



Security Council

Distr.
GENERAL

S/AC.26/2002/2
13 March 2002

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

REPORT AND RECOMMENDATIONS MADE BY THE "D1" PANEL OF COMMISSIONERS
CONCERNING THE ELEVENTH INSTALMENT OF INDIVIDUAL CLAIMS FOR
DAMAGES ABOVE USD 100,000 (CATEGORY "D" CLAIMS)

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
Introduction	1 - 6	4
I. BACKGROUND.....	7 - 10	4
A. Background information	7 - 9	6
B. General legal framework.....	9	5
C. Applicable evidentiary standard.....	10	5
II. FACTUAL AND LEGAL ISSUES ARISING IN THE DETERMINATION OF THE CLAIMS IN THE ELEVENTH INSTALMENT	11 - 51	5
A. D8/D9 individual business losses: related or competing claims for the ownership of a business resolved by the Panel through claim development	12 - 22	5
B. D8/D9 individual business losses: competing claims for the ownership of a business – withdrawal or partial withdrawal of claims for business losses.....	23 - 30	8
C. D8/D9 individual business losses: allegations of fraud made by individuals who have not claimed for the losses that are the subject matter of the allegations	31 - 35	8
D. D8/D9 individual business losses: key money and goodwill losses...	36 - 39	9
E. D8/D9 individual business losses: receivables over KWD 500 – establishment of formal debt collection efforts	40 - 46	10
F. D6 (loss of income): compensability of employee bonus	47 - 50	11
G. Submission of claims to Iraq	51	11
III. CROSS-CATEGORY ISSUES.....	52 - 57	11
A. Claims filed by shareholders in Kuwaiti corporations	52 - 56	11
B. Deduction of category “A”, “B” and “C” awards.....	57	12
IV OTHER ISSUES.....	58 - 64	12
A. Exchange rates	58 - 59	12
B. Interest.....	60 - 62	13
C. Claim preparation costs	63 - 64	13
V. RECOMMENDED AWARDS.....	65 - 66	13
Notes		15
Annex.....		17

Introduction

1. This is the thirteenth report to the Governing Council of the United Nations Compensation Commission (the “Commission”) submitted pursuant to article 38(e) of the Provisional Rules for Claim Procedure (the “Rules”) (S/AC.26/1992/10) 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). 1/ This report contains the determinations and recommendations of the Panel in respect of the eleventh instalment claims submitted to the Panel by the Executive Secretary of the Commission pursuant to article 32 of the Rules on 31 January 2001.
2. The Panel began its review of the eleventh instalment on 31 January 2001. In addition to regular communications among the Commissioners and the secretariat, the Panel held meetings at the Commission’s headquarters in Geneva on the following dates: 29-31 January 2001, 19-21 March 2001, 14-17 May 2001, 25-27 June 2001 and 30 July-2 August 2001. These meetings included joint meetings with the “D2” Panel in January, March and May 2001 to discuss issues of relevance to both Panels as well as a joint meeting with the “D2” and “E4” Panels in January 2001 to discuss cross-category issues.
3. The eleventh instalment as initially submitted to the Panel contained 658 claims. The claimants in this instalment alleged losses aggregating USD 525,331,277.04. Most loss types on the category “D” claim form were encountered in the claims. 2/ The prevalent loss type was D8/D9 (business) losses. The next most common loss types were D4 (personal property) and D7 (real property) losses.
4. Out of the 658 eleventh instalment claims submitted to the Panel, 131 claims were deferred to a later category “D” instalment or transferred from category “D” to category ‘E’. These include 91 claims that have been deferred to later instalments, 37 “overlapping” or “stand alone” shareholder claims that will be processed in accordance with Governing Council decision 123 (S/AC.26/Dec.123 (2001)) and three claims that the Panel determined should be submitted to the Government of the Republic of Iraq (“Iraq”) for comments.
5. As a result of these deferrals and transfers, the number of claims in the eleventh instalment was reduced to 527. Of these, three claims were withdrawn and are indicated in brackets in the chart below. In addition, there are fourteen claims where claimants have claimed for their personal losses as well as business losses suffered by Kuwaiti companies. The business losses will be severed and transferred to the “E4” Panels for review pursuant to Governing Council decision 123.
6. The table below sets out by submitting entity the claims in the eleventh instalment as submitted to the Panel and the claims resolved by the Panel.

