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REPORT AND RECOMMENDATIONS MADE BY THE "D2" PANEL OF COMMISSIONERS
CONCERNING PART ONE OF THE EIGHTH INSTALMENT OF INDIVIDUAL CLAIMS
FOR DAMAGES ABOVE USD 100,000 (CATEGORY "D" CLAIMS)

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Introduction

1. At its thirtieth session held from 14-16 December 1998 the Governing Council of the United Nations Compensation Commission (the "Commission") appointed the "D2" Panel of Commissioners, comprising Messrs. Kamal Hossain (Chairman), Nabil Elaraby and Isomi Suzuki (the "Panel"). The Panel is one of two Panels appointed to review claims filed by individuals for amounts above USD 100,000 (category "D" claims).

2. This is the second report of the "D2" Panel submitted to the Governing Council pursuant to article 38(e) of the Provisional Rules for Claims Procedure (the "Rules").

3. This report contains the determinations and recommendations of the Panel in respect of the part one of the eighth instalment of category "D" claims, comprising 220 claims ("the claims") of the 447 claims in the instalment.

I. OVERVIEW OF THE CLAIMS IN PART ONE OF THE EIGHTH INSTALMENT

4. The 220 claimants in part one of the eighth instalment allege losses aggregating USD 63,802,335.64. Most loss types defined on the category "D" claim form were encountered in the claims. The most significant loss types appearing in the claims were personal and real property losses. The following table sets out the number of claims by submitting entity in part one of the eighth instalment.

Table 1. Summary of claims by submitting entity

<u>Submitting entity</u>	<u>Number of claims</u>
Canada	1
France	2
Germany	1
India	21
Jordan	7
Kuwait	171
Lebanon	1
Pakistan	7

<u>Submitting entity</u>	<u>Number of claims</u>
United Kingdom	1
United States	8
<u>Total</u>	220

II. THE PROCEEDINGS

5. On 25 July 2000, the Panel signed Procedural Order No. 5 in which it gave notice of its intention to complete its review of the claims and to submit its report and recommendations to the Governing Council in two parts, Part one in January 2001 and Part two in July 2001.

6. The Panel met regularly at the Commission's headquarters in Geneva to consider the claims.

7. The Panel has taken into consideration relevant information and views presented by a number of submitting entities and by Iraq in response to the reports submitted to the Governing Council by the Executive Secretary in accordance with article 16 of the Rules.

8. The Panel has sought to achieve consistency, in so far as is possible, with the verification and valuation procedures adopted by other panels for category "D" and "E" losses. This has been accomplished by adopting the relevant features of related methodologies in the assessment of claims, where appropriate.

III. LEGAL FRAMEWORK

A. Applicable law

9. Pursuant to resolution 687 (1991), the Security Council established Iraq's liability under international law for any direct loss arising as a result of Iraq's unlawful invasion and occupation of Kuwait. Paragraph 16 of Security Council resolution 687 (1991) states (in part) that Iraq:

"... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."

10. Article 31 of the Rules identifies the law to be applied by panels of Commissioners in their consideration of claims. Specifically, panels are to apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. Where necessary, panels are to apply other relevant rules of international law.

B. Evidentiary requirements

11. Article 35(1) of the Rules provides that:

"Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claims is eligible for compensation pursuant to Security Council resolution 687 (1991). Each panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted."

12. Article 35(3) provides that claims in categories "D", "E" and "F" must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss.

13. In addition, decision 15 of the Governing Council expressly requires "detailed factual descriptions of the circumstances of the claimed loss, damage or injury" with respect to "all types of business losses, including losses relating to contracts, transactions that have been part of a business practice or course of dealing, tangible assets and income producing properties." 1/

14. The Panel has reviewed the claims and made its recommendations by assessing documentary and other appropriate evidence. In addition, the Panel has sought to balance the interests of claimants who had to flee a war zone with the interests of Iraq which is liable only for direct loss, damage or injury caused as a result of Iraq's invasion and occupation of Kuwait.

