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

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Introduction

1. This is the ninth 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. On 28 August 2002, the Executive Secretary of the Commission submitted the sixteenth instalment of category "D" claims, consisting of 771 claims and alleging losses aggregating approximately USD 1,345,116,803, to the Panel pursuant to article 32 of the Rules. This report contains the determinations and recommendations of the Panel in respect of part one of the sixteenth instalment, which comprises a total of 332 claims. The balance of claims in the instalment will be reported in the Panel's report concerning part two of the sixteenth instalment of category "D" claims.
3. Of the 771 claims in the sixteenth instalment at the time of its submission to the Panel, 52 claims were moved forward and were reported in the "Report and recommendations made by the 'D2' Panel of Commissioners concerning part two of the fourteenth instalment of individual claims for damages above USD 100,000 (category 'D' claims) (S/AC.26/2003/R.13)", as the claims were ready for reporting at the time of signature of that report.
4. An additional 15 claims were transferred to other instalments by the Executive Secretary pursuant to article 32 of the Rules. Ten claims were identified as "stand alone" or "overlap" claims and will be processed by the "E4" Panels of Commissioners in accordance with Governing Council decision 123 (S/AC.26/Dec.123(2001)). To the extent that these claims include individual losses as well as business losses suffered by Kuwaiti companies, the Panel has made recommendations only with respect to the individual losses asserted in these claims. Four claims were transferred from the sixteenth instalment to the "E2" Panels of Commissioners as the claimants have claimed for corporate losses with respect to non-Kuwaiti companies. One additional claim was transferred to the eighteenth instalment of category "D" claims for further claim development.
5. There are an additional 43 claims reported in part one of the sixteenth instalment which were not part of the original 771 claims, but are resolved in this report. These claims comprise: (a) claims from earlier instalments that were deferred to allow for additional claim development that are now ready for reporting; (b) claims having individual losses which have been severed from "overlapping" and "stand alone" claims; and (c) claims from the eighteenth instalment of category "D" claims that have been moved forward as they are ready for reporting at the time of signature of this report.
6. As a result of these transfers and additions, part one of the sixteenth instalment comprises 332 claims. The most common loss type appearing in part one of the sixteenth instalment is D8/D9 individual business losses. Other common loss types are D7 real property losses, D4PP personal property losses and D6 loss of income, unpaid salaries and support. The majority of the claims in part one of the sixteenth instalment were submitted by the Governments of Kuwait, Yemen, Jordan, and Saudi Arabia.

7. Table 1 below sets out by submitting entity the claims submitted to the Panel and the claims resolved by the Panel in part one of the sixteenth instalment.

Table 1. Summary of claims by submitting entity

<u>Submitting entity</u>	<u>Number of initial procedural order claims reviewed by the Panel in part one</u>	<u>Number of claims added to the instalment</u>	<u>Number of claims deferred from the instalment</u>	<u>Number of claims originally in the sixteenth instalment which were reported in an earlier instalment</u>	<u>Total number of claims resolved by the Panel in part one of the sixteenth instalment</u>
Austria	1	1	1	-	1
Canada	1	5	-	-	6
Denmark	1	-	1	-	0
Egypt	2	4	1	-	5
India	7	3	-	-	10
Jordan	41	16	5	3	49
Kuwait	226	8	0	49	185
Lebanon	8	-	2	-	6
Pakistan	4	1	-	-	5
Saudi Arabia	20	-	-	-	20
Syrian Arab Republic	5	4	1	-	8
Turkey	1	-	-	-	1
United Kingdom	6	-	1	-	5
United States	12	-	3	-	9
Yemen	20	-	-	-	20
UNRWA Gaza	1	1	-	-	2
<u>Total</u>	356	43	15	52	332

I. THE PROCEEDINGS

8. On 28 August 2002, the Panel issued Procedural Order No. 28, in which it gave notice of its intention to complete its review of the claims in the sixteenth instalment and to finalize its report and recommendations to the Governing Council in two parts, part one in March 2003 and part two in September 2003. The Panel met regularly to consider the claims.

9. The panel has taken into consideration relevant information and views presented by a number of claimant Governments as well as 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.

10. 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.

II. LEGAL FRAMEWORK

A. Applicable law

11. 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".

12. 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

13. 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."

14. 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.

