



Security Council

Distr.
GENERAL

S/AC.26/2004/11
23 September 2004

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

REPORT AND RECOMMENDATIONS MADE BY THE “D1” PANEL OF COMMISSIONERS
CONCERNING PART THREE OF THE NINETEENTH INSTALMENT OF INDIVIDUAL
CLAIMS FOR DAMAGES ABOVE USD 100,000 (CATEGORY “D” CLAIMS)

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Introduction

1. This is the twenty-first 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 “D1” 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). This report contains the determinations and recommendations of the Panel in respect of part three of the nineteenth instalment, submitted to the Panel by the Executive Secretary of the Commission pursuant to article 32 of the Rules.
2. The Panel commenced its review of the nineteenth instalment in January 2003. Pursuant to Procedural Order No. 35, signed on 28 January 2003, the Panel notified all Governments with claims in the nineteenth instalment of its intention to complete its review of the instalment in two parts. The Panel completed its review of 323 claims in part one in August 2003¹ and completed its review of a further 387 claims in part two in December 2003.² The Panel notes, however, that due to events in Iraq during 2003 that resulted in the loss of certain claim files transmitted to Iraq, the Government of the Republic of Iraq (“Iraq”) was unable to provide comments on 19 claims in time for inclusion in the report in respect of part two of the nineteenth instalment, signed by the Panel in December 2003. Therefore, the Panel deferred its review of the 19 claims to part three of the nineteenth instalment to provide Iraq sufficient time within which to provide comments in respect of the claims.³
3. The nineteenth instalment initially comprised 725 claims.⁴ All of the claims, with the exception of the 19 claims included in this report, were reviewed by the Panel in its reports on parts one and two of the nineteenth instalment. Taking into account all of the claims added to or transferred from the nineteenth instalment, the Panel has resolved a total of 729 claims, including two withdrawn claims.
4. In addition to ad hoc communications among the Commissioners and with the secretariat, the Panel held meetings at the Commission’s headquarters in Geneva on 15 - 17 December 2003 and 17 - 19 March 2004. The March meeting included a joint meeting with the “D2” Panel of Commissioners (the “D2’ Panel”) to discuss issues of relevance to both Panels.
5. Part three of the nineteenth instalment comprises claims containing, inter alia, D4 (personal property) losses, D7 (real property) losses and D8/D9 (individual business) losses.⁵ Of the 19 claims in this report, 18 have been identified as “unusually large or complex” within the meaning of article 38(d) of the Rules, as the claimed amount for each claim exceeds USD 10 million.⁶ Two of these 18 claims include high-value personal property items. All 18 claims were transmitted to Iraq for its comments because of the significant amounts claimed. The remaining claim included in this report was sent to Iraq for its comments because the situs of certain losses was Iraq.⁷ Iraq has provided written comments on all 19 claims included in this report, and the Panel has given due consideration to Iraq’s comments in its review of these claims.
6. The following table sets out the number of claims by submitting entity in the nineteenth instalment, including the number resolved in part three of the nineteenth instalment.

Table 1. Summary of nineteenth instalment claims by submitting entity

<u>Submitting entity</u>	<u>Number of claims originally submitted to the Panel</u>	<u>Number of claims added to the instalment</u>	<u>Total number of claims submitted to the Panel</u>	<u>Number of claims transferred out of the instalment</u>	<u>Number of claims withdrawn</u>	<u>Number of claims resolved by the Panel in part one</u>	<u>Number of claims resolved by the Panel in part two</u>	<u>Number of claims resolved by the Panel in part three</u>	<u>Total number of claims resolved by the Panel in parts one, two and three</u>
Brazil	1	-	1	-	-	-	1	-	1
Canada	1	1	2	-	-	-	2	-	2
Egypt	22	2	24	12	-	8	4	-	12
Germany	2	-	2	-	-	1	1	-	2
India	30	4	34	4	1	12	18	-	30
Ireland	1	-	1	-	-	-	1	-	1
Jordan	103	21	124	33	-	10	80	1	91
Kuwait	390	20	410	5	1	215	174	16	405
Lebanon	2	2	4	-	-	-	4	-	4
Pakistan	10	4	14	-	-	2	12	-	14
Philippines	3	-	3	-	-	1	2	-	3
Saudi Arabia	1	4	5	1	-	-	3	1	4
Syrian Arab Republic	3	2	5	-	-	1	4	-	5
Thailand	1	-	1	1	-	-	-	-	-
Turkey	4	-	4	-	-	3	1	-	4
United Arab Emirates	1	-	1	-	-	-	-	1	1
United Kingdom	2	-	2	-	-	-	2	-	2
United States	1	1	2	-	-	-	2	-	2
Yemen	147	2	149	3	-	70	76	-	146
<u>Total</u>	725	63	788	59	2	323	387	19	729