Summary of claims by submitting entity

<u>Submitting entity</u>	<u>Number of claims as submitted to the Panel</u>	<u>Number of claims resolved by the Panel</u>
Australia	1	1
Canada	11	10
Denmark	1	1
Egypt	1	1
India	37	27 (1)
Iran	4	4
Jordan	231	164
Kuwait	290	255 (1)
Lebanon	3	1
Pakistan	3	1
Singapore	1	1
Syrian Arab Republic	10	6
Thailand	1	0
United Kingdom	4	2
United States	3	1 (1)
Yemen	54	47
UNDP Yemen	1	1
UNRWA Gaza	2	1
<u>Total</u>	658	527

I. BACKGROUND

A. Background information

7. In reviewing the claims in the eleventh 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. 3/

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.

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 “Report and recommendations concerning part one of the first instalment of individual claims for damage above USD 100,000 (category ‘D’ claims)” (S/AC.26/1998/1).

C. Applicable evidentiary standard

10. The evidentiary standard to be applied in reviewing category “D” claims was addressed by the Panel in chapter VI of the Report and Recommendations Concerning Part One of the First Instalment and chapter II of the Report and Recommendations Concerning Part Two of the First Instalment. 4/ As the eleventh instalment contains a significant number of claims for D8/D9 business losses, the Panel has taken particular note of Governing Council decision 15 (S/AC.26/1992/15), which 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”. 5/ As with previous instalments, the Panel reviewed the claims in the present instalment 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 Iraq’s invasion and occupation of Kuwait.

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

11. The eleventh instalment is the first instalment reviewed by the Panel with a significant number of claims for D8/D9 business losses. The Panel addressed numerous factual, legal and valuation issues in recommending the appropriate resolution of these claims. To the extent that claims in the instalment gave rise to new issues not considered in previous instalments, the Panel has ensured that these claims were resolved so as to be consistent with established methodologies. These new issues are described in some of the claims below.

A. D8/D9 individual business losses: related or competing claims for the ownership of a business resolved by the Panel through claim development

12. An unusual feature of the eleventh instalment claims is the large number of related or competing claims for business losses. Extensive cross-checks were conducted to determine whether competing or related claims had been made for the same unincorporated business. It was found that approximately 39 per cent of the claims for business losses in the instalment are related to other claims.

13. While in some cases the related claims were filed by business partners who agreed on their proportional ownership of the business that was the subject of the claim, in other cases the claimants disagreed on their respective pre- or post-invasion ownership rights in the business. In these cases, the Panel found it necessary to request further information in order to resolve ownership issues.

14. Certain claims that at first appeared to be for the same business were, upon further inquiries, found to be for the losses of different businesses the reason being that a number of claimants who operated

businesses under the same business licence, Kuwaiti Chamber of Commerce and Industry number or commercial registration number in fact operated independent businesses.

15. In a number of cases, the additional information enabled the Panel to resolve competing ownership interests. For example, a Kuwaiti and two non-Kuwaiti claimants each claimed for losses in relation to the same computer studies centre. Before Iraq's invasion and occupation of Kuwait, each claimant was a one-third owner of the business. The non-Kuwaiti claimants were also each entitled to 10 per cent of the profits of the business (before partner distributions) as compensation for their management of the business. The Kuwaiti partner initially claimed for 100 per cent of the losses of the business, while the non-Kuwaitis claimed losses based on their pre-invasion ownership interests in the business.

16. In response to inquiries by the Commission, the Kuwaiti claimant acknowledged his partners' rights to receive some compensation. However, he informed the Commission that one of his non-Kuwaiti partners had sold 10 per cent of his interest in the business to him in 1992 and another 10 per cent of his interest to him in 1997. The 1992 sale agreement was silent on the right to claim for compensation from the Commission. In the 1997 sale agreement, the non-Kuwaiti claimant expressly retained his right to claim for compensation in regard to that tranche of the sale. The sale price for the 10 per cent interest sold in 1997 was significantly less than that of the 10 per cent interest sold in 1992.

17. In further letters, the two parties to the sale were asked specifically about the contract negotiations and whether the issue of compensation was discussed in regard to the 1992 sale. Both parties agreed that the issue was neither contemplated nor discussed at that time. The Kuwaiti claimant maintained that a failure to reserve the right to claim meant that the right was sold with the ownership interest. The non-Kuwaiti claimant maintained that he had not sold his right to compensation and that any award should be based on the pre-invasion holdings of the partners.