15. 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

16. 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 fled from 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

17. 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.

18. 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.

19. 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 Governing Council 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.

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

III. NEW FACTUAL, LEGAL AND VALUATION ISSUES ARISING IN THE DETERMINATION OF CLAIMS IN PART ONE OF THE SIXTEENTH INSTALMENT

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

A. D4(PP) personal property losses: one "unusually large or complex" claim for jewellery

23. The Panel reviewed claims that the Panel classified as "unusually large or complex" within the meaning of article 38 of the Rules and for which the Panel engaged the assistance of expert consultants due to the presence in the claims of certain types of D4(PP) personal property that are either of high value and/or unique in nature. At the request of the Panel, the expert consultants were asked to perform a detailed review of each such item and to provide an expert opinion to the Panel as to the lowest replacement value in 1990 for each item.

24. In one "unusually large or complex" claim involving jewellery, the claimant asserts the loss of jewellery in the amount of USD 1,157,439, which included a pair of 10-carat diamond earrings with a claimed value of USD 252,595 (the "Valuation Item"). The claimant indicated that these diamond earrings were from Bulgari and were purchased through a local supplier in Kuwait.

25. The Panel instructed the secretariat to undertake claims development pursuant to article 34 of the Rules with the assistance of the expert consultants with respect to the Valuation Item. In addition, at the direction of the Panel, members of the secretariat and the expert consultants conducted an on-

site interview with the claimant during the course of a technical mission to Kuwait. The Panel reviewed the claim as well as the valuation report provided by the expert consultants. As the total claimed amount was below USD 10 million, the Panel did not require a copy of the claim file to be sent to Iraq for comments.

26. In reviewing the claim, the Panel considered the evidence provided by the claimant in respect of ownership, loss and causation.

1. Ownership

27. The claimant had initially provided an insurance policy for jewellery in the amount of the claimed amount. The policy did not contain a detailed schedule of the insured jewellery items. The claimant also submitted the original invoice for the Valuation Item dated 1 January 1981 that provided detailed information as to the cut, carat, color and clarity of the diamonds. She also provided two certificates from the Gemological Institute of America, Inc. dated 5 February 1979 and 30 July 1979, respectively, appraising the two diamonds constituting the Valuation Item. Based on this evidence, the Panel determines that the claimant has established her ownership of the Valuation Item.

2. Loss and causation

28. The claimant stated that her house was robbed by Iraqi soldiers while she was abroad on summer holiday. She provided witness statements from neighbours and relatives who witnessed the theft by Iraqi soldiers of her safe where her jewellery items were kept. The Panel is satisfied that the Valuation Item was lost as a direct result of Iraq's invasion and occupation of Kuwait.

3. Valuation

29. The Panel determines that the value for the Valuation Item should be based on the lesser of the lowest replacement value in 1990 or the amount claimed for the Valuation Item. The expert consultants made their recommendation to the Panel accordingly. Based on their report and taking into account the original invoice and certificates for the Valuation Item, the Panel recommends an award in the amount of USD 120,000 in respect of the Valuation Item.³

B. D4(PP) personal property losses: two "unusually large or complex" claims for bloodstock

30. The Panel reviewed two "unusually large or complex" claims involving bloodstock. At the request of the Panel, the expert consultants were asked to perform a detailed review of the bloodstock.

31. The two claimants assert the loss of 125 horses (the "Valuation Items") as a result of Iraq's invasion and occupation of Kuwait. The first claimant asserts the loss of eight race horses, 33 mares, 23 foals and three stallions, for a total of 67 horses. The second claimant asserts the loss of 13 race horses, 30 mares, 13 foals and two stallions, for a total of 58 horses.

32. The first claimant seeks compensation in a total amount of USD 7,895,833.91. Of that total amount claimed, the Valuation Items represent an amount of USD 6,839,792.39.⁴ The second

claimant seeks compensation in a total amount of USD 6,382,233.56. Of that total amount claimed, the Valuation Items represent an amount of USD 6,027,439.45.⁵

33. The Panel instructed the secretariat to undertake claim development with the assistance of the expert consultants with respect to the Valuation Items. In addition, members of the secretariat and the expert consultants conducted on-site interviews with the two claimants and with various third parties, as further described below, during a technical mission to Kuwait. The Panel reviewed the two claims at several of its meetings, with the expert consultants in attendance at some of the meetings.

