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

## CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
Introduction .....	1-2	3
I. OVERVIEW OF THE CLAIMS IN PART TWO OF THE TWELFTH INSTALMENT.....	3-7	3
II. THE PROCEEDINGS.....	8-10	5
III. LEGAL FRAMEWORK.....	11-21	5
A. Applicable law .....	11-12	5
B. Evidentiary requirements.....	13-16	5
C. Causation .....	17-19	6
D. The role of the Panel.....	20-21	7
IV. NEW FACTUAL, LEGAL AND VALUATION ISSUES ARISING IN THE DETERMINATION OF CLAIMS IN PART TWO.....	22-56	7
A. D4(PP) personal property losses: “unusually large or complex” claim ...	23-35	7
1. Ownership .....	29-32	8
2. Loss and causation .....	33-34	9
3. Valuation.....	35	9
B. D8/D9 individual business losses: directness of loss.....	36-45	9
C. D8/D9 individual business losses: related or competing claims for the ownership of a business.....	46-55	11
D. Deduction of category “A”, “B” and “C” awards .....	56	13
V. OTHER ISSUES.....	57-60	13
A. Currency exchange rate.....	57-58	13
B. Interest.....	59	13
C. Claims preparation costs.....	60	14
VI. RECOMMENDED AWARDS.....	61	14

### Introduction

1. This is the seventh report to the Governing Council of the United Nations Compensation Commission (the “Commission”) submitted pursuant to article 38(e) of the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the “Rules”) by the “D2” Panel of Commissioners (the “Panel”), being one of two Panels appointed to review individual claims for damages above 100,000 United States dollars (USD) (category “D” claims).

2. This report contains the determinations and recommendations of the Panel in respect of part two of the twelfth instalment, which comprises a total of 286 claims.

#### I. OVERVIEW OF THE CLAIMS IN PART TWO OF THE TWELFTH INSTALMENT

3. The most common loss type appearing in part two of the twelfth instalment is D8/D9 individual business losses. Other common loss types are D4 personal property losses, D6 loss of salary and D7 real property losses. The majority of the claims in part two of the twelfth instalment were submitted by the Governments of Kuwait, India and Jordan.

4. As set out in the report concerning part one of the twelfth instalment, there were 638 claims in the twelfth instalment at the time of its submission to the Panel.<sup>1</sup> Of that number, 392 claims were resolved by the Panel in part one, together with three additional claims from another instalment that were deferred to the twelfth instalment as they were related to claims in part one.<sup>2</sup> Of the remaining 246 claims in the twelfth instalment, 163 claims are resolved by the Panel in part two, and 83 claims are deferred because the Panel requires additional information from the claimants to resolve these claims. The additional 123 claims reported in part two are claims from other instalments that had been deferred or that are related to claims originally included in the instalment and claims from later instalments that are ready for reporting at the time of signature of this report.

5. There are three claims in part two of the twelfth instalment where, in addition to individual losses, the claimants assert losses for which claims were also filed by Kuwaiti companies in category “E”. The Panel has made recommendations only with respect to the individual losses asserted in these claims. The Panel has requested the Executive Secretary to sever the corporate losses asserted by the claimants, which total USD 2,174,379.83, and to transfer such losses to the “E4” Panels of Commissioners in accordance with Governing Council decision 123 (S/AC.26/Dec.123 (2001)).

6. As a result of these additions, deferrals and transfers, part two of the twelfth instalment comprises 286 claims. Of these, two claims have been withdrawn as indicated in table 1 below. For parts one and two of the twelfth instalment, the Panel has resolved a total of 681 claims.

