



Security Council

Distr.
GENERAL

S/AC.26/2003/7
26 June 2003

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

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

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Introduction

1. This is the eighth 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 fourteenth instalment, submitted to the Panel by the Executive Secretary of the Commission pursuant to article 32 of the Rules on 28 January 2002.
3. As set out in the report concerning part one of the fourteenth instalment, there were 600 claims in the fourteenth instalment at the time of its submission to the Panel.¹ Of that number, 306 claims were submitted to the Panel in part one, together with two additional claims from another instalment that were added to the fourteenth instalment as they were related to claims in part one.² A further 68 claims from the fourteenth instalment as it was originally comprised were moved forward and were reported in the “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) (S/AC.26/2003/1)”, as the claims were ready for reporting at the time of signature of that report.
4. Of the remaining 226 procedural order claims in the fourteenth instalment, 166 claims are submitted to the Panel in this report and 60 claims are deferred to later instalments because the Panel requires additional information from the claimants to resolve these claims. Of the 166 claims submitted to the Panel in this report, 15 claims are transferred from the fourteenth instalment by the Executive Secretary pursuant to article 32 of the Rules as they have been found to be “overlapping” or “stand alone” claims that will be processed in accordance with Governing Council decision 123 (S/AC.26/Dec.123(2001)). In addition, there are four claims where claimants have claimed for individual losses as well as business losses suffered by Kuwaiti companies. The Panel has made recommendations only with respect to the individual losses asserted in these claims. The Executive Secretary has severed and transferred the corporate losses to the “E4” Panels of Commissioners (the “E4’ Panels”) in accordance with Governing Council decision 123.
5. There are an additional 74 claims reported in part two of the fourteenth instalment. These comprise (a) claims from other instalments that had been deferred or that are related to claims originally included in the fourteenth instalment; and (b) claims from later instalments that have been moved forward as they were ready for reporting at the time of signature of this report.
6. As a result of these additions, deferrals and transfers, part two of the fourteenth instalment comprises 225 claims. The most common loss type appearing in part two of the fourteenth 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 fourteenth

instalment were submitted by the Governments of Kuwait, Jordan, the Syrian Arab Republic and Canada.

7. This report also contains the findings of the Panel regarding claims filed by non-Kuwaiti individuals on behalf of Kuwaiti corporate entities where the corporation had not filed a claim with the Commission (“stand alone claims”). On 15 March 2001, the Governing Council determined in decision 123 that claims filed by individuals in category “C” or category “D” for losses sustained by companies incorporated in Kuwait should be identified and transferred to the ‘E4’ Panels to be valued as overlapping claims, in cases where the Kuwaiti company has also filed a claim with the Commission, or as stand alone claims where no such corporate claim existed. In conjunction with the “D1” Panel, and in addition to its work on the fourteenth instalment, the Panel considered 132 category “C” or category “D” claims in relation to 110 companies to identify those stand alone claims that are to be transferred to the ‘E4’ Panels in accordance with decision 123. A summary of the “D” Panels’ work in respect of these stand alone claims is set out in this report.

8. 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 fourteenth 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>Total number of claims submitted to the Panel</u>	<u>Number of claims deferred from the instalment^a</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 procedural order claims resolved in a prior report</u>	<u>Total number of claims resolved by the Panel</u>
Austria	1	-	1	-	1	-	-	1
Bahrain	2	-	2	2	-	-	-	0
Canada	28	2	30	8	5	14	3	22
Iran	1	-	1	1	-	-	-	0
Egypt	-	6	6	-	-	6	-	6
India	-	2	2	-	-	2	-	2
Jordan	134	6	140	34	54	49	3	106
Kuwait	350(1) ^b	56	406(1)	17	224(1)	113	52	389(1)
Pakistan	1	1	2	-	1	1	-	2
Spain	1	-	1	-	-	1	-	1
Syrian Arab Republic	80	-	80	18	16	36	10	62
Tunisia	1	-	1	1	-	-	-	0
United States	-	3	3	-	-	3	-	3
<u>Total</u>	600	76	675(1)	81	301(1)	225	68	594(1)

^a This includes 21 claims transferred from the fourteenth instalment by the Executive Secretary pursuant to article 32 of the Rules as they have been found to be overlapping or stand alone claims that will be processed in accordance with Governing Council decision 123.

