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

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Introduction

1. This is the fifth report to the Governing Council of the United Nations Compensation Commission (the "Commission") submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") by the "D2" Panel of Commissioners (the "Panel"), being one of two Panels appointed to review individual claims for damages above 100,000 United States dollars (USD) (category "D" claims).
2. This report contains the determinations and recommendations of the Panel in respect of part one of the twelfth instalment of category "D" claims, comprising a total of 395 claims. On 19 July 2001, the Executive Secretary of the Commission submitted 638 claims to the Panel pursuant to article 32 of the Rules.
3. Three additional claims from subsequent instalments were transferred to the twelfth instalment after 19 July 2001 as they were related to claims in part one of the twelfth instalment. The balance of claims in the instalment will be reported in the Panel's report concerning part two of the twelfth instalment of category "D" claims.

I. OVERVIEW OF THE CLAIMS IN PART ONE

4. The 638 claims in the twelfth instalment at the time of its submission to the Panel assert losses aggregating approximately USD 965,618,803.32, and they assert most of the loss types defined on the category "D" claim form. The most common loss types appearing in the claims are D8/D9 individual business losses. The next most common loss types are D4 personal property losses, D6 loss of salary and D7 real property losses. The majority of the claims in the twelfth instalment have been submitted by the Governments of Kuwait, India and Jordan.
5. The table below sets out by submitting entity the claims in part one of the twelfth instalment as submitted to the Panel and the claims as resolved by the Panel.

Table 1. Summary of claims by submitting entity

<u>Submitting entity</u>	<u>Number of claims submitted to the Panel</u>	<u>Number of claims resolved by the Panel</u>
Australia	2	2
Bolivia	1	1
Brazil	1	1
Canada	6	6
Egypt	9	9
France	1	1
Germany	1	1

<u>Submitting entity</u>	<u>Number of claims submitted to the Panel</u>	<u>Number of claims resolved by the Panel</u>
Greece	1	1
India	75	75
Jordan	58	58
Kuwait	217	217
Lebanon	3	3
Pakistan	5	5
Sudan	1	1
Turkey	1	1
United Kingdom	11	11
Yemen	2	2
<u>Total</u>	395	395

II. THE PROCEEDINGS

6. On 19 July 2001, the Panel issued Procedural Order No. 11, in which it gave notice of its intention to complete its review of the claims in the twelfth instalment and to finalize its report and recommendations to the Governing Council in two parts, part one in January 2002 and part two in July 2002. The Panel met regularly to consider the claims.

7. The Panel has taken into consideration relevant information and views presented by a number of submitting entities and by the Government of the Republic of Iraq ("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 of Commissioners for category "D" and "E" losses. This has been accomplished by adapting the relevant features of related methodologies in the assessment of claims, where appropriate.

III. LEGAL FRAMEWORK

A. Applicable law

9. The Security Council reaffirmed Iraq's liability under international law for any direct loss arising as a result of Iraq's 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) of the Rules 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 (S/AC.26/1992/15) 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 by its 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 (S/AC.26/1991/7/Rev. 1), 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 invasion and occupation of Kuwait. Under paragraph 6 thereof, 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.

17. The Governing Council has confirmed that these guidelines are not intended to be exhaustive.² For each claim, the causation analysis begins with reference to Security Council resolution 687 (1991), and an assessment of whether the claimed loss was a direct result of Iraq's invasion and occupation of Kuwait. The Panel has applied Security Council resolution 687 (1991) in accordance with the guidance provided by relevant decisions of the Governing Council. In each case, therefore, the Panel assesses whether the directness requirement has been met based on one of the enumerated circumstances 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 fails to meet the directness requirement, the Panel recommends no compensation for that claim or loss element.

18. Additionally, the Panel has considered the decisions of other panels of Commissioners dealing with analogous issues of causation. In particular, the Panel has drawn upon and adapted the reasoning applied by the "E2" Panel in its report concerning the second instalment of "E2" claims³ with regard to the jurisdiction of the Commission over losses outside of Kuwait. The Panel has also been guided by paragraph 23 of the report of the "F3" Panel concerning the first instalment of "F3" claims with regard to what constitutes "direct" loss.⁴

D. The role of the Panel

19. 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.