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

Table 1. Summary of claims by submitting entity (parts one and two)

<u>Submitting entity</u>	<u>Number of claims originally submitted to the Panel</u>	<u>Number of claims added to the instalment</u>	<u>Number of claims withdrawn</u>	<u>Total number of claims submitted to the Panel</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 deferred out of the instalment</u>	<u>Total number of claims resolved by the Panel</u>
Australia	2	-	-	2	2	-	-	2
Bolivia	1	-	-	1	1	-	-	1
Brazil	1	-	-	1	1	-	-	1
Canada	8	3	-	11	6	3	2	9
Croatia	1	-	-	1	-	1	-	1
Egypt	38	1	-	39	9	9	21	18
France	2	-	-	2	1	1	-	2
Germany	2	-	-	2	1	1	-	2
Greece	1	-	-	1	1	-	-	1
India	139	4	1	143	75	55	13	130
Jordan	119	4	1	123	58	33	32	91
Kuwait	270	103	-	373	217	153	3	370
Lebanon	3	-	-	3	3	-	-	3
Pakistan	18	-	-	18	5	7	6	12
Sudan	3	-	-	3	1	2	-	3
Syrian Arab Republic	2	10	-	12	-	12	-	12
Turkey	3	-	-	3	1	2	-	3
United Kingdom	13	-	-	13	11	-	2	11
United States	3	-	-	3	-	2	1	2
United Arab Emirates	1	1	-	2	-	1	1	1
Yemen	6	-	-	6	2	2	2	4
UNDP Kuwait	1	-	-	1	-	1	-	1
UNRWA Gaza	1	-	-	1	-	1	-	1
<u>Total</u>	638	126	2	764	395	286	83	681

## II. THE PROCEEDINGS

8. On 19 July 2001, the Panel issued Procedural Order No. 11, in which it gave notice of its intention to complete its review of the claims in the twelfth instalment and to finalize its report and recommendations to the Governing Council in two parts. The Panel signed its report and recommendations to the Governing Council in respect of part one on 28 January 2002. In June 2002, the Panel, pursuant to Governing Council decision 35 (S/AC.26/Dec.35 (1995)), gave notice to the Governing Council of its intention to complete part two of the twelfth instalment by September 2002. The Panel met regularly to consider the claims.

9. The Panel has taken into consideration relevant information and views presented by a number of claimant Governments as well as by the Government of the Republic of Iraq ("Iraq") in response to the reports submitted to the Governing Council by the Executive Secretary in accordance with article 16 of the Rules. In addition, the Panel has reviewed the responses of Iraq in connection with six claims that the Panel transmitted to Iraq for comment.<sup>3</sup>

10. The Panel has sought to achieve consistency, in so far as is possible, with the verification and valuation procedures adopted by other panels of Commissioners for category "D" and "E" losses. This has been accomplished by adapting the relevant features of related methodologies in the assessment of claims, where appropriate.

## III. LEGAL FRAMEWORK

### A. Applicable law

11. The Security Council reaffirmed Iraq's liability under international law for any direct loss arising as a result of Iraq's invasion and occupation of Kuwait. Paragraph 16 of Security Council resolution 687 (1991) states (in part) that Iraq:

"... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait".

12. Article 31 of the Rules identifies the law to be applied by panels of Commissioners in their consideration of claims. Specifically, panels are to apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. Where necessary, panels are to apply other relevant rules of international law.

### B. Evidentiary requirements

13. Article 35(1) of the Rules provides that:

“Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claims is eligible for compensation pursuant to Security Council resolution 687 (1991). Each panel will determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted.”

14. Article 35(3) of the Rules provides that claims in categories “D”, “E” and “F” must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss.

15. In addition, decision 15 of the Governing Council (S/AC.26/1992/15) expressly requires “detailed factual descriptions of the circumstances of the claimed loss, damage or injury” with respect to “all types of business losses, including losses relating to contracts, transactions that have been part of a business practice or course of dealing, tangible assets and income-producing properties”.<sup>4</sup>

16. The Panel has reviewed the claims and made its recommendations by assessing documentary and other appropriate evidence. In addition, the Panel has sought to balance the interests of claimants who fled from a war zone with the interests of Iraq, which is liable only for direct loss, damage or injury caused by its invasion and occupation of Kuwait.