^b Numbers in parentheses represent claims that were withdrawn.

I. THE PROCEEDINGS

9. On 28 January 2002, the Panel issued Procedural Order No. 14, in which it gave notice of its intention to complete its review of the claims in the fourteenth instalment and to finalize its report and recommendations to the Governing Council in two parts, part one in July 2002 and part two in January 2003. The Panel signed its report and recommendations to the Governing Council in respect of part one on 26 July 2002. The Panel met regularly to consider the claims.

10. 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 three claims that the Panel transmitted to Iraq for comment.³

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

II. LEGAL FRAMEWORK

A. Applicable law

12. 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”.

13. 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

14. 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.”

15. 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.

16. 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”.⁴

17. 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

18. 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.

19. 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.

20. The Governing Council has confirmed that these guidelines are not intended to be exhaustive.⁵ 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

21. 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.

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

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

23. The Panel was called upon to address numerous factual, legal and valuation questions in the determination of the claims in part two of the fourteenth 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: two "unusually large or complex" claims for jewellery, carpets, silverware and lamps

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

25. In the first claim, the claimant asserted the loss of eight sets of jewellery, five sets of Persian carpets, Christofle silverware, Limoge dinner services, and two lamps (collectively, the "Valuation Items").

26. The eight sets of jewellery included various necklaces, bracelets, rings, earrings and other types of jewellery with pearls or precious stones such as diamonds, emeralds and rubies. Among these, the claimant seeks compensation for the loss of a diamond set comprising a necklace, earrings, ring and bracelet, which the claimant's husband told her was a Harry Winston set. The carpets included three sets of silk carpets, some of which had gold and silver thread, and two sets of wool and silk carpets. Some of the carpets were allegedly gifted by the former Shah of Iran. The dinner services included a large number of Christofle silverware and Limoge porcelain dinner services. Finally, the claimant asserted the loss of two lamps allegedly manufactured by Tiffany & Co., which were given to her as a wedding gift by a royal family member in 1964.

27. The claimant seeks compensation in a total amount of USD 13,099,456.75. Of that total amount claimed, the Valuation Items represent an amount of USD 11,923,134.95.⁶

28. In the second claim, the claimant asserted the loss of 76 items or sets of jewellery purchased from a renowned jeweller in Kuwait and from Asprey, David Morris, H. Stern and Tiffany & Co. (collectively, the "Valuation Items"). The Valuation Items included rings, earrings, necklaces and watches, with pearls and precious stones such as diamonds, sapphires, emeralds and rubies.

29. The claimant seeks compensation in a total amount of USD 12,764,958.48. Of that total amount claimed, the Valuation Items represent an amount of USD 6,993,359.86.⁷

30. The Panel issued a procedural order instructing the secretariat to submit the claim file for each of these claims to Iraq for comments. The Panel also 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, members of the secretariat and the expert consultants conducted on-site interviews with the two claimants during the course of a technical mission to Kuwait. The Panel reviewed the two claims at several of its meetings, with the expert consultants in attendance at some of the meetings. The Panel, in arriving at its recommendations, duly considered the comments received from Iraq.

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

1. Ownership

32. The claimant in the first claim documented her ownership of the eight sets of jewellery by providing photographic evidence of her wearing the jewellery over the years. The claimant also provided reconstructed, post-invasion invoices from a jeweller documenting two sets of jewellery and reconstructed post-invasion invoices and a post-invasion statement from a different jeweller regarding the remaining six sets of jewellery.

33. In regard to the two jewellery sets, the Panel found no inconsistencies in the evidence and relied on the reconstructed invoices and the photographic evidence submitted to establish the claimant's ownership of the jewellery items.

