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## The Intersection of International Accounting Practices and International Law: The Review of Kuwaiti Corporate Claims at the United Nations Compensation Commission

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# THE INTERSECTION OF INTERNATIONAL ACCOUNTING PRACTICES AND INTERNATIONAL LAW: THE REVIEW OF KUWAITI CORPORATE CLAIMS AT THE UNITED NATIONS COMPENSATION COMMISSION

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## INTRODUCTION

On August 2, 1990, Iraq invaded Kuwait. Saddam Hussein's occupation of Kuwait lasted seven months. The allied air campaign against Iraq began on January 16, 1991, and continued for thirty-eight days. The ground operation ended in 100 hours with the surrender of Iraq. In stark contrast to the brevity with which the allies liberated Kuwait, the process of compensating the victims for their losses continues today, one decade later.<sup>1</sup> This demonstrates the difficult reality that the speed with which a showroom can be looted and accounting records burned far exceeds the time needed to prepare a claim for review and recommend a fair award for those losses.

In 1991, the United Nations ("UN") established the United Nations Compensation Commission ("UNCC") as a subsidiary organ of the UN Security Council to process and pay claims resulting from the Gulf War.<sup>2</sup> With the passage on April 3, 1991 of the Gulf War Cease-fire Resolution ("Cease-fire Resolution," or "Resolution 687"), the UN Security Council welcomed "the restoration to Kuwait of its sovereignty, independence, and territorial integrity."<sup>3</sup> Paragraph 16 of the Cease-fire Resolution reaffirmed that "Iraq . . . is liable under international law for any direct loss, damage, including environ-

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1. See Press Release, United Nations Compensation Commission, Ninth Special Session, PR/2001/02 (Feb. 15, 2001), at [http://www.unog.ch/uncc/pressrel/pr\\_9sp.pdf](http://www.unog.ch/uncc/pressrel/pr_9sp.pdf) (noting that, of the 2.6 million claims filed for losses arising directly from Iraq's invasion and occupation of Kuwait, 12,000 claims seeking approximately \$233 billion dollars in compensation have yet to be reviewed). By January 2001, over 2.59 million claims were resolved with over \$32.2 billion awarded as compensation to more than 1.5 million claimants. *Id.*

2. See S.C. Res. 692, U.N. SCOR, 46th Sess., 2987th mtg., U.N. Doc. S/RES/692 (1991) (requiring the UNCC to carry out its objectives expeditiously and to report its progress to the Security Council).

3. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991), *reprinted in* 30 ILM 847, 852 (1991).

mental damage and the depletion of natural resources, or injury to foreign Governments, nationals, or corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."<sup>4</sup>

Paragraph 18 of the Cease-fire Resolution established a Commission to administer the compensation fund.<sup>5</sup> Yet, even prior to Resolution 687, the Security Council stated, in paragraph 8 of Resolution 674, that "under international law [Iraq] is liable for any loss, damage or injury arising . . . as a result of the invasion and illegal occupation of Kuwait by Iraq."<sup>6</sup> Furthermore, with the adoption of Resolution 692, the UNCC was established at the UN's European headquarters in Geneva, Switzerland.<sup>7</sup> Given that the UNCC first processed individual claims, the processing of corporate claims did not start until 1997. At that time, Jean-Claude Aimé, the head of the UNCC, stated that "[t]his is the first time as far as I know that the UN is engaged in retrieving lost corporate assets and profits."<sup>8</sup> In order to ensure that the war's victims were compensated as expeditiously as possible, the UNCC established a five-year work program

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4. *Id.* para. 16.

5. See *id.* para. 18 (announcing that this fund will address all the debts and obligations resulting from the unlawful invasion of Kuwait).

6. S.C. Res. 674, U.N. SCOR, 45th Sess., 2951st mtg., U.N. Doc. S/RES/674 (1990) (condemning Iraqi actions and reaffirming that Iraq violated the Fourth Geneva Convention). See generally Richard B. Lillich & Charles N. Brower, *Opinion Regarding the Jurisdiction and Powers of the United Nations Compensation Commission February 10, 1992*, 38 VA. J. INT'L L. 25 (1997) [hereinafter Lillich & Brower] (discussing the history of Resolution 687).

7. See Robert C. O'Brien, *The Challenge of Verifying Corporate and Government Claims at the United Nations Compensation Commission*, 31 CORNELL INT'L L. J. 1, 6 (1998) (noting that the UNCC is comprised of the Secretariat, Commissioners, and the Governing Council).

8. Neil King Jr., *Battle Plan: Firms World-Wide Seek Billions to Cover Their Gulf War Losses*, WALL ST. J., Aug. 18, 1997, at A1 (quoting Jean-Claude Aimé, former Executive-Secretary of the UNCC, who described the task of compensating corporate claims as daunting).

that commenced in 1998<sup>9</sup> and called for the complete review of all remaining claims by 2003.<sup>10</sup>

Several commentators have already addressed other aspects of the UNCC, including its history, its basis in international law, and the resolution of war claims.<sup>11</sup> This Article examines the synthesis of in-

9. See *UNCC Adopts Ambitious Work Program*, 12 MEALEY'S INT'L ARB. REP. 10 (1997) (calling for increased efforts to finish category "D," "E," and "F," and the grouping of similar category "E" and "F" claims); see also discussion *infra* Part I.A (describing the principal business claimants before the UNCC).

10. See John Zarocostas, *U.N. Panel to Speed Gulf War Claims*, NAT'L L. J., Oct. 20, 1997, at A18 (responding to pressure from the United States and other governments).

11. See, e.g., John P. Gaffney, *Precedent in the United Nations Compensation Commission*, 14 MEALEY'S INT'L ARB. REP. 1, 12 (1999) (evaluating whether UNCC decisions should be considered precedent for UNCC panels in subsequent cases); Veijo Heiskanen and Robert O'Brien, *UN Compensation Commission Panel Sets Precedents on Government Claims*, 92 AM. J. INT'L L. 339 (1998) (describing the relevant law, pleadings, and evidentiary standards governing government claims); Michael E. Schneider, *How Fair is the United Nations Compensation Commission System?*, 15 J. INT'L ARB. 15 (1998) (outlining the inequities in the system that prevented Iraq from defending itself, denied Iraq standing, and permitted undisclosed evidence to be used against it); Nicolas C. Ulmer, *Claimant's Expectations from the United Nations Compensation Commission*, 15 J. INT'L ARB. 7 (1998) (distinguishing the difference in expectations of large and small claimants); THE UNITED NATIONS COMPENSATION COMMISSION [THIRTEENTH SOKOL COLLOQUIUM] (Richard B. Lillich ed., 1995) [hereinafter 13th SOKOL] (collecting several articles on the UNCC) (on file with the *American University International Law Review*); Lillich & Brower, *supra* note 6, at 25 (summarizing the UN decision establishing the UNCC and assessing the Commission's power under the UN charter); David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 J. INT'L L. & POL. 1 (1994) (evaluating the UNCC's quasi-adjudicative functions and its viability as a compensatory system); Bernard Graefrath, *Iraqi Reparations and the Security Council*, 55 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKRECHT 1, 12 (1995) (discussing the Security Council's use of reparations against Iraq); W. Michael Reisman, Note, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993) (expressing concern that recent UN actions indicate it is seizing more power than its Charter authorizes); John R. Crook, *The United Nations Compensation Commission – A New Structure to Enforce State Responsibility*, 87 AM. J. INT'L L. 144 (1993) (addressing the UNCC structure, procedures for bringing a claim, and the type of claims); THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW (Peter Rowe ed., 1993) (providing a comprehensive analysis of the Gulf War and its effects); Carmel Whelton, *The United Nations Compensation Commission and International Claims Law: A Fresh Approach*, 25 REVUE DE DROIT D'OTTAWA 607, 627 (1993) (comparing the UNCC approach to compensation with International and Canadian claim practice); Elyse

ternational accounting principles and the application of international law to verify, value, and compensate Kuwaiti corporate claims ("E4' claims") at the UNCC. In particular, it considers the rationale and approach taken by the "E4" Panels of Commissioners ("Panels" or "E4' Panels") in establishing a methodology to evaluate the losses suffered by non-governmental Kuwaiti business entities as a result of Iraq's invasion and occupation of Kuwait.

Section I of this Article reviews the work of the UNCC secretariat, which was established to aid the Panels in their evaluation of claims.<sup>12</sup> It discusses the framework by which lawyers, accountants, and other secretariat support staff performed the initial examination of the claims. This section also describes the life cycle of a typical claim, from the receipt of the claim to the award of compensation.

Before devising the system for reviewing the claims, the Panels had to establish the goals or objectives of the methodology. Section II describes the development of the methodology for evaluating the E4 claims. This portion of the Article also explains the competing interests that formed the methodology's basis.

Section III describes the E4 methodology itself. It explains how the Panels treat each type of loss when reviewing an E4 claim. Different types of evidence accompany different types of corporate losses, such as, the loss of tangible property versus the loss of profits. Different losses also raise different valuation and jurisdictional con-

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J. Garmise, *The Iraqi Claims Process and the Ghost of Versailles*, 67 N.Y.U. L. REV. 840 (1992) (recommending that the Iraqi claims be restructured so that Iraq has a greater incentive to pay damages); Bernard Graefrath and Manfred Mohr, *Legal Consequences of an Act of Aggression: The Case of the Iraqi Invasion and Occupation of Kuwait*, 43 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT UND VÖLKERRECHT 109 (1992) (taking a historical approach to methods of addressing war claims); Sompong Suchartikul, *The Process of Peace-Making following Operation 'Desert Storm'*, 43 ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT UND VÖLKERRECHT 1 (1992) (discussing the history of the United Nations and the role of the UNCC in maintaining peace and security).

12. See generally *Provisional Rules for Claims Procedure*, UNCC Governing Council Records (GCR), 6th Sess., 27th Mtg., U.N. Doc. S/AC.26/1992/10 (1992) [hereinafter *UNCC Rules*] (approving the UNCC's *Provisional Rules for Claims Procedure*); *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687*, U.N. Doc. S/22559 (1991), reprinted in 13th SOKOL, *supra* note 11, at 385-89 (describing the role of the secretariat and its relationship to the Governing Council).

cerns.<sup>13</sup> Although unique claims require unique resolutions, this section explains the system that was developed to resolve the majority of Kuwaiti corporate claims.<sup>14</sup>

This Article is intended to serve not only as an explanation of how claims are being resolved by the UNCC, but also why those decisions are made. Should some future conflict call for the resolution of corporate claims, this Article's encapsulation of the principal approaches taken by the "E4" Panels to resolve the claims may prove beneficial. In other words, understanding the basics of the "E4" methodology may allow a future commission or claims assessment agency to develop this model further by adapting it to the procedural rules under which it will operate and to the types of evidence its claimants are able to provide.

## I. OVERVIEW OF THE CATEGORY "E" CLAIMS

### A. BREAKDOWN OF THE BUSINESS CLAIMS

Individuals, governments, and businesses are the three main types of claimants before the UNCC.<sup>15</sup> Business entities with a separate legal identity—mainly corporations and partnerships—are termed

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13. See *Report of the Commission to the General Assembly on the Work of its Fortieth Session*, U.N. Int'l L. Comm'n ("ILCR"), 40th Sess., U.N. Doc. A/CN.4/SER.A/1988/Add.1 (Pt. 2) (1988); *Report of the Commission to the General Assembly on the Work of its Forty-fifth Session*, UN ILCR, 40th Sess., U.N. Doc. A/CN.4/SER.A/1993/Add. 1 (Pt. 2) (1993), reprinted in [1993] 2 Y.B. Int'l L. Comm'n 67 (explaining that the quantification of compensation raises a number of complex valuation and evidentiary issues and has been the subject of extensive review and discussion in the past).