34. In reviewing the two claims, the Panel considered the evidence provided by each claimant in respect of ownership, loss and causation.

35. The Valuation Items were allegedly located in three areas, each of which was shared by the claimants: a stable located on the grounds of Kuwait's Hunting & Equestrian Club (the "HEC"), and two farms located in Sulaibiya and Wafra. The stables were run as one family operation founded by the claimants' father in 1973 for the purpose of breeding and racing horses. The stables are reputed to be one of the pre-eminent racing and breeding stables in Kuwait. In addition to the two claimants, three other family members maintained horses at the family's stables at the HEC and at the Sulaibiya and Wafra farms. The claimants assert, however, that the stables' horses, including the Valuation Items, were individually, not jointly, owned by the various members of the stables. The claimants allege that the family stables had a total of 230 horses prior to Iraq's invasion and occupation of Kuwait.

36. In their original claims submitted to the Commission, the claimants provided, *inter alia*, certificates issued by the HEC to document the number of Valuation Items claimed as well as their value, and documentation concerning certain horses imported from abroad to show the ancestry of the Valuation Items. In addition, the first claimant submitted a fodder card allegedly issued by Kuwait's Public Authority for Agricultural Affairs and Fisheries ("PAAAF") in respect of 700 sheep and 110 horses, and a post-invasion statement from PAAAF purportedly certifying the number of horses registered in the fodder card. The first claimant also submitted magazine articles concerning the family's stables and computer print-outs allegedly from the former general manager of the HEC in support of two detailed lists comprising eight race horses and 17 mares. The second claimant provided similar magazine articles, but he did not state whether any of his Valuation Items were mentioned in such articles.

37. In response to claims development, the claimants submitted, *inter alia*, detailed lists of the Valuation Items, supported by horse identification ("ID") forms allegedly issued by the HEC before Iraq's invasion and occupation of Kuwait. Each ID form was completed by hand, identified the horse by name, date of birth, sire and dam, and provided a short written description of the horse's colour or markings. In addition, the claimants submitted certificates allegedly issued by the Central Statistics Department of Kuwait's Ministry of Planning. These certificates purported to show that, on a particular date before Iraq's invasion and occupation of Kuwait, each claimant owned a specific number of horses at a specified location, such as the HEC stables or at the Sulaibiya or Wafra farms. The first claimant also submitted three PAAAF certificates, similar to the one mentioned above but

dated April, June and July 1990, as well as a different fodder card for 700 sheep and 110 horses. A supplementary notification was sent to the claimants to explore the authenticity and foundation of the documents and, in particular, whether the horse ID forms were reconstructed after liberation for the purpose of supporting their claims for the Valuation Items. In their responses, the claimants asserted that the horse ID forms were obtained from the personal computer of the former general manager of the HEC.

38. The authenticity and foundation of the documents submitted by the claimants were the subject of a series of on-site interviews during the course of a technical mission to Kuwait by the secretariat and expert consultants with the former general manager of the HEC, representatives from the HEC, the Ministry of Planning, PAAAF, and the claimants. The HEC stated that the certificates it submitted in support of the bloodstock claims were based principally on the memory of several of its officers, since most of its records were lost or destroyed during the period of Iraq's invasion and occupation of Kuwait. The HEC denied that it had ever authorized or issued the horse ID forms submitted by the claimants. The former general manager of the HEC also challenged the authenticity of the horse ID forms, because they were not individually signed and bore an HEC stamp that was not in use before Iraq's invasion and occupation of Kuwait. In addition, he said that he would not have accepted the horse ID forms, because none of them gave a graphic description of the horse's individual markings.

39. Officials at the Ministry of Planning denied that the certificates purportedly issued by it and submitted by the claimants were or could be authentic, since the Ministry did not maintain statistics for race horses stabled at the HEC. PAAAF disputed the reliability of the pre-invasion certificates purportedly issued by it since the certificates were, on their face, incomplete. PAAAF also disputed the authenticity of the fodder cards submitted by the first claimant, on the basis that fodder cards are issued only for sheep, camels and goats but not horses, and PAAAF can issue only one fodder card per person each year.