34. The remaining six jewellery sets were supported by a statement and invoices from a jeweller whose services the claimant had used to repair and value her jewellery. As the Panel had questions regarding this evidence, the Panel conducted a telephone interview with the jeweller. The jeweller informed the Panel that the reconstructed invoices were not based on his own recollection or records, as he did not sell these items to the claimant, but rather were provided at the claimant's request and were based on the claimant's own recollection of past purchases as stated to the jeweller. Based on this information, the Panel decides not to rely on this evidence. Instead, the Panel relies on the photographic and other evidence submitted in respect of five of the jewellery sets to establish ownership of the items.

35. In regard to the sixth jewellery set consisting of a Harry Winston diamond necklace, earrings, ring and bracelet, the Panel decides that ownership of this set could not be established through the invoice or photographic evidence provided. The Panel notes that in the original claim, this set was identified as a diamond and ruby set, not as a Harry Winston all diamond set, the invoice provided in support of this item consisted of a post-invasion, reconstructed invoice for a diamond and emerald set, and the photograph provided in support of the item was of the claimant wearing a coral set.

36. In response to claim development pursuant to article 34 of the Rules, the claimant asserted that a mistake had been made in the preparation of her original claim and that the item for which she should have claimed was an all diamond Harry Winston set. The claimant stated that her husband had given the set to her in 1971 and she provided photographs of her wearing a diamond set on various occasions.

37. The Panel noted that no mention was made in the claimant's original timely-filed claim of a jewellery set with such significant economic value. As a result of this omission, together with inconsistencies in the evidence, the Panel finds that the claimant has not established ownership, loss and causation with respect to this Valuation Item and recommends an award of no compensation in regard to this Valuation Item with a claimed value of USD 2,037,252.

38. In respect of the carpets, the claimant provided copies of original, pre-invasion invoices for the carpets that had been purchased. As for the carpets that had been gifted, the claimant submitted a post-invasion statement from a carpet vendor who had been a regular provider of carpets to the claimant and who had valued the gifted carpets before the invasion at the claimant's request. The statement gave a detailed description of each gifted carpet, along with an individual estimate of their 1989 value. The Panel, having reviewed the evidence provided by the claimant in respect of her carpet sets, determines that the claimant has established her ownership of the claimed carpet sets.

39. The silverware and dinner services were supported by a post-invasion statement from the supplier that gave an estimate of the amounts spent by the claimant over the years as well as a general description of the items. The claimant also provided various porcelain fragments from the lost dinner services, some of which bore the manufacturer's stamp. The Panel, having reviewed the evidence in respect of the silverware and dinner services, determines that the claimant has established her ownership of the silverware and dinner services.

40. To document her ownership of the two lamps, the claimant submitted a detailed description of the lamps and her son attested as to the existence of the lamps during the mission interview. The claimant stated that she believed that the lamps were manufactured by Tiffany & Co. but had no independent evidence of that fact as the items were a gift. The only evidence submitted by the claimant to substantiate the alleged maker of the lamps was a photograph of a Tiffany lamp from a magazine that the claimant asserted resembled the two claimed lamps. The Panel, having reviewed the evidence, determines that the claimant has established ownership of two lamps but has not established that the lamps were genuine Tiffany & Co. lamps. The Panel recommends compensation for lower value Tiffany-style lamps.

41. The claimant in the second claim documented his ownership of the Asprey and David Morris jewellery items by providing detailed statements from each supplier describing the items and confirming purchase dates and prices for all of the items, as well as copies of original, pre-invasion purchase records for the majority of the jewellery items. The H. Stern purchases were supported by a statement from the supplier confirming the amount of jewellery purchased by the claimant in January 1989. The claimant also submitted documentary proof of the amount paid to H. Stern, including a copy of the cheque. The jewellery purchased from the Kuwaiti jeweller was supported by a statement from the supplier, which described in detail each of the claimed jewellery items. In addition, the Panel interviewed the supplier by telephone. In respect of all of these Valuation Items, the Panel determines that the claimant has established his ownership of the claimed items.

42. In respect of the jewellery allegedly purchased from Tiffany & Co., the claimant submitted a copy of a cheque to Tiffany & Co. in the amount claimed for the diamond watch. The Panel determines that this evidence is sufficient to establish ownership in respect of the diamond watch.