C. Causation

15. Security Council resolution 687 (1991) establishes Iraq's liability for any "direct" loss arising as a result of its invasion and occupation of Kuwait. The Panel has been particularly concerned to ensure that all losses recommended for compensation are direct losses caused by Iraq's invasion and occupation of Kuwait.

16. In dealing with the issue of causation, the Panel has been guided by Governing Council decision 7, which provides that compensation is available

with respect to any direct loss, damage, or injury (including death) to individuals as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:

(a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;

(b) Departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period;

(c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;

(d) The breakdown of civil order in Kuwait or Iraq during that period;
or

(e) Hostage taking or other illegal detention. 2/

17. The Governing Council has confirmed that these guidelines are not intended to be exhaustive. 3/

18. The causation analysis for each claim begins with reference to resolution 687 (1991) of the Security Council, and an assessment of whether the claimed loss is a direct loss resulting from Iraq's invasion and occupation of Kuwait. The Panel has interpreted resolution 687 (1991) in accordance with the guidance provided by relevant decisions of the Governing Council. In each case, the Panel assesses whether the directness requirement has been met based on one of the causal relationships outlined in paragraph 6 of decision 7, or some other causal relationship arising directly from Iraq's invasion and occupation of Kuwait. If a claim or a loss element in a claim fails to meet the directness requirement, the Panel recommends no compensation for that claim or loss element.

19. Additionally, the Panel has considered the decisions of other panels dealing with analogous issues of causation. In particular the Panel has drawn upon and adopted the reasoning applied by the "E2" Panel in its report concerning the second instalment of category "E2" claims. 4/ The Panel has also been guided by paragraph 23 of the report of the "F3" Panel concerning the first instalment of category "F3" claims. 5/

D. The role of the Panel

20. The Governing Council has entrusted three tasks to the Panel. First, the Panel must determine whether an alleged loss falls within the jurisdiction of the Commission and is compensable in principle. Second, the Panel must verify

whether the loss was actually suffered by the claimant. Third, the Panel must determine the amount of any compensable loss suffered by the claimant and recommend an award in respect thereof.

21. Taking into account the evidentiary and causation requirements that must be met by claimants in category "D", and considering the legal principles that must be respected in the valuation of compensable losses, a case-by-case assessment of each claim is required.

22. Throughout the Panel's review of the claims, the Panel has considered numerous factual, legal and valuation issues arising within the individual claims under consideration.

23. In summary, the Panel's objective was to review the claims by applying established principles in a consistent and objective manner.

IV. PANEL DETERMINATIONS IN RESPECT OF DUPLICATE CLAIMS

24. Pursuant to the consideration of the claims, the Panel identified approximately thirty claims which, on a preliminary basis, appeared to constitute duplicates of other category "D" claims.

25. Upon further investigation, the Panel determined that a total of 19 claims would receive no compensation by reason of the duplication by the claimant concerned of the same losses in two or more separate claims.

V. FACTUAL AND LEGAL ISSUES ARISING IN THE DETERMINATION OF THE CLAIMS IN PART ONE OF THE EIGHTH INSTALMENT

26. The Panel was called upon to address numerous factual and legal questions in the determination of the claims. The Panel does not deem it appropriate to compile an exhaustive list of those issues and the determinations in respect of each. Instead, the Panel has elected to limit itself to three specific issues, which are dealt with below.

A. Losses incurred by a claimant as a result of the forced sale of real property

27. A claimant sought compensation in respect of the difference in what he contended was the true market value and the realised price of the real property on which claimant's home was built. The claimant had been resident in Kuwait at the time of its invasion and occupation. He was unable to return expeditiously to his home country and alleged that he was forced against his will to remain in Kuwait. As a consequence thereof, the claimant alleged that he was unable either to earn an income or to service the monthly mortgage payments. The bank concerned was alleged to have applied pressure upon the

claimant to sell the property while he was in Kuwait and repay the mortgage from the proceeds of the sale. The claimant managed, through family members, to sell the property, but contends that the sale price was unfavourable due to the forced nature of the sale.