### C. Causation

17. Security Council resolution 687 (1991) establishes Iraq’s liability for any “direct” loss arising as a result of its invasion and occupation of Kuwait. The Panel has been particularly concerned to ensure that all losses recommended for compensation are direct losses caused by Iraq’s invasion and occupation of Kuwait.

18. In dealing with the issue of causation, the Panel has been guided by Governing Council decision 7 (S/AC.26/1991/7/Rev. 1), which provides that compensation is available with respect to any direct loss, damage, or injury (including death) to individuals as a result of Iraq’s invasion and occupation of Kuwait. Under paragraph 6 thereof, this will include any loss suffered as a result of:

(a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;

(b) Departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period;

(c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;

(d) The breakdown of civil order in Kuwait or Iraq during that period; or

(e) Hostage taking or other illegal detention.

19. The Governing Council has confirmed that these guidelines are not intended to be exhaustive.<sup>5</sup> For each claim, the causation analysis begins with reference to Security Council resolution 687 (1991), and an assessment of whether the claimed loss was a direct result of Iraq's invasion and occupation of Kuwait. The Panel has applied Security Council resolution 687 (1991) in accordance with the guidance provided by relevant decisions of the Governing Council. In each case, therefore, the Panel assesses whether the directness requirement has been met based on one of the enumerated circumstances outlined in paragraph 6 of decision 7, or some other causal relationship arising directly from Iraq's invasion and occupation of Kuwait. If a claim or a loss element fails to meet the directness requirement, the Panel recommends no compensation for that claim or loss element.

#### D. The role of the Panel

20. The Governing Council has entrusted three tasks to the Panel. First, the Panel must determine whether an alleged loss falls within the jurisdiction of the Commission and is compensable in principle. Second, the Panel must verify whether the loss was actually suffered by the claimant. Third, the Panel must determine the amount of any compensable loss suffered by the claimant and recommend an award in respect thereof.

21. Taking into account the evidentiary and causation requirements that must be met by claimants in category "D", and considering the legal principles that must be respected in the valuation of compensable losses, a case-by-case assessment of each claim is required. In summary, the Panel's objective was to review the claims by applying established principles in a consistent and objective manner.

#### IV. NEW FACTUAL, LEGAL AND VALUATION ISSUES ARISING IN THE DETERMINATION OF CLAIMS IN PART TWO

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

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

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

24. The items in the claim that the Panel referred to the expert consultants for review are 27 items or sets of jewellery, an Islamic Art collection and various carpets (collectively, the "Valuation Items").

25. In respect of the jewellery, the items or sets claimed included various Art Deco necklaces, earrings, bracelets, anklets, cufflinks and rings with rubies, pearls, emeralds, sapphires and diamonds set in gold and white gold; a pigeon blood ruby bead necklace; various Bahraini pearl necklaces, earrings and ring with sapphires and emeralds; a belt buckle transformed into a necklace set with emerald beads, diamonds and pearls; a collection of Burmah ruby beads set in white gold; a collection of Mughal emerald beads; a string necklace with old mine round emerald beads with diamond roundels; a Bahraini pearl necklace with old Mughal carved emerald stone and rose cut diamond; and a Russian style necklace set with rubies, pearls and diamonds. In respect of the claim for the Islamic Art collection, the items claimed included various Islamic textiles, manuscripts and art including seventeenth and eighteenth century embroidered wall hangings, 4,000 Arabic periodicals, six volumes of David Roberts prints, fragments of Mamluk manuscripts from Egypt, fourteenth Century Arabic religious manuscripts from Egypt, a Saljug bronze and a twelfth century Nishapur bowl. The claim for carpets includes various sixteenth, seventeenth, eighteenth and nineteenth century Mughal, Persian, Anatolian and other antique carpets.