I. BACKGROUND

A. Considerations

7. In reviewing the claims in part three of the nineteenth instalment, the Panel has taken into account the factual background relating to Iraq's invasion and occupation of Kuwait, as set out in detail in its reports on part one and part two of the first instalment of category "D" claims.⁸

8. The Panel has also taken into consideration other relevant material, including information accompanying the submission of these claims provided by the Executive Secretary pursuant to article 32 of the Rules. In addition, the Panel has considered information and views presented by Iraq and other Governments in response to the reports submitted to the Governing Council by the Executive Secretary in accordance with article 16 of the Rules, as well as the specific comments provided by Iraq concerning each claim included in this report.

B. General legal framework

9. The general legal framework for the resolution of category "D" claims is set out in chapter V of the Panel's First "D" Report.⁹

C. Applicable evidentiary standard

10. The evidentiary standard to be applied in reviewing category "D" claims has been addressed by the Panel in previous reports.¹⁰ As with earlier instalments, the Panel has reviewed the claims in part three of the nineteenth instalment in accordance with article 35 of the Rules, and made its recommendations by assessing documentary and other appropriate evidence, as well as by balancing the interests of claimants who had to flee a war zone with the interests of Iraq, which is liable only for any direct loss, damage or injury as a result of its invasion and occupation of Kuwait.

II. CLAIMS FOR HIGH-VALUE OR UNIQUE PERSONAL PROPERTY

11. The Panel reviewed two claims, described below, where assistance from expert consultants was obtained with respect to the valuation of certain items of personal property. The items were either of high value or of an unusual nature, such as jewellery and gems, paintings, carpets, bloodstock and various antiques ("Valuation Items"). At the Panel's direction, the expert consultants interviewed representatives of both claimants. In considering these two claims, the Panel took into account the report of the expert consultants and the evidence submitted by the claimants in support of the Valuation Items. For those Valuation Items where sufficient evidence was provided to prove the value of the Items, the claimant's ownership and loss of the Items and the requisite causal link of the loss to Iraq's invasion and occupation of Kuwait, the Panel recommends awards within a range of the lowest replacement values in 1990.

A. UNCC claim No. 3005325

12. This claimant seeks compensation totalling USD 30,188,048.44 for personal and business losses, including USD 2,001,384.08 for Valuation Items. The claimant provided post-liberation documentary evidence and witness statements proving his ownership of the Valuation Items and the loss of the items as a direct result of Iraq's invasion and occupation of Kuwait. Taking into account both the report of the expert consultants regarding the Valuation Items and the evidence submitted by the claimant in support of all losses claimed, and having applied the category "D" methodologies, the Panel recommends that the claimant be awarded USD 13,079,679.92 for all claimed losses, of which USD 580,000.00 is for Valuation Items.

B. UNCC claim No. 3005342

13. This claimant seeks compensation totalling USD 20,184,057.10 for personal losses, including USD 17,335,640.14 for Valuation Items.¹¹ The claimant provided both pre-invasion and post-liberation documentary evidence, as well as witness statements, all attesting to the claimant's ownership of the Valuation Items and the loss of those Items during Iraq's invasion and occupation of Kuwait. Taking into account both the report of the expert consultants regarding the Valuation Items and the evidence submitted by the claimant in support of all losses claimed, and having applied the category "D" methodologies, the Panel recommends that the claimant be awarded USD 5,423,488.37 for all claimed losses, of which USD 3,337,000.00 is for Valuation Items.

III. CLAIM WHERE THE SITUS OF THE LOSS WAS IRAQ

14. The Panel reviewed one claim, described below, where Iraq was the situs of some of the asserted losses. In considering this claim, the Panel took into account the evidence submitted by the claimant and comments provided by Iraq and, having formed the view that the requisite causal link of the loss to Iraq's invasion and occupation of Kuwait has been established, the Panel recommends an award of compensation commensurate with the evidence provided.

A. UNCC claim No. 3010648

15. This claimant seeks compensation of USD 1,541,607.58 for business losses allegedly suffered as a direct result of Iraq's invasion and occupation of Kuwait. The claimant asserted stock and business vehicle losses concerning two shipments he made from Saudi Arabia to his partner in Mosul in Iraq of "goods" and motor vehicles. The claimant provided evidence that the partner received the two shipments but shortly thereafter, as a result of Iraq's invasion and occupation of Kuwait, all effective methods of communication between Iraq and Saudi Arabia ceased, and the claimant could not discover the fate of the two shipments. The claimant asserted that he attempted to mitigate his losses after the liberation of Kuwait by seeking information about what happened to the two shipments, but was unsuccessful. He therefore concluded that the goods and vehicles that comprised the two shipments had been destroyed and he seeks compensation for the loss of the stock.