40. During their interviews, the claimants asked the Commission to disregard the evidence in their original submissions, because it contained misinformation that they corrected in their later-filed submissions. The claimants also asked the Commission to disregard the pre-invasion PAAAF certificates, because they were obtained solely for the purpose of increasing the stables' supply of subsidized fodder and did not accurately reflect the number of horses that they owned. The claimants asked the Commission to focus on the horse ID forms, which they considered as their best evidence of the existence and ownership of the Valuation Items. The claimants reiterated that the horse ID forms were copies of original pre-invasion documents; the originals, they said, were at the HEC. The claimants were asked to explain a number of inconsistencies in the evidence, including the horse ID forms, and to explain the origin of the computer print-outs originally submitted by the first claimant, which the Panel finds they failed to do in a satisfactory manner.

41. It is the claimant's burden to establish by appropriate evidence both the existence of the property claimed as well as his ownership of said property. Pursuant to article 35(1) of the Rules,⁶ the Panel determines that the claimants have failed to meet their evidentiary burden. The Panel cannot rely on the evidence submitted by the claimants with their original submissions, because they have

admitted that it contains misinformation and have specifically asked the Commission to disregard such evidence. In addition, this evidence has either been discredited by a relevant witness or fails to provide the requisite probative weight to establish the claimant's ownership of the Valuation Items. The fodder card's authenticity, for example, has been challenged by PAAAF, the alleged issuer of the card. The magazine articles, computer print-outs, and documentation concerning imported horses do not establish the individual claimant's ownership or the existence of any of the Valuation Items as of the date of Iraq's invasion and occupation of Kuwait. Finally, the HEC certificates are of marginal probative value, since they are not based on actual records of the HEC and given that all the relevant documents submitted in support of the existence and ownership of the Valuation Items have been shown to be unreliable.

42. The claimants urged the Commission to focus on the evidence that they submitted in response to the claims development and, in particular, the horse ID forms. The Panel also determines that it cannot rely on this evidence, as its authenticity and reliability have been undermined to such an extent that it cannot be admissible. Representatives from the Ministry of Planning and PAAAF, for example, questioned the authenticity of the documents purportedly issued by them. Representatives of the HEC as well as its former general manager challenged the authenticity of the horse ID forms. The information gathered from these witnesses not only raises serious questions about the authenticity and reliability of the documentary evidence submitted, but also about the credibility of the claimants themselves. The Panel finds that there is no admissible, credible or probative evidence to support the claimant's ownership of any of the Valuation Items.⁷

43. Accordingly, the Panel decides that neither claimant has satisfied the test of ownership in respect of the Valuation Items and recommends no award of compensation in respect of the Valuation Items.⁸

C. D8/D9 individual business losses filed by the Government of Saudi Arabia

44. The sixteenth instalment includes claims filed by the Government of Saudi Arabia. These claims were originally filed in subcategory "E2" (claims filed by corporations and other business entities, not incorporated in Kuwait), but were later transferred to category "D" as the claimants were individuals claiming for business losses. The Panel addressed a number of new issues arising in connection with these claims relating to loss of tangible property, loss of business income and incremental costs.

1. Loss of tangible property

45. In connection with claims for the loss or theft of tangible property located in Saudi Arabia, the Panel determines, in accordance with paragraph 21 of Governing Council decision 7, that the loss of tangible property located in Saudi Arabia is compensable where the claimant proves that he owned the property as of 2 August 1990 and that the loss of property was due to military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991. This is in accordance with the approach previously taken by the "E1" Panel with respect to tangible property loss claims made by claimants outside of Kuwait.⁹

2. Loss of business income

46. The Panel also considered the issue of loss of profits arising from either a suspension or decline in business income. The Panel determines that claimants with businesses located in Saudi Arabia are entitled to loss of profits if they satisfy the three requirements outlined in the report and recommendations concerning the sixth instalment of category “D” claims. In that report, the Panel held that claimants seeking compensation for loss of business income are required to prove: (a) that the loss was caused as a direct result of Iraq’s invasion and occupation of Kuwait; (b) that the business had a history of profitability; and (c) that the claimant had not gained a windfall profit in the post-invasion period which should be set off against their loss of profits.¹⁰

47. In relation to the first of these requirements, the Panel determines that if the claimant’s business was located within the “compensable area” in Saudi Arabia (defined as that part of Saudi Arabia which was under attack from scud missiles),¹¹ the Panel will find that the loss of business income was directly caused by the invasion and will review the loss of business income claim in accordance with its methodology. Where the claimant’s business is located outside of the compensable area, the Panel requires the claimant to adduce specific evidence of “military operations or threat of military action by either side” which caused the loss of business income.