18. Eventually, the Commission was provided with a letter signed by the Kuwaiti claimant agreeing, after mutual discussions between him and the non-Kuwaiti, that the non-Kuwaiti claimant could claim for compensation based on his pre-invasion ownership interest.

19. The Panel therefore recommends that each claimant be compensated for the proved losses of the business in accordance with their pre-invasion ownership interests.

20. In another case, the Panel identified competing claims filed by a non-Kuwaiti and a Kuwaiti claimant for the same book and stationary store. The non-Kuwaiti claimed for his 50 per cent share in the losses of the business and stated that the remaining 50 per cent of the business was owned by a second non-Kuwaiti partner ("non-Kuwaiti partner"). The non-Kuwaiti claimant stated that the two partners rented a business licence from the Kuwaiti claimant who had no ownership interest in the business. The non-Kuwaiti claimant had not returned to Kuwait and had not resumed the business. His non-Kuwaiti partner had not filed his own claim but had returned to Kuwait and resumed the business. The Kuwaiti claimant claimed for 100 per cent of the losses of the business and made no mention of any partners in his original statement of claim.

21. The two claimants were sent letters seeking information about the competing claims. The non-Kuwaiti partner responded to the letter sent to the Kuwaiti claimant. He agreed that he and the non-

Kuwaiti claimant were each 50 per cent owners of the business before Iraq's invasion and occupation of Kuwait. According to the non-Kuwaiti partner, he had not filed a claim for the losses of the business as the Kuwaiti claimant had agreed to file a claim for the entire losses of the business on behalf of the non-Kuwaiti beneficial owners of the business and to distribute to them any award after the pre-invasion debts of the business had been satisfied. No written document was provided to substantiate the alleged agreement and the non-Kuwaiti claimant denied that such an arrangement existed. The non-Kuwaiti partner also informed the Commission that the Kuwaiti claimant had died in May 2000 and had assigned his right to any award of compensation to him. A copy of the declaration of an assignment was provided.

22. As a result of the information and evidence obtained through claim development, the Panel found that the evidence was clear as to the pre-invasion ownership interests in the business. However, the Panel was not persuaded that the non-Kuwaiti claimant had provided the Kuwaiti claimant with an authorisation to file for 100 per cent of the losses of the business. The Panel therefore finds that each claimant is entitled to seek compensation separately for 50 per cent of the proved losses of the business.

B. D8/D9 individual business losses: competing claims for the ownership of a business – withdrawal or partial withdrawal of claims for business losses

23. Certain competing claims were resolved by the withdrawal of all or part of a claim by a claimant.

24. For example, the Panel reviewed competing claims for the same business filed by a non-Kuwaiti and a Kuwaiti national in regard to a laundry in Kuwait. The claimants resumed their business after the liberation of Kuwait and remain business partners to the present day. The Kuwaiti claimant filed a claim for 100 per cent of the losses of the business and the non-Kuwaiti claimant filed a claim for his 49 per cent share of the losses of the business. The Kuwaiti claimant provided a signed authorization from the non-Kuwaiti claimant stating that the Kuwaiti claimant was authorized to file a claim for the entire losses of the business. Prior to giving this authorization, however, the non-Kuwaiti claimant filed category "C" and category "D" claims with the Commission. The non-Kuwaiti claimant's category "C" and category "D" claims had not been formally withdrawn prior to the review of the claims and the non-Kuwaiti claimant has already received a category "C" award. Both parties were asked in letters for information about the competing claims.

25. The non-Kuwaiti claimant stated that he filed his claims in order to preserve his rights. The Kuwaiti claimant continued to contend that he was authorized to claim for 100 per cent of the losses of the business.

26. The Kuwaiti and the non-Kuwaiti partners were interviewed separately during a technical mission to Kuwait. As a result, the non-Kuwaiti claimant withdrew his category "D" claim, being satisfied that he had reached an acceptable arrangement with his Kuwaiti business partner regarding the division of any potential award.