20. 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. In summary, the Panel's

objective was to review the claims by applying established principles in a consistent and objective manner.

IV. FACTUAL AND LEGAL ISSUES ARISING IN THE DETERMINATION OF THE CLAIMS IN PART ONE

21. The Panel was called upon to address numerous factual and legal questions in the determination of the claims in part one of the twelfth instalment. To the extent that claims in the twelfth instalment gave rise to new issues not considered in previous instalments of category "D" claims, the Panel ensured that these claims were resolved in accordance with the principles of established methodologies. These new factual and legal issues, as well as the related Panel's recommendations, are described below.

A. D8/D9 individual business losses: directness of loss

22. The Panel reviewed a claim involving a claimant who operated a bowling alley in Kuwait at the time of Iraq's invasion and occupation of Kuwait. The claimant had rented the premises and some tangible property from a Kuwaiti business. The claimant left Kuwait during the period of Iraq's invasion and occupation of Kuwait. Upon his return, he found that the lessor had let out the premises to a third party. In his personal statement, the claimant alleged that his business was unharmed during Iraq's invasion and occupation of Kuwait; all of his business losses resulted from the lessor's alleged breach of contract.

23. The Panel decides that the claimed business losses were not directly caused by Iraq's invasion and occupation of Kuwait. The direct cause of the claimant's loss was the lessor's decision after the liberation of Kuwait to breach its contract with the claimant. The Panel therefore recommends no award of compensation.

24. The Panel reviewed a claim for business losses by a claimant who had entered into an agreement with a daily newspaper in Dubai, United Arab Emirates, for the supply of weekly cartoons created by the claimant. The claimant's cartoon series comprised a total of 389 cartoon panels. The agreement, which was entered into in 1986, was open-ended; the claimant would supply each weekly cartoon for a fee, and the newspaper could cancel the agreement at any time. The claimant asserted that the newspaper terminated this agreement in February 1991 due to military operations in the region. The claimant's attempts to resume his course of dealing with the newspaper after the liberation of Kuwait were unsuccessful. The claimant seeks compensation for the value of the remaining 138 cartoon panels in the series.

25. The Panel determines that a claimant who suffers a loss outside of Iraq or Kuwait must make a specific showing that the particular country in which the loss was suffered was under a credible and serious threat of military action within the meaning of paragraph 6 of Governing Council decision 7. If the claimant fails to do so, the loss cannot be deemed to have been the direct result of Iraq's invasion and occupation of Kuwait.

26. The Panel determines that there was no credible and serious threat of military action against the United Arab Emirates.⁵ The lack of directness is further demonstrated by the fact that the claimant's loss resulted from the newspaper's decision, taken several months after the date of Iraq's invasion of Kuwait, to cancel its course of dealing with the claimant. The Panel therefore finds that the claimant's loss was not directly caused by Iraq's invasion and occupation of Kuwait and recommends no award of compensation.

27. The Panel was presented with two claims for business losses in which the claimant alleged the loss of goods in transit. In each case, the claimant alleged the shipment of goods to Kuwait, but could not provide evidence that the claimed goods had arrived in Kuwait at the date of Iraq's invasion and occupation of Kuwait. In both cases, the claimant demonstrated that he had paid for the goods in question on or prior to the date of Iraq's invasion and occupation of Kuwait.

28. In one claim, the claimant alleged a shipment of shoes from Taiwan. The claimant produced a bill of lading showing that the goods had been shipped from Taiwan on 17 July 1990. He also produced a copy of the letter of credit, which was presented for payment in late July 1990 and settled on 2 August 1990.

29. In the other claim, the claimant alleged that a collection of medals had been posted from Taiwan on 23 May 1990. He produced evidence of payment for the medals, and he alleged that the medals were expected to arrive in Kuwait within two or three months from the date of posting.