14. The banking and financial sector claims presented a few unique methodology issues that are not reviewed in this article. See generally *Report and Recommendations made by the Panel of Commissioners Concerning the Third Installment of 'E4' Claims*, UNCC "E4" Panel, 3rd. Inst., U.N. Doc. S/AC.26/2000/6 (2000) [hereinafter *Third Installment Report*] (discussing the recommendations to the Governing Council concerning claims made by Kuwaiti Banks, Rafidian Bank, and other financial losses).

15. See *Criteria for Expedited Processing of Urgent Claims*, UNCC GCR, 1st Sess., U.N. Doc. S/AC/1991/1 (1991); see also *Criteria for Additional Categories of Claims*, UNCC GCR, 3rd. Sess., 24th Mtg., rev. U.N. Doc. S/AC.26/1991/7/Rev. 1 (1992) (discussing the criteria governing the submission of consolidated payments).

category "E" claimants. Some independently run and legally distinct public sector enterprises such as airlines, savings and credit banks, and public transport and port authorities filed losses as category "E" claimants. Within the category "E" claims the claimants are further subdivided based on the claimant's nationality or type of loss.<sup>16</sup> The "E1" Panel reviews the oil sector claims. The "E2" Panels review non-Kuwaiti private sector claims, excluding construction and engineering claims. The "E3" Panels review non-Kuwaiti construction and engineering claims. The "E/F" Panel reviews export guarantee and insurance claims. Finally, the "E4" Panels review all Kuwaiti private sector claims, other than oil sector claims and certain environmental claims that fall within other Panels' jurisdictions.

The total "E" claim population consists of approximately 5,800 claims with asserted losses totaling about 80 billion U.S. dollars ("USD"). Kuwaiti claims account for the majority of category "E" claims (with asserted losses of approximately 55 billion USD). The 55 billion USD of Kuwaiti claims consists of ninety-two oil sector "E1" claims asserting losses totaling about 44 billion USD and 2,750 other private sector claims for losses totaling about 11 billion USD. The "E4" claims average 1.5 million USD and range from 975 million USD to 6,400 USD.<sup>17</sup>

## B. LIFE CYCLE OF AN "E4" CLAIM

The Public Authority for Assessment of Compensation for Damages Resulting from Iraqi Aggression ("PAAC"), a Kuwaiti governmental entity, filed the "E4" claims with the UNCC.<sup>18</sup> PAAC re-

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16. See United Nations Compensation Commission, *Category "E" Claims*, available at [http://www.unog.ch/uncc/claims/e\\_claims.htm](http://www.unog.ch/uncc/claims/e_claims.htm) (last visited Feb. 22, 2001) [hereinafter *UNCC "E" Claims*] (explaining the Secretariat's organization of the Category "E" claims).

17. See *id.* (providing an up-to-date record of the number and value of category "E" claims filed with the UNCC).

18. See *UNCC Rules*, *supra* note 12, art. 15 (allowing governments and international organizations to submit claims to the UNCC). The UNCC article also allows governments to submit claims on behalf of "corporations or other entities that, on the date on which the claim arose, were incorporated or organized under the law of that State." *Id.* Corporations and other private legal entities must request their State to submit their claims to the UNCC. See *id.* (outlining the means by which non-governmental entities bring claims before the Commission). In excep-



viewed the claims before they were filed and assisted the claimants with the preparatory work. Each submission usually consisted of two spiral-ring folders of documents. PAAC assigned each claim a unique number, called the "UN Sequence number." Each claim contained the relevant UNCC claim form, a statement describing the claimant and the losses suffered, and additional evidence supporting the claim such as audited accounts, invoices, receipts, and witness statements.<sup>19</sup> Upon receipt and registration of the claims in Geneva, Switzerland, the UNCC's Registry assigned a claim number.<sup>20</sup>

Once the date for receiving new claims closed, the UNCC secretariat developed a system that would allow for the orderly review of the 2,750 "E4" claims within the five-year mandate.<sup>21</sup> The UNCC categorized the claims by first dividing the claims into twenty-seven separate installments.<sup>22</sup> The first installment contained a random mix of large and small claims. A review of this installment helped the Panel develop the methodology to review future claims.<sup>23</sup> The next twenty-six installments were broken down into two categories, large and complex claims and non-large and complex claims. As of the

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tional circumstances where the government of the State of incorporation or organization fails to submit claims within the established time limit, the corporation or other legal entity could submit its claim directly to the UNCC. *See id.* (limiting this exception to within three months of this time limit).

19. *See id.* art. 14 (prescribing the formal filing requirements for all claims).

20. *See id.* art. 13 (describing the steps the secretariat takes as part of the preliminary assessment of claims). References by the "E4" Panels to the claims in the annexes of their reports include both the UN Sequence and UNCC claim numbers. *See, e.g., Report and Recommendations Made by the Panel of Commissioner Concerning the First Installment of 'E4' Claims*, UNCC "E4" Panel, 1st Inst., U.N. Doc. S/AC.26/1999/4 (1999) [hereinafter *First Installment Report*] (demonstrating the application of these numbers in an "E4" report).

21. *See Decision by the Governing Council not to Accept Further Corporate and Government Claims after 1 January 1996 taken at its 53rd meeting held on 17 May 1995 at Geneva*, UNCC GCR, 53rd Mtg., U.N. Doc. S/AC.26/Dec. 30 (1995) (stipulating that, except for reasons of civil disorder, the last date for filing "E" claims was January 1, 1996).

22. The official language of the UNCC is British English. This article, however, uses American spellings. For example, "Instalment" becomes "Installment." Spellings in text quoted from official UNCC documents have also been revised here.

23. *See First Installment Report*, *supra* note 20, para. 31 (summarizing the nature of the proceedings, verification process, and valuation of "E4" claims).

publication of this article, the "E4" program has remained on its established schedule.<sup>24</sup>

The secretariat then performed an initial review of the claims to determine if they met the formal requirements to advance to the next stage of the resolution process. The claims were reviewed to determine whether the claimant provided the articles of incorporation, whether the proper individual with signing authority completed the claim form, whether a completed claim form and statement of claim have been submitted, and whether the signature or stamp on the claim form was an original.<sup>25</sup> The lawyers in the secretariat reviewed

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24. Some claims were so large and complex that the Panels required more than 180 days for their review. *See id.* para. 7 (noting claims for more than \$10 million are generally considered large); *see also UNCC Rules, supra* note 12, art. 38 (allowing Panels twelve months to review unusually large or complex claims). These claimants were generally grouped by industry. For example, the third installment primarily consisted of financial sector companies with large and complex claims. *See Third Installment Report, supra* note 14, para. 5 (reporting the range of claims as being between \$10 million and \$600 million). The fifth installment, on the other hand, consisted of car dealers and other businesses related to the automotive industry. *See generally Report and Recommendations made by the Panel of Commissioners Concerning the Fifth Installment of 'E4' Claims*, UNCC "E4" Panel, 5th Inst., U.N. Doc. S/AC.26/2000/7 (2000) [hereinafter *Fifth Installment Report*]. Because of their size, there are fewer claims in these large and complex installments. While the non-large and non-complex installments include approximately 140 claims, most large and complex installments are comprised of only about twenty claims. The Panels review each large and complex claim installment in one year, but require only six months to review a non-large and non-complex claim installment. *See UNCC Rules, supra* note 12, art. 38 (providing that, during this time period, the Panel must write a report to the Governing Council detailing the award amount and the reasons for the Panel's decisions). In December of each year, the two "E4" Panels issue four reports covering two large and complex and two non-large and non-complex installments. In mid-summer of each year, the "E4" Panels issue two reports for non-large and non-complex installments. The non-large and non-complex claimants are from a mix of industries and were originally assigned to installments on a first-filed, first-resolved basis. At times, a claim must be moved from its originally assigned installment. For example, 240 incomplete claims filed near the end of the registration procedure were moved to installment two, where the Panel recommended no compensation because the claims did not meet the minimum filing and evidentiary requirements. *See Report and Recommendations Issued by the Panel of Commissioners Concerning the Second Installment of 'E4' Claims*, UNCC "E4" Panel, 2nd Inst., U.N. Doc. S/AC.26/1999/17 (1999) [hereinafter *Second Installment Report*] (finding that the 240 claims contained formal deficiencies).

25. *See UNCC Rules, supra* note 12, arts. 14-15 (describing the secretariat's responsibilities during the preliminary assessment and the consequences for claims

the claims to determine if any legal or factual issues should be included in the "article 16 reports" issued quarterly by the UNCC's Executive-Secretary.<sup>26</sup> These reports allowed interested governments, including Iraq, an opportunity to comment on how the issues should be resolved. Given the homogeneous nature of the "E4" claims population, fewer article 16 issues have been raised since the review of the first seven installments.

The secretariat, acting upon guidance from the "E4" Panels, also performed the initial claim development. The claim development work varied depending on whether the claim was large and complex or non-large and non-complex. For the large and complex claims, a narrative summary was prepared for each claim. It set out the claim in a format that was easier to read and outlined any noted deficiencies. These shortcomings in the claim were brought to the attention of the claimant by way of written interrogatories. Like all communications concerning category "E4" claimants, they were sent to PAAC for further distribution to the claimant.<sup>27</sup> The claimant's response then went to PAAC, who forwarded it to the UNCC's Registry. Based on the responses to these questions and after review of the claim by accounting and loss adjusting consultants, a second round of questions and a visit to the claimants in Kuwait followed when necessary.

Consultants, hired through a competitive bidding process, also reviewed all "E4" claims during the claim development stage. Their review was also based on guidance from the Panels. The consultants prepared a written report on each claim for review by the Panels.<sup>28</sup>

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that failed to meet the formal requirements).

26. *See id.* art. 16 (explaining that these reports identify claims that form the "Commission's case load" and also identify these claims by reference to the submitting entities, the categories of claims submitted, the number of claimants, and the total amount of compensation sought).

27. *See id.* art. 9 (mandating that all communications concerning claims between the Commission's secretariat and a government shall take place through the government's permanent mission in Geneva). *Cf. supra* note 18 (outlining the procedures allowing governments to submit claims on behalf of corporations and other entities).

28. *See First Installment Report, supra* note 20, para. 18 (requiring the consultants to prepare this report using the Panel's verification and valuation methodology).

The consultants' role was to meet with the Panels while the claims were under consideration and accompany the secretariat on missions to meet with claimants.

In advance of their meetings, the Panels were briefed on the claims and observations by governments concerning relevant legal and factual issues. The Panels also received the consultants' verification reports and other materials prepared by the secretariat to aid in the review of the claims. In addition, Panel members were able to access an electronic "Index of Jurisprudence" that allowed them to perform research regarding the UNCC's reports and recommendations. The Panels then reviewed the claims and verification reports at the meetings in Geneva and made determinations on the legal, valuation, and evidentiary issues presented in the claims.

Once a Panel completed reviewing the claims in an installment, the Panel drafted its report and recommendations.<sup>29</sup> Each "E4" Panel report was divided into two main sections: the text of the report and the annexes. An attempt to understand how the Panels reviewed the claims begins with a reading of the *First Installment Report*. This document set out the major provisions of the methodology used to evaluate the claims.<sup>30</sup> All subsequent reports cross-referenced the *First Installment Report* and only elaborated on any new legal or factual issues encountered. Few claimants specifically were mentioned in the text of the report, but all claims were referenced in the annexes to the report. The reports had at least two annexes. Annex I contained a list of claim details and recommended awards in US dollars.<sup>31</sup> Annex II summarized the Panel's reasons for the recommended awards. The rationale provided was usually brief unless the uniqueness of the facts or legal issues presented required an explanation in the text of the report. Once all three Panel members signed their report, the report was placed on the agenda of the next Governing Council meeting. The Governing Council could approve or

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29. See *UNCC Rules*, *supra* note 12, art. 38(e) (directing each Panel to include in its report the claims received, award amount recommended, and the reasons for the Panel's decisions).