48. In accordance with the determination made by the Panel in the sixth instalment report of category “D” claims regarding loss of business income claims, the Panel finds that the “period of loss” for businesses located within the “compensable area” in Saudi Arabia should be from 2 August 1990 to 2 March 1991 and moreover, if a claimant adduces specific evidence that a particular business could not reasonably have been expected to resume (or to return to normal levels, depending on the nature of the claim) until a date after 2 March 1991, the Panel will consider a longer compensation period.¹² The Panel applied these guidelines to claims alleging loss of business income.

3. Incremental costs relating to increased salary costs and increased cost of materials

49. The Panel considered claims for increased costs of completing contracts due to a rise in the cost of labour and/or materials that claimants assert were caused by Iraq’s invasion and occupation of Kuwait. The Panel determines that claimants with businesses located in Saudi Arabia are entitled to compensation for increased salary costs or the increased cost of materials where they prove: (a) their business was located in an area which was exposed to military operations or threat of military action by either side; (b) the costs were incurred between 2 August 1990 and 2 March 1991; (c) the amounts paid were reasonable; and (d) the increased costs were not passed on to customers or recovered from another source. In connection with claims for increased salary, claimants are also required to show that they were forced to pay increased salary to their employees in order to continue business operations during the hostilities. In connection with claims for increased costs of materials, the claimant would also need to show that the costs were incremental and would not have been incurred in the course of the claimant’s normal business practice.¹² The Panel applied these guidelines to claims alleging incremental costs relating to increased salary costs and increased costs of materials.

4. Delay penalties

50. The Panel considered the issue of delay penalties incurred on projects performed in Saudi Arabia that claimants assert were due to delays occasioned by Iraq's invasion and occupation of Kuwait. In relation to delay penalties, the Panel requires a claimant to prove: (a) the claim business was located in the "compensable area"; (b) the project was delayed for a reason specifically connected with "military action or the threat of military action", for example a significant portion of the claimant's workers were too frightened to come to work or returned to their home countries; (c) the delay occurred within the "compensable period"; and (d) the delay penalties were actually paid. The Panel also requires a claimant to clearly explain how the delay penalties were calculated so as to ensure that the amounts paid were in fact delay penalties rather than any other type of penalty unconnected with Iraq's invasion and occupation of Kuwait. The Panel applied these guidelines to claims alleging delay penalties.

D. Deduction of category "A", "B" and "C" awards

51. 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.

IV. OTHER ISSUES

A. Currency exchange rate

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

53. 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.¹³ 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

54. 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).¹⁴ 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.¹⁵

C. Claims preparation costs

55. 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. 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 thereto.

V. RECOMMENDED AWARDS

56. Table 2 below lists the awards recommended by the Panel for each submitting entity with claimants included in part one of the sixteenth instalment. Each submitting entity will be provided with a confidential list containing the individual recommendations made in respect of its claimants. With reference to paragraphs 4 and 5 above, USD 17,725,866.32 is claimed by 18 claimants in respect of business losses that the claimants assert were suffered by Kuwaiti companies. The Executive Secretary has severed and transferred the corporate losses to the "E4" panels of Commissioners in accordance with Governing Council decision 123. This results in a net total claimed amount of USD 211,284,854.22 for the 332 claims resolved in part one of the sixteenth instalment. As will be seen from the table below, the Panel recommends a total of USD 81,331,513.17 against this net total claimed amount.