26. The claimant sought compensation in a total amount of USD 16,599,671.28. Of that total amount claimed, the Valuation Items represent an amount of USD 8,598,259.52.<sup>6</sup>

27. The Panel issued a procedural order instructing the secretariat to submit the claim file to Iraq for review and comment. The Panel instructed the secretariat to undertake claim development pursuant to article 34 of the Rules with the assistance of the expert consultants with respect to the Valuation Items. In addition, an on-site interview of the claimant was conducted during the course of a technical mission to Kuwait. The Panel reviewed the claim at several of its meetings, with the expert consultants in attendance at some of the meetings. The Panel, in arriving at its recommendations, duly considered the comments received from Iraq.

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

#### 1. Ownership

29. To document ownership of the 27 items or sets of jewellery, the claimant provided an inventory of each item or set that gives a detailed description with purchase date and price as well as copies of original invoices for all of the jewellery except three sets. The claimant provided photographic evidence of the three sets that lacked original invoices and provided photographs of most other items.

30. The Panel, having reviewed the totality of the evidence provided by the claimant for ownership of his jewellery items, i.e., the copies of the original invoices and the photographs, determines that the claimant has established his ownership of the jewellery items.

31. To document his ownership of his Islamic Art collection and carpets, the claimant provided copies of original invoices for all items and copies of bank statements evidencing the debits of the amounts invoiced and/or copies of cancelled cheques relating to these purchases for all items.

32. The Panel, having reviewed the evidence provided by the claimant in respect of his Islamic Art collection and carpets, i.e., the copies of the original invoices and proof of disbursements, determines that the claimant has established his ownership of the Islamic art collection and carpets.

## 2. Loss and causation

33. Iraq asserts that the claimant failed to prove that the loss was a direct result of Iraq's invasion and occupation of Kuwait, and proposes several possible causes for the loss of the claimed items. The Panel notes, however, that Iraq did not submit any specific evidence in support of its assertions, whereas the claimant established that the losses were direct by submitting witness statements and other documentary evidence, including evidence that the claimant's palace where the items were located had been used as headquarters for the Iraqi army, and was ransacked, damaged and left devoid of much of its contents as a result of Iraq's invasion and occupation of Kuwait.

34. The Panel finds therefore that the claimant lost the Valuation Items as a direct result of Iraq's invasion and occupation of Kuwait.

## 3. Valuation

35. The Panel determines that the value for each of the Valuation Items should be based on the lesser of the lowest replacement value in 1990 or the amount claimed for the Valuation Item. The expert consultants have made their recommendations to the Panel accordingly. After extensive discussions with the expert consultants regarding the basis of their assessment as well as a review of the evidence provided by the claimant in support of his losses, the Panel recommends that the claimant be awarded an amount of USD 4,224,405.00 in respect of the Valuation Items.<sup>7</sup>

### B. D8/D9 individual business losses: directness of loss

36. The Panel reviewed several claims raising the issue of whether the claimed loss was suffered as a direct result of Iraq's invasion and occupation of Kuwait. For example, the Panel reviewed a claim with asserted individual business losses of over USD 10 million in connection with a number of transactions that the claimant asserted would have taken place but for Iraq's invasion and occupation of Kuwait. According to the claimant, he operated a business in Kuwait that, at the time of Iraq's invasion and occupation of Kuwait, was on the verge of concluding several transactions with various parties in and outside of Kuwait. The claimant alleged that his business stood to reap millions of dollars in profits as the facilitator of the alleged transactions, which profits were lost when the transactions were abandoned as a result of Iraq's invasion and occupation of Kuwait.

37. The Panel issued a procedural order instructing the secretariat to submit the claim file to Iraq for review and comment. The Panel, in arriving at its conclusions, duly considered the comments received from Iraq.

38. The claimant supported his claim by submitting correspondence with third parties. The Panel finds that the correspondence, which was dated significantly before the period of Iraq's invasion and

occupation of Kuwait, related to a business located in Khartoum, Sudan, rather than the business in Kuwait, and does not support the claimant's assertions.