30. See *First Installment Report*, *supra* note 20, para. 31 (providing a detailed explanation of the verification, valuation, and review processes).

31. All UNCC Panels must give their awards in U.S. dollars. *Id.* para. 226.

disapprove the entire report or comment on any aspect of the report.<sup>32</sup> As of March 2001, the Governing Council has approved all of the "E4" Panel reports.

Once approved, the claims then proceeded to payment. Within three months of the Governing Council's approval of the report, amounts up to 25,000 USD were paid. Admittedly, for most claimants, this amount was more symbolic than actually representative of a "real" recovery. In the second round of payments, claimants received an additional payment of up to 75,000 USD.<sup>33</sup> A proposed third round of payments resulted in claims being paid up to 5 million USD.<sup>34</sup> The balance of the compensation fund will determine the extent to which future payment rounds will be able to compensate claimants.<sup>35</sup> Nevertheless, claimants whose claims have already been resolved should be able to receive some real compensation once their claims are finalized. On the other hand, claimants at the end of the "E4" queue should not see the fund exhausted before their claims are resolved. The payment scheme will therefore be a balancing act requiring the attention of the Commission's Governing Council.

After the Governing Council approves a report, it is published in the six official UN languages: Arabic, Chinese, English, French, Russian, and Spanish. The UNCC's Provisional Rules for Claims

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32. See *UNCC Rules*, *supra* note 12, art. 40(1) (authorizing the Governing Council to increase or decrease award amounts if appropriate).

33. See *Decision Concerning the Priority of Payment and Payment Mechanism for the Second Phase of Payment taken by the Governing Council of the United Nations Compensation Commission at its 88th meeting, held on 24 June 1999 at Geneva*, UNCC GC, 88th Mtg., U.N. Doc. S/AC.26/Dec. 73 (1999) (conditioning each award allocation on the condition that the UNCC has sufficient funds).

34. See Press Release, United Nations Compensation Commission, United Nations Compensation Commission Pays Out US\$ 825,177,061.61 and Concludes the Second Phase of Payments to Successful Claimants, PR/2000/08 (2000) (scheduling this round of payments to begin in October 2000).

35. See John Mason, *War Awards Under Threat: Political Pressure May Hamper the Compensation Commission's Work*, FIN. TIMES, Oct. 9, 2000, at 22 (describing the UNCC as a creature of politics). The operating costs of the UNCC are also paid from the Fund. Compare S.C. Res. 705, U.N. SCOR, 46th Sess., 3004th mtg., U.N. Doc. S/RES/705 (1991) (setting the rate of compensation at 30 percent of the value of Iraq's oil export), with S.C. Res. 1330, U.N. SCOR, 55th Sess., 4241st Mtg., U.N. Doc S/Res/1330 (2000) (reducing the rate to twenty-five percent of the value of Iraq's oil export).

Procedure provide that within sixty days from the publication of the decisions and reports, the claimants must bring any “[c]omputational, clerical, typographical or other errors” to the attention of the UNCC’s Executive Secretary.<sup>36</sup> The Executive Secretary must then report such errors to the Governing Council.<sup>37</sup> There is no “appeal” on the amount recommended from the award.<sup>38</sup> Unless an error can be identified, the award stands.

The last step in the life cycle of an “E4” claim was the transfer of award monies from the UNCC to the Government of Kuwait, which actually distributed the awards.

## II. THE UNDERLYING PRINCIPLES

Before drafting the methodology that is used to value the losses in the Kuwaiti corporate claim population, the Panels had to agree on the methodology’s objectives. Several goals shaped the development of the methodology. First, all awards recommended had to be accurate.<sup>39</sup> “Accurate” meant more than the lack of computational, clerical, or typographical errors; rather, the awards had to be compatible with international law and generally accepted accounting principles.<sup>40</sup> Both of the “E4” Panels are chaired by lawyers and include one accountant and one loss adjuster as commissioners.<sup>41</sup>

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36. *UNCC Rules*, *supra* note 12, art.41.

37. *See id.* art. 41 (authorizing the Governing Council to determine whether further action is necessary).

38. *See id.* art. 40(4) (holding that all decisions of the Governing Council are final).

39. *See, e.g.*, Gordon A. Christensen, *State Responsibility and the UN Compensation Commission*, in 13th SOKOL, *supra* note 11, at 325 (noting that the UNCC “is not punitive, but corrective.”).

40. D. Craig Christensen, the “E4” team leader who was responsible for coordinating the development of the methodology, is a certified public accountant and lawyer. BDO, Stoy Hayward, an English accounting firm, and Cunningham International, an English loss adjusting firm, were instrumental in helping the first “E4” Panel of Commissioners with the development of the methodology. Today, they continue to assist in the claims review process. Crowe Chizek of Chicago was hired (like BDO Stoy Hayward and Cunningham International) through competitive bidding to assist the second “E4” Panel and also provide suggestions concerning the methodology.

41. In 1998, the Governing Council appointed the first “E4” Panel of Commissioners, comprising Messrs. Robert R. Briner (chairman), Alan J. Cleary and Lim

Second, it was clear that the methodology had to be capable of being applied consistently to all "E4" claims by different reviewers over an extended period of time. Two Panels evaluate the "E4" claims. Different lawyers, accountants, and loss adjusters from inside and outside the UNCC secretariat support each Panel. As the Panels work in tandem, it is important that the award amounts not differ significantly depending on the happenstance of which Panel reviewed the claim. This goal ensures that whatever award is recommended, the results are capable of being audited and reproduced.

Third, the recommended awards must be capable of being processed timely.<sup>42</sup> The Governing Council set a deadline to complete the review of "E4" claims by 2003. With only six commissioners to review nearly 2,750 claims, and with help from the secretariat whose "E4" staff includes fourteen attorneys, accountants, legal assistants, and secretaries, the review process could not afford delays.

Fourth, the methodology provides for limited oral inquiry.<sup>43</sup> Oral proceedings involving the Governments of Iraq and Kuwait or with individual claimants were an option, but have not been utilized by the "E4" Panels to date.<sup>44</sup> Instead, members of the secretariat inter-

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Tian Huat. See *First Installment Report*, *supra* note 20, para. 1. In 1999, the Governing Council appointed the second "E4" Panel of Commissioners, comprising Messrs. Luiz Olavo Baptista (chairman), Jianxi Wang and Jean Naudet. See *Report and Recommendations made by the Panel of Commissioners Concerning the Fourth Installment of 'E4' Claims*, UNCC "E4" Panel, 4th Inst., para. 1, U.N. Doc. S/AC.26/1999/18 (1999) [hereinafter *Fourth Installment Report*].

42. See, e.g., Francis E. McGovern, *The Intellectual Heritage of Claims Processing at the UNCC*, in 13th SOKOL, *supra* note 11, at 189 (noting that the UNCC *inter alia* "emphasizes expedition.").

43. See, e.g., Charles N. Brower, *The Lessons of the Iran-US Claims Tribunal Applied to Claims Against Iraq*, in 13th SOKOL, *supra* note 11, at 16 (noting the right to confront the other party is virtually non-existent at the UNCC).

44. See *UNCC Rules*, *supra* note 12, art. 36 (contemplating oral hearings only in unusually large or complex cases). The "E1" Panel has held two oral hearings involving Iraq (in 1996 and 1999). See generally *Report and Recommendations by the Panel of Commissioners Appointed to Review the Well Blowout Claims*, UNCC "E1" Panel, U.N. Doc. S/AC.26/1996/5/Annex, Dec. 18, 1996 (detailing the comprehensive legal proceedings surrounding the well blowout claim); *Report and Recommendations by the Panel of Commissioners Concerning the Fourth Installment of 'E1' Claims*, UNCC "E1" Panel, 4th Inst., U.N. Doc. S/AC.26/2000/16 (2000) (listing the Panel's recommendations as to the Arabian, Saudi Arabian, and Kuwaiti oil companies). The Panel reviewing claims by a number of Egyptian workers who left Iraq after its invasion of Kuwait also held oral hearings involving

view "E4" claimants on missions to Kuwait, albeit, a discovery tool limited to the largest claims. Iraq receives the original claim file for those claims involving losses in Iraq or large Iraqi contracts.<sup>45</sup> Iraq also comments on the legal issues raised through the article 16 reports.<sup>46</sup> The methodology was drafted with the understanding that Iraq and the Kuwaiti claimants might often have no additional opportunity to comment on the claim.

Fifth, the methodology must consider the types of evidence capable of being provided by the claimants and civil authorities in Kuwait.<sup>47</sup> Because of the looting and destruction of their premises,<sup>48</sup> even those claimants who kept thorough records before the invasion were no longer able to provide all the information that would aid in the evaluation of their claims. This destruction of records posed one of the most difficult problems for the verification and valuation of claims. For example, how much compensation should the Panels recommend in a case where the evidence submitted (e.g., photographs and video tapes of damaged showrooms) clearly establishes that inventory was stolen or damaged but does not provide any indication of the value of inventory lost or damaged?

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Iraq. *See Report and Recommendations made by the Panel of Commissioners Concerning the Egyptian Workers Claim (Jurisdictional Phase)*, UNCC Egyptian Workers Panel, paras. 5-37, U.N. Doc. S/AC.26/1995/R.20 Rev. 1, (1995).

45. *See First Installment Report*, *supra* note 20, para. 21 (noting the largest claim in the first installment was for \$100 million); *Third Installment Report*, *supra* note 14, para. 17 (reporting that Iraq filed written responses to all seven of the third installment claims for which it received notice); *Fifth Installment Report*, *supra* note 24, para. 18 (submitting a contract claim totaling over \$104 million).

46. *See supra* note 26 and accompanying text (discussing the procedural review of article 16 reports).

47. *See, e.g.*, Christopher S. Gibson, *Mass Claims Processing*, in 13th SOKOL, *supra* note 11, at 170 (discussing the consideration given to category "C" claimants regarding the types of evidence they could provide).

48. *See generally Report to the Secretary-General by a United Nations Mission, Led by Mr. Abdulrahim A. Farah, Former Under-Secretary-General, Assessing the Scope and Nature of Damage Inflicted on Kuwait's Infrastructure during the Iraqi Occupation of the Country from 2 August 1990 to 27 February 1991*, U.N. SCOR, 7th Sess., Agenda Item 89, Annex, U.N. Doc. S/22535 (1991) (on file with the *American University International Law Review*) [hereinafter *Farah Report*] (reporting the loss of official records and documents during Iraq's seven-month occupation of Kuwait).



The UNCC's Governing Council established the evidentiary standards applicable to corporate claims: "[S]uch claims must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss."<sup>49</sup> The Governing Council interpreted this to also mean that "no loss shall be compensated by the Commission solely on the basis of an explanatory statement provided by the claimant."<sup>50</sup> Given that most private Kuwaiti entities were already required to prepare audited accounts, "E4" Panels were aided when applying these standards. These financial statements, containing critical information on a corporate claimant's business and assets, proved invaluable to the Panels. Even if destroyed at the claimant's place of business, the claimant's auditors likely retained a copy. All "E4" claimants were asked to provide audited accounts for the three years preceding and following the invasion. If the claimant was not required to prepare audited accounts under Kuwaiti law, then it could submit unaudited accounts.<sup>51</sup>

Sixth, the Panels had to develop a method to balance the claimants' inability to always provide the best evidence with the "risk of overstatement" created by such evidentiary shortcomings.<sup>52</sup> As noted above, the general availability of audited financial statements solved a large part of the evidentiary problems faced by corporate claimants. A claimant's inability to provide strong evidence in support of the value of a loss claimed increases the risk that a claim is overstated. The Panels focused their attention where this risk was greatest. Of the 2,750 claims filed, 172 claims are in excess of 10 million USD. These 172 claims represent about 60 percent of the total asserted value of "E4" claims.<sup>53</sup> These claims require the most scrutiny, as

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49. *UNCC Rules*, *supra* note 12, art. 35(3).