43. In respect of the remaining jewellery allegedly purchased from Tiffany & Co., the claimant was not able to provide invoices or a cheque documenting the purchases but was only able to provide correspondence between him and Tiffany & Co. and to his bank in New York concerning a cheque which the claimant alleged was used to pay Tiffany & Co. for the rest of the jewellery in 1979. In addition, the claimant submitted a copy of an internal ledger that purportedly records the alleged payment. The Panel took notice of the fact that Tiffany & Co., despite stating that it had records in microfiche for the time period in question, could find no records of the claimed purchases. The Panel also considered it relevant that the claimant did not submit any response from his bank in New York concerning his requests for information. In summary, although the claimant provided the supplier and his bank with various details concerning the alleged payment to Tiffany & Co. for jewellery purchases in 1979, neither the supplier nor the claimant's bank was able to provide evidence of the claimed purchases. The Panel therefore determines that the claimant has not established ownership of these jewellery items totalling USD 376,917.

2. Loss and causation

44. In its comments concerning both claims, Iraq asserts that the claimants failed to prove that their losses were 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 each claimant supported the losses asserted by submitting witness statements and other documentary evidence. In the first claim, the claimant stated that Iraqi soldiers beat the guards stationed at his home and that the guards witnessed the destruction and looting of his home, including the fact that the safes had been emptied by the Iraqi soldiers. In the second claim, the claimant's servants witnessed Iraqi soldiers removing virtually all of the claimant's personal belongings, including the safes containing the jewellery.

45. Except for the Valuation Items that failed the ownership test, the Panel is satisfied that all the Valuation Items were lost as a direct result of Iraq's invasion and occupation of Kuwait.

3. Valuation

46. 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, and based on the Panel's review of the evidence provided by each claimant, the Panel recommends an award in the amount of USD 3,166,635⁸ in respect of the Valuation Items claimed in the first claim, and an award of USD 1,773,980⁹ in respect of the Valuation Items claimed in the second claim.

B. D4(PP) personal property losses: one "unusually large or complex" claim for a painting

47. The Panel also reviewed a claim in which the claimant asserted the loss of one painting by Salvador Dali in the amount of USD 5 million. Due to the item's unique nature and high value, the Panel classified this claim as "unusually large or complex" within the meaning of article 38 of the Rules. The claim was developed pursuant to article 34 of the Rules, with the assistance of the expert consultants in respect of the painting, and the claimant was interviewed by members of the secretariat and the expert consultants during a technical mission to Kuwait, where the claimant still resides. The claim file was not sent to Iraq, as the claim did not fall within the Panel's criteria for transmission of claim files to Iraq.¹⁰

48. The claimant is an executive of a Kuwaiti company. According to the claimant, the painting was given to him as a gift by a client of his employer about 20 years before Iraq's invasion and occupation of Kuwait. The person who gave him the painting said that it was one of two paintings that he had, and that it was by a popular artist. The painting was given to the claimant rolled up and it remained rolled up in storage until the claimant read an article about Salvador Dali in a magazine and realised that the painting was valuable. The painting was taken out from storage, framed and hung in his home. The claimant never had the painting appraised or insured nor did he take any steps to confirm the authenticity or attribution of the painting. The claimant stated that the painting measured approximately 2.5 by 1 feet, that it was signed either "S. Dali" or "Salvador Dali" and that the title "Venice" appeared somewhere in the painting. During Iraq's invasion and occupation of Kuwait, his home was ransacked and the painting, along with other items of personal property, was looted.

49. In support of the claim for the painting, the claimant submitted photographic evidence of the painting as it hung in the claimant's home before Iraq's invasion and occupation of Kuwait. The expert consultants who reviewed the claim found no record in the literature regarding Salvador Dali of a painting of that title nor of a painting of that subject matter, and the expert consultants opined that the painting as evidenced by the claimant's photograph was of a style that could not be attributed to Salvador Dali.

50. The Panel, based on the quality of the evidence provided by the claimant and the opinion of the expert consultants, determines that the claimant has not established ownership of a painting by Salvador Dali and recommends an award of no compensation in regard to this Valuation Item with a claimed value of USD 5,000,000.