27. The Panel found that the category "C" claim filed by the non-Kuwaiti claimant was for personal losses and not business losses and that the competing claims issues were resolved. As the non-

Kuwaiti claimant has withdrawn his category "D" claim for business losses, the Panel determines that the Kuwaiti claimant should be compensated for 100 per cent of the losses of the business.

28. In a similar case, a Kuwaiti and a non-Kuwaiti claimant filed competing claims for the losses of a supermarket in Kuwait. The Kuwaiti claimant filed for 100 per cent of the losses of the business and provided powers of attorney signed by two non-Kuwaiti partners authorizing him to file a claim for 100 per cent of the losses of the business. Nevertheless, one of the two non-Kuwaiti partners filed claims in category "C" and category "D" for the losses of the supermarket.

29. In response to an inquiry by the Commission, the non-Kuwaiti claimant withdrew his claim for part of the business losses claimed. The remaining part of his claim was rejected by the Panel as those losses had been considered and paid in category "C".

30. The Panel also determines that it is appropriate on these facts to deduct the non-Kuwaiti claimant's category "C" award for his business losses from the Kuwaiti claimant's category "D" award. The Panel finds that the two claimants had manifested an intention through the powers of attorney to file a single claim for the losses of the business and to divide any potential award. Under these circumstances, a failure to deduct the non-Kuwaiti's category "C" award from the Kuwaiti claimant's category "D" award for 100 per cent of the losses of the business would result in over-compensation of the claimants. The Panel also directs that the reason for the deduction be communicated to the Kuwaiti claimant so that he has the information necessary to allow for an appropriate distribution of any category "D" award.

C. D8/D9 individual business losses: allegations of fraud made by individuals who have not claimed for the losses that are the subject matter of the allegations

31. In the course of its review of claims, the Panel considered comments submitted by individuals who alleged that a claimant filed a fraudulent claim. The individuals who made these allegations have not claimed for these losses.

32. In two instances, the Panel reviewed claims by non-Kuwaiti claimants who alleged beneficial ownership of a business but whose assertion of ownership was challenged by the Kuwaiti business licence holders although the licence holders had not themselves claimed for the losses of the business. The licence holders contended that they could not claim for the losses of the business because they lacked adequate documentation but that the non-Kuwaiti claimants were not entitled to claim for the losses of the business as they were employees only and had no ownership interest in the business.

33. In the first case, the non-Kuwaiti claimant provided a side agreement documenting the fact that he was the beneficial owner of the business. Upon being provided with this document, the licence holder withdrew his allegations questioning the non-Kuwaiti's ownership of the business. Accordingly, the Panel recommends that the non-Kuwaiti claimant be compensated for the proved losses of his business.

34. In the second case, the non-Kuwaiti claimant did not have a side agreement but provided other indicia of ownership including a lease document for the business premises in his name, detailed inventory lists, an authorization signed by the licence holder allowing him broad powers to act in

relation to the business and witness statements attesting to his beneficial ownership of the business. The licence holder did not provide any documentary evidence in support of his allegations questioning the non-Kuwaiti's ownership of the business. Furthermore, the licence holder did not himself file a claim for the losses of the business, despite the fact that he had filed for losses in relation to three other businesses. As there was no possibility of duplication of losses claimed, and as the Panel finds that the non-Kuwaiti claimant has provided adequate evidence of his ownership interest in the assets claimed, the Panel recommends that the non-Kuwaiti claimant be compensated for the proved losses of his business.

35. In another case, the Commission received an anonymous submission from an individual who claimed to have detailed knowledge of an eleventh instalment claim. In the submission, the individual stated that the claimant had suffered no losses and alleged that the claimant exited Kuwait with the vehicles that he claimed were stolen. The allegations made were general and no basis for the alleged knowledge was asserted. As the submission was anonymous, the Panel had no opportunity to follow up with the individual about the content of the submission. Although the Panel is not generally inclined to take notice of anonymous communications, in this particular case, in view of the large size of the claim, a copy of the letter was forwarded to the claimant for comment. The claimant, who had previously provided five witness statements attesting to his loss of the assets, denied the allegations. In addition, he provided a statement from the Jordanian Vehicles Control Division certifying that the vehicles claimed never entered Jordan. As the claimant provided proof in support of his losses and no credible basis was asserted for the allegations, the Panel determines that the claimant should be compensated for his proved losses.