50. *Decision Concerning Explanatory Statements by Claimants in Categories 'D', 'E' and 'F' taken by the Governing Council of the United Nations Compensation Commission at its 75th meeting, held on 2 February 1998 at Geneva*, UNCC GCR, 14th Sess., 75th Mtg., U.N. Doc. S/AC.26/Dec. 46 (1998).

51. *See Second Installment Report*, *supra* note 24, para. 21 (noting that the secretariat requested claimants to provide supplemental evidence).

52. *See First Installment Report*, *supra* note 20, para. 36 (noting the investigative nature of the Panel's approach to verification and valuation of claims).

53. *See discussion supra* note 24.

they pose the greatest risk of overstatement. The Panels review these “large and complex” claims over the course of one year.<sup>54</sup> A set of written questions is sent to these claimants, and many of these claimants receive an on-site inspection by members of the secretariat following a second round of interrogatories. Since the smaller claims are only under review for six months by the Panels,<sup>55</sup> the Panels requested that the secretariat send these smaller claimants a standardized request for key documents, such as audited financial statements, inasmuch as it is infeasible to pose individualized questions for every such claim.<sup>56</sup>

Within a claim, the Panels again focus on the elements that pose the greatest risk of overstatement. Based on international accounting practices, a materiality level is set for each claim. The treatment of individual items and aggregate balances as “material” is dependent upon whether they exceed the level where the Panels would be concerned if the claim were overstated by this amount or more. Materiality is established at the lower of five percent of the total value of the “net claim” or Kuwait dinars (KD) 10,000 (approximately 34,600 USD). For materiality purposes, the “net claim” is “the gross asserted claim value less amounts claimed for disallowed items (*e.g.*, claims for losses outside the Commission’s jurisdiction) and amounts claimed for interest, claim preparation costs, cash losses and uncollectible receivables.”<sup>57</sup> All loss items in a claim are reviewed. The materiality process merely allows the Panels to focus greater attention on the larger losses. Certain loss claims, *e.g.*, loss of cash, are always subject to a higher level of scrutiny, regardless of the amount claimed, because of the greater risk of overstatement in such cases.<sup>58</sup>

Finally, the methodology had to permit the Panels to exercise judgment in exceptional cases. No rigid set of rules would bind them to recommend, reject, or adjust an award if something unique about

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54. *See id.*

55. *See UNCC Rules, supra* note 12, art. 38(c) (stating that small claims are reviewed within 180 days of submission).

56. *See, e.g., Second Installment Report, supra* note 24, paras. 20-26 (describing the key documents requested by the secretariat).

57. *First Installment Report, supra* note 20 paras. 44-47.

58. *See id.* para. 127 (explaining why cash claims receive the highest level of review).

the facts of a claim warranted a departure from the standard methodology.

### III. THE METHODOLOGY

The "E" claim form specifies six particular types of losses, namely, losses related to: (1) "contract," (2) "business transaction or course of dealing," (3) "real property," (4) "other tangible property," (5) "income-producing property," and (6) "payment or relief to others." There is an additional catch-all "other" category, which includes claims for loss of profits, receivables, restart costs, interest and claim preparation costs. The "E4" Panels developed specific programs for the verification and valuation of losses in each category. These loss category-specific programs are discussed below.

Three stages of review are common to all the programs. The first two occur before a program is applied and the third after a program has been completed. First, before any review program can be applied, it is necessary to identify the applicable review program. This step is required because different claimants could claim for the same loss under different categories. For instance, one claimant might treat building repairs as a real property claim, while another may claim similar repairs as restart costs. Similarly, claimants use loss categories for "profits," "contracts," "income-producing properties," and "business transaction or course of dealing" to assert a loss of profit claim. The "E4" methodology, therefore, provides for a preliminary review of the claimant's loss classification. This step often requires that losses be reclassified to more appropriate categories so that the most suitable review programs can be applied.<sup>59</sup> The categories of loss reflected in annex II of the Panel report, regarding the type of loss and amount claimed, reflect this loss reclassification. Likewise, the numbers in the Panels' reports for total amounts claimed for a particular loss category also reflect this reclassification. For example, the amount shown as claimed as a loss of contract claim represents not what the claimant deemed a loss of contract claim, but what the

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59. See *First Installment Report*, *supra* note 20, para. 41 (emphasizing the importance of verification of the claimant's loss categories in order to facilitate proper review).

Panel deemed a loss of contract claim under the "E4" methodology."<sup>60</sup>

The second step is derived from the Security Council's mandate that holds Iraq "liable under international law for any direct loss, damage . . . or injury" resulting from its invasion and occupation of Kuwait.<sup>61</sup> Therefore, this next aspect common to all review programs, concerns causation. Before applying a verification and valuation program, the methodology provides for a determination of whether the loss claimed is compensable *per se*.<sup>62</sup>

Third, all loss review programs also provide for a final adjustment decision to be made by the Panels.<sup>63</sup> After applying a category-specific verification and valuation program, as described below, the Panels consider "whether, based on the cumulative effect of the evidence submitted," any additional adjustment is warranted. This final adjustment may increase or decrease the claim. It is a "step back" once the methodology has been applied to see if the award is fair and reasonable. In no case, however, do the Panels award a claimant more than the compensation sought for each loss category.

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60. See, e.g., *id.* para. 63 (stating that the Panel has reclassified claims into their appropriate loss categories using the applicable methodology); see also *Second Installment Report*, *supra* note 24, para. 30 (noting the Panel's reclassification of losses using the "E4" methodology).

61. See S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg., at 5, U.N. Doc. S/RES/ 687 (1991).

62. See *First Installment Report*, *supra* note 20, para. 169 (stating the Panel's interpretation of "compensable losses"). A loss that is compensable *per se* may be valued differently because parts of the loss are not compensable. For example, with a loss of profits claim, whether the loss is compensable *per se* depends on whether any loss of profits was suffered as a direct result of Iraq's invasion and occupation of Kuwait. However, the indemnity period for which such loss of profits is compensated (*i.e.*, the valuation of the loss of profits claim) also depends on whether a loss of profits during that entire period can be regarded as a direct result of Iraq's invasion and occupation of Kuwait. Therefore, while a loss of profits claim may be compensable *per se*, the claim's valuation may be revised because the Panel does not regard losses that occurred three years after the invasion to be a direct result of the invasion. The loss-specific review programs ensure that a review of causation for valuation purposes is not precluded by the earlier review of causation that determines whether the loss is compensable *per se*. See *id.* paras. 182, 187, 196-202 (describing the Panel's procedure in determining whether or not a loss of profits claim is compensable).

63. See *id.* paras. 97, 114 (noting the Panel's consideration of the effect of additional evidence in its adjustment decisions).

A. CONTRACT<sup>64</sup>

As stated earlier, Panels may transfer losses asserted as loss of contracts to more appropriate loss categories. "Thus, amounts billed under a contract but not received are reviewed as uncollectible receivables. Profits that would have accrued from goods or services to be provided over the remainder of a terminated or repudiated contract are reviewed as loss of profits."<sup>65</sup>

The Panels first look for evidence to support the existence of a valid contractual relationship at the time of the loss. Without such evidence or a reasonable explanation for the lack of such evidence, the claim will fail. Even if the claimant's evidence supporting the contract has been destroyed, it may be the case that another party to the contract is still able to provide a copy of the document or other evidence sufficient to corroborate its existence.

Once the Panels assess a valid contractual relationship of the claim, they then review the evidence of the repudiation, cancellation, or failure to perform the contract. Where this evidence is not provided, a Panel will either apply a risk assessment factor or adjust the claim based on the particular facts concerning this contract. The *First Installment Report* cited the example of rental contracts.<sup>66</sup> The Panel understood that claimants might not be able to provide proof that their tenants cancelled their leases as they fled Iraq's invading army. On the other hand, it required evidence of a supply contract's termination where the other contracting party continued operations after March 1991.<sup>67</sup> A failure to provide evidence of termination of the supply contract, without any reasonable explanation of the failure to provide the evidence, resulted in a recommendation that the claim fail at this stage of the review.

Next the Panels attempt to determine if the amount of the loss claimed agrees with the contractual terms. If they do, the claim is not

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64. See *First Installment Report*, *supra* note 20, paras. 77-94 (describing the verification and valuation methodology for contract claims).

65. *Fourth Installment Report*, *supra* note 41, para. 30.

66. See *First Installment Report*, *supra* note 20, para. 7-8.

67. See *id.* (explaining the Panel's awareness of the difficulty that claimants face in acquiring evidence of termination from tenants that fled invasion).

adjusted; otherwise, the award is reduced to the amount supported by the contract.

With all loss categories, the claimants have the obligation to demonstrate that they have attempted to mitigate their losses.<sup>68</sup> The Commission's Governing Council stated that "[t]he duty to mitigate applies to all claims."<sup>69</sup> The Panels determine whether the claimant has mitigated its "loss in the best way possible, given the circumstances prevailing in Kuwait during Iraq's occupation and immediately thereafter."<sup>70</sup> For example, the Panels determine whether the contracting parties could resume the contract after Iraq's occupation ended. The Panels review the evidence on contractual remedies and whether resumption of the contract was possible. Where the claimant fails to demonstrate that it pursued its contractual remedies and the claimant does not provide a reasonable explanation for this failure, this shortcoming leads to a further adjustment. The claim will be reduced to offset the failure to mitigate properly the loss.

The Panels also determine whether the claimant has matched costs with revenues in calculating its loss. In other words, a recommendation will only be made for the amount, net of incremental and variable costs, that would otherwise have been incurred. The Panels will make an adjustment based on the actual amount of these costs if determinable and, if not, the claim will be reduced due to the risk of overstatement associated with this evidentiary shortcoming.

Finally, the Panels look for evidence regarding the history of the contractual relationship. The claimant must demonstrate "a reasonable expectation of meeting its contractual obligations and reaching a satisfactory settlement of the contract prior to the date of the loss."<sup>71</sup> Thus, if a claimant was in default at the time of the loss and would

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68. See *id.* para. 80 (noting the Panel's request for evidence of termination when supply contracts were involved).

69. *Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures were also a Cause – Decision taken by the Governing Council of the United Nations Compensation Commission at its 31st meeting on 18 December 1992*, UNCC GCR, 31st Mtg., para. 9(IV)(i), U.N. Doc. S/AC.26/1992/15\_\* (1992) [hereinafter *Decision 15*].

70. *First Installment Report*, *supra* note 20, para. 80.

71. *Id.* para. 82.

have incurred penalties or damages on the contract, the Panels will reduce the recommended award for such costs where the claimant has not already done so. If the claimant has not demonstrated its ability to meet its contractual obligations prior to the date of the loss, the Panel will either make an actual adjustment if the amount is quantifiable or, if not, the claim will be reduced for this risk of overstatement.

B. REAL AND TANGIBLE PROPERTY (OTHER THAN VEHICLES, INVENTORY AND CASH)<sup>72</sup>

The Panels subdivide tangible property claims into one of four categories: vehicles, inventory, cash, and other tangible property. Other tangible property claims usually consist of claims for furniture or equipment. Because few—if any—of the claimants divided their claims into these subcategories, the Panels frequently reclassify the tangible property claims. The method applied by the Panels to review real property claims is identical to the method used for tangible property claims (other than vehicles, inventory, and cash).<sup>73</sup>

The initial issue the Panels seek to resolve when evaluating such property claims is the nature of the claimant's interest in the property.<sup>74</sup> The Panels review all the evidence submitted in reaching this determination and adjust the claim as appropriate if this evidence is not provided.