39. The Panel considers that the claimant has failed to establish that the business which allegedly suffered a loss of business income had a history of profitability or a reasonable expectation of profits.<sup>8</sup> The claimant has not submitted any evidence of past profitability in respect of his business and has not established what he stood to gain in profits if the alleged transactions had been completed. The Panel finds that the claimant's explanation as to how the alleged transactions were frustrated as a result of Iraq's invasion and occupation of Kuwait is vague and conclusory, and devoid of the requisite particulars to establish that the losses were directly caused by Iraq's invasion and occupation of Kuwait. For all of these reasons, the Panel recommends no award of compensation in respect of this claim.

40. The Panel reviewed a claim for compensation of an agricultural production and export business located in Yemen at the time of Iraq's invasion and occupation of Kuwait. The claimant alleged that his business was engaged in growing and purchasing local Yemeni produce for export, more than 90 per cent of which was exported principally to Saudi Arabia and the rest to Kuwait. The claim sought compensation in excess of USD 76 million for the cost of produce that, the claimant alleges, would have been exported but for Iraq's invasion and occupation of Kuwait; projected profits for a period of five years commencing in 1991, which the claimant calculated at approximately USD 6 million per annum; and goodwill losses, computed on the basis of three years of business profits.

41. The Panel issued a procedural order instructing the secretariat to submit the claim file to Iraq for review and comment. The Panel, in arriving at its conclusions, duly considered the comments received from Iraq.

42. The Panel, mindful of the Commission's jurisprudence concerning the non-compensability of losses alleged to have occurred in areas of Saudi Arabia that were outside of the reach of scud missiles,<sup>9</sup> asked the claimant to provide a detailed explanation as to how the losses associated with exports to Saudi Arabia were directly caused by Iraq's invasion and occupation of Kuwait. The Panel finds that the claimant's response was devoid of particulars, and that he failed to show how the exports to Saudi Arabia were frustrated as a direct result of Iraq's invasion and occupation of Kuwait. The Panel accordingly considers that such losses are not compensable because the claimant has not satisfied the directness requirement.

43. With respect to the claimant's losses relating to exports to Kuwait, although specifically requested by the Panel, the claimant failed to submit financial evidence of any sort, such as accounts, financial statements, invoices, or receipts in order to establish the business' periodic revenues, expenses or profits prior to Iraq's invasion and occupation of Kuwait. The Panel notes that the business was located outside of the war zone and that most financial records should have been intact. The claimant only submitted evidence attesting to the business' exports, such as correspondence from customers, transport businesses, and Yemeni governmental bodies. None of this evidence, however, establishes that the business made any profits prior to Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no award of compensation.<sup>10</sup>

44. The Panel also reviewed a number of claims for business losses in which the claimants speculated that their tangible property losses were suffered as a result of Iraq's invasion and occupation of Kuwait. For example, the Panel reviewed a claim for the losses of a business operating in Iraq at the time of Iraq's invasion and occupation of Kuwait. The claimant asserted that he left Iraq in September 1990 in order to protect his safety, and that he did not return to Iraq to determine the fate of his business property. The claimant sought compensation for, among other things, lost office equipment and machinery, stock, and other tangible property losses in relation to this business. Another claimant sought similar tangible property losses suffered by his business, which was located in Kuwait at the time of Iraq's invasion and occupation of Kuwait. This claimant had left Kuwait prior to 2 August 1990 to go on vacation, and he was unable to return to Kuwait. The claimant speculated that the business might have been looted during the period of Iraq's invasion and occupation of Kuwait, but he failed to provide a witness statement or other evidence to substantiate his assertions.

45. In these and other similar cases in part two of the twelfth instalment, the Panel recommends no award of compensation in respect of the claims for lost tangible property, because the claimants could only speculate as to the fate of their tangible business property and, therefore, could not establish a direct link between Iraq's invasion and occupation of Kuwait and the claimed tangible property losses.