16. The Panel finds that, in the light of the totality of the evidence submitted by the claimant and the chaotic circumstances in Iraq during the jurisdictional period, and particularly after the commencement of air raids by Allied Coalition Forces in January 1991, the claimant's loss of goods and vehicles located in Iraq directly resulted from the invasion and occupation of Kuwait. The Panel also finds that the claimant has explained and documented his efforts to mitigate his losses. For these reasons, the Panel recommends that an award of compensation of USD 825,137.62 be made in respect of this claim, in accordance with the D8/D9 (individual business) loss methodology.

IV. "UNUSUALLY LARGE OR COMPLEX" CLAIMS

17. The Panel considered 16 claims designated "unusually large or complex" because the claimed amounts were in excess of USD 10 million. The Panel reviewed each of these 16 claims individually with reference to the applicable methodologies and took into account the evidence submitted by the claimants and comments provided by Iraq. Where the requisite causal link between the loss and Iraq's invasion and occupation of Kuwait was established, the Panel recommends awards commensurate with the evidence provided.

A. New issues arising in application claims

18. Some of the claims in part three of the nineteenth instalment raise new factual, legal or valuation issues that have not been dealt with in the Panel's previous reports. To the extent that claims in part three of the nineteenth instalment gave rise to such new issues, the Panel has ensured that these claims were resolved so as to be consistent with the established methodologies. These new issues and the Panel's findings and recommendations are set out below.

19. The Panel notes that all of these "unusually large or complex" claims contain sizeable individual business losses which were supported by documentary evidence that, in almost every case, included audited financial statements. Many of these individual business loss claims contain large claims for losses of stock. In assessing these high-value stock claims, the Panel has been of the view that, where the stock claim represents well over half of the value of the asserted business loss, it is appropriate to apply a reasonable discount to cover obsolete or slow-moving stock, depending on the evidence in the claim file and the circumstances of each claim.

1. UNCC claim No. 3003942

20. This claimant seeks compensation of USD 14,324,856.99 for business losses allegedly suffered as a direct result of Iraq's invasion and occupation of Kuwait. An allegation of fraud concerning the claimant's asserted tangible property and vehicle losses ('equipment') was received by the Panel from a third party. Iraq independently received a copy of the fraud allegation and forwarded it to the Panel. The third party alleged that the claimant had actually sustained no equipment losses, but had sold all of the equipment after the liberation of Kuwait. After receipt of the fraud allegation, the Panel sought further clarification from the claimant and independent information from the Government of Kuwait regarding the claimant's business and its ownership of the equipment alleged to have been damaged or stolen during Iraq's invasion and occupation of Kuwait.

21. In the light of the allegation of fraud with respect to certain elements of the claim, the Panel intensively scrutinized the evidence in the claim file and information received from the Government of Kuwait, and considered Iraq's comments in respect of the claim. The Panel finds that the evidence did not indicate that items asserted as lost or damaged by the claimant were owned by him as at 2 August 1990, or lost by him as a direct result of Iraq's invasion and occupation of Kuwait. The Panel also finds that the claimant had in fact sold a number of the vehicles after the liberation of Kuwait in respect of which he has made a claim. Considering the Panel's findings and the totality of the evidence, the Panel considers that the claimant has not suffered some of the losses claimed and the remaining asserted losses are not the direct result of Iraq's invasion and occupation of Kuwait. The Panel therefore recommends no award of compensation with respect to this claim.

2. UNCC claim No. 3006804

22. This claimant seeks compensation totalling USD 25,887,598.62 for losses sustained by his business, allegedly as a direct result of Iraq's invasion and occupation of Kuwait. The claimant asserted a loss related to a large computer equipment system that his business had delivered to a customer just before Iraq's invasion of Kuwait. The claimant stated in his personal statement that the computer system was stolen during the jurisdictional period, and that he had not received payment from his customer prior to Iraq's invasion and occupation of Kuwait, thus resulting in the asserted loss. The Panel reviewed the evidence in the claim file (including witness statements, correspondence between the claimant and his customer regarding the theft of the equipment, the contract for the computer system between the claimant and his customer and documents relating to the dispute between the parties) and finds that title in the equipment had not passed from the claimant to his customer as at 2 August 1990; and therefore, the claimant has not suffered a receivables loss but has suffered a loss of stock with regard to the computer system. The Panel recommends an award of compensation of USD 15,601,399.01 in respect of the entire claim, in accordance with the D8/D9 (individual business) loss methodology.