Having reviewed evidence to support the claimant's interest in the property, the Panels usually find that the loss claimed represents (a) costs incurred for repairing the property, (b) costs incurred for replacing the property, or (c) a valuation or other estimate of the loss.

Where the claimant has already incurred the costs of repairing or replacing the property, the Panels satisfy themselves that enough evidence exists to support the fact that the claimant incurred the cost in the amount claimed. What suffices as proof of payment depends

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72. *See id.* paras. 92-101, paras. 111-16 (discussing the verification and valuation methodology for real and tangible property claims).

73. *See id.* para. 110 (revealing the differences in approach between the valuation and verification for stock, cash, vehicles, etc.)

74. *See id.* para. 111 (comparing the valuation and verification methods for tangible property claims and real property claims).

on the type of claim made.<sup>75</sup> For major repair contracts, certifications might be required. For minor repair contracts, invoices and payment receipts would normally suffice.

The Panels characterize each loss element as a repair or replacement of the property. The Panels make this distinction to ensure that a claimant is not compensated for ordinary expenses it normally would have incurred on the property. Thus, with repairs, one would expect periodic maintenance costs, such as painting, to have been incurred. As explained in the first installment report, “[t]he full amount of such costs (e.g., routine painting) cannot be regarded as a direct result of Iraq’s invasion and occupation of Kuwait and is therefore discounted.”<sup>76</sup> As to replaced items, the Panels will likewise reduce the claim (if not already so reduced) to reflect the normal adjustments for depreciation.

A possible source of overstatement with any property claim is unforced “betterment.” The “E4” Panels adopt the commonly understood definition of betterment found in an earlier report issued by the “E2” Panel: “Betterment occurs when old and used items are replaced with new or better ones; in such cases, a significant increase in value can be realized.”<sup>77</sup> Thus, when “tile floors are replaced with marble, or room size dimensions are increased,” then betterment has occurred.<sup>78</sup> If the betterment is forced, for example, due to shortage of a former building material or some other reasonable explanation, then no betterment adjustment will be made. If the actual amount of betterment can be determined, an adjustment will be made accordingly; otherwise, the Panels will reduce the claim for this risk of overstatement.

Where the claim is based on an estimate or valuation opinion, the Panels review the qualifications and independence of the person or entity that provided the opinion. As is done in claims based on costs incurred, the Panels review claims based on an estimate or valuation

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75. See *id.* para. 95 (explaining the different ways to provide proof of payment).

76. *Id.* para. 96.

77. *Report and Recommendations made by the Panel of Commissioners Concerning the First Installment of Category ‘E2’ Claims*, UNCC “E2” Panel, 1st Inst., para. 271, U.N. Doc. S/AC.26/1998/7 (1998) [hereinafter *First E2 Report*].

78. *First Installment Report*, *supra* note 20, para. 97.



opinion to determine whether the estimate or opinion considers normal maintenance costs, depreciation, and unforced betterment. However, in the case of such claims, the Panels also review the evidence to determine whether the claimant repaired or replaced the assets. If the claimant does not provide evidence of such reinstatement or a reasonable justification for its failure to reinstate the assets, the claim is adjusted for the risk of overstatement created by this shortcoming.

Once the Panels have arrived at a recommended award using the "estimate or valuation opinion" methodology, this figure is compared to another figure computed using an alternative method of valuation, *e.g.*, the net book value based on audited accounts. Whatever method "assesses the loss with a greater level of certainty" becomes the method applied by the Panels in recommending compensation for property claims.<sup>79</sup>

As mentioned before, the claimants' audited accounts are an important element of the review process for such property claims. Of course, when claims are based on the net book value of the property, the audited accounts are indispensable. In any case, pre-invasion audited accounts allow the Panels to establish the claimant's interest in the property, to verify the cost of the asset and date of purchase, and to review the depreciation applied. Post-invasion accounts generally record the fact of loss of material assets as an extraordinary item, and reflect reinstatement of these assets. If the accounts are unaudited or materially qualified, then the Panels will make an adjustment because of the risk of overstatement.

## C. VEHICLES, INVENTORY AND CASH

### 1. *Vehicles*<sup>80</sup>

Initially, the Panels determine whether the claimant seeks recovery for the loss of a vehicle or merely the cost of repairing it. If the claim is for repair costs, the Panels apply the tangible property loss meth-

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79. *Id.* para. 100.

80. *See id.* paras. 130-35 (describing the verification and valuation methodology for vehicles); *cf. Fifth Installment Report, supra* note 24, paras. 57-59 (noting the treatment of claims by car dealers relating to new and second-hand vehicles held as inventory).

odology described above.<sup>81</sup> Given the large-scale theft and destruction of vehicles in Kuwait, most vehicle claims are for a total loss.<sup>82</sup>

If the claim is for a total loss of the vehicle, the Panels look for evidence to support the claimant's interest in the vehicle on the day of the invasion. For instance, the Panels relied on certificates issued by the Traffic Department of the Government of Kuwait. These vehicle registration cancellation certificates, called "deregistration certificates," were treated as sufficient evidence to support the claimant's interest in the vehicle. The Government of Kuwait informed the Panels that these certificates provided evidence of the legally registered owner of the vehicle on the date of Iraq's invasion and occupation of Kuwait. The Kuwaiti Traffic Department notified the Panels that it would be impossible to reregister or transfer the ownership of a deregistered vehicle without written confirmation from PAAC that the vehicle is not included in the claim of the registered owner of the vehicle. Absent a deregistration certificate, the vehicle claim would normally fail. It was not enough to demonstrate proof of ownership before the invasion as the title could simply have been transferred prior to August 2, 1990, the date on which Iraq invaded Kuwait. As a result, the Panels stated that "claims for loss of vehicles cannot be compensated in the absence of an official 'deregistration certificate' issued by the Government of Kuwait."<sup>83</sup>

The certificates mark only the beginning of the Panels' review of vehicle claims. The Panels also look for witness statements or other records (e.g., the claimant's post-liberation accounts recording the loss of vehicles as an extraordinary loss) to support the loss.

Sometimes, the name on the "deregistration certificate" does not match the claimant's name. Where such a discrepancy exists, the Panels investigate the possible reasons for the difference in names. Kuwaiti vehicles operated by private entities are often registered in the names of one of the owners, directors, or employees. The risk exists that this same vehicle could be the subject of a claim in the in-

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81. See *supra* Part III.B.

82. See *Farah Report*, *supra* note 48, paras. 324-31 (discussing the extensive stripping and damaging of cars, rendering them unusable).

83. *First Installment Report*, *supra* note 20, para. 132 (explaining that "deregistration certificates" are proof of legal ownership of vehicles).

dividual categories of claims. Because of this risk of a dual claim, the Panels direct the secretariat to carry out a check to ensure that the individual whose name appears on the "deregistration certificate" has not filed a duplicate vehicle claim.

To determine whether the amount claimed for the vehicle is reasonable, the Panels rely on a Motor Vehicle Valuation Table (the "M.V.V. Table"). The M.V.V. Table carries the market value, by make, model, and year, for most of the vehicles in circulation in Kuwait on the date of the invasion. PAAC provided the M.V.V. Table to the UNCC in 1994 along with a report regarding claims for motor vehicles. The value in the M.V.V. table is treated as the "maximum compensable value for a vehicle of the same make, model and year," as was done for certain individual claims at the UNCC.<sup>84</sup>

## 2. Inventory

One day's goods in transit is the next day's stock. Therefore, the methods of verification and valuation applied to claims for loss of inventory and goods in transit are similar. The Panels require the claimants to prove "the existence of stock or goods in transit on 2 August 1990 or on the date of loss if later."<sup>85</sup>

Ideally, the Panels' work would be easier if they could rely on a stock-taking attended by the claimants' independent accountants shortly before Iraq's invasion; however, this rarely occurred.<sup>86</sup> With no penalty to the claimant, the Panels calculate the value of the stock by the "roll-forward" method.<sup>87</sup> When claimants have not prepared a

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84. See *Report and Recommendations made by the Panel of Commissioners Concerning Part One of the First Installment of Individual Claims for Damages above US\$100,000 (Category 'D' Claims)*, UNCC, "D" Panel, 1st Inst., paras. 267-72, U.N. Doc. S/AC.26/1998/1 (1998) [hereinafter *First D Report*] (describing the M.V.V. Table and commenting on the results of an independent verification of the adequacy of the table in valuing vehicle claims).

85. *First Installment Report*, *supra* note 20, para. 117.

86. See *id.* para. 118 (describing the best evidence to prove the existence of stock).

87. See *id.* para. 119 (describing the "roll-forward" calculation that uses as a starting point the closing stock balance reflected in the claimant's audited accounts for the last financial year immediately preceding Iraq's invasion, which is generally December 31, 1989 or March 31, 1990). To this closing stock value, the Panels add stock purchases made until Iraq's invasion on August 2, 1990. In order to

roll forward, the Panels direct the consultants to try and prepare one from available evidence. Even when the claimants have prepared a roll forward, it is reviewed for its accuracy. In those rare instances where the evidence submitted does not allow the Panels to prepare a roll-forward, an adjustment is made to the claim to overcome the risk of overstatement.<sup>88</sup>

With regard to claims for goods in transit, the Panels seek proof that the goods landed in Kuwait shortly before the invasion and that the claimant had paid for the goods. Where the seller and Kuwaiti buyer have both submitted claims for the goods, the claimants may receive an interrogatory that seeks to determine who actually suffered the loss.<sup>89</sup> The seller is often not a Kuwaiti corporation and, therefore, coordination with other UNCC Panels is required.

In order to prove that the goods landed in Kuwait, claimants often furnish copies of certificates obtained from Kuwaiti port authorities that reference the specific shipment and its date of arrival. The Panels also look to letters from shipping agents to establish the existence, ownership, and loss of goods in transit. The Panels also review letters of credit, invoices, and other documents related to the transaction to ascertain the value of the goods in transit.<sup>90</sup>

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support the value of purchases made, the Panels look for at least a sample of stock purchase invoices or other purchase documents. The Panels then deduct the "cost of sales" on goods sold from the end of the financial year to August 2, 1990. This "cost of sales" on goods sold is calculated by deducting the claimant's historical gross profit on sales from the sales made during that period. For example, assume the closing stock on December 31, 1989 is USD 1,000, the stock purchases and sales between that date and August 2, 1990 are USD 200 and USD 500 respectively, and the historical gross profit on sales is twenty percent. The roll-forward calculation is then  $\text{USD } 1,000 + \text{USD } 200 - [\text{USD } 500 \times (100-20) \text{ percent}]$ , i.e., the closing stock plus purchases less "cost of sales." Some claimants were able to recover part of their stock left in their warehouses after the occupation of Iraq ended. The Panels deduct this amount from the calculation. *Id.*

88. See *First Installment Report*, *supra* note 20, para. 119 (stating that the inability to complete a "roll-forward" creates a "risk of overstatement").

89. See *Report and Recommendations made by the Panel of Commissioners Concerning the Sixth Installment of 'E4' Claims*, UNCC "E4" Panel, 6th Inst., para. 18, U.N. Doc. S/AC.26/2000/8 (2000) (describing the information requested from those claiming goods in transit losses).

90. See *First Installment Report*, *supra* note 20, para. 120 (explaining that trade documents were reviewed during the investigation of the claims).