D. D8/D9 individual business losses: key money and goodwill losses

36. The Panel reviewed several claims for goodwill and key money losses filed in relation to businesses that are still operating in Kuwait. These claims are unusual as in previous cases claimants who claimed for key money or goodwill losses had either sold any interest they had in the business after Iraq's invasion and occupation of Kuwait or no longer operated the business as it was destroyed, abandoned or no longer functional after the invasion and occupation.

37. In one case, two non-Kuwaiti claimants made substantial claims for the diminished value of the key money and goodwill of the automobile workshop that they had jointly owned and operated before Iraq's invasion and occupation of Kuwait. The claimants did not return to Kuwait but they executed powers of attorney in 1991 authorizing a person in Kuwait to resume operation of their business. The claimants continued to manage the business through this agent. The claimants valued the amount of their key money and goodwill loss by comparing a pre-invasion offer for the business with a 1995 offer they received when they attempted to sell their business. The claimants rejected the 1995 offer as unsatisfactory and continue to own the business.

38. On these facts, the Panel recommends no compensation for the alleged loss by way of diminished key money and goodwill as the claimants have not established the fact of the loss. The claimants retain ownership of the business and retain the right to realize a benefit from the sale of the goodwill and key money of the business in the future.

39. The Panel also examined the issue of whether claimants have made adequate attempts to mitigate their key money and goodwill losses. A claimant must demonstrate adequate attempts to recover the diminished value of the key money or goodwill of a business through resale, unless the asset was completely destroyed. In one case, where a claimant claimed for the loss of key money for business premises that were entirely destroyed by fire during the period of Iraq's invasion and occupation, the Panel determines that there should be no valuation adjustment for failure to mitigate.

E. D8/D9 individual business losses: receivables over KWD 500 – establishment of formal debt collection efforts

40. Under the D8/D9 methodology for receivables over Kuwaiti dinars (KWD) 500, in order for a claimant to be compensated for a debt, the claimant must demonstrate that the debt was not uncollectable prior to Iraq's invasion and occupation of Kuwait. 6/ The claimant must also demonstrate that he or she has undertaken sufficient debt collection efforts since the end of Iraq's invasion and occupation of Kuwait and that the debt was not collectable as a direct result of Iraq's invasion and occupation of Kuwait. Evidence to establish such debt collection efforts typically includes court records of proceedings to collect the debts, court records or other official records demonstrating the debtor's absence from Kuwait after liberation, Kuwait Chamber of Commerce and Industry certificates stating that a company did not resume operations after the invasion and occupation period, and certificates from the Kuwait Ministry of Labour and Social Affairs stating that a debtor had been declared bankrupt after 2 March 1991. 7/

41. Several claimants made claims for receivables in amounts greater than KWD 500. The Panel determines that most of these claims are not compensable as the claimants failed to demonstrate sufficient debt collection efforts.

42. A few claimants have been able to demonstrate adequate debt collection efforts in regard to one or more debts owed to their businesses. For example, one claimant claimed for eight debts owed to his transportation business before Iraq's invasion and occupation of Kuwait. The Panel finds that three of the debts were not direct losses as they were presumed to be uncollectable prior to Iraq's invasion and occupation of Kuwait because of the age of the debts.

43. In regard to the remaining five debts totalling KWD 10,800, the claimant provided evidence of debt collection efforts. In 1992, the claimant obtained a court judgment for the full value of the debts but could not execute the judgment despite several attempts to do so as the debtor could not be located. The claimant provided a certification of these attempts from the Ministry of Justice.

44. The Panel considered these efforts satisfactory under the requirements of the methodology. Accordingly, the Panel recommends an award of compensation in relation to the remaining five debts.

45. Another claimant filed a claim for an unpaid debt totalling KWD 15,000. The claimant's evidence of debt collection efforts included evidence of his presentation and the bank's rejection of the cheque and a September 1993 Kuwaiti court judgment in default of the debtor's appearance. The claimant attempted to attach the house that the debtor had lived in but found that it did not belong to him. Furthermore, the claimant provided evidence from the process servers stating that the debtor had been

missing since Iraq's invasion and occupation of Kuwait. This was corroborated by a statement from the "National Committee for the Missing and the Prisoners of War Affairs."

46. After reviewing these facts, the Panel determines that the claimant has satisfied the requirements of the methodology. Accordingly, the Panel recommends an award of compensation.