C. D8/D9 individual business losses: related or competing claims for the ownership of a business

46. Part two of the twelfth instalment includes a number of related or competing claims for business losses. In some cases, two or more category "D" claimants filed for losses in connection with the same business. In other cases, a category "D" claimant filed for losses in connection with a business in respect of which a category "C" claimant has already received compensation from the Commission. Such claims were deemed to be competing because the claimants had made inconsistent assertions concerning the ownership of the business that, unless resolved by the Panel, would lead to duplication of payment for the same underlying loss.

47. The Panel requested further information from the claimants in order to resolve the competing ownership issues. The claimants' responses enabled the Panel to resolve competing ownership issues in respect of some claims. Other claims were resolved based on information gathered through interviews with the claimants during a technical mission to Kuwait and Jordan carried out at the direction of the Panel.

48. For example, the Panel reviewed two category "D" claims from a Kuwaiti claimant and a non-Kuwaiti claimant in which each claimant asserted ownership of the same sheep farm in Kuwait. The farm, which was damaged during Iraq's invasion and occupation of Kuwait, was licensed in the name of the Kuwaiti claimant. Each claimant asserted that he was the sole owner of the farm and its assets, and denied that the other claimant had a right to claim for losses in respect of the farm.

49. The Kuwaiti claimant supported his claim by relying on documents issued after Iraq's invasion and occupation of Kuwait that referred to the farm as being registered in his name. The non-

Kuwaiti claimant supported his claim by providing a written declaration purportedly signed by the Kuwaiti claimant before Iraq's invasion and occupation of Kuwait, in which the latter acknowledged that the farm belonged to the non-Kuwaiti claimant. The non-Kuwaiti claimant also submitted other documents dated prior to Iraq's invasion and occupation of Kuwait, such as contracts, receipts, and a vaccination certificate in respect of the farm's animals.

50. The claimants were interviewed during the technical mission to Kuwait and Jordan. The Kuwaiti claimant admitted that the signature in the acknowledgement was very similar to his own but asserted that it was forged. The Kuwaiti claimant also asserted that all of the other documents submitted by the non-Kuwaiti claimant were fraudulent or otherwise not genuine, even though one of the documents had been issued by a Kuwaiti governmental body prior to 2 August 1990. The Kuwaiti claimant explained that he had no documents issued prior to Iraq's invasion and occupation of Kuwait because they had been lost or destroyed during the invasion and occupation. The non-Kuwaiti claimant denied the Kuwaiti claimant's assertions of forgery and fraud.

51. The Panel considers the Kuwaiti claimant's allegations to be unpersuasive, particularly because only the non-Kuwaiti claimant submitted documentary evidence relating to the farm that had been issued prior to Iraq's invasion and occupation of Kuwait. On the basis of this evidence, the Panel finds that the non-Kuwaiti claimant was the owner of the farm when Iraq's invasion and occupation of Kuwait occurred and recommends an award of compensation for the farm's losses to the non-Kuwaiti claimant.

52. The Panel also reviewed two category "D" claims relating to alleged losses sustained by a general goods store in Kuwait as a result of looting during Iraq's invasion and occupation of Kuwait. The Kuwaiti claimant asserted that he was the sole owner of the business, whereas the non-Kuwaiti claimant asserted that he owned 49 per cent of the business. The business was licensed in the name of the Kuwaiti claimant. According to the Kuwaiti claimant, the non-Kuwaiti claimant was merely an employee of the business and not a partner.

53. The non-Kuwaiti claimant alleged that he and the Kuwaiti claimant's father jointly purchased the business from a third party in 1985. The non-Kuwaiti claimant produced several pre-invasion documents to establish that he was a partner in the business prior to Iraq's invasion and occupation of Kuwait. Included among these documents were a 1985 contract for the sale of the business in which the non-Kuwaiti claimant is shown as a buyer, accounts signed by both the non-Kuwaiti claimant and the Kuwaiti claimant's father, authorizations issued by the Kuwaiti claimant and by his father to the non-Kuwaiti claimant in connection with a bank account of the business, an agreement with a Kuwaiti bank in which the non-Kuwaiti claimant personally guaranteed loans granted to the business, and a lease agreement for the business in which the non-Kuwaiti claimant is shown as a lessee.