C. D8/D9 individual business losses: goodwill

51. The Panel reviewed several claims alleging loss of business goodwill as a result of Iraq's invasion and occupation of Kuwait. For example, the Panel reviewed a claim for business losses from a car repair and steel works business. In addition to other losses, the claimant asserted a loss of goodwill in the amount of 35,000 Kuwaiti dinars (KWD). The claimant stated that he initially paid KWD 4,000 for the business and that thereafter the business prospered and the value of the goodwill increased. In support of the value of the goodwill at 2 August 1990, the claimant provided a certificate from a real estate agent which specifies the address and area of the business and then states: "After conducting research and investigation, we have found out that the estimated value there, prior to 1990, is equal to KWD35,000."

52. The Panel referred to the requirements contained in the report concerning the sixth instalment of category "D" claims¹¹ in relation to the compensability of claims for goodwill and key money losses. The claimant is required to demonstrate that the claim is not "unduly speculative" by producing "verifiable evidence of value" of the goodwill or key money at the date of Iraq's invasion and occupation of Kuwait. The Panel also considered the findings concerning the valuation of key money and goodwill obtained on a recent technical mission to Kuwait.

53. The Panel decides that the real estate agent's estimate is too vague to be considered verifiable evidence of the value of the goodwill loss. The agent did not provide evidence of his qualifications and experience as a valuer nor did he provide sufficient detail to explain the basis for the estimate. Accordingly, the Panel finds that the claim for appreciation of goodwill is unduly speculative and that the claim should be valued on the basis of the original cost of the goodwill.

D. D8/D9 individual business losses: stock

54. The Panel reviewed a claim for losses in connection with a gold and jewellery business in Kuwait. In addition to other losses, the claimant seeks compensation for the reduction in value of 40 kilograms of gold jewellery that allegedly resulted from Iraq's invasion and occupation of Kuwait. The claimant explained that in an attempt to mitigate his business losses, he melted his stock into gold bars, painted them, hid them in the air-conditioning unit of his vehicle and fled Kuwait in this vehicle.

He stated that while Iraqi soldiers at the border confiscated his wife's jewellery, the gold bars were not discovered. In support of his loss, the claimant submitted an insurance policy for the period from October 1989 to October 1990, for "gold and golden jewellery". The claimant calculated the value of his loss at 25 per cent of the value of the stock prior to melting.

55. The Panel notes the general duty of claimants to take reasonable steps, where feasible, to mitigate their losses and to Panel decisions that certain costs associated with such mitigation efforts are compensable in principle if they are appropriate in nature.¹² The Panel finds that the claimant undertook reasonable efforts to evacuate the goods in order to minimize the losses of his business. The Panel notes that looting and robbery were common and widespread during Iraq's invasion and occupation of Kuwait and that the claimant's concern that the stock would be looted was well-founded. The Panel also notes that the confiscation of valuables at borders was prevalent during the invasion and occupation of Kuwait, and finds that the claimant's action in disguising and hiding his stock in his car was appropriate. As the claimant's efforts arguably prevented a total loss of stock, and since such measures were appropriate and reasonable, the Panel finds that the loss associated with the mitigation efforts is compensable. The Panel decides that the valuation proposed by the claimant is appropriate, except that an adjustment will be applied to account for the profit margin included in the claimant's valuation of his stock.

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

56. Part two of the fourteenth 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.

57. 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 certain 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.

58. For example, the Panel reviewed competing claims for a pharmacy filed by a Kuwaiti category "D" claimant and a non-Kuwaiti category "C" claimant. The Kuwaiti claimant filed a claim for 100 per cent of the losses of the business and provided a business licence, a pharmacy licence, pre-invasion audited financial statements and stock sales and purchase invoices for 1990 in support of the claim. The non-Kuwaiti claimant alleged that he purchased the business in 1988 from the Kuwaiti claimant's son and claimed for the purchase price. In support of his claim, he provided a statement from the Kuwaiti claimant's son dated 1988 stating that the stock in the pharmacy belonged to the non-Kuwaiti claimant. The non-Kuwaiti claimant has already received a category "C" award for losses from this business.