F. D6 (loss of income): compensability of employee bonus

47. The Panel reviewed a claim filed by a Kuwaiti claimant for the loss of the annual bonus that he alleged he would have earned but for Iraq's invasion and occupation of Kuwait. The claimant was and continues to be the managing director of a large Kuwaiti company. He provided documentation of his bonus history over a period of 17 years (1983-1999). The only year he did not receive a bonus was 1990. He received a significantly smaller than average bonus in 1991. The evidence provided showed that the amount of his bonus was consistent and that it made up approximately 50 per cent of his annual remuneration.

48. The claimant provided documentation from his company stating that his performance was not the reason that he received no bonus in 1990 and a smaller than average bonus in 1991. The company stated that it paid no bonuses in 1990 because of the financial consequences of Iraq's invasion and occupation of Kuwait. Similarly, it paid very few bonuses in 1991 but made an exception in the case of the claimant to reward the significant effort he expended in restarting the company.

49. The company has filed a claim for the company's losses in category "E4". Under the "E4" and "E4A" Panels' review procedures, costs such as employee remuneration, including bonuses, are taken into account in determining the level of compensation to award a company for lost profits during the invasion and occupation period. Thus, a company would receive an award based on an estimate of what its profits would have been after the payment of all expenses, including employee remuneration. This practice ensures that there is no duplication between an employee's claim for lost earnings and the company's claim for lost profits.

50. The Panel finds that while the claimant was not contractually entitled to a fixed amount bonus, his bonuses were based on his performance and showed a pattern of even and consistent payments. Accordingly, the losses claimed are sufficiently certain and quantifiable to qualify for compensation.

G. Submission of claims to Iraq

51. In the course of the review of the claims, the Panel decided that three claims should be sent to Iraq for comment. These claims involved asserted losses in relation to a transaction with an Iraqi entity or party. They were deferred out of the instalment to allow the Panel to take into account Iraq's comments on these claims.

III. CROSS-CATEGORY ISSUES

A. Claims filed by shareholders in Kuwaiti corporations

52. On 15 March 2001, the Governing Council determined in decision 123 that claims filed by individuals in category "D" for losses sustained by companies incorporated in Kuwait should be

identified and transferred to category “E4” to be valued as “overlapping” or “stand alone” corporate claims. 8/

53. The Panel initiated an investigation of whether there were claims in the eleventh instalment for losses sustained by Kuwaiti corporate entities. Once these claims were identified, the Panel, in consultation and co-operation with the “E4” and “E4A” Panels, initiated a further investigation of any potential overlap between category “E4” claims filed by Kuwaiti corporations and corporate losses in category “D” claimed by non-Kuwaiti shareholders of the Kuwaiti corporations.

54. As a result of this investigation, the Panel determined that the instalment contained 37 claims filed by non-Kuwaiti shareholders in Kuwaiti corporations for losses of those entities. Of these, 16 claims concern losses for which claims were also filed by the Kuwaiti company in category “E” (“overlapping claims”) and 21 of these claims concern losses for which no duplicative claim has been filed by the Kuwaiti company (“stand alone claims”).

55. In order to implement decision 123, the Panel requested the Executive Secretary to group and transfer the overlapping claims to category “E4” for consolidation with the “E4” claims. 9/ In addition, the Panel has deferred the stand alone claims to a later category “D” instalment to allow for a determination by the Panel as to whether the individual claimant had authority to file a claim on behalf of the company. If these individuals can establish such authority to file, the Panel will request that the Executive Secretary group and transfer these claims to category “E4” for review as Kuwaiti corporate claims. 10/

56. To the extent any of these shareholder claims contained personal losses unrelated to the corporate entity, the Panel has reviewed these personal losses and made recommendations with respect to awards of compensation for those losses.

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

57. Recommended awards in respect of the claims are reported after deduction of category “A”, “B” and “C” approved awards.

IV. OTHER ISSUES

A. Exchange rates

58. For purposes 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 its First Report.

59. In paragraph 39 of its Fifth Report, 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 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 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”.

B. Interest

60. A number of claimants in the eleventh instalment filed claims in category “D” specifically for interest on their category “D” claims. In its report and recommendations on part one of the first instalment, the Panel determined that interest will be awarded in accordance with Governing Council decision 16 (S/AC.26/1992/16). 11/

61. For category “D” loss types other than individual business losses, “the date the loss occurred” under Governing Council decision 16 is 2 August 1990 (the date of Iraq’s invasion and occupation of Kuwait).