54. The Kuwaiti claimant was interviewed during the technical mission to Kuwait and Jordan. Although he did not dispute the authenticity of the documents submitted by the non-Kuwaiti claimant, in particular the 1985 agreement for the sale of the business to the non-Kuwaiti claimant and the Kuwaiti claimant's father, he insisted that only he had the right to claim for the losses of the business.

55. The Panel considers that, in the light of the totality of the evidence submitted by both claimants, the non-Kuwaiti claimant has established that he was a partner in the business. The Panel finds that the non-Kuwaiti claimant should be compensated for 49 per cent of the demonstrated losses of the business and that the Kuwaiti claimant should be compensated for 51 per cent of the demonstrated losses of the business.

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

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

### V. OTHER ISSUES

#### A. Currency exchange rate

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

58. 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.<sup>11</sup> 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

59. In its decision 16 (S/AC.26/1992/16), the Governing Council specified that “[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.” For category “D” loss types other than individual business losses, “the date the loss occurred” under Governing Council decision 16 is a single fixed date, being 2 August 1990 (the date of Iraq’s invasion and occupation of Kuwait).<sup>12</sup> 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.<sup>13</sup>

C. Claims preparation costs

60. A number of category “D” claimants have made claims for claims preparation costs incurred by them, either in amounts specified on the claim form or in general terms. The Panel has been informed by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claims preparation costs in the future. Accordingly, the Panel makes no recommendation with respect thereto.

VI. RECOMMENDED AWARDS

61. Table 2 below lists the awards recommended by the Panel for each submitting entity with claimants included in part two of the twelfth instalment. Each submitting entity will be provided with a confidential list containing the individual recommendations made in respect of its claimants. With reference to paragraph 5 above, USD 2,174,379.83 is claimed by three claimants in respect of business losses that the claimants assert were suffered by Kuwaiti companies. The Panel has requested the Executive Secretary to sever the asserted company losses from the category “D” claims and to transfer such losses to the “E4” Panels of Commissioners pursuant to Governing Council decision 123. This results in a net total claimed amount of USD 458,310,336.04 for the 286 claims resolved in part two of the twelfth instalment. As will be seen from the table below, the Panel recommends a total of USD 116,576,394.47 against this net total claimed amount.

Table 2. Recommended awards by submitting entity

<u>Submitting entity</u>	<u>Number of claims recommended for payment</u>	<u>Number of claims not recommended for payment or withdrawn<sup>a</sup></u>	<u>Amount of compensation claimed (USD)</u>	<u>Net amount of compensation claimed (USD)<sup>b</sup></u>	<u>Amount of compensation recommended (USD)</u>
Canada	3	0	421,066.48	421,066.48	35,559.37
Croatia	1	0	2,967,474.05	2,967,474.05	501,842.55
Egypt	6	3	9,721,747.81	9,635,242.62	343,320.39
France	1	0	560,841.66	560,841.66	18,478.88
Germany	1	0	D1(MPA)	D1(MPA)	6,200.00
India	40	14 (1)	29,070,877.14 <sup>c</sup>	29,070,877.14	5,638,544.40
Jordan	28	4 (1)	55,905,842.93 <sup>d</sup>	53,817,968.29	8,600,630.07
Kuwait	152	1	150,325,350.59	150,325,350.59	97,389,011.24
Pakistan	7	0	2,322,855.99	2,322,855.99	833,681.30
Sudan	1	1	15,744,982.70	15,744,982.70	88,179.91
Syrian Arab Republic	11	1	3,675,539.16	3,675,539.16	1,578,085.69
Turkey	2	0	4,081,742.70	4,081,742.70	754,708.25
United Arab Emirates	0	1	104,027,083.63	104,027,083.63	nil
United States	2	0	681,733.68	681,733.68	438,533.26
Yemen	1	1	80,503,715.76	80,503,715.76	129,004.15
UNDP Kuwait	1	0	173,010.38	173,010.38	173,010.38
UNRWA Gaza	1	0	300,851.21	300,851.21	47,604.63
<u>Total</u>	258	26 (2)	460,484,715.87	458,310,336.04	116,576,394.47