59. In an interview during a technical mission to Kuwait, the son of the Kuwaiti claimant stated that the non-Kuwaiti claimant had been renting the business licence from 1986 for a monthly fee and that he owned all of the medicine in the pharmacy at that time. He denied, however, that the non-Kuwaiti claimant ever purchased the pharmacy. He stated that in 1988 the arrangement with the non-Kuwaiti claimant was terminated on terms specified in a discharge agreement, which he submitted as evidence. He stated that the pharmacy thereafter employed a new pharmacist. The Kuwaiti claimant's son provided additional evidence in support of his mother's ownership of the pharmacy at 2 August 1990 including declarations signed by the non-Kuwaiti claimant confirming that the non-Kuwaiti claimant's relationship with the pharmacy terminated in 1988. He also provided Ministry of Health documents confirming the employment of the new pharmacist from 1988 until the date of Iraq's invasion and occupation of Kuwait. The non-Kuwaiti claimant subsequently responded to an inquiry sent by the Commission and stated that his category "C" claim may have been filed in error.

60. The Panel finds that the evidence as a whole establishes the Kuwaiti claimant's ownership of the business at 2 August 1990. The Panel therefore recommends that the Kuwaiti claimant be compensated for the losses sustained by the business.

61. The Panel notes that its purpose in requesting additional information from claimants with previously awarded category "C" claims is to gather additional evidence to assist the Panel in its determination of a category "D" claimant's entitlement to claim for losses that are currently before the Panel. In many cases, as a result of information provided by category "C" claimants, a recommendation as to an award in relation to a category "D" claim for business losses is reduced or awarded no compensation based on the Panel's finding that the category "C" claimant was the owner of the business. In this case, however, the Panel found that the category "D" claimant was the owner of the business at issue. The Panel notes that the category "C" Panel of Commissioners, on the basis of the evidentiary standard applicable to category "C" claims, made a recommendation of an award of compensation to the non-Kuwaiti claimant in respect of his category "C" claim which was subsequently approved by the Governing Council and paid to the category "C" claimant. As the award to the category "C" claimant amounts to a material duplication of some of the losses for which compensation is recommended in category "D", the Panel recommends that this issue be brought to the attention of the Governing Council.¹³

62. The Panel also reviewed competing claims for the same trading and contracting establishment filed by a Kuwaiti category "D" claimant and two non-Kuwaiti category "C" claimants. The Kuwaiti claimant asserted 100 per cent ownership of the business and claimed for 100 per cent of the business losses. Category "C" claims were filed by a non-Kuwaiti and his son in relation to the marble and decoration department of the business. The son claimed that he owned 12.5 per cent of this department pursuant to a partnership agreement entered into with the Kuwaiti claimant and others. The father asserted that he had made capital contributions to the marble and decoration department for which he claimed compensation. Both category "C" claimants received awards from the Commission.

63. In an interview during a technical mission to Kuwait, the Kuwaiti claimant explained that the contracting division of the business, including a marble and decoration department, commenced

during the 1980s and became an important part of the business in 1987-1988. When presented with the partnership agreement provided by the non-Kuwaiti claimant, the Kuwaiti claimant stated that in 1989 the business obtained a major contract to provide marble to the Amiri Diwan project and that he wished to increase the capital of the contracting division of the business and take on new partners. The agreement provides that the claimant would contribute KWD 10,000 and the other partners KWD 90,000 between them, thereby increasing the capital by KWD 100,000. The claimant stated that there was disagreement amongst the partners soon after signing and the contract was cancelled without any money ever changing hands. The audited financial statements provided by the claimant show a KWD 100,000 capital increase between 1988 and 1989. When questioned on this issue, the claimant stated that he provided all of the money himself but was not able to provide any evidence to substantiate this assertion.

64. The Panel finds that the Kuwaiti claimant has not established that he was entitled to claim for 100 per cent of the business losses given the existence of the 1989 partnership agreement and the corresponding capital increase in the same year shown in the financial statements. The Panel decides to award the Kuwaiti claimant 10 per cent of the losses of the marble and decoration department of the business and 100 per cent of the losses of the other departments of the business.

