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

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Introduction

1. This is the fourth 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 the tenth instalment of category "D" claims. The instalment comprised 653 claims (the "claims") at the time of its submission to the Panel on 30 January 2001 by the Executive Secretary of the Commission pursuant to article 32 of the Rules.

I. OVERVIEW OF THE CLAIMS IN THE INSTALMENT

3. The 653 claims in the tenth instalment at the time of its submission to the Panel assert losses aggregating USD 466,455,214.30. Most of the loss types defined on the category "D" claim form were encountered in the claims. The most significant loss types appearing in the claims were D8/D9 individual business losses. The next most significant loss types appearing in the claims were D4 personal property losses and D7 real property losses. All of the claims in the tenth instalment have been submitted by the Government of Kuwait, the submitting entity with the largest group of claims in category "D".
4. Forty-three claims were deferred to subsequent category "D" instalments or transferred to a category "E" instalment. As a result of these deferrals and transfer, the number of claims for which a determination and recommendation has been made by the Panel in the tenth instalment is reduced to 610.

II. THE PROCEEDINGS

5. On 30 January 2001, the Panel issued Procedural Order No. 10, in which it gave notice of its intention to complete its review of the claims and to finalize its report and recommendations to the Governing Council in August 2001. The Panel met regularly to consider the claims.
6. The Panel has taken into consideration relevant information and views presented by a number of submitting entities and by Iraq in response to the reports submitted to the Governing Council by the Executive Secretary in accordance with article 16 of the Rules.
7. The Panel has sought to achieve consistency, in so far as is possible, with the verification and valuation procedures adopted by other panels for category "D" and "E" losses. This has been accomplished by adapting the relevant features of related methodologies in the assessment of claims, where appropriate.

III. LEGAL FRAMEWORK

A. Applicable law

8. 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”.

9. 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

10. 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.”

11. 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.

12. 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/}

13. The Panel has reviewed the claims and made its recommendations by assessing documentary and other appropriate evidence provided by the Executive Secretary pursuant to article 32 of the Rules. In addition, the Panel has sought to balance the interests of claimants with the requirement that Iraq be liable only for direct loss, damage or injury caused by its invasion and occupation of Kuwait.

C. Causation

14. 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.

15. 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. 2/

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

17. 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" claims with regard to the jurisdiction over losses outside of Kuwait. 4/ The Panel has also been guided by paragraph 23 of the report of the "F3" Panel concerning the first instalment of claims with regard to what constitutes "direct" loss. 5/

D. The role of the Panel

18. 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.

19. 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. FURTHER ELABORATION OF THE D8/D9 BUSINESS LOSS METHODOLOGY

20. The Panel was called upon to address two areas where further elaboration of the D8/D9 business loss methodology was necessary. 6/ These areas are discussed below.

A. Loss of business income: receivables owed by an Iraqi party

21. A number of claimants requested compensation for unpaid debts owed by an Iraqi party. While the D8/D9 business loss methodology addresses legal review and valuation of receivables claims for debts owed by non-Iraqi parties, the methodology does not specifically address the guidelines to be applied for receivable claims for debts owed by an Iraqi party. 7/

22. Claims for debts owed by Iraq present a unique legal issue not otherwise present in claims for unpaid debts by non-Iraqi parties. This distinction lies primarily in the language of Security Council resolution 687 (1991), which provides that:

“Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage . . . or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.” 8/

23. When reviewing claims in respect of receivables owed by an Iraqi party, the Panel noted that Security Council resolution 687 (1991) requires that the receivables claimed do not fall within the clause excluding from the Commission’s jurisdiction “debts and obligations of Iraq arising prior to 2 August 1990”.

24. The Panel adopts the following guidelines in connection with D8/D9 business losses:

(a) For purposes of review of claims for receivables owed by an Iraqi party, such claims include claims for debts and obligations owed both by the Iraqi government and Iraqi private parties operating or residing in Iraq.