3. UNCC claim No. 3008054

23. This claimant seeks compensation totalling USD 13,629,152.25 for personal and businesses losses allegedly sustained as a direct result of Iraq's invasion and occupation of Kuwait. The claimant's business losses include a large claim for prospective debts related to fines that may be levied on the claimant's business as a result of 394 violations of foreign customs laws. The claimant's business was an unincorporated automobile association that sold carnets to private motorists. The carnets allowed the motorists to travel throughout the Middle East without having to pay duty on their personal vehicles upon entering each country, provided that they stayed in the country for less than a specified number of days. The claimant asserted that 394 of her customers overstayed the allowed number of days in one country, resulting in a 'violation' and accompanying fine being levied in respect of each of those customers. Because the customers could not be located by the relevant customs authority to pay the fines, the claimant alleged that her business became responsible for those fines, as it sold the original carnets. The claimant confirmed that she had not paid any of the fines, but asserted that the business would be obligated to pay the fines at some future date.

24. The Panel finds that the claimant has not suffered any loss, as her liability to pay the fines is speculative, and can only crystallize if the relevant customs authority imposes the fines. The Panel also notes that the ultimate liability to pay the fines is that of the customers and the claimant would be able to recover any eventual loss from the customers who had overstayed the specified number of days. Therefore the Panel recommends no award of compensation for this loss. As to the remaining asserted personal losses and the business losses of both the unincorporated automobile association and a second business, the Panel recommends an award of compensation of USD 1,661,036.72 in accordance with the applicable methodologies.

V. CROSS-CATEGORY ISSUE

25. Recommended awards in respect of claims in part three of the nineteenth instalment are net of any category “A”, “B” and “C” approved awards made to the same claimants.¹²

VI. OTHER ISSUES

A. Exchange rates

26. For the purpose of calculating recommended amounts, the Panel has converted currencies into United States dollars in accordance with the rates set out in paragraphs 61- 63 of the First “D” Report.

27. In its report and recommendations concerning the third instalment of category “D” claims,¹³ the Panel noted that where losses are claimed for money in currencies other than United States dollars and it is established that the application of the exchange rate approved by the Panel in its First “D” Report would result in either under-compensation or over-compensation of the claimant, the Panel determined that it will select a conversion rate based on the evidence that most closely compensates the claimant for the value of the losses suffered. In particular, this method would be applied in situations where the claimant has submitted evidence that he or she purchased the money at a rate different from the rate adopted by the Panel.¹⁴

B. Interest

28. A number of claimants in part three of the nineteenth instalment claim for interest on losses contained in their category “D” claims for a total amount of USD 31,023,358.19. Governing Council decision 16 (S/AC.26/1992/16) provides that the methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time. For this purpose, in relation to category “D” losses other than loss of business income and incremental costs, the “D” Panels have previously determined that the phrase “the date the loss occurred” in Governing Council decision 16 should be a single fixed date.¹⁵ The “D1” and “D2” Panels (collectively, “the ‘D’ Panels”) determined that 2 August 1990 (the date of Iraq’s invasion and occupation of Kuwait) should serve as the fixed date.¹⁶

29. Claims for loss of business income are claims for income that would have been earned over a period of time. As such, a date of loss of 2 August 1990 for such losses would result in over-compensation for claimants. The "D" Panels have therefore adopted 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. The "D" Panels also adopted a fixed date of 1 May 1991 as the date of loss for the purpose of calculating interest on awards for claims for incremental costs.¹⁷

30. The Panel applies these findings to the claims included in part three of the nineteenth instalment.

C. Claims preparation costs

31. A number of claimants in part three of the nineteenth instalment seek claims preparation costs incurred by them, either for a specific or an unspecified amount. The total amount asserted for claims preparation costs is USD 379,315.75.

32. 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

33. The annex hereto lists the awards recommended by the Panel for each Government for the claims resolved in part three of the nineteenth 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 annex, the total amount claimed is USD 357,610,839.73. Against the net balance of USD 326,208,165.83 claimed, which amount excludes interest and claims preparation costs, the Panel recommends a total compensation of USD 152,830,005.26.

VIII. SUBMISSION OF THE REPORT

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

Geneva, 31 March 2004

(Signed) R.K.P. Shankardass
Chairman

(Signed) G. Abi-Saab
Commissioner

(Signed) M.C. Pryles
Commissioner

Notes

¹ See the “Report and recommendations made by the ‘D1’ Panel of Commissioners concerning part one of the nineteenth instalment of individual claims for damages above USD 100,000 (category ‘D’ claims)” (S/AC.26/2003/27).