F. Stand alone claims

65. The Governing Council determined in decision 123 that stand alone claims are not properly filed in category "C" or category "D" and directed the Commission to identify and transfer such claims to the 'E4' Panels for review as Kuwaiti corporate claims. However, pursuant to the terms of decision 123, each claimant who has filed a stand alone claim must first demonstrate that he or she had the authority to act on behalf of the company before the claim is transferred by the "D" Panels to the "E4" Panels for review. If the claimant fails to demonstrate that he or she had authority to act on behalf of the company, the stand alone claim is not reviewed by the "E4" Panels. At a joint meeting held in May 2001, the "D" Panels developed an "authority to act" test pursuant to which a claimant is deemed to have authority to file the claim on behalf of the company where the claimant demonstrates that he or she had authority to manage the business on a day-to-day basis or had ownership of the company's assets. In January 2002, the "D" Panels met jointly to review an initial group of stand alone claims. The "D" Panels determined that these stand alone claims passed the "authority to act" test because the claimants had produced a range of evidence demonstrating their ownership and/or management of the company including proof that they held a legal shareholding in the company.

66. In May 2002 the "D" Panels met and determined that if two individuals had made claims in relation to the same company and one of those claimants had passed the "authority to act" test, all of the claims could proceed to the "E4" Panels for review.

67. In respect of the 132 stand alone claims in relation to 110 companies that have been transferred to the "E4" Panels for review, the "D" Panels have jointly determined that all of the claimants have satisfied the authority to act test. The "E4" Panels will review these stand alone claims and make recommendations in respect of these claims during the course of the twenty-third (A) instalment of category "E4" claims.

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

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

IV. OTHER ISSUES

A. Currency exchange rate

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

70. 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.¹⁴ 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

71. 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).¹⁵ 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.¹⁶

C. Claims preparation costs

72. 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.

D. Valuable tangible property stolen or looted during Iraq's invasion and occupation of Kuwait that may be subsequently located

73. The Panel draws to the attention of the Governing Council an issue which may arise in a case when a claimant has been awarded or recommended compensation in respect of valuable tangible property that was allegedly stolen or looted during Iraq's invasion and occupation of Kuwait by officials, employees or agents of Iraq or its controlled entities and such property is subsequently located in Iraq or elsewhere in the hands of any person. It is proposed that this issue could be addressed in the following manner.

74. First, where the claimant becomes aware that such property has been located, or where such property comes to be within the possession of the claimant, the claimant shall promptly report this to the secretariat of the Commission.

75. Second, the secretariat of the Commission, when it receives such a report or otherwise learns that such property has been located or has come within the possession of the claimant, will report this matter to the Governing Council, as well as to the Panel which resolved the claim, or where the Panel is no longer in existence, to the Governing Council directly.

76. Third, appropriate action will be taken by the secretariat of the Commission for recovery of such property and/or its restitution, upon such terms as the Governing Council may direct.

77. The receipt of compensation in respect of such property will ipso facto bind the claimant to comply with the reporting obligation and to comply with any Governing Council direction issued under the provisions set forth above.

V. RECOMMENDED AWARDS

78. Table 2 below lists the awards recommended by the Panel for each submitting entity with claimants included in part two of the fourteenth 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 2,798,855.28 is claimed by four claimants in respect of business losses that the claimants assert were suffered by Kuwaiti companies. The Executive Secretary has severed and transferred the corporate losses to the "E4" Panels in accordance with Governing Council decision 123. This results in a net total claimed amount of USD 208,088,037.22 for the 225 claims resolved in part two of the fourteenth instalment. As will be seen from the table below, the Panel recommends a total of USD 94,701,734.25 against this net total claimed amount.