30. The Panel took notice of the jurisprudence of the "E4" Panels of Commissioners with respect to similar claims made by Kuwaiti importers of goods. If a claimant is unable to provide evidence that the goods had arrived in Kuwait by the date of Iraq's invasion and occupation of Kuwait, the "E4" Panels consider that the claim is nevertheless compensable if it is apparent that, based on shipping dates, modes of transport used and other shipping details, the loss did not occur as a result of the trade embargo or other related measures.⁶ The Panel similarly adopts a case-by-case approach and considers such relevant evidence as the date of shipping, the mode of shipping and whether payment has been made in order to determine whether the claimed loss directly resulted from Iraq's invasion and occupation of Kuwait.

31. The Panel finds that the claimants have shown that the goods at issue had been paid for and shipped to Kuwait. The claimants also asserted a time frame for delivery of the goods which makes it likely that the goods had arrived in Kuwait but were subsequently lost during the period of Iraq's invasion and occupation of Kuwait. Even if the goods had not arrived in Kuwait at the date of Iraq's invasion and occupation of Kuwait, the Panel determines that the goods were not lost as a result of the trade embargo and related measures. The Panel therefore recommends compensation for the claims pursuant to the established D8/D9 methodology.

B. Further elaboration of the D8/D9 individual business loss methodology

32. The Panel approved the methodology for evaluating individual claims for business losses, including losses arising from the interruption of a contract, in its report concerning the sixth instalment

of “D” claims.⁷ During the course of its review of claims in the twelfth instalment, the Panel was called upon to elaborate further on the D8/D9 methodology relating to contract losses.

33. A contract loss is essentially a claim for loss of profits that were expected to be earned if a contract had been completed. The valuation methodology for contract claims requires, at a minimum, information regarding the period of the contract, the time elapsed under the contract, the total amount to be paid under the contract and the expected profit margin for the contract.

34. A number of claimants in the twelfth instalment asserted claims for contract losses that lacked adequate information to determine the monthly income expected under the contract, or failed to state the duration of the contract.

35. The Panel determines that, where the claimant has given inadequate information to determine the monthly income expected under the contract, the Panel will apply an evidentiary adjustment to the valuation of the claims. If a claimant fails to state the duration of the contract, a determination will be made by the Panel about its likely duration based on the evidence provided by the claimant.

V. CROSS-CATEGORY ISSUE

A. Deduction of category “A”, “B” and “C” awards

36. The awards of compensation recommended by the Panel are reduced by the amount of any approved category “A”, “B” and “C” awards for the same losses. In some cases, the deduction of a category “C” award constitutes a deduction of a prorated amount. This occurs where there are multiple category “C” loss elements, and the category “C” award was capped at USD 100,000. In such cases, the category “C” award is prorated back to the category “C” loss elements to reach an amount that can be deducted from the corresponding category “D” award.

VI. OTHER ISSUES

A. Currency exchange rate

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

38. 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.⁸ 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. 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.

B. Interest

39. In its decision 16 (S/AC.26/1992/16), 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.” For category “D” loss types other than individual business losses, “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).⁹ 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.¹⁰

C. Claims preparation costs

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

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

VII. RECOMMENDED AWARDS

42. The table below lists the awards recommended by the Panel for each Government with claimants included in part one of the twelfth instalment. Each Government 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 100,698,098.58 against a total claimed amount of USD 237,121,258.95 for the 395 claims resolved in part one of the twelfth instalment. Of this total amount claimed, USD 19,478,478.85 is for business losses suffered by Kuwaiti companies that will be severed from the category “D” claim and transferred to the “E4” Panels of Commissioners for their review pursuant to Governing Council decision 123 (S/AC.26/Dec.123 (2002)).