² See the “Report and recommendations made by the ‘D1’ Panel of Commissioners concerning part two of the nineteenth instalment of individual claims for damages above USD 100,000 (category ‘D’ claims)” (S/AC.26/2004/6) (“Part Two, Nineteenth Instalment Report”).

³ Pursuant to Procedural Order No. 46, signed on 17 December 2003, the Panel notified all Governments with claims to be deferred to part three of the nineteenth instalment of its decision to include those claims in that instalment part.

⁴ See paragraph 3 of Part Two, Nineteenth Instalment Report for a detailed discussion of the claims transferred into and from the nineteenth instalment of category “D” claims.

⁵ In part one of the first instalment of category “D” claims, the Panel developed methodologies for the following loss types: D1 (money); D1 (mental pain and anguish) (“MPA”); D3 (death); D4 (motor vehicles); D6 (loss of income); D10 (payments or relief to others); and D10 (other). A full description of the methodologies is set out at paragraphs 103-380 of the “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) (the “First ‘D’ Report”). The Panel developed methodologies for the following loss types in part one of the second instalment: D2 (personal injury) and D5 (loss of bank accounts, stocks and other securities). These methodologies are described in the “Report and recommendations made by the Panel of Commissioners concerning part one of the second instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/1998/11) at paragraphs 41-115. The Panel developed the methodology for D4 (personal property) losses in part two of the second instalment. This methodology is described in the “Report and recommendations made by the Panel of Commissioners concerning part two of the second instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/1998/15) (“Part Two, Second Instalment Report”) at paragraphs 30-57. The Panel developed the methodology for D7 (real property) losses in part two of the fourth instalment. This methodology is described in the “Report and recommendations made by the Panel of Commissioners concerning part two of the fourth instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/2000/11), at paragraphs 9-72. The “D2” Panel of Commissioners developed the methodology for D8/D9 (individual business) loss claims, which is described in the “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 Report”). The methodologies for resolving all of the loss types in category “D” have now been developed.

⁶ The Rules, article 38.

⁷ See the First “D” Report for a discussion of the transmittal of claims to Iraq.

⁸ See in particular chapter II of the First “D” Report and chapter IV of the “Report and recommendations made by the Panel of Commissioners concerning part two of the first instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/1998/3).

⁹ See note 5 above for further information on the development of the general legal framework.

¹⁰ See chapter VI of the First “D” Report and chapter II of Part Two, Second Instalment Report. See also paragraph 8 of Governing Council decision 7 (S/AC.26/1991/7/Rev.1), which provides that “[S]ince...[category ‘D’] claims may be for substantial amounts, they must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss”. See also articles 35(1) and 35(3) of the Rules.

¹¹ The Panel notes that the claimant asserted two different claimed amounts in the original claim submission: one amount on the claim form and a higher amount in the personal statement. The Panel further notes that the evidence did not support the higher claim amount described in the personal statement.

¹² See paragraph 21 of the “Report and recommendations made by the Panel of Commissioners concerning part one of the fourth instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/1999/21).

¹³ See the “Report and recommendations made by the Panel of Commissioners concerning the third instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)” (S/AC.26/1999/9) (the “Third Instalment Report”).

¹⁴ See paragraph 39 of the Third Instalment Report.

¹⁵ Paragraph 1 of Governing Council decision 16 states 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.”

¹⁶ See paragraphs 64-65 of the First “D” Report with respect to category “D” losses other than D8/D9 (individual business) losses and paragraphs 225-226 of the Sixth Instalment Report with respect to claims for D8/D9 (individual business) losses.

¹⁷ See paragraphs 227-228 of the Sixth Instalment Report.

AnnexSUMMARY RECOMMENDATIONS FOR CATEGORY "D" CLAIMS
IN PART THREE OF THE NINETEENTH INSTALMENTTable 2. Summary of recommendations

<u>Submitting entity</u>	<u>Number of claims not recommended for payment</u>	<u>Number of claims recommended for payment</u>	<u>Total amount claimed (USD)^a</u>	<u>Amount of compensation recommended (USD)</u>
Jordan	1	0	14,324,856.99	0.00
Kuwait	0	16	328,046,825.58	151,689,105.22
Saudi Arabia	0	1	1,541,607.58	825,137.62
United Arab Emirates	0	1	13,697,549.58	315,762.42
<u>Total</u>	1	18	357,610,839.73	152,830,005.26

^a This total amount claimed includes USD 31,023,358.19 for interest and USD 379,315.75 for claims preparation costs.
