total amount of the admissible claims in the tourism sector will be

in the region of FFr550 – 600 million or €84 - 91 million (£53 – 58 million). He considers that an additional allowance for marketing campaigns of FFr50 million or €8 million (£5 million) would be prudent. The total amount of the admissible claims in sectors other than tourism is estimated at FFr250 - 300 million or €38 - 46 million (£24 - 29 million). Based on these estimates, the total of the admissible claims would be in the region of FFr950 million or €145 million (£92 million). The total amount available for compensation is FFr1 211 966 811 or €184 763 149 (£117 million). On this basis there would be a sufficient safety margin to enable the 1992 Fund to increase the level of payments to 100%.

- 6.3.7 As the Director stated at the Executive Committee's session in July 2002 there are, however, other factors that give rise to uncertainties. Claims which have not been presented to the Claims Handling Office have been lodged against the shipowner's limitation fund for some FFr46 million or €7 million (£4.5 million). The outcome of the court surveys referred to in paragraph 1.15 may result in further claims and it is not possible to make an estimate of the magnitude of such claims. Account should also be taken of the actions against the 1992 Fund in various courts referred to in paragraph 1.16 where the claims total FFr135 million or €21 million (£13 million). It should be noted that the Director has been advised that the French courts might adopt a more flexible approach in their interpretations of 'pollution damage' than an interpretation based on the criteria for admissibility applied by the 1992 Fund. As mentioned above, there is still some time before the expiry of the time bar period and it is possible that a significant number of new claims will emerge before the expiry of that period. In view of these 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 20th session, to be held in early 2003.

7 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 decide on the level of the 1992 Fund's payments.
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