Additionally, the Panels review the timing of the shipment. If the shipment landed in Kuwait long before the invasion, then the risk exists that the loss was not caused by the invasion or that the goods in transit were accounted for with the claim for loss of inventory. The shipment date, mode of transport employed, and other shipment details are used to determine whether the goods claimed were lost in Kuwait prior to or as a result of the imposition of the trade embargo and related measures.<sup>91</sup>

The Panels next review the claimant's basis of valuation for the inventory. Auditors require most businesses to value their inventory at the lower of the cost or net realizable value. When claimants have not used this basis of valuation, or provided a reasonable explanation for an alternative valuation, the Panels adjust the claims to offset the risk that the inventory is overvalued. First, the Panels establish the existence and method of valuation for the inventory. Then, they test the level of inventory held by comparing the claim against the claimant's historical holdings and business needs.<sup>92</sup>

For stock claims, the Panels have directed the consultants to prepare tables delineating a claimant's historical stockholding levels, obsolescence provisions, sales levels, and exceptional stock write-offs or restocking costs. A preliminary test checks whether the exceptional write-off in the claimant's accounts, which shows inventory losses during Iraq's invasion and occupation of Kuwait, is lower than the amount claimed. Again, by using historical data, the Panels review the claim for overall reasonableness. If the amount of inventory claimed is materially higher than the average levels of inventory held by the claimant prior to Iraq's invasion and occupation of Kuwait, the Panels will review the file to determine why a stock build-up might have occurred. They will look, for example, to the seasonality of the business<sup>93</sup> or to documented changes in demand. If the

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91. See *Decision 15*, *supra* note 69, para. 9(III)(ii) (declaring that losses resulting from both Iraq's invasion and occupation and the trade embargo and related measures will be compensated to the extent they were a direct result of Iraq's invasion and occupation).

92. See *First Installment Report*, *supra* note 20, para. 122 (describing the checking of claims for loss of inventory against historical results).

93. See *id.* para. 123 (noting the Panel's attribution of stock build-up to seasonality or changes in demand).

evidence provided does not justify the stock build-up, then the Panels adjust the claim to the historical level.

The Panels also compare the inventory claimed with the historical sales volumes. This allows the Panels to identify whether the levels of inventory held are reasonable or whether there is evidence of over-stocking. When possible, the Panels direct the consultants to compare the volume of inventory claimed “with industry stocking standards common in Kuwait and the Middle East.”<sup>94</sup>

The Panels also seek confirmation that claimants have considered and applied the correct obsolescence figure to their inventory and goods in transit claims. The nature of the goods lost determines the applicable level of obsolescence. Where the stock consists of food, the level of obsolescence will be higher than for construction items. In some cases (*e.g.*, jewelry or antiques), one might expect no obsolescence. The Panels’ methodology prescribes benchmark obsolescence rates for various types of goods. If the claimant applies an obsolescence rate higher than that expected by the Panels’ methodology, the Panels apply the higher rate based on the claimant’s assessment of its business. The Panels adjust claims that have been under-provisioned for obsolescence. Sometimes, the inventory consists of many different types of items with different obsolescence rates. In this situation, if they cannot segregate the goods, the Panels may use a blended rate.<sup>95</sup>

### 3. Cash

Given the mobility of cash, it is often difficult for a claimant to demonstrate the fact and amount of cash losses. This increases the potential for overstatement and often means that the Panels recommend no award.<sup>96</sup> The Panels always review cash claims in detail, even if the amount claimed is below the materiality threshold estab-

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94. See *id.* para. 124 (noting the comparison of inventory volume claimed with industry standards).

95. See *id.* para. 125 (describing the Panel’s adjustment of claims to reflect appropriate obsolescence rates).

96. See, *e.g.*, *id.*, Annex II, at 52-97 (demonstrating the Panel’s tendency to give no compensation for cash loss claims).

lished for detailed review, *i.e.*, the Panels treat all cash claims as material.<sup>97</sup>

Initially, the Panels review the statement of claim and supporting documents to verify whether the facts and circumstances of the loss appear credible. Most claims pass this test because it is reasonable to expect that cash left on the premises would have been taken. However, some claims appear less credible, *e.g.*, where a claimant returned to retrieve the accounting records but left the cash. Despite the lack of credibility, there may be some reasonable explanation, *e.g.*, the employee's failure to have the keys to the cash box or a prior theft of the money.

Difficulties arise with providing credible and contemporaneous records of cash on the premises. The Panels look for cash books, bank statements, daily cash deposits, and withdrawals. Often, this level of support is not provided. An extraordinary loss of cash entry does not alone allow a claim for loss of cash to succeed even though the Panels always review the claimant's audited post-liberation accounts to determine if an extraordinary loss of cash is reported. In most cases, the accountants are merely reporting a figure given to them by the claimant's employees. With the inability to test the figure independently, the mere fact of entry in the post-liberation accounts cannot justify an award.<sup>98</sup>

#### D. INCOME-PRODUCING PROPERTY

Few claims were raised for the loss of an income-producing property, and of these few claims, most were re-categorized by the Panels to other loss categories such as loss of profit. The *First Installment Report* addressed three claims within this category, all of which failed. Two claimants submitted similar claims. One claimant "asserted a claim for loss of income-producing property, alleging a permanent diminution in sales after the liberation of Kuwait compared with sales prior to Iraq's invasion."<sup>99</sup> The claimant then computed "its loss by projecting a diminution in cash flows for a period of ten

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97. See *supra* note 58 and accompanying text (emphasizing the fact that loss of cash claims receive greater scrutiny).

98. See *First Installment Report*, *supra* note 20, para. 129.

99. *Id.* para. 146.

years from 31 December 1991 and discounting this diminution (by a factor of 4.5 percent) to arrive at the present value of said cash flows.”<sup>100</sup> The second claimant raised a similar claim for loss of income-producing property, “alleging it suffered a permanent diminution in rental income due to reduced occupancy levels in its Kuwaiti properties. . . . [with] the value of the loss calculated by discounting a projected diminution in cash flows over 25 years (applying a 4 per cent discount factor).”<sup>101</sup> Both claimants also had separate loss of profit claims for periods during the occupation.

The Panel offered three justifications for recommending no compensation for these two claims. First, it found that the claimants’ loss of income suffered as a direct result of Iraq’s invasion and occupation of Kuwait had already been compensated under the “loss of profit” category. Second, the claimants failed to establish why the losses would not be recouped, based on cash flows projected over ten and twenty-five years, and how the losses projected over these extended periods arose as a result of Iraq’s invasion and occupation of Kuwait. Third, the Panel found that the method of calculating the loss would permit a double recovery if awarded. The discounted cash flow method of valuation used by the claimants measures the value of a business as a whole on a going-concern basis. As the Panel noted in its initial justification for rejecting the claim, it will not award a loss of profit claim twice: “Where a claimant has separately been compensated for loss of assets and loss of profits, any additional compensation based on a discounted cash flow basis would include a duplication of these loss elements.”<sup>102</sup>

In the third claim, the claimant alleged that “it suffered a compensable loss when it sold its interest in a United States-based investment company.”<sup>103</sup> The claimant asserted that it was forced to sell this interest because the United States-based company faced bankruptcy, allegedly arising from a lack of confidence in the Kuwaiti ownership. According to the claimant, this lack of confidence was a direct result of Iraq’s invasion and occupation of Kuwait.

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100. *Id.*

101. *Id.* para. 147.

102. *Id.*

103. *Id.* para. 149.



The claimant relied on an agreement dated seven months after the liberation of Kuwait to establish that it did sell shares to a United States-based company. The Panel found that this agreement did not support the claimant's contentions concerning sale of shares or establish that the sale was forced. In addition, the claimant's pre-invasion audited accounts were materially qualified and the claimant's auditor declined to express any opinion on them. Although the accounts for the years 1990 and 1991 showed a loss on the sale of shares as an extraordinary item, these accounts also contained material qualifications and established a difference between the historical cost of the shares and their selling price.

From the evidence provided, the Panel was unable to determine the carrying value of the investment before Iraq's invasion of Kuwait or at the time of the sale. Because the Panel found no basis on which to value the loss claimed, it recommended no compensation for the claim. Thus, the Panel did not need to address the issue of whether the loss was a direct result of Iraq's invasion and occupation of Kuwait.<sup>104</sup>

#### E. PAYMENT OR RELIEF TO OTHERS

Claims for payment or relief to others usually relate to expenses for evacuation or return of staff. The Panel first verifies proof of payment for all items claimed. The nature of the payment determines the type of evidence expected. When the claimant is seeking reimbursement for airfare, the Panels look for a copy of the airline ticket and an internal ledger that will list the name and the Kuwaiti civil identification number or passport number. If the claimant cannot demonstrate that he or she actually incurred the amounts, then the Panels recommend no compensation. In addition, where the recipients of the relief payments are identified but the claimants do not provide passport and other identification details, these shortcomings create a "risk of overstatement" and the claim is adjusted as appropriate.<sup>105</sup>

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104. *See id.* para. 151 (stating that, due to the nature of the shares of stock, the Panel found no basis on which to verify or value the loss claimed).

105. This "risk of overstatement" arises because the employees may also have raised a claim for the same airfares. The absence of data that allows the employees to be identified prevents the UNCC from checking such potential duplication.

Some types of claims were not awarded compensation by the Panels.<sup>106</sup> For example, several Kuwaiti cooperative societies asserted claims for inventory that they gave away free to members of the public. The Panels deemed such a decision, though laudable, to be an independent business decision that broke the chain of causation. In addition, some claimants did not record a complete loss of inventory, thus ruling out the implication that the goods necessarily would have been lost even if they had not been given away.

#### F. LOSS OF PROFIT

The part of the methodology that provided the most challenge for Panels concerned claims for loss of profit. The Governing Council previously directed all Panels to consider compensating claims for loss of profit where the loss could be determined with "reasonable certainty based on prior earnings or profits."<sup>107</sup> The fact that nearly all Kuwaiti companies were required to prepare audited accounts was of considerable help. The Panels requested all Kuwaiti corporate claimants to provide the audited accounts for the three years preceding Iraq's invasion and the three years following the end of Iraq's occupation.<sup>108</sup>

The first step in the review of claims is to check that all of the audited accounts are submitted. If a claimant fails to submit any audited accounts without a reasonable explanation, the Panels recommend no compensation for the loss of profit claim. However, there are some obvious exceptions to this rule. For example, audited

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106. See, e.g., *Fourth Installment Report*, *supra* note 41, para. 60 (stating that the Panel deemed as "not compensable" those goods that were voluntarily given away and whose loss were not the direct result of Iraq's invasion).

107. See *Decision taken by the Governing Council of the United Nations Compensation Commission during the resumed Fourth Session, at the 23rd meeting held on 6th March 1992 – Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation*, UNCC GCR, 4th Sess., 23rd Mtg., para. 19, U.N. Doc. S/AC.26/1992/9 (1992) [hereinafter *Decision 9*] (stating that the method of valuing a business should focus on its past performance rather than future projections).

108. See, e.g., *First Installment Report*, *supra* note 20, para. 20 (stating that the Panel, seeking to complete its review of the first installment claims within twelve months of February 20, 1998, requested copies of audited financial statements for the years 1988 to 1993).

accounts for 1987 or 1988 are not required from claimants that incorporated shortly before the invasion, and post-liberation accounts are not required from claimants that did not restart operations after the occupation ended. The Panels also recognize that many Kuwaiti partnerships are not required to produce audited accounts.<sup>109</sup> The Panels then review the claimant's calculation of its claim. Occasionally, claimants extract a number incorrectly from the audited accounts or the calculation contains possible arithmetic error.<sup>110</sup>

Most Kuwaiti businesses ceased operating during the Iraqi occupation. Claims based on gross revenues lost during this period are reduced to claims for loss of profits. This adjustment assumes that the claimants were not generating expenses during the claim period. This compensatory "saving" had to be accounted for when determining the effective loss of income. Therefore, recovery is allowed for operating revenues net of operating expenses. Similarly, Kuwaiti corporate claimants that were engaged in more than one line of business before Iraq's invasion cannot calculate their claim of losses based only on the results of a few profitable lines of business, while excluding other less remunerative operations. All lines of business affected by the invasion are considered when determining the effective loss.