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>Net amount of compensation claimed (USD)</u>	<u>Amount of compensation recommended (USD)</u>
Austria	1	0	211,349.48	55,363.32	36,332.18
Canada	5	1	2,554,041.76	2,251,203.76	1,032,660.40
Egypt	3	2	5,036,775.90	5,036,775.90	448,485.53
India	4	6	9,226,245.31	8,939,705.52	980,511.17
Jordan	44	5	47,214,017.00	31,246,160.13	6,988,262.42
Kuwait	185	0	105,936,067.91	105,936,067.91	66,142,701.19
Lebanon	6	0	3,237,216.73	3,237,216.73	651,062.75
Pakistan	5	0	3,536,929.02	3,536,929.02	940,431.41
Saudi Arabia	3	17	36,093,613.14	36,093,613.14	137,431.56
Syrian Arab Republic	5	3	1,755,890.03	1,297,740.03	344,380.03
Turkey	0	1	7,345.00	7,345.00	0.00
United Kingdom	3	2	1,752,566.90	1,752,566.90	129,708.00
United States	7	2	2,755,412.56	2,755,412.56	853,299.70
Yemen	17	3	8,148,946.63	8,148,946.63	2,641,402.54
UNRWA Gaza	1	1	1,544,323.17	989,807.67	4,844.29
<u>Total</u>	289	43	229,010,740.54	211,284,854.22	81,331,513.17

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

Geneva, 31 March 2003

(Signed) K. Hossain
Chairman

(Signed) I. Suzuki
Commissioner

(Signed) N. Comair-Obeid
Commissioner

Notes

¹ Governing Council decision 15, paragraphs 5 and 10.

² Governing Council decision 15, paragraph 6.

³ Out of the total amount claimed of USD 1,231,508.65, USD 1,157,439.45 was claimed in respect of D4(PP) personal property losses and USD 74,069.20 was claimed in respect of D7 real property losses. Out of the total amount claimed of USD 1,157,439.45 in respect of D4(PP) personal property losses, USD 1,024,844.29 is recommended.

⁴ Out of the total amount claimed of USD 7,895,833.91, USD 7,733,550.17 was claimed in respect of D4(PP) personal property losses, USD 57,093.43 was claimed in respect of D6 salary losses, USD 87,889.27 was claimed in respect of D7 real property losses, and USD 17,301.04 was claimed in respect of claim preparation costs.

⁵ Out of the total amount claimed of USD 6,382,233.56, USD 6,273,550.17 was claimed in respect of D4(PP) personal property losses, and USD 108,683.39 was claimed in respect of D7 real property losses.

⁶ "Each panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted."

⁷ In reaching its decision, the Panel took note of a document from the Kuwait Ministry of Justice provided to the Commission subsequent to the technical mission to Kuwait. The document does not, however, change the Panel's decision not to accept the certificates purportedly issued by the Ministry of Planning as authentic pre-invasion documents that can be relied upon to support the bloodstock claims.

⁸ While no award is recommended with respect to the Valuation Items, with respect to the remaining losses in their respective claims, the Panel recommends a total award of USD 588,959.39 for the first claim and a total award of USD 329,046.42 for the second claim.

⁹ "Report and recommendations made by the panel of Commissioners concerning the third instalment of 'E1' claims" (S/AC.26/1999/13), paragraphs 238-258; and "Report and recommendations made by the panel of Commissioners concerning the fifth instalment of 'E1' claims" (S/AC.26/2000/1), paragraphs 116-124.

¹⁰ See "Report and recommendations made by the panel of Commissioners concerning the sixth instalment of individual claims for damages above US\$100,000 (category 'D' claims)" (S/AC.26/2000/24), (the "sixth 'D' report") paragraphs 126-130.

¹¹ See "Report and recommendations made by the panel of Commissioners concerning the third instalment of 'E2' claims" (S/AC.26/1999/22) (the "third 'E2' report"), paragraph 77 and "Report and recommendations made by the panel of Commissioners concerning the second instalment of 'E2' claims" (S/AC.26/1999/6), paragraphs 81 and 139-142.

¹² This is consistent with the findings of the "E2" Panel in its third and eighth instalment reports. See the third "E2" report, paragraph 100; and "Report and recommendations made by the panel of Commissioners concerning the eighth instalment of 'E2' claims" (S/AC.26/2001/19), paragraphs 145 and 160.

¹³ See “Report and recommendations made by the panel of Commissioners concerning part one of the first instalment of individual claims for damages above USD 100,000 (category ‘D’ claims)” (S/AC.26/1998/1), paragraphs 61-63.

¹⁴ Ibid., paragraphs 64-65. The “D2” Panel adopted this decision in the sixth “D” report at paragraph 226.

¹⁵ This is consistent with the practice of other panels, see, for example, “Report and recommendations made by the panel of Commissioners concerning the first instalment of “E4’ claims,” S/AC.26/1994/4, paragraph 230.