<sup>a</sup> Numbers in parentheses represent claims that were withdrawn and are in addition to the claims not recommended for payment.

<sup>b</sup> This amount claimed is net of USD 2,174,379.83 for business losses allegedly suffered by Kuwaiti companies that will be transferred to the "E4" Panels for review pursuant to Governing Council decision 123.

<sup>c</sup> Excludes the "Amount claimed" with respect to the claim that was withdrawn.

<sup>d</sup> See note c above.

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

Geneva, 25 September 2002

(Signed) K. Hossain  
Chairman

(Signed) N. Comair-Obeid  
Commissioner

(Signed) I. Suzuki  
Commissioner

### Notes

<sup>1</sup> See “Report and recommendations made by the ‘D2’ Panel of Commissioners concerning part one of the twelfth instalment of individual claims for damages above USD 100,000 (category ‘D’ claims)”, S/AC.26/2002/10 (the “twelfth instalment part one ‘D’ report”), paragraph 2.

<sup>2</sup> See the twelfth instalment part one “D” report, paragraph 3.

<sup>3</sup> The claims selected by the Panel for transmission to Iraq satisfied the following criteria. The amount claimed exceeded USD 10 million and either the verification and quantification of the claim was deemed by the Panel to require more than 180 days, or the Panel determined that the views of Iraq would be of assistance to the Panel for the review of the claim. In addition, the Panel considered a claim for transmission to Iraq if Iraq was a party to a contract forming part of the subject matter of the claim, or if the situs of the alleged loss was in Iraq.

<sup>4</sup> Decision 15, paragraphs 5 and 10.

<sup>5</sup> Decision 7, paragraph 6 and decision 15, paragraph 6.

<sup>6</sup> Out of the total amount claimed of USD 16,599,671.28, USD 8,598,259.52 was claimed in respect of D4(PP) personal property losses and USD 8,001,411.76 was claimed in respect of D7 real property losses.

<sup>7</sup> Out of the total amount recommended of USD 8,512,780.54, USD 4,224,405.00 was recommended in respect of D4(PP) personal property losses and USD 4,288,375.54 was recommended in respect of D7 real property losses.

<sup>8</sup> This is a requirement under the D8/D9 methodology. See “Report and recommendations made by the Panel of Commissioners concerning the sixth instalment of individual claims for damages above USD 100,000 (category ‘D’ claims)”, S/AC.26/2000/24 (the “sixth instalment ‘D’ report”), paras. 127-128.

<sup>9</sup> See “Report and recommendations made by the Panel of Commissioners concerning the third instalment of ‘E2’ claims”, S/AC.26/1999/22, paragraph 77 (describing compensable areas and periods).

<sup>10</sup> See the sixth instalment “D” report, paragraph 127 (“a complete lack of information on either the revenues or the expenses of the business results in this element of the claim not being recommended for compensation”).

<sup>11</sup> See “Report and recommendations made by the Panel of Commissioners concerning part one of the first instalment of individual claims for damages above US\$100,000 (category ‘D’ claims)”, S/AC.26/1998/1, paragraphs 61-63.

<sup>12</sup> Ibid., paragraphs 64-65. The “D2” Panel adopted this decision in the sixth instalment “D” report at paragraph 226.

<sup>13</sup> This is consistent with the practice of other panels; see for example “Report and recommendations made by the Panel of Commissioners concerning the first instalment of ‘E4’ claims”, S/AC.26/1999/4, paragraph 230.