Next, as with stock claims, the Panels direct the consultants to review the claimant's historical results, excluding any extraordinary items that appear in the three years before the invasion. If the adjusted amount exceeds the average profits achieved in this period preceding Iraq's invasion, the Panels adjust the award. In certain situations, where pre-invasion results demonstrate a trend in profits (or losses), the Panel will adjust the award to account for this rise or fall. When investigating this trend, the Panels check for increased revenues due to "non-recurring or extraordinary items such as the sale of capital assets."<sup>111</sup> Such exceptional items are removed from

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109. See Kuwaiti Law 15 of 1960 dealing with Commercial Companies, May 12, 1960 (Kuwait) (on file with the *American University International Law Review*).

110. See *First Installment Report*, *supra* note 20, para. 195 (describing the second phase of the verification and valuation process, during which any errors are corrected).

111. See *id.*, para. 200 (describing the review for exceptional or highly volatile

the computation so that a claimant will neither benefit, for example, from a “trend” caused by a one-time sale of a building, nor will it suffer, for example, from a fire that occurred in 1988. In the rare instance where the amount of the exceptional items cannot be identified, the claims are adjusted to avoid any “risk of overstatement” in the loss of profit claims.

The Panels review the period over which the claimant suffered loss of profit as a direct result of Iraq’s invasion and occupation of Kuwait. The criteria considered in this review comes from two decisions of the Governing Council. Governing Council decision 9 states that “[i]n the event that the business has been rebuilt and resumed, or that it could reasonably have been expected that the business could have been rebuilt and resumed, compensation may only be claimed for the loss suffered during the relevant period.”<sup>112</sup> In a subsequent decision, the Governing Council directed as follows:

[I]n the case of a business which has been, or could have been, rebuilt and resumed, compensation would be awarded for the loss from the cessation of trading to the time when trading was, or could have been, resumed. In the case of a business . . . which it was not possible to resume, the Commissioners would need to calculate a time limit for compensation for future earnings and profits, taking into account the claimant’s duty to mitigate the loss wherever possible.<sup>113</sup>

Therefore, the indemnity period differs depending on whether the claimant restarted operations after liberation and on the type of business involved. Further, extended indemnity periods are not viewed by the Panels as a direct result of Iraq’s invasion and occupation of Kuwait. In this regard, the Panels have relied on the first report issued by the Commissioners reviewing category “E2” claims, who found there that “compensation for lost business in such a case may be awarded for the period between the cessation of operations and the time when the business reasonably could have resumed produc-

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results).

112. See *Decision 9*, *supra* note 107, para. 17 (stating that claimants are entitled to compensation only for losses attributable to the Iraqi invasion).

113. See *Decision 15*, *supra* note 69, para. 7 (discussing the relevant valuation methods for different categories of losses).

tion at the pre-invasion capacity.”<sup>114</sup> The “E4” Panels recommend recovery until the claimants could have recommenced operations at pre-invasion capacity. The Panels attempt to determine when the capacity, not the profitably, of the pre-invasion operations could be obtained.

Based on the above, claimants who restart operations after the liberation of Kuwait receive loss of profit for the seven-month occupation period and an additional three or five months, depending on the nature of the business. Claimants involved in heavy industries may be entitled to recover losses for as much as two years. Generally, claimants recover up to one year's loss of profit unless they justify losses over an extended period. For example, if landmines remained on a claimant's facility, this may justify an increase in the normal indemnity period.

The Panels use a shorter indemnity period for businesses that did not restart operations. This distinction is based on Governing Council decision 15, which establishes many causal factors as to the failure to restart. Most claimants argue their inability to resume trading was due to financial difficulties following Iraq's occupation. Specifically, these financial difficulties include “pre-invasion financial problems, the trade embargo and related measures and the economic situation caused thereby.”<sup>115</sup> Nearly all claimants who have not resumed trade are limited to an indemnity period of seven months, *i.e.*, the period of Iraq's invasion and occupation of Kuwait, as this period constitutes a “separate and distinct” cause for loss of profits suffered by claimants who did not resume business.

The Panels then review the seasonality of the business for claimants who do not have a loss indemnity period covering a year. With sufficient evidence, adjustments are made due to seasonal variations. Where proof of seasonality exists, but insufficient evidence exists to make an actual adjustment, then the claim may be regarded as pre-

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114. See *First E2 Report*, *supra* note 77, para. 242 (arguing that limiting the compensation period from the time of the invasion to the time at which business operations resumed is critical for those businesses who resumed operations in incremental stages).

115. *First Installment Report*, *supra* note 20, para. 186 (asserting the rationale for the shorter compensation period, which takes into account possible pre-invasion financial problems).

senting a risk of overstatement. In practice, because the invasion and occupation straddled summer and winter months, such adjustments are uncommon.

Finally, the Panels review the claimants' post-liberation results to determine whether any windfall profits resulted from Iraq's invasion and occupation of Kuwait. Some claimants are more likely to have enjoyed windfall profits because of the losses suffered in Kuwait during the occupation. For instance, construction and automotive businesses witnessed exceptional increases in demand because of the widespread damage to buildings and the ubiquitous loss of vehicles. If windfall profits are evident, the claims are adjusted to offset these extraordinary profits. Before adjusting claims for windfall profits, the Panels review the nature of the business, pre-invasion trends, and post-liberation sales and profit margins to ensure that the windfall profits were attributable to Iraq's invasion and occupation of Kuwait.

Many Kuwaiti businesses participated in a debt forgiveness program, the Difficult Debt Settlement Programme of 1992 and 1993 ("Programme"), which was created by the Government of Kuwait following the liberation.<sup>116</sup> Under this Programme, "the Central Bank of Kuwait purchased from Kuwaiti banks and financial institutions, the debt owed to these banks and institutions by Kuwaiti individuals and corporations as well as the debt owed by citizens of Gulf Cooperation Council States."<sup>117</sup> The plan set up a dual-option settlement mechanism, both of which included the waiver of interest unless there was a default: (a) spot settlement, under which only a part of the original debt was required to be repaid for full settlement of the debt; and (b) staggered settlement, under which the purchased debt was required to be repaid in twelve annual installments from 1995 onward.<sup>118</sup>

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116. *Kuwaiti Decree-Law No. 32 of 1992 on Dealing with the Status of the Banking and Financial Sectors*, No. 32 (1992) (Kuwait); *Kuwaiti Law No. 41 of 1993 - State Purchase of Select Debts and Collection Procedures*, No. 41 (1993) (Kuwait).

117. *First Installment Report*, *supra* note 20, paras. 162-63 (discussing the purposes of the Difficult Debt Settlement Programme and its operations).

118. *Id.* para. 164 (describing the method by which the purchased debt would be resettled).

The Panels noted that the Programme was very similar to national economic rehabilitation programs instituted by the Government of Kuwait before Iraq's invasion.<sup>119</sup> After a careful review, the Panels found that the benefits offered were not "based on the nature of loss suffered or the extent of damage suffered by claimants either during or as a result of Iraq's invasion and occupation of Kuwait."<sup>120</sup> Thus, the benefits of the Program cannot be regarded as 'compensating' any loss or damage suffered as a direct result of Iraq's invasion and occupation of Kuwait.<sup>121</sup> Consequently, the Panels ignore any increase in profits due to the Programme.

### G. RECEIVABLES

The Panels have seldom found enough evidence directly linking the failure to collect receivables to Iraq's invasion and occupation of Kuwait. The timing of the debt and location of the debtor are factors in the Panels' decisions. The Panels perform several tests on claims for receivables. Accounting records and contemporaneous documents are reviewed to reconcile the claim for receivables with the amount of debt outstanding before August 2, 1990. The claim must also be incremental to the normal level of bad debt experienced by the claimant prior to the invasion. When a claimant fails to provide information regarding its normal level of debts, a risk assessment factor is applied to the claim.

The Panels then review "the period for which the claimant recognized the debt as outstanding prior to Iraq's invasion and occupation of Kuwait."<sup>122</sup> If any part of the claim relates to debt that "would have been written off under international accounting practices prior to Iraq's invasion," then the Panels recommend no compensation for

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119. *Id.* para. 166 (explaining that the Difficult Debt Settlement Programme was similar to a program created in 1986 to relieve the problems caused by the Kuwaiti stock market crash of 1981 to 1983).

120. *Id.* para. 170.

121. *See id.* para. 174 (emphasizing that beneficiaries of the Difficult Debt Settlement Programme should not consider such assistance as compensation for damages).

122. *Id.* para. 212 (suggesting that the Panel looks for debt that became uncollectible because of the Iraqi invasion).

that portion of the claim given that it appeared to be irrecoverable before Iraq's invasion.

For claims that pass at this review level, the Panels seek evidence that the invasion was a "separate and distinct" direct cause rendering such debt irrecoverable. The Panels also examine any attempts made to recover the bad debts and mitigate damages. The Panels do not regard a claim as being sufficiently established "where the claimant has not made any attempt to recover the receivables and has not provided any reasonable explanation of its failure to do so."<sup>123</sup> Finally, the Panels determine whether the claimant demonstrates that the debtor's inability to pay is due to Iraq's invasion. Most claims fail at this step.<sup>124</sup>

#### H. RESTART COSTS

Claims for restart costs may include the cost of clearing rubble, recruiting new employees, or bringing back former employees. No new methodologies are applied to this category; instead, the Panels use the methodologies developed for other loss categories. A key feature reviewed in such claims is whether the costs claimed are incremental to normal business operations. With respect to the cost of returning employees, the Panels adapted the existing methodology and determined the criteria for compensation. First, the cost must appear reasonable. Second, the claimant must provide evidence, including civil identification numbers and payroll records. Third, adequate evidence, such as ticket receipts, must show the claimant incurred a restart cost. Fourth, the claimant must establish that the employee has not submitted the same claim to the UNCC. Finally, the payment should not appear to be in the form of a loan to the em-

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123. *Id.* para. 213 (stating the Panel's resolve to ensure that claimants have exhausted or continue to mitigate or recover from the damages suffered from the Iraqi invasion).

124. *See First E2 Report, supra* note 77, para. 232 (citing the example of a company that was not compensated by the Panel because its accounts receivable were already non-performing before the Iraqi invasion).



ployee.<sup>125</sup> Claims reduced or disallowed by the Panels have been due to insufficient evidence.<sup>126</sup>

### I. OTHER LOSSES

With each installment of claims, the Panels encounter new loss types that defy categorization into any of the existing loss types. "Other losses" span a range of issues relating to transactions that may have occurred before, during, and after Iraq's invasion and occupation of Kuwait. For example, claims have been made for the loss of benefit relating to amounts paid before August 2, 1990.<sup>127</sup> Transactions during the invasion and occupation include claims for bribes to Iraqis,<sup>128</sup> claims for sales against cancelled Kuwaiti dinar notes,<sup>129</sup> and claims for forced sales against Iraqi dinar notes at an artificial exchange rate.<sup>130</sup> Claimants have also sought compensation for costs

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125. See *Second Installment Report*, *supra* note 24, para. 95 (listing the criteria considered in compensating returning employees).

126. See *id.* para. 96 (noting most such claims were disallowed because they failed to respond or provide the requested information).

127. See *id.* para. 108 (holding as non-compensable claims for rent paid in advance to use business premises during the immediate months after the invasion).

128. See *Fifth Installment Report*, *supra* note 24, para. 104 (citing as non-compensable claims for amounts paid to Iraqi soldiers in exchange for protecting a company's assets).