62. 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, using 2 August 1990 as the date of loss 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. 12/

C. Claim preparation costs

63. 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.

64. 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.

V. RECOMMENDED AWARDS

65. The annex hereto lists the awards recommended by the Panel for each Government and international organization for the claims resolved in the eleventh instalment. Each Government and international organization will be provided with a confidential list containing the individual recommendations made in respect of its claimants. As will be seen from the table, the Panel recommends a total of USD 172,461,714.82 against a total claimed amount of USD 384,298,420.78. Of this total amount claimed, USD 9,071,428.90 is for business losses suffered by Kuwaiti companies that will be severed from the category “D” claim and transferred to the category “E4” Panels of Commissioners for their review pursuant to Governing Council decision 123.

66. 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) R.K.P. Shankardass
Chairman

(Signed) H.M. Joko-Smart
Commissioner

(Signed) M.C. Pryles
Commissioner

Notes

1/ S/AC.26/1992/10.

2/ 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); D3 (death); D4 (motor vehicles); D6 (loss of income); D10 (payment and 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 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 30-57. The Panel developed the methodology for D4 (personal property) 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), at paragraphs 30-68. 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 30-68. The “D2” Panel of Commissioners developed the methodology for D8/D9 (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 US\$100,000 (Category ‘D’ Claims)” (S/AC.26/2000/24) (the “Sixth Instalment Report”). The methodologies for resolving all of the losses in category “D” have now been developed.

3/ See in particular chapter II of the part one of the first 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).

4/ 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 (3) of the Rules.

5/ Paras. 5 and 10.

6/ See the Sixth Instalment Report, paras. 167-174.

7/ Ibid., paras. 166-176.

8/ S/AC.26/Dec.123 (2001), paras. 1(a-b).

9/ Ibid., para. 1(a).

10/ Ibid., para. 1(b).

11/ Paragraph 1 of decision 16 states that “interest 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.” See also paragraphs 64-65 of the report on part one of the first instalment.

12/ This is consistent with the practice of other panels; see for example the “Report and recommendations made by the Panel of Commissioners concerning the first instalment of ‘E4’ claims”, S/AC.26/1999/4, para. 230.

Annex

SUMMARY RECOMMENDATIONS OF THE ELEVENTH
INSTALMENT OF CATEGORY "D" CLAIMS

<u>Submitting Entity</u>	<u>Amount claimed (USD)</u>	<u>Number of claims recommended for payment</u>	<u>Number of claims not recommended for payment or withdrawn a/</u>	<u>Amount of compensation (USD)</u>
Australia	393,905.22	1	0	27,404.38
Canada	10,534,055.39	9	1	3,197,454.94
Denmark	434,658.98	1	0	85,286.74
Egypt	168,689.02	1	0	13,917.00
India	11,163,044.29 <u>b/</u>	23	4 (1)	2,666,246.80
Iran	3,649,619.38	0	4	nil
Jordan	147,772,460.30	152	12	38,963,830.04
Kuwait	176,570,418.07 <u>b/</u>	248	7 (1)	119,095,340.17
Lebanon	10,380.62	1	0	72,035.00
Pakistan	586,014.00	1	0	80,714.12
Singapore	286,685.05	1	0	22,222.00
Syrian Arab Republic	5,579,744.87	5	1	1,451,747.60
United Kingdom	423,154.47	2	0	108,447.00
United States	4,138,711.57 <u>b/</u>	1	(1)	614,460.10
Yemen	21,731,313.44	39	8	5,765,067.95
UNDP Yemen	749,445.00	1	0	268,224.98
UNRWA Gaza	106,121.11	1	0	29,316.00
<u>Total</u>	384,298,420.78 <u>c/</u>	487	37 (3)	172,461,714.82

a/ Numbers in parentheses represent claims that were withdrawn and are in addition to the claims not recommended for payments.

b/ Excludes the "Amount claimed" with respect to claims that were withdrawn.

c/ This amount claimed includes USD 9,071,428.90 for business losses suffered by Kuwaiti companies that will be transferred to the "E4" Panels for review pursuant to Governing Council decision 123 and excludes the amounts claimed in respect of the withdrawn claims.