28. The Panel concluded that the loss alleged did not constitute a direct loss, damage or injury as contemplated in paragraph 16 of Security Council resolution 687 (1991) because it was too remote. On this basis the Panel recommends that no compensation be awarded.

B. Losses incurred as a result of temporary psychological injuries

29. Two claimants sought compensation in respect of losses arising from temporary psychological injuries. Both claimants had been passengers aboard a British Airways flight en route to Malaysia, which had landed in Kuwait on 2 August 1990. The two were detained as hostages by Iraqi forces, the first for thirty days and the second for ninety days. Both claimants alleged that their detention led to psychological injury, which had in turn impaired their respective abilities to perform their jobs. As a result of these facts, the claimants had become unemployed. The loss of income suffered by both was alleged to have occurred as a consequence of Iraq's invasion and occupation of Kuwait.

30. The Panel paid regard to similar cases decided by the "D1" Panel in assessing the compensability of these claims. Based upon these decisions, the Panel concludes that the first claim is not compensable. The reason for this is that the claimant had not provided sufficient evidence to establish the fact of injury. The second claimant on the other hand had demonstrated the fact of injury with credible medical evidence. The Panel determines that the appropriate award, making adjustments for evidentiary deficiencies, is the equivalent of ten months of lost salary.

C. Claim for future loss of earnings on behalf of minor child

31. A claimant sought compensation of USD 500,000 in respect of future loss of earnings on behalf of her minor son, aged nine years at the time of Iraq's invasion and occupation of Kuwait. The basis of the claim was that the son would have earned a salary of USD 7,500 per month had he not been forced to leave school in Kuwait and return to his home country. The USD 500,000 was sought in order to produce an equivalent income of USD 7,500 per month for the rest of the son's anticipated lifetime.

32. The Panel finds that the claimant had not demonstrated that a compensable loss had been suffered. Even if such a loss were to have been established, the Panel finds that it would not have been a direct loss

resulting from Iraq's invasion and occupation of Kuwait. The Panel accordingly recommends that no compensation be awarded.

VI. CROSS CATEGORY ISSUES

A. Overlap with category "E4" claims

33. The Panel has initiated an investigation of the nature and scope of the potential overlap of claims filed by individual claimants in category "D" and claims for compensation in respect of the same losses filed by Kuwaiti corporate claimants in category "E4". This potential claims overlap issue is being assessed in co-operation and consultation with the "D1", "E4" and "E4A" Panels. Pending the results of the investigation, and the receipt of guidance from the Governing Council, the Panel has decided to defer three claims in the eighth instalment submitted by Jordanian shareholders of Kuwaiti corporate entities with limited liability where a potentially competing "E4" claim has been filed.

B. Deductions of category "A", "B" and "C" awards

34. Recommended awards in respect of the claims are reported after deduction of category "A", "B" and "C" approved awards.

35. In some cases, the deduction of a category "C" award constitutes a deduction of a pro-rated amount. This occurs where there are multiple category "C" loss elements, and the "C" award was capped at USD 100,000. In such cases, the "C" award is pro-rated back to the "C" loss elements to reach an amount that can be deducted from the corresponding category "D" award.

VII. OTHER ISSUES

A. Currency exchange rate

36. The Commission issues its awards in United States dollars. The Panel accordingly determines the appropriate exchange rate applicable to claims expressed in other currencies.

37. The Panel finds that it is not possible to calculate the exchange rate separately for each individual claim. The Panel accordingly adopts the reasoning of the "D1" Panel on this issue. 6/

38. For claims stated in Kuwaiti dinars, the currency exchange rate to be applied is the rate of exchange in effect immediately prior to Iraq's invasion and occupation of Kuwait (i.e., 1 August 1990) for converting Kuwaiti dinars into United States dollars.