129. During the first few months of the invasion, Iraq seized control of the Central Bank of Kuwait ("CBK") and stole a large amount of Kuwaiti currency from the vaults of the CBK. The CBK had not officially placed the stolen currency in circulation before August 2, 1990. This Kuwaiti currency was used in various transactions during the period of Iraq's occupation of Kuwait. The Kuwaiti authorities in exile cancelled this currency and, after the liberation of Kuwait, transactions in the cancelled Kuwaiti Dinars were not permitted. See *Farah Report*, *supra* note 48, para. 515; see also *Second Installment Report*, *supra* note 24, para. 98 (stating that losses for cancelled Kuwaiti Dinar notes are compensable because there is a direct link between the theft and circulation of the cancelled Kuwaiti dinars by Iraqi soldiers and the claimant's loss).

130. During the occupation, the Iraqi authorities revoked the Kuwaiti dinar and required all Kuwaiti transactions to be conducted in Iraqi dinars. Before the invasion, the Kuwaiti dinar was worth between 10 and 12 Iraqi dinars. However, the Iraqi authorities mandated that an exchange rate of 1:1 be applied when converting Kuwaiti dinars to Iraqi dinars. See *Farah Report*, *supra* note 48, para. 513; see also *Fourth Installment Report*, *supra* note 41, para. 96 (citing as compensable the losses incurred as a result of an artificial exchange rate between Kuwaiti and Iraqi dinars imposed by the Iraqi authorities).

incurred after the liberation of Kuwait, *e.g.*, fees paid to lawyers and collection agencies to recover debts and fees.<sup>131</sup> In reviewing these claims, the Panels have drawn on the general principles set down by the Governing Council and the “E4” methodology. Therefore, the Panels first address whether the claimed losses are a direct result of Iraq’s invasion and occupation of Kuwait. If the loss is a direct result of Iraq’s invasion and occupation of Kuwait, the Panels require that the evidence meet the standard of “evidence sufficient to demonstrate the circumstances and the amount.”<sup>132</sup> Where the evidence presented is insufficient, the claim may be disallowed if the evidentiary shortcomings are fundamental or, instead, adjusted if the shortcomings generate a risk of overstatement.

A large number of claimants asserted claims for costs incurred in preparing their claims. Such costs typically cover fees paid to lawyers, accountants and translation services. A few claimants have also sought compensation for the time invested by their employees in preparing claims. It remains to be seen whether the claimants will receive any compensation for their claim preparation costs, and, if so, on what basis. Will it be the same figure for all claimants, a graduated amount based on the amount claimed, or some other method? Because the Panels were informed by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claim preparation costs in the future, they have made no recommendation in any report with respect to compensation for claim preparation costs.

#### J. DATES FOR CALCULATING THE CURRENCY EXCHANGE RATE AND INTEREST

Most Kuwaiti corporate claimants have asserted their losses in Kuwaiti dinars. However, as the Commission issues its awards in U.S. dollars, the Panels must determine the appropriate exchange rate to apply. The three options generally considered by courts and tribunals for this purpose are the exchange rate on the date (i) of the loss,

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131. See *Fourth Installment Report*, *supra* note 41, para. 109.

132. See *UNCC Rules*, *supra* note 12, art. 35 (establishing the evidentiary guidelines to establish an eligible claim).

(ii) of judgment, or (iii) of the execution of the judgment.<sup>133</sup> The most commonly used method by previous Panels is the date of the loss.<sup>134</sup>

Governing Council decision 16 contemplates payment of interest "from the date the loss occurred until the date of payment."<sup>135</sup> Most losses asserted occurred on various occasions or regularly throughout Iraq's invasion and occupation of Kuwait. Accordingly, the Panels recommended that the midpoint of the period of Iraq's occupation (*i.e.*, November 15, 1990) be used as the date of loss. However, where the losses continued for some months after the liberation of Kuwait, the Panels recommended using the midpoint of the period for which the loss of earnings or profits was awarded as the date of the loss. Inasmuch as the Governing Council has indicated that it would consider the methods of calculation and payment of interest at a future date, the Panels have made no further recommendations with respect to the payment of interest at this time.<sup>136</sup>

During Iraq's occupation of Kuwait there were significant disturbances in the exchange rate for the Kuwaiti dinar. Therefore, the Panels have used the Kuwaiti dinar exchange rate on August 1, 1990, for losses where the midpoint of Iraq's occupation is used as the date of loss.<sup>137</sup> However, in claims for loss of earnings or profits, where

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133. See *Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individual Claims for Damages up to US\$100,000 (Category 'C' Claims)*, UNCC "C" Panel, 1st Inst., para. 93, UN Doc. S/AC.26/1994/3, (1994) [hereinafter *First C Report*] (stating the criteria established by the Panel to determine the proper rate of conversion).

134. See, *e.g.*, *First D Report*, *supra* note 84, para. 61 (establishing the exchange rate to be used for the purpose of processing Category "D" claims, stated in Kuwaiti dinars and other currencies); see also *First E2 Report*, *supra* note 77, para. 279; see also *Report and Recommendations Made by the Panel of Commissioners Concerning Part One of the First Installment of Claims by Governments and International Organizations (Category "F" Claims)*, UNCC "F" Panel, 1st Inst., para. 100, U.N. Doc. S/AC.26/1997/6 (1997) [hereinafter *First F Report*] (observing the consensus among the courts in the criteria to determine exchange rates).

135. See *Awards of Interest: Decision taken by the Governing Council of the United Nations Compensation Commission at its 31st meeting, held in Geneva on 18 December 1992*, UNCC GCR, 31st Mtg., U.N. Doc. S/AC.26/1992/16 (1993) (establishing the method for payment of interest on the claimed amounts and declaring that interest will only "be paid after the principal amount of awards.").

136. *Id.*

137. *United Nations Monthly Bulletin of Statistics*, vol. XLIV, No. 12 (Dec.

the award relates to periods extending beyond the liberation of Kuwait, the Panels use the average of the monthly exchange rates over the period for which an award for loss of earnings or profits was recommended. In such cases, the Panels recommend that the Kuwaiti dinar exchange rate for August 1, 1990 be regarded as the exchange rate for the months of Iraq's occupation of Kuwait.

## CONCLUSION

This article concerning the "E4" Panels' methodology was written in "midstream" before the resolution of all Kuwaiti corporate claims and after the departure of the authors from UNCC. Thus, it is premature to conclude the success of the methodology to the resolution of these war reparation claims. However, some preliminary conclusions about the program can be reached today. In 1997, the *Wall Street Journal* called the UNCC's settlement of over a million individual claims an "act of legal wizardry."<sup>138</sup> However, it suggested that the "daunting task" of processing corporate claims that lies ahead would prove to be more difficult. A "big unknown" was the label it used for the question of how quickly the UNCC could assemble "a team of attorneys, accountants, and United Nations bureaucrats."<sup>139</sup>

For anyone who does not have access to a library that acts as a depository for UN documents, the success can be seen by visiting the UNCC's web-site.<sup>140</sup> Less than four years after this *Wall Street Jour-*

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1990) (on file with the authors); see also *First C Report*, *supra* note 133, paras. 100-02 (establishing the exchange rate to be used for the purpose of processing Category "C" claims stated in Kuwaiti dinars and other currencies); *First D Report*, *supra* note 84, para. 62 (declaring that, for claims stated, in whole or in part, in Kuwaiti dinars, the currency exchange rate to be applied is the rate of exchange on the pre-invasion date, i.e., the rate in effect on August 1, 1990, for converting Kuwaiti dinars to United States dollars; *First E2 Report*, *supra* note 77, para. 284 (stating that, due to the significant disturbance in the exchange rate for the Iraqi and Kuwaiti dinars resulting from Iraq's invasion and occupation of Kuwait, the Panel uses the exchange rates for these currencies that prevailed immediately before the invasion for the purpose of determining compensation); *First F Report*, *supra* note 134, para. 102.

138. King, *supra* note 8, at A1.

139. See *id.* at A1.

140. See United Nations Compensation Commission, Status of Claims Processing, at [www.unog.ch/uncc/status.htm](http://www.unog.ch/uncc/status.htm) (last visited Jan. 16, 2001) (providing a

nal article appeared, 1,133 "E4" claims—totaling in excess of 5 billion USD—have been resolved.<sup>141</sup> The *Wall Street Journal* article correctly predicted that the determination of how much companies should recover would turn on a "slew of issues," such as: "should lost profits count?"; "what is a used tractor really worth?"; and "does the commission have the luxury for so many questions?"<sup>142</sup> The "E4" Panels quickly developed and implemented a methodology that provided answers to these (and many other) questions. In addition, by developing a system that focused the greatest attention on the largest claims, it recognized that, far from a "luxury," the UNCC must make the time and take the care to provide accurate answers "to so many questions." If the Panels did otherwise, the mere payment or denial of claims would be a resolution without any regard to fairness, and thus would not be a real resolution at all. The impartiality and high caliber of the commissioners who serve on the Panels<sup>143</sup> continue to make this fair resolution possible. The published Panel reports, which are available to Iraq, the claimants, and the public, should provide some measure of confidence.

"Once we've been in existence for 10 years," the head of the UNCC stated in 1997, "people are going to have every right in the world to say, 'What in the hell have you been doing all this time?'"<sup>144</sup> For the Kuwaiti corporate claims, the answer lies in the millions that have been awarded *and paid* to the victims of Iraq's aggression. For those claimants whose awards were denied in whole or in part, the success should be measured by their right to have their claims timely heard and the ability to read and offer corrections to any errors they find. In this sense, the development and implementation of the "E4" methodology can be regarded as a success thus far.

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status report of claims, divided by category).

141. See *id.* (observing also that the UNCC has dealt with over 2.6 million claims).

142. See King, *supra* note 8, at A1 (reporting on the claims filed after the Gulf War and the challenges that the UNCC faces in resolving them).

143. See John P. Gaffney, *Due Process in the United Nations Compensation Commission*, 10 MEALEY'S INT'L ARB. REP. 40 (Oct. 2000) (explaining the steps the United Nations took to ensure an impartial adjudicative Panel).

144. See King, *supra* note 8, at A1 (commenting on the challenge the UNCC assumed in settling claims for Gulf War losses).

If a future commission concerns itself with the review of corporate claims for war related losses, it might also be able to draw some lessons from the methodology employed by the Kuwaiti Corporate Claims Panels. Those lessons may be limited, however, by the number of variables that went into developing the methodology. A future commission may confront such questions as the following: How would the methodology be altered in the absence of audited accounts? Should the claims be presented in meetings open to concerned governments, the claimants, and the public? How can the interests of the party paying compensation be best balanced against the intolerable delays that would result if every claim became a trial? How would the review process change if the claims numbered in the tens or hundreds instead of thousands? How would the review change if the commission had more (or less) time and greater (or fewer) resources?

The Commission's processes are not unprecedented.<sup>145</sup> What is unprecedented is the magnitude and scale of the claims settlement operation. The review and compensation of over 2.5 million claims marks "a two-step increase in order of magnitude from the next-largest historical claims institutions: the Iran-United States Claims Tribunal, the Upper Silesian Tribunal, and the U.S.-German Mixed Claims Commission."<sup>146</sup> It is possible that the Commission's exact structure will likely not be replicated in future claims settlement regimes.<sup>147</sup> This is mainly because of a number of unique aspects related to the Commission's creation and operation, *e.g.*, the magnitude of the program, the ability to access a definite source of funds and ensure payment, and the consensus reflected in Security Council actions since 1990 to 1991. Even if the existence of this Commission may not deter a future aggressor, it will provide some timely measure of justice to the aggrieved. Additionally, the methods applied by the Commission in fulfilling its mandate can guide the creation and operation of future authorities organized to compensate the victims of war and armed conflict.

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145. See, *e.g.*, David J. Bederman, "Historic Analogues of the UN Compensation Commission," in 13th SOKOL, *supra* note 11, at 307.

146. *Id.*

147. See, *e.g.*, Frederic L. Kirgis, Jr., "Claims Settlement and the United Nations Legal Structure," in 13th SOKOL, *supra* note 11, at 115.