(b) The Commission has jurisdiction over claims for receivables owed by an Iraqi party under the “arising prior to” clause of Security Council resolution 687 (1991) in the following instances:

(i) If the basis of the claim is a contract for the sale of goods, the supplier’s claim is within the Commission’s jurisdiction if the shipment of the goods occurred on or after 2 May 1990; and

(ii) If the basis of the claim is a letter of credit, the Panel may consider either the contract for the sale of goods or the letter of credit as the basis for the Commission's jurisdiction. On the basis of a letter of credit, the supplier's claim is within the Commission's jurisdiction if the documents required under the letter of credit were presented to the issuing bank on or after 2 May 1990 and the period between the shipment and the presentation of the documents to the bank did not exceed 21 days.

(c) Claims for receivables owed by an Iraqi party are presumed to be a direct result of Iraq's invasion and occupation where the debt became due between 2 August 1990 and 2 August 1991. 9/

(d) For purposes of valuing claims for receivables owed by an Iraqi party, the valuation method for receivables greater than 500 Kuwaiti dinars (KWD), as described in the sixth instalment "D" report, will apply. 10/

B. Loss of stock: goods lost in transit

25. A number of claimants requested compensation for the loss of goods in transit. The claims were filed by Kuwaiti purchasers who had imported goods that arrived in the Kuwaiti seaport or airport immediately prior to Iraq's invasion and occupation of Kuwait but were stolen or destroyed during the invasion and occupation before delivery.

26. The Panel, keeping in mind the methodologies in respect of loss of goods in transit by the "E2" and "E4" Panels 11/, determines that during the legal review of loss of goods in transit claims, the claimants are required to provide appropriate documentation of their ownership and loss of the goods. Such documentation includes shipping and customs documents, letters of credit or invoices, insurance documents, and statements from shipping, customs, or port officials confirming the loss of goods. In valuing claims for goods lost in transit, the Panel determines that the existing valuation method for stock, as described in the sixth instalment "D" report, will apply. 12/

27. The Panel's approach with regard to loss of goods in transit claims is intended to ensure that appropriate steps have been taken to avoid multiple recovery for the same goods. Specific cross-checks are undertaken to verify that claims for the loss of goods in transit are not compensated for both the supplier and the purchaser of the goods.

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

28. The Panel was called upon to address numerous factual and legal questions in the determination of the claims in the tenth instalment. To the extent that claims in the tenth 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: extension of compensable period for loss of income claims for businesses located on Failaka island

29. The Panel was called upon to review several claims submitted for losses sustained by businesses located on Failaka Island. Following liberation, the claimants did not return to the island, allegedly because of the presence of mines and the designation of the island as a military site. Consequently, the claimants were unable to resume their businesses. The claimants requested compensation for loss of business income for various extended periods of time.

30. In the sixth instalment "D" report, the Panel set forth the principles to determine the appropriate compensable period of loss of income as follows:

"Accordingly...the Panel generally applies a 12 month period of loss for business income claimants where the business resumed and the location of the business is Kuwait or Iraq. In cases where a business located in Kuwait or Iraq did not resume after liberation, the Panel imposes a seven month limitation on the period of loss." 13/

31. The Panel extended this rule to a case where the claimant "can clearly demonstrate an extraordinary reason for a longer period of time needed to resume operations at pre-invasion capacity." The Panel granted an 18 month period of loss for the business income claim submitted by a farm claimant who proved that his farm had been mined, and that removing the mines had been a lengthy process delaying the resumption of his business. 14/

32. The "D1" Panel was also called upon to decide on the issue of extension of the period of loss with respect to losses on Failaka Island. With respect to a claim for loss of rental income, the "D1" Panel decided that the location of the property on Failaka Island did not justify an extension of the period of compensation. This was based on the Panel's determination that "the continuing loss of rental income is due to the Government of Kuwait's decision to keep the island uninhabited." The claimant was limited to a maximum of 12 months. 15/

33. The issue to be determined by the Panel was whether the situation on Failaka Island after the invasion constituted "extraordinary circumstances" justifying an extension of the compensable period of loss of income. The Panel took notice of the fact that Failaka Island was heavily mined during the invasion and occupation and was not de-mined following liberation. The claimants were not permitted to return to the island to recommence their businesses. In addition, the Government of Kuwait did not take steps to expropriate the land for military purposes until 1992.