Table 2. Recommended awards by submitting entity

<u>Submitting entity</u>	<u>Number of claims recommended for payment</u>	<u>Number of claims not recommended for payment</u>	<u>Amount of compensation claimed (USD)</u>	<u>Net amount of compensation claimed (USD)</u> ^a	<u>Amount of compensation recommended (USD)</u>
Canada	12	2	11,136,557.97	10,341,557.97	3,002,602.97
Egypt	2	4	3,277,938.10	3,277,938.10	227,250.33
India	2	-	6,427,957.93	6,427,957.93	455,674.31
Jordan	45	4	47,982,488.13	46,628,816.85	13,634,427.33
Kuwait	113	-	119,983,615.14	119,983,615.14	71,234,123.27
Pakistan	1	-	2,188,600.00	2,188,600.00	851,549.30
Spain	1	-	279,366.37	279,366.37	78,050.86
Syrian Arab Republic	35	1	18,196,440.61	17,546,256.61	5,149,582.16
United States	2	1	1,413,928.25	1,413,928.25	68,473.72
<u>Total</u>	213	12	210,886,892.50	208,088,037.22	94,701,734.25

^a This amount claimed is net of USD 2,798,855.28 for business losses allegedly suffered by Kuwaiti companies that will be transferred to the "E4" Panels for review pursuant to Governing Council decision 123.

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

Geneva, 31 January 2003

(Signed) K. Hossain
Chairman

(Signed) N. Comair-Obeid
Commissioner

(Signed) I. Suzuki
Commissioner

Notes

¹ See “Report and recommendations made by the ‘D2’ Panel of Commissioners concerning part one of the fourteenth instalment of individual claims for damages above USD 100,000 (category ‘D’ claims)”, S/AC.26/2002/21 (the “fourteenth instalment part one ‘D’ report”), paragraph 2.

² Ibid.

³ 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 may 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.

⁴ Decision 15, paragraphs 5 and 10.

⁵ Decision 7, paragraph 6 and decision 15, paragraph 6.

⁶ Out of the total amount claimed of USD 13,099,456.75, USD 12,339,595.16 was claimed in respect of D4(PP) personal property losses and USD 759,861.59 was claimed in respect of D7 real property losses.

⁷ Out of the total amount claimed of USD 12,764,958.48, USD 12,244,370.24 was claimed in respect of D4(PP) personal property losses, USD 122,664.36 was claimed in respect of motor vehicles, and USD 397,923.88 was claimed in respect of D7 real property losses.

⁸ Out of the total amount recommended of USD 4,049,292.72, USD 3,383,577.98 was recommended in respect of D4(PP) personal property losses and USD 665,714.74 was recommended in respect of D7 real property losses.

⁹ Out of the total amount recommended of USD 6,583,710.59, USD 6,158,256.10 was recommended in respect of D4(PP) personal property losses, USD 77,271.10 was recommended in respect of D4 motor vehicles, and USD 348,183.39 was recommended in respect of D7 real property losses.

¹⁰ See note 3 above.

¹¹ See “Report and recommendations made by the ‘D2’ 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”), paragraph 198.

¹² See for example “Report and recommendations made by the ‘F’ Panel of Commissioners concerning part one of the first instalment of claims by Governments and International Organisations”, S/AC.26/1997/6, paragraph 79.

¹³ A similar issue arises in another claim in part two of this instalment. In this claim, the claimant is a non-Kuwaiti and the claim concerns losses of a clothing store. The Panel became aware of a competing claim in category “C” by another non-Kuwaiti claimant for which compensation was awarded. The category “D” claimant submitted evidence establishing his rental of the business licence from a Kuwaiti licence holder, copies of leases for the business premises and other evidence establishing his ownership of the business at 2 August 1990. The only evidence provided to support the category “C” claim for business losses was a list of stock items written on the letterhead of the

business that made no reference to the category “C” claimant. Two notes verbale were sent to the category “C” claimant notifying that claimant of the competing claim and requesting information and evidence to support his ownership of the clothing store. The category “C” claimant did not respond. The Panel finds that the category “D” claimant has proven ownership of the business and recommends compensation accordingly. The Panel notes that the award paid to the category “C” claimant amounts to a material duplication of some of the losses for which compensation is recommended in category “D”. Accordingly, this claim should also be brought to the attention of the Governing Council.

¹⁴ See “Report and recommendations made by the Panel of Commissioners concerning part one of the first instalment of individual claims for damages above USD 100,000 (category ‘D’ claims)”, S/AC.26/1998/1, paragraphs 61-63.

¹⁵ Ibid., paragraphs 64-65. The “D2” Panel adopted this decision in the sixth instalment ‘D’ report at paragraph 226.

¹⁶ 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.