39. For claims stated in currencies other than Kuwaiti dinars or United States dollars, the currency exchange rate to be applied is the average rate in effect for the month of August 1990 for converting those currencies into United States dollars as indicated in the United Nations Monthly Bulletin of Statistics. 7/

B. Interest

40. In decision 16, the Governing Council specified that "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award."

41. For category "D" loss types other than individual business losses, the "D1" Panel has decided that "the date the loss occurred" under Governing Council decision 16 is a single fixed date, being 2 August 1990 (the date of Iraq's invasion and occupation of Kuwait). The Panel adopts this decision.

42. Category "D" claims for loss of business income are for losses of income that would have been earned over a period of time. As such, an interest start date of 2 August 1990 for such losses would result in over-compensation for claimants. The Panel accordingly adopts the midpoint of the period for which loss of business income claims have been recommended for compensation as the date of loss for the purpose of calculating interest. 8/

C. Claim preparation costs

43. A number of category "D" claimants have made claims for claim preparation costs incurred by them, either in amounts specified on the claim form or in general terms.

44. The Panel has been informed by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claim preparation costs in the future. Accordingly, the Panel makes no recommendation with respect to compensation for claim preparation costs.

VIII. RECOMMENDED AWARDS

45. Table 2 hereto lists the awards recommended by the Panel for each Government and international organisation with claimants included in part one of the eighth instalment. Each Government and international organisation will be provided with a confidential list containing the individual recommendations made in respect of its claimants. As will be seen from the table below, the Panel recommends a total of USD 34,906,517.12 against a total claimed amount of USD 58,204,370.11 for the 216 claims resolved in this instalment.

Table 2. Recommended awards by submitting entity

<u>Country</u>	<u>Number of claims recommended for payment</u>	<u>Number of claims not recommended for payment a/</u>	<u>Amount of compensation claimed (USD)</u>	<u>Amount of compensation recommended (USD)</u>
Canada	-	1	44,000.00	nil
France	1	1	183,375.62	21,701.52
Germany	1	-	247,743.28	18,676.00
India	4	17	4,200,357.14	24,661.58
Jordan	2	2 (3)	1,929,894.17	242,941.51
Kuwait	169	2	49,745,727.36	34,069,358.34
Lebanon	1	-	247,550.00	150,910.00
Pakistan	5	2	1,167,221.55	184,026.27
United Kingdom	1	-	45,739.54	22,195.04
United States	6	2 b/	392,761.45	172,046.86
<u>Total</u>	190	27 (3)	58,204,370.11	34,906,517.12

a/ Numbers in parentheses represent claims that have been deferred.

b/ Includes one withdrawn claim.

Geneva, 30 January 2001

(Signed) K. Hossain
Chairman

(Signed) N. Elaraby
Commissioner

(Signed) I. Suzuki
Commissioner

Notes

- 1/ S/AC.26/1992/15, ("decision 15"), paras. 5 and 10.
- 2/ S/AC.26/1992/7, ("decision 7"), para. 6.
- 3/ Decision 7, para. 6 and decision 15, para. 6.
- 4/ "Report and recommendations made by the panel of Commissioners concerning the second instalment of 'E2' claims", S/AC.26/1999/6.
- 5 "Report and recommendations made by the panel of Commissioners concerning the first instalment of 'F3' claims", S/AC.26/1999/24.
- 6/ "Report and recommendations made by the panel of Commissioners concerning part one of the first instalment of individual claims for damages above US\$100,000 (category 'D' claims)", S/AC.26/1998/1, paras. 61-63.
- 7/ Vol. XLV No. 4, April 1991 (ST/ESA/STAT/SER.1/220).
- 8/ This is consistent with the practice of other panels; see for example the "Report and recommendations made by the panel of Commissioners concerning the first instalment of 'E4' claims", S/AC.26/1999/4, para. 230.