34. Consistent with its decision in the sixth instalment, the Panel reaffirms that the presence and non-removal of mines constituted extraordinary circumstances justifying the extension. However, the Panel decides that 12 months is the appropriate period of loss, consistent with the decision of the "D1" Panel.

B. D8/D9 individual business losses: expectation of profitability for loss of income claim

35. The Panel reviewed a claim for loss of income where the claimant's business began operation only for a short period before the invasion. The claimant proved existence of the business at the time of the invasion by means of a lease contract for business premises, a trading licence and commercial registration. There were no financial statements for the business for the period preceding the invasion.

36. In its sixth instalment "D" report, the Panel set forth the criteria by which the compensability of loss of business income is to be determined. Proof is required that the subject business "had a history of profitability, or a reasonable expectation of profitability during the period of loss". 16/

37. The claim for loss of income is supported by a loss adjuster's report, post-invasion bank statements and balance sheets showing post-liberation annual net profits. In light of the thoroughness of the evidence, the Panel determines the loss of income to be compensable on the basis that the claimant has demonstrated a reasonable expectation of profitability during the period of loss.

C. D8/D9 individual business losses: pre-invasion contractual expenses

38. The Panel considered the compensability of a claim for certain pre-invasion expenses incurred in connection with a contract that was interrupted as a result of Iraq's invasion and occupation of Kuwait. The expenses were predominantly employee expenses associated with bringing foreign workers to Kuwait.

39. Governing Council decision 9 (S/AC.26/1992/9) provides that Iraq is liable for losses arising from contracts that were interrupted as a direct result of Iraq's invasion and occupation of Kuwait. 17/ In Paragraph 88 of the sixth instalment report of category "E2" claims, the "E2" Panel found compensable costs incurred in reliance upon and specifically with reference to contracts which were interrupted as a result of the invasion and occupation. 18/

40. Having regard to the foregoing, the Panel determines that the expenses were incurred specifically to enable the claimant to fulfil his contractual obligations and are therefore compensable.

D. D8/D9 individual business losses: pre-invasion real property improvements

41. The Panel was called upon to decide how to value a claim for estimated repairs to a leased business property, where the landlord of the property had submitted an "E4" claim for repairs to the same premises. The real property repairs constituted pre-invasion improvements to the claimant's leased property from which he could not derive a benefit after Iraq's invasion and occupation of Kuwait.

42. The Panel determines that the claimant's claim is properly valued under the historic cost methodology, with no risk adjustment, as the claimant was unable to resume his business after the liberation of Kuwait. The Panel further determines, however, that the claimant's award amount should be reduced to avoid duplication with the "E4" claim filed by the claimant's landlord.

VI. CROSS-CATEGORY ISSUES

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

43. 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 “C” award was capped at USD 100,000. In such cases, the “C” award is prorated back to the “C” loss elements to reach an amount that can be deducted from the corresponding category “D” award.

B. Category “D” claims with competing category “C” claims

44. The Panel identified a number of category “D” claims for business losses in respect of which competing claims were filed and awarded in category “C”. The competing category “C” claims were typically filed by non-Kuwaiti claimants who asserted ownership of the same business. The Panel decides to defer all but one of such “D” claims to allow time for further claim development with respect to the category “D” claimant and the category “C” claimant.

VII. OTHER ISSUES

A. Currency exchange rate

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

46. 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. ^{19/} 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

47. In 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). ^{20/} 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. 21/

C. Claim preparation costs

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

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

VIII. RECOMMENDED AWARDS

50. The table below lists the awards recommended by the Panel for the Government of Kuwait which is the submitting entity for all of the claimants included in the tenth instalment. The Government of Kuwait 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 281,551,235.07 against a total claimed amount of USD 404,984,363.94 for the 610 claims resolved in the instalment.

Table of recommended awards

<u>Country</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>
Kuwait	609	1	404,984,363.94	281,551,235.07
<u>Total</u>	609	1	404,984,363.94	281,551,235.07

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

Geneva, 30 August 2001

(Signed) K. Hossain
Chairman

(Signed) N. Elaraby
Commissioner

(Signed) I. Suzuki
Commissioner

Notes

1/ Paragraphs 5 and 10.