Table 2. Recommended awards by submitting entity

<u>Submitting entity</u>	<u>Number of claims recommended for payment</u>	<u>Number of claims not recommended for payment</u>	<u>Amount of compensation claimed (USD)</u>	<u>Amount of compensation recommended (USD)</u>
Australia	2	0	208,996.92	14,076.38
Bolivia	0	1	373,702.43	nil
Brazil	1	0	6,507,000.00	5,338,991.22
Canada	4	2	1,572,738.30	452,467.15

<u>Submitting entity</u>	<u>Number of claims recommended for payment</u>	<u>Number of claims not recommended for payment</u>	<u>Amount of compensation claimed (USD)</u>	<u>Amount of compensation recommended (USD)</u>
Egypt	6	3	12,703,784.13	1,101,185.64
France	0	1	34,602.08	nil
Germany	1	0	141,277.49	56,944.78
Greece	1	0	224,367.00	14,596.36
India	60	15	58,525,981.02 ^a	6,637,529.01
<u>Jordan</u>	42	16	39,661,943.11 ^b	6,095,067.87
<u>Kuwait</u>	216	1	109,626,000.85	79,376,920.12
<u>Lebanon</u>	3	0	1,015,147.36	532,170.10
<u>Pakistan</u>	5	0	3,393,065.74	700,564.66
<u>Sudan</u>	1	0	74,394.46	23,224.91
<u>Turkey</u>	0	1	249,115.22	nil
<u>United Kingdom</u>	2	9	779,594.20	92,440.36
<u>Yemen</u>	2	0	2,029,548.65	261,920.02
<u>Total</u>	346	49	237,121,258.95 ^c	100,698,098.58

^a Two claims submitted by India included losses totalling USD 796,292.00 that were suffered by Kuwaiti companies. The Panel has decided to sever such company losses and to transfer them to the "E4" Panels for review pursuant to Governing Council decision 123. The amount claimed by India net of the severed portion totals USD 57,729,689.02.

^b Three claims submitted by Jordan included losses totalling USD 18,682,186.85 that were suffered by Kuwaiti companies. The Panel has decided to sever such company losses and to transfer them to the "E4" Panels for review pursuant to Governing Council decision 123. The amount claimed by Jordan net of the severed portion totals USD 20,979,756.26.

^c Of this total for all submitting entities in part one of the twelfth instalment, a total claimed amount of USD 19,478,478.85 has been severed, as explained in notes a and b above. The total amount claimed by all submitting entities in part one, net of all severed amounts, is USD 217,642,780.10.

43. The Panel respectfully submits this report pursuant to article 38(e) of the Rules, through the Executive Secretary to the Governing Council.

Geneva, 28 January 2002

(Signed) K. Hossain (Signed) N. Comair-Obeid (Signed) I. Suzuki
Chairman Commissioner Commissioner

Notes

¹ Decision 15, paragraphs 5 and 10.

² Decision 7, paragraph 6 and decision 15, paragraph 6.

³ See “Report and recommendations made by the Panel of Commissioners concerning the second instalment of ‘E2’ claims”, S/AC.26/1999/6, paras. 53-68.

⁴ See “Report and recommendations made by the Panel of Commissioners concerning the first instalment of ‘F3’ claims”, S/AC.26/1999/24, para. 23.

⁵ The Panel also refers to the jurisprudence of the “E2” Panel of Commissioners concerning compensable areas. The “E2” Panel has held that there was no credible and serious threat of military action against the United Arab Emirates. See “Report and recommendations made by the Panel of Commissioners concerning the third instalment of ‘E2’ claims”, S/AC.26/1999/22, para. 71.

⁶ See “Report and recommendations made by the Panel of Commissioners concerning the first instalment of ‘E4’ claims”, S/AC.26/1999/4 (the “first instalment ‘E4’ report”), para. 140.

⁷ See “Report and recommendations made by the Panel of Commissioners concerning the sixth instalment of individual claims for damages above USD 100,000 (category ‘D’ claims)”, S/AC.26/2000/24 (the “sixth instalment ‘D’ report”), paras. 144-156.

⁸ See “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.

⁹ Ibid., paragraphs 64-65. The “D2” Panel has adopted this decision in the sixth instalment “D” report at paragraph 226.

¹⁰ This is consistent with the practice of other panels; see, for example the first instalment “E4” report, paragraph 230.