2/ Paragraph 6.

3/ Decision 7, para. 6 and decision 15, para. 6.

4/ “Report and recommendations made by the Panel of Commissioners concerning the second instalment of ‘E2’ claims”, S/AC.26/1999/6 (the “second instalment ‘E2’ report”).

5/ “Report and recommendations made by the Panel of Commissioners concerning the first instalment of ‘F3’ claims”, S/AC.26/1999/24 (the “first instalment ‘F3’ report”).

6/ 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”).

7/ During its review of the sixth instalment of category “D” claims, the Panel adopted the general principles set forth by the “E2” Panel in the fourth instalment report for review of Iraqi party receivables claims, but deferred consideration of compensability or valuation of losses arising from debts owed by an Iraqi party in the absence of a successful claim presenting this issue. See the sixth instalment “D” report, paras. 181-182.

8/ Paragraph 16.

9/ “Report and recommendations made by the Panel of Commissioners concerning the fourth instalment of ‘E2’ claims”, S/AC.26/2000/2 (the “fourth instalment ‘E2’ report”), paras. 86-87, 96 and 117-119; “Report and recommendations made by the Panel of Commissioners concerning the sixth instalment of ‘E2’ claims”, S/AC.26/2001/1 (the “sixth instalment ‘E2’ report”), paras. 35-37 and 42; “Report and recommendations made by the Panel of Commissioners concerning the seventh instalment of ‘E2’ claims”, S/AC.26/2000/2 (the “seventh instalment ‘E2’ report”), paras. 48-49; “Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of ‘E4’ claims, S/AC.26/2000/7 (the “fifth instalment ‘E4’ report”), para. 89; “Report and recommendations made by the Panel of Commissioners concerning the third instalment of ‘E4’ claims”, S/AC.26/1999/4 (the “third instalment ‘E4’ report”), paras. 62-65.

10/ The sixth instalment “D” report, para. 180.

11/ The “E4” Panel requires claimants (Kuwaiti purchasers) to provide proof of payment for the goods (to establish ownership) and Kuwait Port Authority documents demonstrating that the goods were actually received in the Kuwait port prior to the invasion (to establish loss). Where the claimant is unable to provide such documentation, the “E4” Panel has determined that it should evaluate dates of shipment, modes of transports, and other shipment details to determine whether the goods claimed to have been lost were in Kuwait on or prior to the invasion. Where direct evidence of the loss (such as port authority or shipping agent statements) is not available, the “E4” Panel has determined that copies of invoices, letters of credit, bills of lading, bank debit advances, and customs clearing forms may be used to establish loss. The “E2” Panel requires claimants (non-Kuwaiti suppliers) to provide proof that they have not been paid for the goods for which they have claimed. It must be noted that “E2” claims for loss of goods in transit are generally filed by non-Kuwaiti suppliers who have not been paid for the goods that they have shipped to Kuwait. In contrast, “E4” claims for loss of goods in transit are generally filed by Kuwaiti purchasers who have paid for, but not received, the goods for which they have claimed. See the fifth instalment “E4” report, para. 61; “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”), paras. 120 and 139-140; the fourth instalment “E2” report, paras. 135-139.

12/ The sixth instalment “D” report, paras. 100-101.

13/ Ibid., para. 134.

14/ Ibid., para. 135.

15/ “Report and recommendations made by the Panel of Commissioners concerning the seventh instalment of individual claims for damages above USD 100,000 (category ‘D’ claims)”, S/AC.26/2000/25, para. 22.

16/ The sixth instalment “D” report, paras. 126-128.

17/ Paragraphs 9-10.

18/ The sixth instalment “E2” report, para. 88.

19/ “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 (“Part one of the first instalment ‘D’ report”), paras. 61-63.

20/ Part one of the first instalment “D” report, paras. 64-65. The “D2” Panel has adopted this decision in the sixth instalment report of category “D” claims. See the sixth instalment “D” report, para. 226.

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